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# TELLEZ V. DOLE: NICARAGUAN BANANA WORKERS CONFRONT THE U.S. JUDICIAL SYSTEM

ARMIN ROSENCRANZ\* & STEPHEN ROBLIN\*\*

“Here, fortunately, although there has been a strong attempt to bring the seeds of the Nicaraguan corruption here to this country, it has not succeeded, and if I have anything to say about it, it will not succeed.”<sup>1</sup>  
—Judge Victoria Chaney

“This is the face of American jurisprudence which these cases have presented to the other nations in this hemisphere: a legal system where a major American corporation can receive[] . . . permission from an American judge to recruit witnesses to testify in secret, free to fabricate outrageous lies which can be used to justify vacating a judgment won in an open, above-board jury trial.”<sup>2</sup>  
—Steve Condie

## I. INTRODUCTION

For decades, the U.S. judicial system has presided over a contest between Central American banana workers and the Dole Food Company and related entities. Lacking home country courts capable and willing to enable victims of corporate crimes to seek justice, some of these workers have tried to access U.S. courts. However, these foreign plaintiffs have typically been denied access through corporate defendants’ invocation of

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<sup>1</sup> Transcript of Record at 19, *Mejia v. Dole Food Co.*, No. BC340049 (Cal. Super. Ct. L.A. Cnty. Apr. 23, 2009).

<sup>2</sup> Appellants’ Opening Brief at 341, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

*forum non conveniens* (FNC). FNC is a legal doctrine that gives a court the authority to reject a foreign plaintiff's case on grounds that there is a more appropriate and convenient forum, namely the plaintiff's home nation's courts.<sup>3</sup> While not devised for this purpose, in application this doctrine has immunized multinational corporations from accountability for their abuses committed abroad by effectively denying the victims their right to a remedy.<sup>4</sup> In addition, the application of FNC by U.S. courts seems to violate multilateral treaties such as the International Covenant of Civil and Political Rights.<sup>5</sup>

In the late 1990s, several Latin American governments began drafting and enacting anti-FNC statutes to counter its effects.<sup>6</sup> Nicaragua was among them. In 2000, its legislature passed *Special Law 364* in response to political pressure coming from a movement of labor organizations, activists, and peasants.<sup>7</sup>

The movement represented former agricultural workers who labored on banana plantations directed by the corporate fruit giant, Standard Fruit (now Dole Food Company or Dole), in the 1970s and 1980s.<sup>8</sup> During this time, plantation workers were exposed to the toxic pesticide

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<sup>3</sup> See generally Erin Foley Smith, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145 (2010).

<sup>4</sup> Smith quotes Texas Justice Lloyd Doggett's criticism of the doctrine in *Dow Chem. Co. v. Castro Alfaro*, where he referred to forum non conveniens as a "legal fiction with a fancy name to shield alleged wrongdoers." He also stated that the doctrine "has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad." *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680–81 (Tex. 1990) (Doggett, J., concurring) (quoted in Smith, *supra* note 3, at 169–70 & nn.135–136). Justice Doggett's remarks on the effective immunity (i.e., corporate impunity) enjoyed by multinational corporations is supported empirically. As Smith explains, "studies indicate that a forum non conveniens dismissal is typically outcome-determinative—if the victims are unable to sue in U.S. courts, they are unable to recover for the violations of their rights. Therefore, the doctrine represents a real barrier for victims of human rights abuses at the hands of U.S. corporations." Smith, *supra* note 3, at 165–66 (footnote omitted). Smith cites a study published in 1987 that surveyed 180 transnational cases dismissed on the basis of the legal doctrine and found that none resulted in a victory in the foreign court. *Id.* at 165 n.104.

<sup>5</sup> See generally Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 31 (2003).

<sup>6</sup> *Id.* at 22.

<sup>7</sup> Susanna Rankin Bohme, *Pesticide Regulation, Citizen Action, and Toxic Trade: The Role of the Nation-State in the Transnational History of DBCP*, in DANGEROUS TRADE: HISTORIES OF INDUSTRIAL HAZARD ACROSS A GLOBALIZING WORLD 168 (Christopher Sellers & Joseph Melling eds., 2012) [hereinafter Bohme, *Pesticide Regulation*]; see also Susanna Bohme, *National Law, Transnational Justice? Countering Forum Non Conveniens in Nicaragua*, in UNEQUAL EXPOSURES: THE TRANSNATIONAL HISTORY OF A TOXIC PESTICIDE (forthcoming) [hereinafter Bohme, *National Law, Transnational Justice?*].

<sup>8</sup> Bohme, *Pesticide Regulation*, *supra* note 7; see also Bohme, *National Law, Transnational Justice?*, *supra* note 7.

dibromochloropropane (DBCP). DBCP was discovered in the mid-1950s.<sup>9</sup> By the mid-1970s, the U.S. National Cancer Institute found the chemical to be extremely carcinogenic. Afterwards, it became known that DBCP causes male sterility. Despite knowing the harmful effects of DBCP for humans, Dole continued to use the pesticide on its banana farms in Nicaragua as late as 1980.<sup>10</sup>

The movement, which emerged in the early 1990s, focused on changing Nicaraguan state policy as a means of attaining justice for DBCP-affected individuals. It fought for the passage of a law that would facilitate the trial of Dole and other companies in Nicaragua for their involvement in exposing laborers to DBCP and frustrate the corporate defendants' use of FNC in the United States.<sup>11</sup>

Of all the foreign plaintiffs denied access to U.S. courts under FNC, tens of thousands have been DBCP plaintiffs from around the world.<sup>12</sup> The Nicaraguan legislature designed *Special Law 364* to handle DBCP cases involving Nicaraguan citizens. In essence, the law makes Nicaraguan courts more punitive than U.S. courts for corporations such as Dole.<sup>13</sup> As a result, it is no longer in the corporation's best interest for its attorneys to assert FNC. Instead of Nicaraguan courts, Dole's local courts in California have become the more "convenient" forum for litigating claims brought by DBCP-affected individuals from Nicaragua.<sup>14</sup>

With the FNC legal tactic successfully neutralized by *Special Law 364*, the door opened for the first-ever DBCP trial enabling foreign plaintiffs to claim harm and seek damages in a lawsuit brought before an

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<sup>9</sup> Vicent Boix & Susanna R. Bohme, Commentary, *Secrecy and Justice in the Ongoing Saga of DBCP Litigation*, 18 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 154 (2012), available at [www.bananasthemovie.com/wp-content/uploads/resources/IJOEH\\_Boix\\_Bohme\\_2012.pdf](http://www.bananasthemovie.com/wp-content/uploads/resources/IJOEH_Boix_Bohme_2012.pdf).

<sup>10</sup> *Id.* at 155.

<sup>11</sup> Bohme, *Pesticide Regulation*, *supra* note 7, at 174-75.

<sup>12</sup> *Id.* at 173.

<sup>13</sup> See Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt Forum Non Conveniens a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT'L L. 703, 729-33 (2005).

<sup>14</sup> As Susanna Bohme explains, when plaintiffs began seeking enforcement of Nicaraguan verdicts in U.S. courts, "corporate lawyers reversed their previous position that the Nicaraguan law and Nicaraguan courts were appropriate to the trial of DB[C]P case[s]. Now, the corporations argued the cases could not be enforced in the U.S. because Law 364 was deeply incompatible with U.S. legal culture. For example, Dow's spokesperson maintained the law 'offends virtually every notion Americans have of fair play and substantial justice' because, among other reasons, it was retroactive, violated due process, and selectively targeted just a few companies. This move seemed especially cynical in light of the fact that the company had previously argued that US legal norms shouldn't apply to Nicaraguan DBCP case. Now, it sought to use those very norms to denigrate Nicaraguan laws." Bohme, *National Law, Transnational Justice?*, *supra* note 7, at 15-16.

