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11 and WG FILM AB

12  
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **COUNTY OF LOS ANGELES**

15 DOLE FOOD COMPANY, INC., a  
Delaware corporation,

16 Plaintiff,

17 v.

18 FREDRIK GERTTEN, an individual,  
19 MARGARETE JANGÅRD, an individual  
20 WG FILM AG, a Swedish corporation

21 Defendants.

Case No. BC417435

[Assigned to the Hon. Ernest M. Hiroshige]

**NOTICE OF MOTION AND SPECIAL MOTION  
OF DEFENDANTS FREDRIK GERTTEN,  
MARGARETE JANGÅRD AND WG FILM AB  
TO STRIKE UNDER C.C.P. § 425.16;  
SUPPORTING MEMORANDUM OF POINTS  
AND AUTHORITIES**

Filed concurrently: Declarations of Fredrik Gertten,  
Margarete Jangård, Lincoln D. Bandlow and John  
Shaeffer; Appendix of Non-California Authorities;  
Request for Judicial Notice and Proof of Service

Hearing Date: October 8, 2009

Hearing Time: 8:30 a.m.

Location: Department 54

Complaint Filed: July 8, 2009

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 8, 2009, at 8:30 a.m., or as soon thereafter as  
3 counsel may be heard, in Department 54 of the above-entitled Court, the Honorable Ernest M.  
4 Hiroshige presiding, located at 111 North Hill Street, Los Angeles, California 90012, Defendants  
5 Fredrik Gertten, Margarete Jangård and WG Film AB (erroneously sued as “WG Film AG”)  
6 (collectively “Defendants”) will and hereby do move the Court for an order striking the Complaint  
7 filed by Dole Food Company, Inc. (“Dole”) pursuant to California’s anti-SLAPP statute, Code of  
8 Civil Procedure § 425.16 (“Section 425.16”).<sup>1</sup>

9 Dole’s Complaint for defamation regarding the contents of the documentary film *Bananas!*\*  
10 (the “Documentary”), the contents of the website for the Documentary (the “Website”) and against  
11 statements made by Gertten when he was speaking about the Documentary (“Gertten’s Public  
12 Statements”) are predicated wholly on Defendants’ speech in connection with issues of public  
13 interest and concern. Accordingly, this action falls within the scope of Section 425.16(e)(4) and, as  
14 such, the burden shifts to Dole to establish, with competent and admissible evidence, a probability  
15 that it will prevail on its claims. Section 425.16(b)(1). Dole cannot satisfy its burden for the  
16 following reasons:

- 17 (1) Neither the Documentary, the Website nor Gertten’s Public Statements make, either  
18 directly or implicitly, the defamatory statements alleged by Dole;
- 19 (2) To the extent any of the statements alleged by Dole were actually made, those statements  
20 are literally or substantially true;
- 21 (3) To the extent any of the statements alleged by Dole were actually made, they are  
22 privileged under California Civil Code § 47 as fair and true reports of judicial  
23 proceedings;
- 24 (4) To the extent any of the statements alleged by Dole were actually made, they are opinions  
25 protected under the First Amendment; and  
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27  
28 <sup>1</sup> The acronym “SLAPP” stands for Strategic Lawsuit Against Public Participation.

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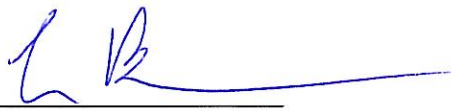
(5) To the extent any of the statements alleged by Dole were actually made, Dole cannot meet its burden to prove, by clear and convincing evidence, that the statements were made with constitutional "actual malice" *i.e.*, knowledge of falsity or reckless disregard for the truth.

The foregoing grounds are addressed in detail in the attached Memorandum of Points and Authorities. This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declarations of Fredrik Gertten, Margarete Jangård, Lincoln D. Bandlow and John Shaeffer and all Exhibits attached thereto, the Request For Judicial Notice, all papers, pleadings, records and files in this case, and on such other evidence and/or argument as may be presented to the Court on the hearing on this Motion.

Defendants respectfully request that the Court dismiss Dole's Complaint with prejudice and without leave to amend, retaining jurisdiction solely for the purposes of allowing Defendants to file a motion to recover its attorneys' fees and costs pursuant to Section 425.16(c).

DATED: September 10, 2009

LATHROP & GAGE LLP

By:   
Lincoln D. Bandlow  
Attorneys for Defendants

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Nearly three decades of legal struggle came to a head in a Los Angeles courtroom [on  
4 Thursday, July 19, 2007] as a trial began in a case pitting impoverished Latino field  
5 hands against America’s largest corporations. . . . The [*Tellez v. Dole*] case marks the  
6 first time that an American company has gone before a jury to face accusation that  
7 the pesticide called DBCP poisoned field hands on banana plantations in another  
8 country. Since the 1980s, attorneys for the field hands have filed civil lawsuits on  
9 behalf of more than 30,000 workers on plantations in Africa, Latin America and the  
10 Philippines. . . . The cases have attracted the attention of legal scholars and plaintiff’s  
11 attorneys who have struggled to determine an equitable system of justice in a world  
12 where commerce is global but courts are local” (the “*Tellez Trial*”).<sup>2</sup>

13 The documentary film *Bananas!\**, produced by film makers Fredrik Gertten and Margarete  
14 Jangård through their company WG Film AB (collectively “WG Film” or “Defendants”), uses the  
15 *Tellez Trial* to tell from a new perspective a well-worn and much larger story. It is a story engrained  
16 in the world’s psyche since at least 1904 when O. Henry coined the term “Banana Republic.”<sup>3</sup> It is a  
17 story about the relationship between banana workers, their government, and transnational fruit  
18 companies. It is a story that Dole Fruit Company, Inc. (“Dole”)<sup>4</sup> has been part of for over 100 years.<sup>5</sup>

19 Capitalizing on a recent order terminating two cases that were companion to *Tellez*, Dole now  
20 propagates a new mythology: Dole is the victim of corrupt plaintiff’s lawyers and a compromised  
21 Nicaraguan judiciary.<sup>6</sup> Wielding this construct, Dole intends to extricate itself from billions of  
22 dollars in foreign judgments and end the claims of thousands of additional foreign workers.

23 \_\_\_\_\_  
24 <sup>2</sup> Miller, *Pesticide trial begins against Dole*, Los Angeles Times, July 20, 2007. A copy of this article  
25 is attached to the accompanying declaration of [Lincoln D. Bandlow](#) (“[Bandlow Decl.](#)”) as Ex. 2.

26 <sup>3</sup> See O. Henry, *The Admiral*, in *Cabbages and Kings*, at 130, 132 (1913), [Bandlow Decl. Ex. 3](#).

27 <sup>4</sup> “Dole” refers to plaintiff as well as Dole’s predecessor and related corporate entities including  
28 Castle & Cooke, Inc., Standard Fruit Company, Castle & Cooke Foods and the Dole Fresh Fruit  
Company. See Dole History from the company’s website, [Bandlow Decl. Ex. 4](#).

<sup>5</sup> [Tellez Trial Transcript](#) (“TTT”) at 2787:6-2791:20. Relevant portions of TTT are attached to the  
Bandlow Decl. as Ex. 5. For the Court’s convenience, attached to the Bandlow Decl. as Ex. 1 is an  
electronic version of this memorandum that contains hyperlinks to the cited portions of the actual  
footage from the *Tellez Trial*, when available, and *Bananas!\** as well as additional exhibits and cases.

<sup>6</sup> See Dole’s video “*DBCP: A Conspiracy of Fraud*,” posted on YouTube that implies that any claim  
by a banana worker is the product of fraud. [Bandlow Decl. Ex. 41](#).