American court. The case was *Tellez v. Dole Food Company*.<sup>15</sup> In 2004, individuals who worked on plantations in Nicaragua filed a lawsuit against Dole and Dow Chemical Company (Dow), the company that manufactured and sold DBCP to Dole.<sup>16</sup> The foreign plaintiffs claimed they became sterile due to their exposure to the pesticide while working on Dole banana plantations in the 1970s.<sup>17</sup>

On November 5, 2007, a Los Angeles Superior Court jury, presided over by Judge Victoria Chaney, found Dole and Dow responsible for exposing six of the plaintiffs to DBCP.<sup>18</sup> The jury awarded them \$3.2 million in damages.<sup>19</sup> The jury also determined that Dole acted with “malice, fraud, and oppression.”<sup>20</sup> On November 15, 2007, the jury awarded \$2.5 million in punitive damages to five of the six plaintiffs.<sup>21</sup>

In a case viewed as a test of how well the U.S. legal system could respond to injuries inflicted abroad by U.S.-based multinational corporations, some legal observers considered the jury’s modest verdict an important victory in holding corporations accountable.<sup>22</sup> Indeed, it marked the first time a U.S. jury had found Dole liable for its conduct outside of the United States, the *L.A. Times* reported at the time.<sup>23</sup> The verdict was a “hopeful sign” for the over 5,000 foreign agricultural workers who had filed suit in U.S. courts over the use of DBCP by U.S. corporations.<sup>24</sup> The verdict also boded well for two subsequent DBCP cases, *Mejia v. Dole Food Company* and *Rivera v. Dole Food Company*, over which Judge Chaney also presided, given the overlapping nature of these cases and *Tellez*.<sup>25</sup>

<sup>15</sup> Bohme, *Pesticide Regulation*, *supra* note 7, at 176.

<sup>16</sup> See First Amended Complaint, *Tellez v. Dole Food Co.*, No. BC312852 (Cal. Super. Ct. L.A. Cnty. Sept. 7, 2004), 2004 WL 5468592. The number of plaintiffs varied, as they were transferred, dropped, and added between the *Tellez*, *Mejia*, and *Rivera* cases. But we estimate that there were between 40 and 60 plaintiffs representing several thousand injured banana workers.

<sup>17</sup> *Id.*

<sup>18</sup> *Tellez v. Dole Food Co.*, No. BC312852, 2008 WL 744052 (Cal. Super. Ct. L.A. Cnty. Mar. 7, 2008) (trial order); *id.*, 2008 WL 744051 (Cal. Super. Ct. L.A. Cnty. Mar. 7, 2008) (trial order); see John Spano, *Dole Must Pay Farmworkers \$3.2 Million*, L.A. TIMES, Nov. 6, 2007, available at [articles.latimes.com/2007/nov/06/local/me-dole6](http://articles.latimes.com/2007/nov/06/local/me-dole6).

<sup>19</sup> *Id.*

<sup>20</sup> John Spano, *Executive Says “New Dole” Should Not Pay for Misdeeds of “Old Dole,”* L.A. TIMES, Nov. 15, 2007, available at [articles.latimes.com/2007/nov/15/local/me-dole15](http://articles.latimes.com/2007/nov/15/local/me-dole15).

<sup>21</sup> *Banana Workers Win \$2.5M in Dole Lawsuit*, CBS NEWS, Nov. 16, 2007, available at [www.cbsnews.com/news/banana-workers-win-25m-in-dole-lawsuit/](http://www.cbsnews.com/news/banana-workers-win-25m-in-dole-lawsuit/).

<sup>22</sup> Spano, *supra* note 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; *Banana Workers Win \$2.5M in Dole Lawsuit*, *supra* note 21.

<sup>25</sup> See Written Ruling, *Mejia v. Dole Food Co.*, No. BC340049, at 5 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

The historic *Tellez* jury verdict, however, was later vacated.<sup>26</sup> Dole's attorneys engineered a stunning comeback in the *Mejia* and *Rivera* cases. Like the *Tellez* case, these cases were brought on behalf of Nicaraguan banana plantation workers who claimed they were made sterile from their exposure to DBCP over three decades ago while working on Dole banana farms.<sup>27</sup> But unlike *Tellez*, they never reached a jury trial.

On June 15, 2009, Judge Chaney dismissed them both with prejudice, determining that a vast conspiracy had been orchestrated by the plaintiffs' lawyers, Nicaraguan judges, and others to defraud Dole and U.S. courts.<sup>28</sup> Judge Chaney's dismissal set the stage for Dole's later comeback in *Tellez*, when on March 11, 2011, Judge Chaney vacated the *Tellez* jury verdict and dismissed the case with prejudice.<sup>29</sup> This ruling came as the outcome of a *coram vobis* hearing, which is an extraordinary remedy available to victims of fraud.<sup>30</sup> Judge Chaney's *coram vobis* ruling was appealed to the Court of Appeal of the State of California, under the name *Laguna v. Dole Food Company*, with Steve Condie representing the six Nicaraguan appellants.<sup>31</sup>

In this Article, we explore the rollback of the jury's verdicts. In doing so, we focus on the legal defense strategy that Dole's attorneys employed after the *Tellez* jury verdict. We show that the strategy aimed to discredit the DBCP plaintiffs, as well as Nicaraguan legal institutions, and that Judge Chaney facilitated this strategy by disabling the adversarial process. We then review evidence that challenges Dole's version of events and suggests that Judge Chaney's method of evaluating evidence was flawed. Finally, we analyze the various biases Judge Chaney demonstrated during the course of the trials, which we believe contributed to her amenability to Dole's defense strategy and ultimately placed the foreign plaintiffs at an unfair disadvantage.

Before proceeding, we want to emphasize that the conclusions

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<sup>26</sup> *Id.*

<sup>27</sup> See Armin Rosencranz et al., *Doling Out Environmental Justice to Nicaraguan Banana Workers: The Jose Adolfo Tellez v. Dole Food Company Litigation in the U.S. Courts*, 3 GOLDEN GATE U. ENVTL. L.J. 161 (2009).

<sup>28</sup> Written Ruling, *Mejia*, No. BC340049, at 1-2, 58 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>29</sup> See *Tellez v. Dole Food Co.*, No. BC312852, 2008 WL 744052 (Cal. Super. Ct. L.A. Cnty. Mar. 7, 2008) (trial order), *rev'd on other grounds*, *Coram Vobis Ruling, Tellez v. Dole Food Co.*, No. BC312852 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>30</sup> *Id.* at 45-48.

<sup>31</sup> Appellants' Opening Brief, *supra* note 2, at 4-5; *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

drawn in this Article are provisional. Much of the evidence in this case is not publicly available and the legal documents for these cases are redacted because of a protective order that Judge Chaney entered following the *Tellez* jury verdict. We acknowledge the possibility that the further release of the record may present challenges to our conclusions on Dole's strategy and Judge Chaney's handling of the case. But despite the evidentiary limitations, we believe that the available record supports our conclusions.

Moreover, we believe it is important to raise them, especially in light of the fact that a jury verdict favorable to the plaintiffs was overturned. If nothing else, our hope is that this Article will draw other scholars' attention to the defendant's aggressive strategy and the possibility of judicial bias in this case.

## II. POST-TELLEZ JURY VERDICT ROLLBACK

Two important events took place in the immediate aftermath of the November 2007 *Tellez* jury verdict. First, Judge Chaney modified the compensatory damages verdict and denied punitive damages against Dole, thereby reducing the overall verdict of \$5.8 million to \$1.58 million.<sup>32</sup> In her view, the jury did not correctly apply the law and there were insufficient facts on which to base its punitive damages decision.<sup>33</sup> On the matter of compensatory damages, Judge Chaney ultimately granted the defendant's motion for Judgment Notwithstanding the Verdict (JNOV) regarding strict liability, because there was no evidence demonstrating that Dole was a seller or distributor of DBCP.<sup>34</sup>

Judge Chaney also granted the defendant's motion for JNOV regarding punitive damages.<sup>35</sup> Dole's lawyers (Jones, Day, with lead counsel Frederick McKnight) made the distinction between the "old Dole" of 1977 and the "new Dole" of today, arguing that the "new Dole" should not be punished for what the "old Dole" had done.<sup>36</sup> They claimed that the "new Dole" does not place concern for production and profits over worker and environmental safety, and mentioned that only one of the top executives employed by the firm in 1977 remains with the company today.<sup>37</sup> Judge Chaney accepted this line of reasoning and

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<sup>32</sup> Rosencranz et al., *supra* note 27, at 174.

<sup>33</sup> *Id.* at 173.

<sup>34</sup> *Id.* at 174.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 172.

<sup>37</sup> *Id.*



concluded that awarding punitive damages as a means of punishment would be “arbitrary.”<sup>38</sup> She also determined that California did not have an interest in punishing “a domestic corporation for injuries that occurred only in a foreign country.”<sup>39</sup>

The second important event following the *Tellez* jury verdict, but before Judge Chaney’s JNOVs, was Dole informing the court of “a witness, later designated ‘Witness X,’ who claimed to be aware” of a fraudulent scheme perpetrated on U.S. courts by the plaintiffs’ co-counsel, Juan Dominguez from Los Angeles, Dominguez’s Nicaraguan colleague, Antonio Ordeñana, and their agents in Nicaragua.<sup>40</sup> The witness did not implicate the plaintiffs’ other counsel, Duane Miller and other attorneys with the Sacramento firm Miller, Axline & Sawyer (MAS).

Witness X alleged that at least two of the *Tellez* plaintiffs never worked on banana farms and that they submitted false documentary evidence and perjured testimony to the court.<sup>41</sup> Witness X also expressed concern for his safety and life, leading the court to enter a “protective order” on January 17, 2008, to preserve the witness’s anonymity.<sup>42</sup> Dole asked for a new trial based on this alleged fraud. But Judge Chaney rejected it, concluding the witness’s statements constituted “inadmissible hearsay.”<sup>43</sup>

While Dole’s attorneys’ attempt to retry the *Tellez* case following the jury verdict was initially unsuccessful, the introduction of Witness X under the conditions of a protective order laid the groundwork for their subsequent victories in two other cases, *Mejia* and *Rivera*.

#### A. THE *MEJIA* PROCEEDINGS: DOLE IMPLEMENTS “CONTAMINATION” LEGAL DEFENSE

The introduction of Witness X marked the launching of an unusual legal defense employed by Dole’s attorneys, who were from the law firm Gibson, Dunn & Crutcher LLP. (Gibson, Dunn & Crutcher became associated as counsel during the post-trial period in late 2007 and replaced Jones, Day in 2008.) Their strategy was to destroy the

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<sup>38</sup> *Tellez v. Dole Food Co.*, No. BC312852, 2008 WL 744052 (Cal. Super. Ct. L.A. Cnty. Mar. 7, 2008) (trial order).

<sup>39</sup> *See Tellez*, No. BC312852, 2008 WL 744051.

<sup>40</sup> Written Ruling, *Mejia v. Dole Food Co.*, No. BC340049, at 7 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



credibility of the Nicaraguan DBCP plaintiffs and their attorneys and supporters, and to paint Nicaraguan society—its government, legal system, and people—as utterly corrupt. By discrediting every connection to the Nicaraguan DBCP cases, Dole’s attorneys’ strategy aimed to convince Judge Chaney that none of these cases would be able to stand on their own merits in U.S. courts. Dole’s attorneys successfully implemented this strategy during the *Mejia* proceedings, which occurred from October 2008 to April 23, 2009, the final day of the dismissal hearings.<sup>44</sup> Judge Chaney issued her written ruling on June 15, 2009.<sup>45</sup>

The primary instrument for the strategy was testimony that Dole’s attorneys obtained from anonymous witnesses from Nicaragua. This testimony, together with “evidence” gathered by Dole’s investigators, from Texas-based Investigative Research Inc., presented a story of a vast conspiracy. The supposed conspiracy involved the lawyers representing the plaintiffs at the time, primarily Juan Dominguez from Los Angeles, Antonio Ordeñana from Nicaragua, and their agents in Nicaragua. They allegedly worked in concert with corrupt Nicaraguan judges and medical labs to recruit fraudulent plaintiffs, to assist them in obtaining false lab reports confirming their sterility, and to “coach” them to lie about working on banana farms. Furthermore, Dominguez and his supposed co-conspirators allegedly relied on obstruction, intimidation, and threats of violence to prevent anyone from blowing the whistle about their campaign to defraud Dole in U.S. courts.<sup>46</sup>

During the *Mejia* proceedings, Dole’s version of events passed through the judicial process largely uncontested, primarily as a result of Judge Chaney’s compromising the adversarial judicial process. The fateful moment occurred on October 6, 2008, when Judge Chaney granted Dole’s attorneys’ motion for a protective order that, like the protective order entered on behalf of Witness X, preserved the anonymity of three “John Doe” witnesses.<sup>47</sup> A month later the court

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<sup>44</sup> See Appellants’ Opening Brief, *supra* note 2, at ii-xv (setting forth the factual and procedural history of the case). This Article treats October 2008 as the start of the *Mejia* proceedings, because the trial court granted Dole’s motion to take secret depositions of Nicaraguan witnesses for the *Mejia v. Dole* case on October 6, 2008. See *id.* at v.

<sup>45</sup> Written Ruling, *Mejia*, No. BC340049, at 1 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>46</sup> See Transcript of Record, *supra* note 1, at 6-14; *Mejia v. Dole Food Co.*, No. BC340049 (Cal. Super. Ct. L.A. Cnty. Apr. 23, 2009) (setting forth a detailed description of the “heinous conspiracy”); Written Ruling, *Mejia*, No. BC340049, at 1-4, 41-48 (Cal. Super. Ct. L.A. Cnty. June 15, 2009); Coram Vobis Ruling, *Tellez v. Dole Food Co.*, No. BC312852, at 11-25 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev’d on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>47</sup> See Written Ruling, *Mejia*, No. BC340049, at 8-13 (Cal. Super. Ct. L.A. Cnty. June 15,

amended the protective order to extend to additional John Doe depositions.<sup>48</sup> Dole's attorneys took depositions from a total of seventeen John Doe witnesses.<sup>49</sup>

The attorneys argued the order was necessary because they had witnesses who knew about the alleged conspiracy but would not come forward in U.S. courts out of fear that Dominguez and his Nicaraguan agents would intimidate or even harm them if their identities became public knowledge.<sup>50</sup> By entering the protective order, Judge Chaney prevented Dominguez, Ordeñana, and the public from learning the names of the John Doe witnesses.<sup>51</sup> They were not allowed to face their accusers. The protective order did not apply to the plaintiffs' other counsel, Duane Miller and other attorneys with MAS, but it inhibited their ability to engage in effective investigation and cross-examination.<sup>52</sup>

The admission of John Doe testimony under non-adversarial conditions appears to have had two significant effects. First, it gave Dole the opportunity to attack the plaintiffs' counsel.<sup>53</sup> Second, it left Judge Chaney to determine the veracity of the story Dole's attorneys pushed through, which expanded during the course of the proceedings. After Dole's attorneys implicated Dominguez and Ordeñana in the "conspiracy," they attempted to connect Duane Miller and other attorneys from MAS to the fraudulent scheme.

On December 22, 2008, Dole filed a motion for sanctions against the MAS attorneys, accusing them of tampering with witnesses and

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2009); Coram Vobis Ruling, *Tellez*, No. BC312852, at 6-8 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>48</sup> Written Ruling, *Mejia*, No. BC340049, at 11 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.* at 9, 11-12.