1 *Bananas!\** interferes with Dole’s effort at re-education. Because *Bananas!\** allows audiences  
2 to form their own views, Dole now employs the oxymoron “directly implies” to proclaim the film  
3 defames and must be stopped. Simply watching the film *Bananas!\** is the best way to see that Dole’s  
4 complaint has no clothes.<sup>7</sup> In fact, *Bananas!\** is the distillation of intense research painstakingly  
5 compiled from hundreds of hours of content, including footage of the entire four-month *Tellez* Trial.  
6 The film contains no narration, rather, it is told through the words of the participants, including Dole.  
7 *Bananas!\** contributes to an important public debate by presenting a glimpse into these issues.

8 Without question, the misconduct of certain plaintiffs’ lawyers who injected themselves  
9 between the health claims of Nicaraguan banana workers and Dole has harmed many. In dismissing  
10 the then pending cases because of her finding of misconduct, Judge Chaney commented that “[w]e’ll  
11 never know if anybody in Nicaragua was actually injured or harmed by the alleged wrongful conduct  
12 of the defendants, and people will never have the opportunity to learn, since this fraud is so pervasive  
13 and extensive that it has forever contaminated even our own ability to know the truth.”<sup>8</sup> Judge  
14 Chaney’s findings, however, are not avoided in the film. Indeed, *Bananas!\** ends with Judge Chaney  
15 statement,<sup>9</sup> even though (a) this misconduct was not brought to light until more than four months  
16 after *Bananas!\** was completed and a year and a half after the *Tellez* Trial had ended; and (b) Judge  
17 Chaney’s order does not extend to any of the plaintiffs that prevailed in *Tellez*.<sup>10</sup>

18 The expedited procedures provided by the anti-SLAPP statute afford WG Film a mechanism  
19 to quickly extricate itself from Dole’s grip. The first prong of the anti-SLAPP statute is clearly met:  
20 Dole’s complaint targets speech that relates to issues of profound public interest and concern.

21 Because Dole cannot demonstrate with competent evidence that it will likely prevail on its  
22 complaint, its case should be dismissed. First, while Dole may not like the speech in *Bananas!\**, the  
23

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24 <sup>7</sup> A DVD copy of the movie *Bananas!\** is attached to the accompanying declaration of John Shaeffer  
25 as Ex. A, which is being filed under seal pursuant to the Court’s Order of September 8, 2009.

26 <sup>8</sup> See April 23, 2009 Proceedings before Judge Chaney in *Mejia v. Dole, et al*, LASC Case No.  
27 BC340049 (“*Mejia* Proceedings”) at 27:1-6, [Bandlow Decl. as Ex. 6](#).

28 <sup>9</sup> See closing card stills from *Bananas!\**, [Bandlow Decl. Ex. 39](#).

<sup>10</sup> See August 20, 2009 Proceeding before Judge Chaney in *Tellez* at [47:23-49:4](#), [66:17-68:28](#),  
[Bandlow Decl. Ex. 30](#).

1 film does not state or “directly imply” the defamatory statements Dole alleges. Second, to the extent  
2 any such statements are made, those statements are true. Third, any such statements are privileged by  
3 the fair and true report privilege and/or are protected statements of opinion. Finally, Dole cannot  
4 show that any purported defamatory statements were made with actual malice.

5 Whether Dole poisoned banana field workers is a question that has long been and will  
6 continue to be debated in a variety of forums. Whether Dole can poison the fountain of free speech,  
7 however, is a question for this Court to decide on this Motion. Dole’s sophisticated effort to silence  
8 debate on that first question, a debate captured by *Bananas!*\* and reported by journalists around the  
9 globe, requires that the Court answer the second question “no.”

## 10 **II. BACKGROUND**

### 11 **A. Dole's Nicaraguan Banana Production**

12 Bananas are one of the world’s most popular fruits, and Dole is one of the fruit’s largest  
13 marketers. Dole began exporting bananas from Nicaragua in the early 1970s.<sup>11</sup> While Dole did not  
14 own the land underlying the 16 Nicaraguan banana farms it had under contract, Dole leased the land,  
15 was a 20% partner, and required strict compliance with its procedures, including the acquisition and  
16 application of pesticides. [Bandlow Decl. Ex. 7 at 3](#); *see also Nicaragua v. Standard Fruit Co.*, 937  
17 F.2d 469, 471-472 (9th Cir. 1991), [Bandlow Decl. as Ex. 8](#).

18 One third of the production cost of a banana goes to pesticides.<sup>12</sup> Four types of pesticides are  
19 generally used in the production of bananas: (1) herbicides to control weeds; (2) insecticides to  
20 protect the bananas stems from insects; (3) fungicides to control fungus; and (4) nematicides to  
21 control the tiny worms that destroy the plants’ roots. Following Dole’s recommendations, the  
22 nematicide 1,2 Dibrano-3-Chloropropane, or “DBCP” was applied by overhead irrigation systems  
23 during a seven year period between 1973 and 1980. [Bandlow Decl. Ex. 7 at 3](#). As a result of this  
24 drenching process, the DBCP would either soak into the soil or evaporate.<sup>13</sup> Dole purchased DBCP

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25  
26 <sup>11</sup> See June 1, 2007 Dole’s Memorandum of Contentions of Fact and Law (“Dole Memo”) filed in  
*Tellez* at 2, [Bandlow Decl. Ex. 7](#).

27 <sup>12</sup> See closing card still from *Bananas!*\*, [Bandlow Decl. Ex. 9](#).

28 <sup>13</sup> See *Bananas!*\* Dialogue Transcript (“BDT”) at 15, [Bandlow Decl. Ex. 10](#). The hyperlink in the  
electronic version of this brief links directly to the scene from the film.

1 from Dow Chemical Company (“Dow”). In 1977, California banned the use of DBCP and the EPA  
2 suspended DBCP’s registration following a study linking exposures to DBCP with male sterility.<sup>14</sup>  
3 The EPA found “substantial” evidence linking DBCP with cancer.<sup>15</sup> DBCP causes testicular  
4 dysfunction and sterility in men at sufficient doses.<sup>16</sup> On August 11, 1977, Dow ceased all  
5 production and sale of DBCP. [Bandlow Decl. Ex. 10 at 21](#). Dow informed Dole of its decision to  
6 suspend sales of DBCP via an August 24, 1977 letter, which added:

7           We took this action as a result of preliminary evidence indicating the  
8           compound may cause sterility. Present testing indicates some Dow [DBCP]  
9           workers in our Magnolia Arkansas plant are currently sterile. We urge that  
          all [DBCP] products be returned to Dow.

10 *Id.* Dole, however, did not agree to cease its use of DBCP. Instead, Dole told Dow that Dow’s  
11 failure to deliver DPCP would be a breach of contract. Dole ultimately agreed to indemnify Dow  
12 against any third party claims arising from Dole’s continued used of Dow’s product.<sup>17</sup> *Id.* at 21-22.  
13 Dole continued to use DBCP in Nicaragua after Dole had received reports that 10 of its workers in  
14 Costa Rica were sterile. *Id.* at 15-16.

15           While the Sandinistas took power in Nicaragua in 1979, Dole continued to operate in  
16 Nicaragua under a new agreement with the government. *Nicaragua v. Standard Fruit Co.*, 937 F.3d  
17 at 472-473, [Bandlow Decl. Ex. 8](#). When Dole left in 1982, the Nicaraguan government sued Dole.  
18 The Ninth Circuit found the existence of a contract and ordered arbitration.<sup>18</sup> *Id.* at 481.