<sup>51</sup> According to Judge Chaney, "Dominguez was later granted access to John Does 1-3." Coram Vobis Ruling, *Tellez*, No. BC312852, at 7 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>52</sup> Steve Condie provides a detailed account of how the protective order inhibited MAS from contesting Dole's version of events. See Appellants' Opening Brief, *supra* note 2, at 62-63, 76-79, 81-82, 92-96, 98-101, 119-28. Close observers of these cases agree that the procedure instituted by Judge Chaney allowed Dole to push through its version of events uncontested. Vicent Boix and Susanna R. Bohme write, "[T]hese cases should not have [been] dismissed on the basis of undisclosed and uncountered testimony. Moving forward, the appellate court considering *Tellez* should reject the notion that secret evidence can form a legitimate basis to reverse a decision duly made by a California jury. All courts hearing DBCP cases should ensure that all evidence is heard and refuse to allow secrecy to interfere with the administration of justice." Boix & Bohme, *supra* note 9, at 159.

<sup>53</sup> One of the key anonymous witnesses, "John Doe 17," claims that Dole's strategy was to neutralize the opposing counsel. In Condie's appellants brief, he cites the following statement from the witness: "The biggest problem they have are the lawyers. First they went for Dominguez and now Provost." The witness is quoted further: "[T]heir first action is to get rid of the law firms, because they don't want lawyers . . . ." Appellants' Opening Brief, *supra* note 2, at 343.

leaking secret information.<sup>54</sup> The motion was later dropped.<sup>55</sup> Dole's attorneys also implicated lawyers with the Texas law firm Provost Umphrey and their associate, Benton Musslewhite, who were involved in DBCP litigation in Texas.<sup>56</sup> During the hearings, the plaintiffs discharged Dominguez,<sup>57</sup> which left MAS attorneys (who did not speak Spanish) as their sole counsel. Unable to effectively investigate and cross-examine the John Doe testimony and faced with allegations from Dole about their supposed involvement in the "conspiracy," MAS was neutralized, leaving the plaintiffs without meaningful representation.

With the attorneys effectively sidelined, Judge Chaney relied on demeanor evidence to determine the veracity of the John Doe testimony. She found the John Doe testimony to be credible, "[b]ased not only on the words spoken but also on the nonverbal cues, such as tone of voice, rapidity of response, body posture and facial expression."<sup>58</sup> She concluded there was "clear and convincing evidence" that the plaintiffs and their counsel, Dominguez and Ordeñana (not MAS), committed fraud on the court and on Dole<sup>59</sup> and that Dominguez and his agents created an "atmosphere of intimidation and fear"<sup>60</sup> through threats of violence, which prevented anyone from speaking out about the "illegal schemes brewing in Nicaragua."<sup>61</sup> Judge Chaney filed a complaint against Dominguez with the State Bar of California.<sup>62</sup>

Moreover, Judge Chaney's oral ruling was unusual in its language and scope. She stated that the campaign of fraud was made possible because of Nicaragua's "particular odd social ecosystem."<sup>63</sup> She likened the alleged campaign to a mythical "chimera," a "fire-breathing she

<sup>54</sup> *Id.* at 93, 100.

<sup>55</sup> *Id.* at 93.

<sup>56</sup> *Id.* at 7-8, 178-81, 221.

<sup>57</sup> *Id.* at 119.

<sup>58</sup> Judge Chaney described the criteria she used to assess the veracity of John Doe witnesses depositions from *Mejia* in her written ruling for the *Tellez coram vobis* proceedings. See *Coram Vobis Ruling*, *Tellez v. Dole Food Co.*, No. BC312852, at 28 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>59</sup> *Written Ruling*, *Mejia v. Dole Food Co.*, No. BC340049, at 1-2, 58 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>60</sup> *Id.* at 57.

<sup>61</sup> *Id.* at 4, 43-50, 57.

<sup>62</sup> Amanda Bronstad, *California State Bar Drops Complaint Against Attorney Who Sued Dole*, CORPORATE COUNSEL, [www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202488692576&California\\_State\\_Bar\\_Drop\\_s\\_Complaint\\_Against\\_Attorney\\_Who\\_Sued\\_Dole&slreturn=20130517145602](http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202488692576&California_State_Bar_Drop_s_Complaint_Against_Attorney_Who_Sued_Dole&slreturn=20130517145602) (last visited June 17, 2013).

<sup>63</sup> Transcript of Record at 3, *supra* note 1, at 3.

monster with a head of a lion, a body of a goat, and a tail of a snake.”<sup>64</sup> Thus, for Judge Chaney, the conspiracy was a product not only of those who directly participated in the scheme, but also the general dysfunction of Nicaraguan society, which she determined was marred by corrupt legal institutions and a general lack of respect for the rule of law in the country.<sup>65</sup>

While Judge Chaney did not accept every aspect of Dole’s story, enough passed through for the corporation to achieve the goal of its defense—to destroy the credibility of all the Nicaragua DBCP lawsuits. As Judge Chaney explained, “Because of the interrelationships of the law firms and plaintiff groups in all DBCP cases in and emanating from Nicaragua, the taint of the fraud proven in this case permeates and discredits all such cases.”<sup>66</sup> This determination compelled her to take the unusual step of contacting U.S. District Court Judge Paul C. Huck, who presided over another Nicaraguan DBCP case, *Osorio v. Dole Food Company*. That case involved plaintiffs seeking enforcement of a Nicaraguan verdict in a Miami federal court. In October 2009, Judge Huck declined to enforce the Nicaraguan decision, but his reasons did not include the fraud found by Judge Chaney.<sup>67</sup>

#### B. DOLE ATTEMPTS TO SUPPRESS DOCUMENTARY

The Nicaraguan DBCP claimants’ struggle in U.S. courts was the subject of a documentary called *BANANAS!\*: ON TRIAL FOR MALICE*,<sup>68</sup> which was directed by Swedish documentary filmmaker and journalist, Fredrik Gertten. Dole’s attorneys attempted to suppress the documentary. Their efforts demonstrate the extent to which both MAS was neutralized and Dole would attack any supporting link to the DBCP cases. On July 8, 2009, Dole sued the filmmakers, claiming the film, the contents of the website, and statements made by Gertten when speaking about the documentary amounted to defamation.<sup>69</sup> The crux of Dole’s defamation allegation was that the film excluded any mention of the court’s finding

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<sup>64</sup> *Id.* at 5.

<sup>65</sup> Written Ruling, *Mejia*, No. BC340049, at 22-26 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>66</sup> *Id.* at 53.

<sup>67</sup> See Order Denying Recognition of Judgment, *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff’d sub nom.* *Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011) (per curiam).

<sup>68</sup> See *Bananas!\**, *BANANAS THE MOVIE*, [www.banasthanemovie.com/](http://www.banasthanemovie.com/) (last visited Mar. 11, 2014).

<sup>69</sup> See Complaint for Defamation, *Dole Food Co., v. Gertten*, No. BC417435 (Cal. Super. Ct. L.A. Cnty. July 8, 2009).

of fraud.<sup>70</sup>

The complaint came about a month after the film premiered at the Film Independent's Los Angeles Film Festival.<sup>71</sup> Dole's attorneys made efforts to prevent Gertten from releasing the film. In fact, during the *Mejia* proceedings, MAS agreed to send a letter to the filmmaker discouraging him from releasing the film, a gesture of which Judge Chaney approved.<sup>72</sup> After screening the documentary, the Film Festival pulled it from the documentary competition, saying that the filmmakers relied on "unreliable evidence" and that the trial judge in *Tellez* uncovered the alleged fraudulent scheme.<sup>73</sup>

When the filmmakers mounted a defense to Dole's defamation lawsuit, Dole dropped the suit.<sup>74</sup> The filmmakers filed a motion seeking to recoup defense costs under the California SLAPP (strategic lawsuit against public participation) statute.<sup>75</sup> On November 17, 2010, a Los Angeles Superior Court determined that Dole's suit was a SLAPP suit; it lacked "minimal merit," and Dole was ordered to pay attorney fees and other associated costs.<sup>76</sup>

### C. THE *TELLEZ CORAM VOBIS* PROCEEDINGS: DOLE'S STORY BEGINS TO UNRAVEL

On May 19, 2009, a month after the *Mejia* dismissal hearings, Dole's attorneys petitioned the appellate court for a writ of error *coram vobis*, alleging a massive campaign of fraud orchestrated by Dominguez, Ordeñana, and the *Tellez* plaintiffs.<sup>77</sup> On July 7, 2009, the appellate court

<sup>70</sup> *Id.*, at 2; Amanda Bronstad, *Dole Food Sues Filmmakers, Alleging Documentary Was Based on Fraud*, NAT'L L.J. (July 8, 2009), available at [www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432119262&Dole\\_Food\\_sues\\_filmmakers\\_alleging\\_documentary\\_was\\_based\\_on\\_fraud\\_&slreturn=20130515143512](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432119262&Dole_Food_sues_filmmakers_alleging_documentary_was_based_on_fraud_&slreturn=20130515143512).

<sup>71</sup> Bronstad, *supra* note 70.

<sup>72</sup> See Appellants' Opening Brief, *supra* note 2, at 128.

<sup>73</sup> Bronstad, *supra* note 70.

<sup>74</sup> See Notice of Motion, *Dole Food Co., v. Gertten*, No. BC417435 (Cal. Super. Ct. L.A. Cnty. Sept. 10, 2009) (notice of motion and special motion of defendants Fredrik Gertten, Margaret Jangard, and WG Film AB to strike under CAL. CIV. PROC. CODE § 425.16; supporting memorandum of points and authorities); Order on Special Motion, *Dole Food Co., v. Gertten*, No. BC417435 (Cal. Super. Ct. L.A. Cnty. Nov. 17, 2010) (order on special motion to strike and motion for attorney fees), 2, 3, 11.

<sup>75</sup> See Cross-Complaint, *Dole Food Co., v. Gertten*, BC417435 (Cal. Super. Ct. L.A. Cnty. Sept. 10, 2009) (cross-complaint of wg film ab against dole food company, inc. for intentional interference with prospective economic advantage).

<sup>76</sup> Order on Special Motion, *Dole Food Co., v. Gertten*, No. BC417435 (Cal. Super. Ct. L.A. Cnty. Nov. 17, 2010) (order on special motion to strike and motion for attorney fees).

<sup>77</sup> See Appellants' Opening Brief, *supra* note 2, at 134; see also *Coram Vobis Ruling, Tellez v. Dole Food Co.*, No. BC312852, at 1 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other*

remanded the *Tellez* action to Judge Chaney's court and ordered the plaintiffs to show cause why the previous judgment should not be vacated and why the case should not be dismissed with prejudice.<sup>78</sup> In August 2009, Steve Condie took over as the counsel for the six *Tellez* plaintiffs.<sup>79</sup> The trial court presided over a year-long evidentiary hearing. The *Tellez coram vobis* proceedings occurred from June 2009 to July 15, 2010, when Judge Chaney delivered her oral ruling vacating the verdict and dismissing the case with prejudice.<sup>80</sup> She issued her written ruling on March 11, 2011.<sup>81</sup>

These proceedings were consistent with the *Mejia* proceedings in three general respects. First, they were conducted under constrained and non-adversarial conditions, for Judge Chaney maintained a version of the protective order throughout the course of the proceedings, which undermined Condie's ability to investigate the witnesses and their stories.<sup>82</sup> (Also, Judge Chaney denied Condie's request to re-depose two of the crucial anonymous witnesses, whose testimony was proven to be unreliable.)<sup>83</sup>

Second, Dole's attorneys continued their legal defense strategy, which included attacking the opposing counsel. For example, they filed a motion for sanctions against Steve Condie, accusing him of assisting Dominguez and Ordeñana in their "intimidation" of John Doe witnesses.<sup>84</sup> Third, Judge Chaney maintained that the *Tellez* claim was the product of a campaign of fraud. However, Judge Chaney's *Tellez* ruling is more circumscribed than her *Mejia* ruling. This outcome can be attributed to the evidence introduced during the proceedings that challenged aspects of Dole's version of events as well as the veracity of the John Doe witness testimony.

Judge Chaney conceded that the conspiracy was not as vast as she initially thought. In her *Mejia* ruling, the conspiracy story is bolstered with an account of a secret meeting in Chinandega, Nicaragua, that took

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*grounds*, Laguna v. Dole Food Co., No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), petition for review filed (Cal. Apr. 15, 2014) (No. S217842).

<sup>78</sup> Coram Vobis Ruling, *Tellez*, No. BC312852, at 1 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>79</sup> *Id.* at 3.

<sup>80</sup> See Appellants' Opening Brief, *supra* note 2, at ii-xv (setting forth the factual and procedural history of the case).

<sup>81</sup> Coram Vobis Ruling, *Tellez*, No. BC312852, at 51 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>82</sup> Appellants' Opening Brief, *supra* note 2, at 136-41.

<sup>83</sup> *Id.* at 151-55, 177-91. Condie details his motion to re-depose John Does 17 and 18 and GDC and Judge Chaney's various responses to this motion.

<sup>84</sup> Appellants' Opening Brief, *supra* note 2, at 181-82.



place in March 2003.<sup>85</sup> Judge Chaney found that at this meeting, Nicaraguan Judge Socorro Toruño, representatives from laboratories, and the Nicaraguan and U.S. lawyers “conspired to manufacture evidence of sterility and thereby ‘fix’ [the DBCP] cases in Nicaraguan courts.”<sup>86</sup> Based on “detailed, undisputed testimony” from anonymous witnesses, she concluded that Dominguez, the plaintiffs’ Nicaraguan counsel, Benton Musslewhite, and Mark Sparks from Provost Umphrey, and others attended the meeting.<sup>87</sup>

The anonymous witnesses’ testimony was later disputed. Both Sparks and Musslewhite denied participating in the alleged meeting. Musslewhite presented his passport, which proved that he was not in Nicaragua at the time of the alleged meeting.<sup>88</sup> In light of his passport and testimony, Judge Chaney reversed her judgment and determined that Musslewhite “did not participate in such a meeting” in her *Tellez coram vobis* ruling.<sup>89</sup>

She also concluded that Sparks did not participate “in the plaintiffs’ fraud in this case.”<sup>90</sup> According to Musslewhite, the meeting was “a big lie” and a “tragic example . . . [of] a power-play by a big corporation like Dole.”<sup>91</sup> Additional evidence suggests Musslewhite is correct.

In their article on the DBCP litigation, Susan Bohme and Vicent Boix state that Judge Toruño, the supposed “brain” behind the meeting, and a laboratory analyst claim they were not present at the supposed meeting.<sup>92</sup> The authors also draw attention to an important discrepancy: One of the main purposes of the alleged meeting was to fix the medical results for the plaintiffs. Forty percent were supposed to have the most severe type of infertility, while thirty percent would show infertility of a less severe type, and another thirty percent would show other damages. Yet the plaintiffs’ sterility breakdown departed drastically from these percentages.<sup>93</sup>

<sup>85</sup> Written Ruling, *Mejia v. Dole Food Co.*, No. BC340049, at 29 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 29.

<sup>88</sup> See Bohme & Bohme, *supra* note 9, at 157.