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19 <sup>14</sup> [Bandlow Decl. Ex. 5 at 2712:10-2717:17](#); Feb.1999 OEHHA Report at 9, [Bandlow Decl. Ex. 11](#).  
20 EPA cancelled registrations for DBCP products in 1979. Dole Form 10-K for fiscal year ending Jan.  
21 3, 2009 (“Dole 2008 10-K”) at 21, relevant pages are attached to the [Bandlow Decl. as Ex.12](#).

22 <sup>15</sup> EPA, The Carcinogen Assessment Group’s List of Carcinogens, 7/14/80, [Bandlow Decl. Ex. 15](#).

23 <sup>16</sup> M.D. Whorton, *Male Occupational Reproductive Hazards*, 137 *The Western Journal of Medicine*  
24 521, 522 (Dec. 1982), [Bandlow Decl. Ex. 16](#); [Bandlow Decl. Ex. 5 at 6559:9-25](#); *see Shell Oil Co. v.*  
25 *Franco*, 2005 WL 6184247 (C.D. Cal. 2005) (Shell Oil Co., manufacturer of DBCP, agreed that  
26 DBCP “can cause sterility in males”), [Bandlow Decl. Ex. 17](#); [Bandlow Decl. Ex. 5 at 6559:9-25](#),  
27 [6581:8-15](#), [6595:11-6596:5](#), [6600:27-6601:2](#)

28 <sup>17</sup> Dole objects to WG Film failing to include Dole’s answer to a question at trial concerning the need  
for indemnity if DBCP posed no risk. Complaint ¶ 24. Dole’s response about the reasons for the  
indemnity, however, does not support its claim. [Bandlow Decl. Ex. 5 at 2638:11-2639:11](#).

<sup>18</sup> Curiously, Dole implies that as a result of the Sandinista revolution, all of its Nicaraguan  
employment records were destroyed. [Bandlow Decl. Ex. 5 at 2754:28-2755:8](#).

1           **B. DBCP Health Claims**

2           Around 1984, foreign banana workers represented by U.S. lawyers began filing claims in  
3 U.S. courts alleging DBCP-related sterility.<sup>19</sup> *Dow v. Alfaro*, 789 S.W.2d 674, 675 (Tex. 1990);  
4 [Bandlow Decl. Ex. 18](#). By the early 1990s, the claims of 26,000 foreign banana workers were  
5 consolidated in the Southern District of Texas. That court dismissed each of the cases based on the  
6 discretionary doctrine of *forum non conveniens*. See *Delgado v. Shell*, 890 F. Supp. 1324 (S.D.Tex.  
7 1995). The *Delgado* court accepted Dole’s argument that Dole and the plaintiffs could each receive  
8 a fair trial in Nicaragua.<sup>20</sup> *Id.* at 1362.

9           In response to the closing of U.S. courts, foreign governments enacted retaliatory  
10 legislation.<sup>21</sup> In Nicaragua, banana workers, lead by ex-Sandinista politician Victorino Espinales,  
11 pressured the country’s National Assembly to adopt “Special Law for the Procedure of Lawsuits  
12 Filed by those Affected by the Use of Pesticides Made with DBCP” (“Law 364”).<sup>22</sup> Law 364 gives  
13 companies like Dole the option of either waiving their *forum non conveniens* defense in U.S. courts  
14 to the DBCP claims of Nicaraguan citizens or complying with deposit and expedited procedures in  
15 order to have such claims adjudicated in Nicaraguan. *Dow Chemical v. Calderon*, 422 F.3d 827, 829  
16 (9th Cir. 2005), [Bandlow Decl. Ex. 23](#). To participate in Nicaraguan proceedings, defendants had to  
17 deposit \$100,000 with the Court and place the equivalent of \$15 - \$20 million into a special account  
18 with a bank of the defendant’s choosing.<sup>23</sup>

19 \_\_\_\_\_  
20 <sup>19</sup> Grundberg, *Confronting the Perils of Globalization: Nicaraguan Banana Worker’s Struggle for*  
21 *Justice*, 1 Iowa Historical Review 95, 103 (2007), [Bandlow Decl. Ex. 19](#).

22 <sup>20</sup> See Mayer and Sable, *Yes, We Have No Bananas: Forum Non Conveniens and Corporate Evasion*,  
23 4 Int’l B. L. Rev. 130, 153-154 (2004), [Bandlow Decl. Ex. 20](#).

24 <sup>21</sup> See Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available*  
25 *Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56  
26 Kansas L. Rev. 609, 628 (2009), [Bandlow Decl. Ex. 21](#); Scott, *What to Do About Foreign*  
27 *Discriminatory Forum Non Conveniens Legislation*, 49 Harv. Int’l L. J. 95 (2009), [Bandlow Decl.](#)  
28 [Ex. 22](#).

<sup>22</sup> [Bandlow Decl. Ex. 19](#) at 107; [Bandlow Decl. Ex. 22](#) at 95 n. 2.

<sup>23</sup> [Bandlow Decl. Ex. 22](#) at 100. *Dole v. Gutierrez*, 2004 WL 3737123, \*1-2 (C.D. Cal. 2004)  
 (“*Gutierrez*”), [Bandlow Decl. Ex. 24](#). Dole caused significant diplomatic pressure to be imposed on  
 the Nicaraguan government to repeal Law 364. [Bandlow Decl. Ex. 19](#) at 107-108.

1           Following the enactment of Law 364, a case involving more than 583 plaintiffs was set for  
2 trial in Nicaragua in the Fall of 2002. Dole 2003 10-K at 20, [Bandlow Decl. Ex. 25](#). Rather than  
3 waive their *forum non conveniens* defense, Dole responded to this case and deposited the requisite  
4 \$100,000. Dole participated in this case even though the complaints did not name any existing Dole  
5 entity. *Id.* On December 13, 2002, the court in Managua entered a judgment in favor of 468 of the  
6 plaintiffs, in the aggregate amount of \$489.4 million. That court also ordered that Dole’s \$100,000  
7 deposit be returned. *Id.* When a U.S. lawyer sought to enforce this judgment in the Central District  
8 of California, Dole successfully obtained dismissal of that case on the ground that no existing Dole  
9 entity was the subject of the judgment (“Franco Action”). *Id.*

10           On December 23, 2003, Dole filed a RICO complaint against the plaintiffs and their  
11 Nicaraguan counsel in the Franco Action as well as an additional 465 other Nicaraguan plaintiffs  
12 who were parties to seven other actions pending in Managua. [Bandlow Decl. Ex. 24 at\\*1, \\*3](#). Dole  
13 alleged that U.S. lawyers had transmitted funds to Nicaraguan lawyers in a scheme to defraud Dole  
14 by, among other things, presenting “falsified medical records and evidence of DBCP exposure.”  
15 [Bandlow Decl. Ex. 24 at \\*9, \\*13](#). Although Dole ultimately dismissed this action, Dole by this time  
16 was already actively investigating in Nicaragua claims of fraud and corruption.<sup>24</sup>

17           While judgments totaling more than \$1.5 billion have been entered against Dole in Nicaragua  
18 pursuant to Law 364, Dole maintains that “none of the Nicaraguan civil trial court judgments will be  
19 enforceable against any Dole entity . . . because Nicaraguan’s Law 364 is unconstitutional and  
20 violates international principles of due process.”<sup>25</sup> [Bandlow Decl. Ex. 12 at 23](#). Since the enactment  
21 of Law 364, Dole has not paid any remuneration to any Nicaraguan banana worker, despite a  
22 statement of intent to the contrary.<sup>26</sup>

23  
24 <sup>24</sup> Examination of Madrigal, April 22, 2009 *Mejia* Proceedings at 59:9-15, [Bandlow Decl. Ex. 26](#).

25 <sup>25</sup> While Dole charges that the Nicaraguan judiciary is corrupt ([Bandlow Decl. Ex. 26 at 127:26-](#)  
26 [128:2](#)), independent scholars who have viewed the trials found them fair. Arroyo, *Notes on*  
27 *Nicaraguan Litigation: A Judgment Issued under Law 364*, 5 IABA L. Rev. (2007), [Bandlow Decl.](#)  
[Ex. 27](#).

28 <sup>26</sup> See July 5, 2007 Dole Press Release attached to July 6, 2007 attached to Declaration of Fredrik  
Gertten (“Gertten Decl.”) as Ex. G.

1           **C.       Action Before Judge Chaney**

2           In September 2004, Juan Dominguez filed an action in Los Angeles Superior Court on behalf  
3 of approximately 50 Nicaraguan banana workers that was eventually captioned *Tellez v. Dole*.  
4 [Bandlow Ex. 19 at 117](#). From the outset, Dole questioned the accuracy and validity of the plaintiff  
5 health claims. [Bandlow Decl. Ex. 5 at 2652:3-11](#). The discovery conducted **by Dole** in the case  
6 included up to three separate medical examinations of the plaintiffs who proceeded to trial. [Bandlow](#)  
7 [Decl. Ex. 5 at 6479-6538](#). In May of 2007, the *Tellez* case was transferred to the Hon. Victoria  
8 Chaney for trial.<sup>27</sup> The *Tellez* case was coordinated with similar groups of cases captioned as *Mejia*  
9 *v. Dole* and *Rivera v. Dole*. [Bandlow Decl. Ex, 32 at 1-5](#). At that time, there were over 40 other  
10 cases involving more than 5,000 banana workers from various countries pending before the Los  
11 Angeles Superior Court. *Id.* at 6.

12           Dominguez retained Duane Miller to represent at trial the 12 remaining plaintiffs in the  
13 *Tellez* case. [Bandlow Decl. Ex. 10 at 10](#). As trial commenced in July 2007, Dole and Espinales  
14 restated their commitment to resolve the Nicaraguan workers claims. [Gertten Decl. Ex. G](#).

15           On November 3, 2007, the jury returned a verdict that Dole breached a duty owed to all 12 of  
16 the plaintiffs, but only six had proved that this breach caused them injury, awarding the six plaintiffs  
17 \$3.2 million.<sup>28</sup> While the jury later returned a \$2.5 million punitive damages award, Judge Chaney  
18 reversed it, concluding that California lacked sufficient interest to warrant an award of punitive  
19 damages for conduct occurring outside the state. [Bandlow Decl., Ex. 35 at 6](#). Judge Chaney also  
20 held that Dole could not be held strictly liable and reduced the damage award accordingly.

21           As part of its new trial motion, Dole informed the court of the existence of witnesses who  
22 would testify to misconduct by Dominguez and his Nicaraguan counterpart. [Bandlow Decl. Ex. 32](#)  
23 [at 7](#); [Bandlow Ex. 30 at 13:26-17:17](#). While Judge Chaney denied Dole’s motion, she stayed further  
24 activity on the remaining cases except for discovery aimed at uncovering the existence of any fraud.

25 \_\_\_\_\_  
26 <sup>27</sup> June 17, 2009 Findings of Fact and Conclusions of Law Supporting Order Terminating Mejia and  
Rivera Cases (“Mejia Findings”) at 5, [Bandlow Decl. Ex. 32](#). [Bandlow Ex. 30 at 10:1-13:25](#)

27 <sup>28</sup> *Tellez* Special Verdict Form, [Bandlow Decl. Ex. 29](#); [Bandlow Decl. Ex. 10 at 36-38](#); *see also*  
28 closing credits of the *Bananas!*\* film showing images and text indicating the plaintiffs who won and  
who lost, [Bandlow Decl. Ex. 34](#).

1 *Id.* The Court precluded Dominguez from participating in any of this discovery. [Bandlow Decl. Ex.](#)  
2 [32 at 8-18](#); [Bandlow Ex. 30 at 17:24-26:21](#).

3 On March 11, 2009, the Court issued an order to show cause regarding terminating sanctions,  
4 and, on April 21 and 22, 2009, the Court held a hearing, which consisted of a one-sided presentation  
5 of evidence by Dole. [Bandlow Decl. Ex. 32 at 17 and 22](#). On April 23, 2009, Judge Chaney  
6 terminated the *Mejia* and *Rivera* cases, concluding that a member of the Nicaraguan judiciary,  
7 lawyers from Nicaragua law firms and Dominguez had “conspired to manufacture evidence of  
8 sterility and otherwise fix those lawsuits in favor of plaintiffs.”<sup>29</sup> [Bandlow Decl. Ex. 6 at 23](#). Judge  
9 Chaney, however, noted the limitations of her ruling: “I just want to make sure that it is clear. I’m  
10 not ruling on anything in terms of [Dole’s] liability.” *Id.* at 26.

11 **D. The Making Of *Bananas!*\***

12 Defendants are renowned documentary film makers. [Gertten Decl. ¶ 2](#). In December 2006, a  
13 Swedish journalist, Sara Befgors, who had reported from Nicaragua for several years, approached  
14 Gertten to produce a documentary about the devastation that pesticides had inflicted on Nicaraguan  
15 banana workers and their families. *Id.* at ¶ 3. While Gertten initially declined, he explored other  
16 ways of telling the story. *Id.* at ¶¶ 4-6. In April of 2007, WG Film first learned about the suits  
17 brought by U.S. plaintiffs’ lawyers in U.S. courts on behalf of Nicaraguan banana workers and began  
18 considering incorporating the U.S. actions into the story. *Id.* at ¶ 9.

19 Gertten and his film crew traveled to Nicaragua in June of 2007, where they interviewed  
20 banana field workers and medical professionals, each of whom expressed the opinion that pesticide  
21 exposure had harmed the health of banana workers and their families. *Id.* at ¶¶ 11-20. WG Film also  
22 interviewed Espinales and learned about the workers’ struggle in Nicaragua. *Id.* at ¶¶ 17, 24.

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23  
24 <sup>29</sup> Judge Cheney accepted the testimony presented by Dole that a conspiracy was hatched at a  
25 meeting hosted by Nicaraguan Judge Socorro Toruno with plaintiffs lawyers and the directors of  
26 most of the Nicaraguan sterility labs. Recently, Judge Cheney learned that evidence submitted in a  
27 related Florida proceeding, in the form of five affidavits of persons that Dole alleged had attended  
28 this conspiratorial meeting, demonstrating that no such meeting ever took place. *See, e.g.,* [Bandlow Decl. Ex. 30 at 45:6-46:17](#); *see also, e.g.,* Affidavit of Claudia Salazar, [Bandlow Decl. Ex. 37](#). In fact, one of the alleged conspirators presented a copy of his passport proving that he was out of the country at the time of the alleged meeting. Affidavit of Benton Musslewhite, [Bandlow Decl. Ex. 38](#).

1 Wanting to tell a story relevant to banana workers worldwide, WG Film decided not to focus on the  
2 legal and political activities in Nicaragua. *Id.* at ¶¶ 23-24.

3 While in Nicaragua, Gertten happened upon a funeral procession in one neighborhood and  
4 decided to capture it on film. *Gertten Decl.* at ¶ 21. This funeral of a banana worker who died of  
5 kidney failure opens *Bananas!\**, and the worker’s son becomes a focal point of the documentary. *Id.*  
6 at ¶ 21; *Bandlow Decl. Ex. 10* at 1. While the grieving man expresses his opinion that pesticide use  
7 contributed to his father’s death and his mother’s cancer, in one poignant scene, Dominguez tells the  
8 young man that “[w]e have decided to base our lawsuit on sterility. Not on death, not on cancer,  
9 kidney failure, birth defects, testicular cancer or other conditions, even though there is research that  
10 supports it. But the findings with regard to sterility are indisputable.” *Bandlow Decl. Ex. 10* at 32.