<sup>89</sup> *Coram Vobis Ruling, Tellez v. Dole Food Co.*, No. BC312852, at 21 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev’d on other grounds, Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>90</sup> *Id.*

<sup>91</sup> Amanda Bronstad, *Litigation Fraud Allegations Hotly Disputed in Dole Banana Case*, NAT’L L. J. (Feb. 1, 2010), [www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202441775977](http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202441775977).

<sup>92</sup> See Bohme & Bohme, *supra* note 9, at 157.

<sup>93</sup> *Id.*; see also Appellants’ Opening Brief, *supra* note 2, at 83.



Moreover, the authors claim that there was severe internal conflict among the plaintiffs' groups. Boix was present at a gathering of DBCP victims in Managua in May 2003, around the same time as the alleged meeting. Boix observed that the disagreements were so strong that the groups could not sit at the same table.<sup>94</sup>

Other aspects of Dole's story were challenged during the *Tellez coram vobis* proceedings. These challenges also raised questions about the reliability of the anonymous witnesses' testimony. On May 15, 2010, the Associated Press reported on a news conference in Nicaragua, where seven workers accused Dole of bribing them for the purpose of casting doubt on the DBCP claims.<sup>95</sup> One of them reportedly said, "What they wanted was for me to testify that the tests had been altered, that they had not worked on the banana plantation, and that for saying what they wanted, they would give me \$225,000."<sup>96</sup> Others have testified in Nicaraguan legal proceedings, claiming Dole's agents offered them money to deny that plaintiffs had worked on banana farms.<sup>97</sup>

Dole's attorneys claimed that the lead conspirators coerced the seven workers into supporting the plaintiffs' cause. However, the available evidence also casts doubt on Dole's claim that Dominguez and his agents relied on threats of violence and intimidation as a linchpin for the fraudulent scheme. For example, an independent filmmaker, Jason Glaser, who performed investigative work for Provost Umphrey<sup>98</sup> and directed and produced a documentary on the injustices in the banana industry called BANANA LAND,<sup>99</sup> attended the May 14, 2010, press conference.<sup>100</sup> In his testimony, which Judge Chaney "found credible,"<sup>101</sup> he stated, "None of [the seven workers at the news conference] appeared to be afraid or intimidated and all appeared to be present voluntarily."<sup>102</sup>

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<sup>94</sup> Boix & Bohme, *supra* note 9, at 157.

<sup>95</sup> Marcos Aleman, *Nicaraguan Workers Deny Conspiracy Against Dole*, GUARDIAN, May 15, 2010, [www.guardian.co.uk/world/feedarticle/9079347](http://www.guardian.co.uk/world/feedarticle/9079347).

<sup>96</sup> *Id.*

<sup>97</sup> See Boix & Bohme, *supra* note 9, at 158 (testimony from Nicaragua's legal procedure called "Absolucion de Posiciones").

<sup>98</sup> See Appellants' Opening Brief, *supra* note 2, at 7.

<sup>99</sup> *The Filmmakers*, BANANA LAND, [www.bananalandmovie.org/the-filmmakers/](http://www.bananalandmovie.org/the-filmmakers/) (last visited Feb. 14, 2014).

<sup>100</sup> See Appellants' Opening Brief, *supra* note 2, at 190.

<sup>101</sup> *Coram Vobis Ruling*, *Tellez v. Dole Food Co.*, No. BC312852, at 12 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>102</sup> See Appellants' Opening Brief, *supra* note 2, at 190. In a personal interview with one of the authors, Glaser stated, "They weren't afraid at all." Interview by Stephen Roblin with Jason Glaser, Dir., Producer, BANANA LAND (Nov. 17, 2013).

Glaser is arguably in a unique position to weigh in authoritatively on the competing claims. In their extensive investigation for Provost Umphrey, Glaser and his colleagues interviewed some of the plaintiffs, secret witnesses, and other actors involved in this case.<sup>103</sup> In fact, Condie's appellate brief relied heavily on Glaser's evidence.<sup>104</sup>

Glaser doubts Dole's allegations concerning the supposed threats of violence and intimidation. For example, he does not believe anyone was in danger from Ordeñana.<sup>105</sup> Moreover, he attended a demonstration organized by pro-plaintiff activists, who denounced the secret recruitment of witnesses by Dole's agents.<sup>106</sup> Dole's attorneys used the demonstration to bolster the "atmosphere of intimidation" claim by alleging demonstrators threatened Dole's agents.<sup>107</sup> According to Glaser, "I saw indignation with the fact that [p]eople were being manipulated. I did not see . . . the desire to cause harm."<sup>108</sup>

Despite the challenges to Dole's version of events and the proven unreliability of aspects of the anonymous witnesses' testimony, Judge Chaney still ruled against the banana farm workers, believing a campaign of fraud was committed on Dole and the court, though it involved fewer actors. She also defended her decision to exercise broad authority in entering the protective order, which the plaintiffs argued deprived them of due process.<sup>109</sup> Moreover, Judge Chaney attributed the fraudulent scheme to "a confluence of social, political, and legal factors in Nicaragua."<sup>110</sup>

In fact, her *Tellez coram vobis* ruling expanded on her earlier assessment in the *Mejia* ruling with respect to the connection between the conditions in Nicaragua and the scheme. The factors she cited include: the "disarray" of Nicaragua's courts, the effects of *Special Law 364*, the general conditions of poverty in the country, the country's "highly politicized atmosphere," and Nicaragua's supposed political

<sup>103</sup> Interview with Jason Glaser, *supra* note 102.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; see also Appellants' Opening Brief, *supra* note 2, at 114.

<sup>106</sup> Interview with Jason Glaser, *supra* note 102; see also Appellants' Opening Brief, *supra* note 2, at 194.

<sup>107</sup> See *Coram Vobis Ruling*, *Tellez v. Dole Food Co.*, No. BC312852, at 16-18 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842); see also *Written Ruling*, *Mejia v. Dole Food Co.*, No. BC340049, at 12-19, 48-49 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>108</sup> Appellants' Opening Brief, *supra* note 2, at 118, 193-96.

<sup>109</sup> *Coram Vobis Ruling*, *Tellez*, No. BC312852, at 30-34 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>110</sup> *Id.* at 25-27.

isolation from other countries in the Western Hemisphere.<sup>111</sup> She also cites Judge Huck's judgment in his *Osorio* ruling that the Nicaraguan judicial system "does not provide procedures compatible with due process of law."<sup>112</sup>

On March 25, 2011, two weeks after Judge Chaney issued her *Tellez coram vobis* written ruling, the United States Court of Appeals for the Eleventh Circuit affirmed Judge Huck's ruling.<sup>113</sup> But the Eleventh Circuit did not affirm Judge Huck's disparagement of Nicaragua's judicial system. It expressly dropped Judge Huck's assertion regarding Nicaragua's lack of impartial tribunals.<sup>114</sup>

#### D. THE STATE BAR OF CALIFORNIA RAISES ADDITIONAL DOUBTS

The views of the State Bar of California raised additional doubts about both Dole's version of events and the reliability of Judge Chaney's process. The California State Bar investigated the allegation concerning Dominguez's misconduct in the case. On March 1, 2011, ten days before Judge Chaney issued her written ruling for the *Tellez coram vobis* proceedings, the Bar cleared him of wrongdoing, stating "the allegations of professional misconduct" do not "warrant further action."<sup>115</sup>

A month later, the State Bar also closed a complaint filed by Condie against Dole's counsel.<sup>116</sup> The State Bar stated that much of the information on which Condie's complaint was based was subject to the protective order, and even if the Bar had been a party to the order, the order would have prevented it from "actually using that information in any meaningful way."<sup>117</sup> The State Bar further stated, "[T]here have already been judicial findings related to the issues . . . raised. Those findings could be difficult to overcome for purposes of our proceedings."<sup>118</sup> As Susanne Bohme and Vicent Boix pointed out, "The bar's primary obstacle to undertaking an investigation of the Dole

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 26; see also Order Denying Recognition of Judgment, *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom.* *Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011) (per curiam).