11 Less than a month prior to the commencement of the *Tellez* Trial, Dominguez agreed to give  
12 WG Film access. *Gertten Decl.* at ¶¶ 25-26. While *Bananas!\** tells the broad story of the impact of  
13 pesticides, the *Tellez* Trial is about the pesticide DBCP only. *Id.* at ¶¶ 22-24. Dominguez, a  
14 charismatic plaintiff’s lawyer, proved a rich character through whom much of the *Bananas!\** story  
15 could be told, including the tension between his drive for fame and wealth and the plight of the  
16 banana workers. *Id.* at ¶ 25; *Bandlow Decl. Ex. 10* at 1-2, 23. Throughout the process, however, WG  
17 Film remained committed to making a film about the broader plight of banana workers and, for this  
18 reason, emphasized the bereaved banana worker’s son, who was not part of the DBCP litigation.  
19 *Gertten Decl.* at ¶ 24.

20 The entire four months of the *Tellez* trial was filmed and then painstakingly distilled down to  
21 just those portions needed to tell the broader *Bananas!\** story. *Gertten Decl.* at ¶ 31. The  
22 background of the banana trade in Nicaragua was told through clips from a 13 minute grainy film  
23 entitled *Bananeras* made in the 1980s. *Id.* at ¶ 13. Judge Chaney, after an extensive evidentiary  
24 hearing, permitted much of this same film to be shown to the *Tellez* jury, including the scenes of  
25 banana workers walking through puddles and scenes of the high powered sprinkler systems used to  
26 apply DBCP to banana fields.<sup>30</sup> Judge Chaney held that the *Bananeras* film “illustrates for the jury

27 \_\_\_\_\_  
28 <sup>30</sup> *Bandlow Decl. Ex. 10* at 32; *Bandlow Decl. Ex. 5* at 1455:14-1484:20; 1792:24-1805:13; 1948:8-  
1950:13; 8002:3-8011:12; 8164:28-8165:25.



1 the general landscape, the size and scale of the individual banana plantations.” [Bandlow Decl. Ex. 5](#)  
2 [at 1483:11-20](#).

3 From extensive use of courtroom scenes, *Bananas!*\* presents Dole’s defense in the *Tellez*  
4 Trial. For example, among other things, *Bananas!*\* shows: (a) the opening and closing statements of  
5 Dole’s counsel in which counsel states that the lawsuit has no merit ([Bandlow Decl. Ex. 10 at 33](#));  
6 (b) testimony that Dole had ceased using DBCP in Nicaragua by 1980 (*Id.* [at 34](#)); (c) evidence that  
7 Dole had investigated and concluded that its recommended handling of DBCP was safe (*Id.* [at 34](#));  
8 and (d) Dole’s grueling cross-examination of the plaintiffs, calling into question their veracity and  
9 demonstrating that some of the plaintiffs were sterile before ever working at a banana plantation,  
10 others were not sterile at all, and still others may have been rendered sterile by alcoholism or  
11 engaging in dangerous sexual activity (*Id.* [at 27-31](#)). Indeed, the film shows that the jury ultimately  
12 agreed with Dole, rejecting the claims of half of the *Tellez* plaintiffs. [Bandlow Decl. Ex. 34](#).

13 *Bananas!*\* does not depict Dominguez as a noble hero. Indeed, the film depicts Dominquez  
14 as a complex person. On the one hand, he expresses his interest in the plight of Nicaraguan banana  
15 workers. On the other hand, the film portrays his ubiquitous “1-800-ACCIDENTES” bus and  
16 billboard ads, his love for his new red Ferrari as he speeds down the road, and his lavish home and  
17 offices, which includes a portrait of Dominquez himself. [Bandlow Decl. Ex. 10 at 1-2, 23](#). The film  
18 also depicts his callous dissatisfaction with the jury’s verdict. *Id.* [at 36](#).

19 While the courtroom evidence ends with the jury’s punitive damage award, *Bananas!*\* shows  
20 Dole’s post-verdict statement that “for the plaintiffs’ lawyers this is a substantial defeat because of  
21 them to have invested so heavily as they did in time and costs and to come up with this result that  
22 would even come close to paying their smallest bills, is a real defeat.” [Bandlow Decl. Ex. 10 at 40](#).

23 Following the verdict, WG Film began the editing process. [Gertten Decl. ¶ 31](#). During this  
24 process, WG Film compiled and reviewed substantial research on the banana trade, the use of  
25 pesticides at banana plantations, and the thirty year history of the DBCP dispute. *Id.* Editing began  
26 in August 2008 and was completed before Christmas of that year. *Id.* [at ¶ 39](#). At this time, the film  
27 was “locked” – meaning no substantial changes were allowed. Post-production was completed by  
28 March 2009. *Id.*

1 In April 2009, *Bananas!\** was selected to compete at the Los Angeles Film Festival (the  
2 “Festival”). *Id.* at ¶ 41. On May 5, 2009, WG Film released on its website the trailer for *Bananas!\**  
3 along with a press kit. *Id.* at ¶ 42. On May 8, 2008, and without seeing the film, counsel for Dole  
4 demanded that WG Film stop “making false, defamatory statements about Dole” and copied its  
5 complaint to all of the Festival’s corporate sponsors. *Id.* at ¶ 43, Ex. J. Dole’s letter was the first  
6 time WG Film learned about the fraud investigation into Dominquez and his clients. *Id.* at ¶ 44.  
7 After reviewing Judge Chaney’s findings and reviewing its film again, WG Film added closing cards  
8 to the already “locked” film to explain what had transpired. *Id.* WG Film also added to its press kit a  
9 discussion of these developments, including the following:

10 [T]he film is not only about DBCP or the Tellez case, which seems to be a  
11 misconception here. The funeral in the film is the funeral of a man named  
12 Alberto Rosales. We are not saying he died from exposure to DBCP, but he did  
13 die from kidney damage, which is a common symptom from pesticide exposure. .  
14 . . . Yes, it is difficult to prove scientifically, but pesticides have had extremely  
15 negative effects on the people and environment of many areas of Central  
16 America. . . . [Additionally] we are not saying that the plane in the trailer is  
17 spraying DBCP. We are saying that pesticides are very much still in use.<sup>31</sup>

18 Dole’s efforts resulted in *Bananas!\** being pulled from competition. *Bananas!\**, however,  
19 was still screened twice out of competition. In advance of each screening, representatives of the  
20 Festival read a prepared statement about the ongoing controversy. *Gertten Decl.* ¶ 48.

21 Gertten has participated in panel discussions and interviews about his film where he reiterates  
22 that the film presents what occurred in the courtroom and what he saw in Nicaragua, expressed in the  
23 words of the participants. *Id.* at ¶ 48.; *See Declaration of Margarete Jangård* at ¶ 6.

### 24 **III. DISCUSSION**

#### 25 **A. The Anti-SLAPP Statute Applies To Dole's Claims**

26 California’s anti-SLAPP statute allows courts to strike “[a] cause of action against a person  
27 arising from any act of that person in furtherance of the person’s right of petition or free speech under  
28 the . . . Constitution.” Section 425.16(b)(1). The anti-SLAPP statute was enacted to encourage  
continued participation in matters of public significance by targeting “lawsuits brought primarily to

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<sup>31</sup> *Press Kit* at 8-9, *Gertten Decl. Ex. I.*

1 chill the valid exercise of the constitutional rights of freedom of speech.” *Equilon Enterprises v.*  
2 *Consumer Cause, Inc.*, 29 Cal.4th 53, 59-60 n.3 (2002) (quoting Section 425.16(a)). “Because these  
3 meritless lawsuits seek to deplete the defendant’s energy and drain his or her resources, the  
4 Legislature sought to prevent SLAPPS by ending them early and without great cost to the SLAPP  
5 target.” *Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 1335 (2009) (citations and  
6 internal quotations omitted).

7 The statute creates a two-step process for determining whether an action should be stricken:

8 [1] First, the court decides whether the defendant has made a threshold showing that  
9 the challenged cause of action is one arising from protected activity. The moving  
10 defendant’s burden is to demonstrate that the act or acts of which the plaintiff  
11 complains were taken “in furtherance of the [defendant]’s right of petition or free  
12 speech under the United States or California Constitution in connection with a public  
issue,” as defined in the statute. (§ 425.16, subd. (b)(1).)

13 [2] If the court finds such a showing has been made, it then determines whether the  
14 plaintiff has demonstrated a probability of prevailing on the claim.

15 *Equilon*, 29 Cal.4th at 67. Here, both of those steps are met, requiring dismissal of this action.

16 The anti-SLAPP statute applies to actions aimed at documentary films. *M.G. v. Time Warner,*  
17 *Inc.*, 89 Cal.App.4th 623, 629 (2001) (anti-SLAPP statute applied to claims asserted against HBO  
18 documentary on molestation in child sports). Because the film provides extensive reporting about the  
19 ongoing DBCP controversy, the speech contained in *Bananas!*\* is “in connection with a public issue  
20 or an issue of public interest” under the anti-SLAPP statute. *See Sipple v. Foundation of National*  
21 *Progress*, 71 Cal.App.4th 226, 238 (1999) (article on domestic violence allegation raised in a custody  
22 battle with a political consultant was in the public interest). *Nygaard, Inc. v. UUSI-Kerttula*, 159  
23 Cal.App.4th 1027, 1042 (2008) (“an issue of public interest . . . is *any issue in which the public is*  
24 *interested*”) (emphasis in original); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984)  
25 (discussing the “public concern about the safety of pesticides and their effect on the environment”  
26 which is a matter of “public interest”).

1           **B. Dole Cannot Demonstrate A Probability Of Success**

2           The tort of defamation “involves (a) a publication that is (b) false, (c) defamatory, and (d)  
3 unprivileged, and that (e) has a natural tendency to injure or that causes special damage.” *Taus v.*  
4 *Loftus*, 40 Cal. 4th 683, 720 (2007). Moreover, a public figure plaintiff such as Dole must show, by  
5 clear and convincing evidence, that the statements were made with actual malice. *Reader’s Digest*  
6 *Ass’n v. Sup. Ct.*, 37 Cal. 3d 244, 253-255 (1984).

7                           **1. Bananas!\* And WG Film Did Not Make False Statements**

8           The truth, no matter how damning to a party’s reputations and irrespective of the publisher’s  
9 intent, can never support a claim for defamation. *Smith v. Maldonado*, 72 Cal. App. 4th 637, 646  
10 (1999). Dole, as a public figure freely capable of presenting its position to an interested public, bears  
11 the burden of proving falsity. *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1021 (2005).

12           Instead of pointing to any particular false statement, Dole, argues that scenes from, or  
13 supposed impressions left by, *Bananas!\** and the surrounding commentary, somehow “imply”  
14 something false. While “defamation by implication” is possible, an implication of falsity requires  
15 consideration of the publication as a whole and requires Dole to prove that the false impression Dole  
16 contends is the one more probably then not left in the minds of the public. *Balzaga*, 173 Cal. App.  
17 4th at 1339 (“To determine defamation the court must view the broadcast as a whole rather than  
18 dwell upon specific parts of the broadcast”) (*quoting Ramsey v. Fox News Network*, 351 F. Supp. 2d  
19 1145, 1151 (D.C. Col. 2005)); *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*,  
20 69 Cal. App. 4th 1057, 1065 (1999) (“the publication ... must be read as a whole in order to  
21 understand its import and effect, which it was calculated to have on the reader [citation], and  
22 constructed in light of the whole scope [of the publication]”).

23           Dole’s Complaint cites nine separate allegations of defamation, all of which fail.

24           •           ***Bananas!\* allegedly “directly implies that Dole is still using DBCP.”*** Complaint  
25 at ¶ 24. The film does no such thing. In fact, it includes the courtroom scenes where the jury was  
26 “told that Dole stopped. They stopped when the government of the United States in 1979 said,  
27 ‘There is no permitted level of DBCP on bananas.’” [Bandlow Decl. Ex. 10 at 34](#).

28

1           •       ***Bananas!\** allegedly portrays Juan Dominguez as a crusading hero.** Complaint at  
2 ¶¶ 15, 19, 22, 59e. Stating that Dominguez is the hero of *Bananas!\** conflates “hero” with  
3 “protagonist.” While it is true that Dominguez is a central figure in the documentary, to perceive his  
4 depiction as heroic is to view King Lear as the hero of Shakespeare’s play. While *Bananas!\** allows  
5 Dominguez to discuss his reasons for pursuing these cases it also presents his flamboyant lifestyle.  
6 *Supra* at 10-11. Moreover, the film ends citing Judge Chaney findings of serious fraud allegations  
7 implicating Dominguez. [Bandlow Decl. Ex. 39](#).

8           •       ***Bananas!\** allegedly “portrays the claims of the *Tellez* plaintiffs as genuine, valid,  
9 and not the product of a fraudulent scheme to extort Dole and other U.S. companies.”**

10 Complaint at ¶ 22; see also ¶¶ 6, 59. The presentation of the *Tellez* plaintiffs in the film consists  
11 almost exclusively of their courtroom testimony, which is dominated by Dole’s cross examination of  
12 these plaintiffs that very seriously calls into question their credibility.<sup>32</sup> The documentary gives equal  
13 time to Dole’s closing, presenting its argument that “[t]here is no causation, no exposure” as well as  
14 Dole’s contention that the *Tellez* plaintiffs did not testify truthfully. [Bandlow Decl. Ex. 10 at 32-33](#).  
15 *Bananas!\** makes explicit that the jury rejected the claims of half of the *Tellez* plaintiffs. [Bandlow](#)  
16 [Decl. Ex. 34](#). The closing cards include Judge Chaney’s post-trial comment that as a result of serious  
17 fraud allegations “[w]e will never know if any Nicaraguan was actually injured or harmed by the  
18 alleged wrongdoing.” [Bandlow Decl. Ex. 39 at 2](#). While Dole argues that it is the victim and did  
19 nothing wrong, Dole admitted during the *Tellez* trial that DBCP causes sterility at sufficient exposure  
20 levels, that residual DBCP remained in the banana fields after application and drenching, and that  
21 Dole continued to use DBCP after Dole was made aware the chemical caused sterility. [Bandlow](#)  
22 [Decl. Ex. 5 at 6595:11-6596:5](#). Dole’s General Counsel also testified that “[t]oday’s Dole would  
23 have discontinued DBCP in 1979. . . . And Why? Because the focus of Dole is on worker health and  
24 safety.” [Bandlow Decl. Ex. 5 at 9096:8-11](#).

25           •       ***Bananas!\** allegedly “directly implies” that Dole use of DBCP caused people in**  
26 **Nicaragua to die.** Complaint ¶22. Dole is correct that *Bananas!\** presents the opinions of both a  
27

28 <sup>32</sup> [Bandlow Decl. Ex. 10 at 16-19; 24-27; and 27-31](#).