<sup>113</sup> *Osorio v. Dow Chem. Co.*, 635 F. 3d 1277 (11th Cir. 2011) (per curiam).

<sup>114</sup> *Id.*

<sup>115</sup> Letter from William E. Graham Jr., Investigator, State Bar of Cal., to Susan Lynn Margolis, Margolis & Margolis LLP (Mar. 1, 2011), available at [www.bananasthemovie.com/wp-content/uploads/resources/dominguez\\_closing\\_letter.pdf](http://www.bananasthemovie.com/wp-content/uploads/resources/dominguez_closing_letter.pdf).

<sup>116</sup> Letter from James E. Towery & Lelanie J. Lawrence to Robert S. Condie (Feb. 16, 2011) (on file with The State Bar of California).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

attorneys—the secrecy of witness testimony—is the same obstacle that has prevented full access to justice for the Nicaraguan plaintiffs.”<sup>119</sup>

### III. *LAGUNA V. DOLE: TELLEZ CORAM VOBIS APPEALED*

Judge Chaney’s *coram vobis* ruling was appealed to the Court of Appeal of the State of California, under the name *Laguna v. Dole Food Company*.<sup>120</sup> The plaintiffs’ attorney, Steve Condie, submitted a detailed 346-page opening brief, in which he put forth a three-part argument. First, he argued that the process instituted by Judge Chaney in *Mejia* and the *Tellez coram vobis* case constituted an abuse of judicial discretion that “destroyed the reliability of the court’s fact-finding function and [ultimately] violated the appellants’ right to due process of law.”<sup>121</sup> Second, he argued that Dole did not meet the requirements of the writ of error *coram vobis*.<sup>122</sup> Third, he alleged that Judge Chaney derogated Nicaraguan society—its people, lawyers, judges, and judicial processes—and that this represented “an injudicious inclination to perceive wrongdoing in events in a foreign country which the court simply did not understand and undermines the credibility of our judicial system.”<sup>123</sup>

Condie’s brief emphasized how all but one of the key questions was never in doubt. During the *Tellez* case, the following facts had already been proven: the dangers of DBCP, Dole’s decision to use the pesticide despite its knowledge of these dangers, and that the plaintiffs suffered health impairment that DBCP caused. In fact, American labs tested the six plaintiffs and verified their medical conditions.<sup>124</sup> Therefore, in

<sup>119</sup> Boix & Bohme, *supra* note 9, at 159.

<sup>120</sup> *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>121</sup> Appellants’ Opening Brief, *supra* note 2, at 211.

<sup>122</sup> Condie argued that Dole failed to meet the requirements for four reasons. First, “[a]ll of the facts upon which Dole based its petition were known to Dole before or during trial and could have been brought to the attention of the court before judgment was entered.” *Id.* at xxii; Second, “[t]here is no evidence that any factual issue underlying the judgment was wrongly decided other than the court’s improper readjudication of the jury’s findings as to two appellants based on its reassessment of the significance of their poor job of describing at trial events which happened 30 years earlier.” *Id.* at xxiii; Third, “[e]vidence of fraudulent conduct involving claims of other people (e.g., the Nicaraguan DBCP claims filed in Nicaragua) is not grounds for vacating the judgment won by these appellants in this case under *coram vobis* precedent.” *Id.* at xxiv-xxv; The fourth reason given by Condie is that “[t]he things done by third parties which are cited as proof that appellants were implicated in ‘the fraud’ did not in any way affect the process or the outcome of the trial in this case.” *Id.* at xxvi; *see also id.* at 299-320.

<sup>123</sup> *Id.* at 323.

<sup>124</sup> *Id.* at 2, 16, 314, 319.

Condie's view, the only remaining factual question was whether the plaintiffs worked on Dole banana farms in the 1970s.<sup>125</sup> Instead of proving that the six plaintiffs had never worked on Dole farms, Dole's attorneys convinced Judge Chaney that the question could never be conclusively answered. In her justification for denying a retrial, Judge Chaney observed, "There is no longer a reasonable probability that any party will ever get to the truth."<sup>126</sup>

Dole's attorneys responded to the appellants' brief, arguing that the court should affirm the *coram vobis* judgment of dismissal.<sup>127</sup> Dole claimed that the appellants' attempts to reargue the evidence were improper and that the *coram vobis* requirements were met. They also rejected the appellants' argument that the trial court violated their due process rights. Dole's attorneys defended the protective order and the factfinding procedure Judge Chaney instituted.<sup>128</sup> The California District Court of Appeal affirmed the decision of the trial court on March 7, 2014.<sup>129</sup> The appellants filed a petition for review by the California Supreme Court; that petition was pending as this Article went to press.<sup>130</sup>

#### IV. ANALYSIS

In this Part, we raise concerns about the factfinding process Judge Chaney instituted in the *Mejia* and the *Tellez coram vobis* hearings. We then discuss the various biases she manifested during the course of these proceedings. In our estimation, Dole's attorneys exploited both this process and these biases in executing their "contamination" legal defense strategy. Ultimately, we are sympathetic to Condie's argument that the plaintiffs were denied due process and that the results of the *coram vobis* proceedings should be vacated.

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<sup>125</sup> *Id.* at 314, 319-20.

<sup>126</sup> Coram Vobis Ruling, *Tellez v. Dole Food Co.*, No. BC312852, at 51 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>127</sup> (Redacted Version) Respondent's Brief for Dole Food Company at 114-17, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842); *see* Respondent's Brief for the Dow Chemical Co. at 29, *Laguna*, No. B233497, 2014 WL 891268, *brief available at* 2012 WL 6220576.

<sup>128</sup> Dole's attorneys also argued that the court should affirm the *coram vobis* judgment on the separate and independent ground that the court has the inherent power to terminate a lawsuit when the plaintiff has engaged in egregious misconduct, necessitating dismissal to preserve fairness. *See* Respondent's Brief for Dole Food Company at 114-17, No. B233497, 2014 WL 891268.

<sup>129</sup> *Laguna*, No. B233497, 2014 WL 891268, *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>130</sup> *Laguna v. Dole Food Co.*, (No. S217842) (Cal. Apr. 15, 2014).

A. UNRELIABLE FACTFINDING PROCESS

In our view, there are compelling reasons to question the factfinding process that Judge Chaney instituted in the *Mejia* and *Tellez coram vobis* proceedings. As we explained above, the protective order she issued protected the identities of the seventeen John Doe witnesses and curtailed the plaintiffs' counsel's ability to engage in meaningful investigation and cross-examination. Judge Chaney then relied on demeanor evidence to determine the veracity of the John Doe testimony, which she based on the plaintiffs' verbal and nonverbal cues, like tone of voice, rapidity of response, facial expression, and body posture.<sup>131</sup>

The fact that the scope of the conspiracy diminished from Judge Chaney's *Mejia* ruling to the *Tellez coram vobis* ruling illustrates the unreliability of the anonymous witnesses' testimony and the trial court's method of discerning the truth. During the *Tellez coram vobis* proceedings, aspects of this testimony, which Judge Chaney determined to be true, were proven false, such as the claim that Benton Musslewhite and Mark Sparks attended the alleged conspiracy meeting.<sup>132</sup> In our view, this fact should have caused Judge Chaney to become concerned about the overall veracity of the anonymous witnesses' testimony and the method she used to discern its veracity.

Moreover, this fact raises two obvious questions: Why were some parts of the John Doe testimony reliable and others unreliable? And how did Judge Chaney determine this?<sup>133</sup> Without convincing answers to these questions, we do not see how the factfinding process that she instituted can be seen as reliable.