1 young Nicaraguan man (grief-stricken after burying his father) and a priest that pesticides used in  
2 banana production had killed Nicaraguan workers. [Bandlow Decl. Ex. 10 at 1](#). Such opinions  
3 offered by persons who do not purport to possess the medical expertise to render such opinions as  
4 fact are not actionable as defamation. *Campanelli v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 572,  
5 580 (1996) (parents statement regarding purported cause of child’s sickness a protected opinion  
6 because parents are not generally thought of as experts in the medical field). Moreover, *Bananas!\**  
7 makes clear that the suits against Dole related to DBCP concern **sterility** and **not death** because the  
8 link between DBCP and mortality is less certain. [Bandlow Decl. Ex. 10 at 32](#).

9 • ***Bananas!\** uses clips from the archival Nicaraguan film *Bananaras* to supposedly**  
10 **falsely represent the operations of Dole-contracted banana farms.** Complaint at ¶ 57. Dole  
11 already made this argument and lost it. In *Tellez*, Judge Chaney, after listening and considering  
12 Dole’s exact same argument, permitted the jury to view most of the same *Bananaras* film,  
13 concluding that the film “illustrates for the jury the general landscape, the size and scale of individual  
14 banana plantations.” [Bandlow Decl. Ex. 5 at 1483:11-20](#). While a limiting instruction was given, the  
15 jury was simply told that there was no evidence that any of the plaintiffs in this case worked barefoot  
16 in the muddy fields. [Bandlow Decl. Ex. 5 at 1949:6-1950:8](#). Dole had the opportunity to depose the  
17 videographer of *Bananaras* in advance of the film being shown to the jury, and elected not to call the  
18 videographer as a witness. [Bandlow Decl. Ex. 5 at 1481:4-7](#). While Dole initially objected to the  
19 scenes of puddles being shown to the jury, the scenes were shown and witnesses corroborated that the  
20 scenes represented the actual conditions. [Bandlow Decl. Ex. 5 at 8164:28-8165:25](#).

21 • ***Bananas!\** allegedly “directly implies that DBCP was applied on Dole-contracted**  
22 **banana farms regularly, if not on a daily basis, and that it was applied by airplane by**  
23 **drenching the fields while the banana workers were working in them.”** Complaint at ¶¶ 55, 59b.  
24 DBCP was applied by adding it to the closed overhead sprinkling system. [Bandlow Decl. Ex. 5 at](#)  
25 [800:7-801:20](#). An example of this system shown in *Bananas!\** was taken from the *Bananaras* film,  
26 the same scene that Dole repeated in its closing argument when discussing the application of DBCP.  
27 [Bandlow Decl. Ex. 5 at 8001:27-8003:6](#). While Dole objects to a reference to these sprinklers as  
28 “water cannons,” Dole admits that this system sprays 700 gallons per minute covering 3.8 acres.

1 [Bandlow Decl. Ex. 5 at 1794:3-7](#). Dole is correct that *Bananas!\** does not offer details about the  
2 frequency or extent of DBCP use at these banana plantations. *Bananas!\**, however, presents Dole’s  
3 defense that the *Tellez* plaintiffs’ exposure to DBCP was insufficient to cause adverse health impacts  
4 and that the jury agreed with Dole with respect to half of the plaintiffs.<sup>33</sup> Dole is similarly correct  
5 that *Bananas!\** includes a shot of an airplane spraying liquid, but today that is how Dole applies  
6 much of its pesticides. [Bandlow Decl. Ex. 5 at 9151:4-12](#).

7 • ***Bananas!\** Film allegedly implies that the punitive damage award against Dole**  
8 **was a laudable victory.** Complaint at ¶¶ 58-59(d). *Bananas!\**, however, presents Dole’s response  
9 that “for the plaintiffs’ lawyers [the punitive damage award was] a substantial defeat.” [Bandlow](#)  
10 [Decl. Ex. 10 at 40](#).

11 • **Gertten falsely asserts that Dole was found guilty of fraud and malice, a**  
12 **determination that remains valid.** Complaint ¶ 67. During an interview with KPFK and in  
13 response to a question about the current status of the legal battle, Gertten actually responded “What I  
14 can say is that this is a very complex situation. This is one of the poorest countries in the world.  
15 There are a lot of rumors, everything is possible. But first of all, there is an American jury that came  
16 out... told...said...Dole was found guilty with fraud and malice in this case.” KPFK interview,  
17 [Bandlow Decl. Ex. 40 at 4](#).

18 • **Gertten supposedly falsely asserts that Judge Chaney’s fraud findings are**  
19 **erroneous.** Complaint ¶ 69. During the same interview, what Gertten actually said about “the fraud  
20 case [was that], it’s really early and Juan Dominguez hasn’t had his day in court. It’s really hard to  
21 dig into because the evidence produced by Dole is 16 so-called John Doe witnesses so for a journalist  
22 or a filmmaker, it’s almost impossible to understand what is right and what is wrong, when I read all  
23 these papers I can put tons of question marks. It could be differently.” [Bandlow Decl. Ex. 40 at 4](#).

24 Accordingly, because Dole cannot meet its burden to show that a false defamatory statement  
25 was actually made, Dole cannot show a probability of success and the Motion should be granted.  
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27 <sup>33</sup> [Bandlow Decl. Ex. 10 at 33](#). Dole used approximately 65,000 gallons of DBCP in Nicaragua in  
28 1979. [Bandlow Decl. Ex. 5 at 2885:1-15](#). The 9-10 gallons per acre applied by Dole far exceeded  
Dow’s recommended 1.5 gallons per acre. [Bandlow Decl. Ex. 5 at 2895:6-10](#).

1                                   **2. The Challenged Statements Are Protected By The Litigation Privilege**

2                   *Bananas!*\* reporting of the *Tellez* Trial, and the facts and circumstances leading up to that  
3 trial, are a “privileged publication” of a “judicial proceeding” and therefore protected from  
4 defamation liability under Civil Code § 47(d)(1)(A). *Dorsey v. National Enquirer, Inc.*, 973 F. 2d  
5 1431, 1434 (1992) (“courts must accord media defendants a ‘certain amount of literary license,’ and  
6 exercise a “degree of flexibility’ in determining what is a ‘fair report.’”); *Green v. Cortez*, 151 Cal.  
7 App. 3d 1068, 1074 (1984).

8                   Dole does not question that the depictions of the *Tellez* Trial were “fair and true.” Instead,  
9 Dole questions the adequacies of the film’s explication of events that occurred after the trial. The  
10 “fair and true” reporting privilege does not require the media to “resolve the merits of the charges,”  
11 nor is the media required to “present the [plaintiff’s] version of the facts.” *Dorsey*, 973 F. 2d at 1436.  
12 In *Dorsey*, this privilege extended to a *National Enquirer* article headline: “Mother of His Child  
13 Claims in Court...Engelbert Has AIDS Virus” even though this allegation was called into question  
14 during the proceedings. *Dorsey*, 973 F. 2d at 1437-38. Similarly, WG Film was not required to  
15 detail Dole’s side of the story. Irrespective of this point, *Bananas!*\* includes footage of Dole’s  
16 impeachment of the *Tellez* plaintiffs as well as large portions of Dole’s attorney’s examinations and  
17 closing argument. [Bandlow Decl. Ex. 10 at 27-33](#). Moreover, *Bananas!*\* ends by stating that on  
18 “April 23, 2009, Judge Chaney dismis[s]e[d] all Nicaraguan cases pending before her, citing serious  
19 fraud allegations.” [Bandlow Decl. Ex. 39](#).

20                   The “fair and true” privilege extends to the information about the work leading up to  
21 courtroom proceedings and to Gertten’s statements about those proceedings. *Dorsey*, 973 F. 2d at  
22 1437 (privilege extends to any out-of-court statements if they “comprise a history of the proceedings”  
23 *citing Glenn v. Gibson*, 75 Cal. App. 2d 649, 660 (1946)). “California provided a certain amount of  
24 breathing room for [the media] to explain the basis of a judicial proceeding without at the same time  
25 opening themselves up to exposure for defamation liability.” *Id.* In *Dorsey*, the defendant’s use of  
26 out-of-court statements by a party and a witness were privileged under California Civil Code § 47  
27 “because these statements ‘detail the circumstances, and theories based upon circumstances, in regard  
28 to the [court] proceeding.’” *Id.*; *citing Hayward v. Watsonville Register-Pajaronian and Sun*, 265



1 Cal. App. 2d 255, 299 (1968). Like the out-of-court statements in *Dorsey*, the material used by WG  
2 Film in *Bananas!*\* and the statements made by Gertten comprise the history’ of the court proceedings  
3 in *Tellez*, and as such is protected from defamation liability.

4 **3. The Statements Are Opinions Protected Under The First Amendment**

5 “Under the First Amendment there is no such thing as a false idea. However pernicious an  
6 opinion may seem, we depend for its correction not on the conscience of judges and juries but on the  
7 competition of other ideas.” *Nygaard, Inc. v. UUSI-Kerttula*, 159 Cal.App.4th at 1048 quoting *Gertz*  
8 *v. Robert Welch, Inc.* 418 U.S. 232, 340 (1974). “Opinions that present only an individual’s personal  
9 conclusions and do not imply a provable false assertion of fact are not actionable; indeed such  
10 opinions are the lifeblood of public discussion promoted by the First Amendment.” *Paterno v.*  
11 *Supreior Court*, 163 Cal.App.4th 1342, 1356 (2008) (publication of employee’s statement that  
12 employer had slashed employment benefits not actionable). “[T]he question is not strictly whether  
13 the published statement is fact or opinion. Rather the dispositive question is whether a reasonable  
14 fact finder could conclude the published statement declares or implies a provable false assertion of  
15 fact.” *Franklin v. Dynamic Details, Inc.*, 116 Cal.App.4th 375, 385 (2004). In answering this  
16 question the Court should examine the work as a whole. *Paterno*, 163 Cal.App.4th at 1356.

17 *Bananas!*\* presents competing opinions. While Dole objects to the conclusions of a young  
18 Nicaraguan man and a local priest that pesticides contributed to the death of banana workers, the film  
19 presents Dole position, that workers were not exposed to quantities of DBCP sufficient to cause any  
20 injury. Moreover, it is unfathomable to conclude that the statements of a son grieving over the death  
21 of his father and a priest presided over the funeral amount to actionable statements of fact, rather than  
22 constitutionally protected opinions.

23 Dole seems most troubled with the Dominguez statement in Spanish “every time a banana  
24 worker who was exposed to this chemical dies . . . then it’s one more victory for Dole Food  
25 Company.” [Bandlow Decl. Ex. 10 at 32](#). This type of hyperbolic statement, however, is consistently  
26 held by Courts to be a “protected opinion [that] does not imply a provable fact.” *See e.g. James v.*  
27 *San Jose Mercury News, Inc.*, 17 Cal.App.4th 1, 20 (1993) (statement in news report of molestation  
28

1 trial that “when the legal community turns on kids, it doubles their trauma” not actionable);  
2 *Campanelli v. Regents of University of California*, 44 Cal.App.4th at 580 (comment that “players  
3 were beaten down and troubled psychologically” not actionable). Moreover, Dole argument ignores  
4 the context and misses import of Dominguez’s comment, which is that relevant evidence is lost when  
5 the banana worker dies. Thus, Dole has one less claim against it.

#### 6 **4. Dole Cannot Prove Actual Malice**

7 Dole must prove by clear and convincing evidence that WG Film knew that its statements  
8 were false or that it acted with reckless disregard for their truth or falsity. *Reader’s Digest Ass’n v.*  
9 *Sup. Ct.*, 37 Cal. 3d at 256-57.<sup>34</sup> “Gross or even extreme negligence will not suffice to establish  
10 actual malice . . . .” *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 88 (2007)

11 At a minimum, Dole must show that WG Film “entertained serious doubt as to the truth of  
12 [its] publication.” *Reader’s Digest*, 37 Cal. 3d at 256. While Dole objects to WG Film’s failure to  
13 contact it prior to completing *Bananas\**, “[t]he failure to conduct a thorough and objective  
14 investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue  
15 of fact on that controversy.” *Id.* (failure to interview church spokesman was “inconsequential” on  
16 issue of actual malice). WG Film’s awareness of Dole’s charges of corruption and Dole’s conviction  
17 that its use of DBCP had not harmed anyone are insufficient. *Id.* (knowledge that plaintiff had sued  
18 source for defamation insufficient); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S.  
19 657, 692 n. 37 (1989)(“such denials are so commonplace in the world of polemical charge and  
20 countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of  
21 error”). Similarly, Dole cannot meet its proof by simply arguing that *Bananas!\** fails to provide an  
22 objective account or that it is less than accurate. *Id.* at 259; *Huckabee v. Time Warner Entertainment,*  
23 *Co.*, 19 S.W. 3d 413, 426 (Tex. 2000) (“in the absence of evidence that the defendant selected the  
24 material to portray the judge’s record falsely, the First Amendment protects the organization’s choice  
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26 <sup>34</sup> “The burden of proof by clear and convincing evidence ‘requires a finding of high probability. The  
27 evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command  
28 the unhesitating assent of every reasonable mind.’” *Christian Research Institute v. Alnor*, 148 Cal.  
App. 4th 71, 84 (2007) (*quoting Copp v. Paxton*, 45 Cal. App. 4th 829, 846 (1996)).

1 of which material to include in its broadcast”). “Fair and objective reporting may be a worthy ideal,  
2 but there is also room, within the protection of the First Amendment, for writing which seeks to  
3 expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in  
4 its presentation.” *Reader’s Digest*, 37 Cal. 3d at 260.

5 Dole’s construct that *Bananas!\** is nothing more than a hit piece created to service the illicit  
6 desires of compromised plaintiffs’ counsel collapses when one simply watches the film. As  
7 discussed in Sections III.C above Dole’s inability to prove the falsity of any charged statement  
8 dooms its claim. Moreover, the film presents in Dole’s own words its defense to the charges made  
9 by the *Tellez* plaintiffs and shows that Dole persuaded a jury to rule in its favor that Dole’s conduct  
10 was not the cause of any injury to half of these plaintiffs. While the film does not mention that the  
11 *Tellez* court threw out the jury’s punitive damage finding on technical grounds, *Bananas!\** presents  
12 Dole’s comment that this award was a substantial defeat for counsel to the plaintiffs.

13 The First Amendment for good reason shields WG Film from the hammer of Dole’s  
14 defamation claim, effacing Dole’s desire to have final cut authority over *Bananas!\** To the extent  
15 Dole believes that any statement contained in *Bananas!\** “requires further explanation [Dole], its  
16 lawyers, public relations experts, and crisis managers are free to provide them.” *Paterno v. Superior*  
17 *Court*, 163 Cal.App.4th at 1353. This is a clear cut case of documentary film makers who have made  
18 good faith editorial decisions to create a narrative from their artistic perspective. Dole’s effort to  
19 interfere with this right is something the First Amendment and the anti-SLAPP statute do not tolerate.

20 **IV. CONCLUSION**

21 From the outset, Dole concedes that “[t]he right of free speech is a justly cherished and  
22 fundamental American value.” Complaint ¶ 1. Fortunately, the anti-SLAPP statute exists to hold  
23 Dole to these words. For the reasons above, Defendants WG Film AB, Fredrik Gertten and  
24 Margarete Jangård respectfully request that the Court grant this Special Motion to Strike Dole’s  
25 Complaint with prejudice and without leave to amend.

26 DATED: September 10, 2009

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27 By: 

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