It also appears that Judge Chaney treated Jason Glaser's testimony in an inconsistent manner. She relied on parts of Glaser's testimony to buttress her ruling. For example, she cited his testimony to support the claim that Dominguez's "captains" recruited false claimants.<sup>134</sup> However, she disregarded his testimony when it contradicted the anonymous witnesses' testimony and the allegations put forth by Dole's attorneys, such as his refutation that Dominguez and Ordeñana knew that the "captains" were knowingly recruiting false claimants and that they used threats of intimidation and violence.

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<sup>131</sup> See *Coram Vobis Ruling, Tellez*, No. BC312852, at 28 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>132</sup> *Id.* at 21.

<sup>133</sup> Condie raised similar questions in his brief. See Appellants' Opening Brief, *supra* note 2, at 225.

<sup>134</sup> *Coram Vobis Ruling, Tellez*, No. BC312852, at 12, 29 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

Again, two obvious questions are raised: Why were some parts of Glaser's testimony reliable and not others? And how did Judge Chaney determine this? In Glaser's opinion, Judge Chaney essentially cherry-picked his testimony to confirm what she already believed about the case.<sup>135</sup>

#### B. NEGATIVE CONCEPTION OF NICARAGUAN SOCIETY

Judge Chaney's judicial performance in these cases has been described as "derogatory" and "paternalistic."<sup>136</sup> When examining her written and oral rulings and some of the decisions she made at key junctures during the proceedings, we believe it is clear that Judge Chaney demonstrated a negative conception of Nicaraguan society—its people, culture, government, and judicial system. This negative conception seems to have compelled her to draw erroneous conclusions.

Judge Chaney's distorted conception of Nicaraguan society became apparent during her *Mejia* oral ruling on April 23, 2009. As explained above, Judge Chaney likened the alleged conspiracy to a "heinous and repulsive" mythical "chimera" that was hatched in Nicaragua's "particular odd social ecosystem."<sup>137</sup> Her oral ruling is riddled with phrases that can be interpreted as offensive and derogatory toward Nicaraguan society.<sup>138</sup> Judge Chaney's language leads us to believe that she held a negative and simplistic view of Nicaraguan society.<sup>139</sup>

Moreover, she made sweeping denunciations of Nicaraguan society. For example, she stated that the fraud offers "a sad commentary about the government and legal system in Nicaragua and the inability of the Nicaraguan system to bring justice and safety to its citizens."<sup>140</sup> Though she dropped the chimera analogy and softened her language in her subsequent rulings, Judge Chaney maintained the view that the alleged fraud was nurtured by the country's broken judicial system and other

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<sup>135</sup> Interview with Jason Glaser, *supra* note 102.

<sup>136</sup> Boix & Bohme, *supra* note 9, at 157.

<sup>137</sup> Transcript of Record, *supra* note 1, at 3, 6.

<sup>138</sup> For example, Judge Chaney stated, "Like many little critters in plants that live in those unique ecosystems . . . those animals and plants cannot survive outside of their ecosystem . . . [and] although there has been a strong attempt to bring the seeds of the Nicaraguan corruption here to this country, it has not succeeded, and if I have anything to say about it, it will not succeed." *Id.* at 19.

<sup>139</sup> We find it striking that during Judge Chaney's harsh denunciation of the plaintiffs' society, she admitted to how little she knows about Nicaraguan society. At one point she stated, "The Sandinista Revolution changed the system of government there. I'm not quite sure what it's been replaced with. I know there is a government there. I have no idea how well it's really functioning." *Id.* at 4.

<sup>140</sup> *Id.* at 25.



general societal conditions.

The U.S. Court of Appeals for the Eleventh Circuit weighed in on the issue of Nicaragua's judicial system and refused to accept that it lacks impartial tribunals.<sup>141</sup> As stated above, Judge Chaney contacted Judge Huck, who presided over the *Osorio* case, to inform him of the supposed conspiracy. Judge Huck determined that Nicaragua lacks impartial tribunals, which Judge Chaney cited in her *Tellez coram vobis* ruling, along with U.S. State Department reports.<sup>142</sup>

The *Osorio* plaintiffs appealed Judge Huck's ruling in order to seek enforcement.<sup>143</sup> While the Eleventh Circuit affirmed Judge Huck's ruling on March 25, 2011, it expressly dropped Judge Huck's assertion regarding Nicaragua's lack of impartial tribunals.<sup>144</sup> The appellate panel said, "We . . . affirm the district court's judgment; however, we do not address the broader issue of whether Nicaragua as a whole 'does not provide impartial tribunals' and decline to adopt the district court's holding on that question."<sup>145</sup>

Judge Chaney's views concerning Nicaragua's legal system are also evinced in her response to testimony obtained by the "*absoluciones*" legal process, which is a legal forum for courts to obtain testimony from citizens. Witnesses reported that Dole's agents offered them money to deny that others had been banana workers, corroborating statements made by witnesses at the press conference and during Glaser's numerous interviews, which he communicated to the court during the *Tellez coram vobis* hearings.<sup>146</sup> Judge Chaney concluded in the *Tellez coram vobis* ruling that "the *absoluciones* lack any semblance of credibility."<sup>147</sup> Some of the reasons she provided were that questions are written by an interested party, the witness cannot be represented by counsel, and cross-examination is not permitted.<sup>148</sup>

Judge Chaney's judgment on the *absoluciones* procedure appears to suffer from her lack of knowledge about the Latin American legal

<sup>141</sup> *Osorio v. Dow Chem. Co.*, 635 F. 3d 1277 (11th Cir. 2011) (per curiam).

<sup>142</sup> *Coram Vobis Ruling, Tellez v. Dole Food Co.*, No. BC312852, at 25-27 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011), *rev'd on other grounds, Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842).

<sup>143</sup> *Osorio*, 635 F. 3d 1277.

<sup>144</sup> *Id.* at 1279.

<sup>145</sup> *Id.*

<sup>146</sup> See Boix & Bohme, *supra* note 9, at 158 (testimony from Nicaragua's legal procedure called "Absolucion de Posiciones"); see also Interview with Jason Glaser, *supra* note 102.

<sup>147</sup> *Coram Vobis Ruling, Tellez*, No. BC312852, at 29 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>148</sup> *Id.* at 29-30.

context and her readiness to fall back on a negative conception of Nicaraguan institutions. According to Alejandro Garro, law professor at Columbia University and expert on Latin American legal systems, procedures for acquiring sworn testimony like *absoluciones* are common in Latin American judicial systems.<sup>149</sup> In his view, while the procedure has its limits, there is no reason why the statements would be deemed unreliable.<sup>150</sup>

What is particularly striking is how Judge Chaney determined that “the John Doe witness testimony was all the more credible when contrasted with witness statements produced by plaintiffs, in particular the *absoluciones*,” a procedure that “renders them untrustworthy.”<sup>151</sup> Thus, we are to believe not only that Judge Chaney’s method for determining the veracity of the John Doe testimony under non-adversarial conditions—a method that failed to detect bogus testimony—is more reliable than a legal procedure common to Latin America, but also that the *absoluciones* procedure somehow further validates this testimony.

Judge Chaney also revealed her negative conception of Nicaraguan society by drawing disparaging conclusions about the Chinandega community. She concluded that the Chinandega community is exceptionally cohesive and that this characteristic, along with extreme poverty, compelled the community to unify behind the campaign to defraud Dole.<sup>152</sup> She explained in her *Tellez coram vobis* ruling that the “collective mood of the community” functioned “as shields to obscure the truth and as swords to bring money into a very impoverished region.”<sup>153</sup> Judge Chaney observed:

Because of the extreme poverty in Nicaragua, the possibility that these DBCP lawsuits would bring money into impoverished communities encouraged members of the community to rally behind the claimants. A threat to one particular plaintiff was perceived as a threat to all. This adherence to the cause of “The Affected” impeded the defendants’ ability to obtain voluntary statements by individuals willing to speak

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<sup>149</sup> Email from Alejandro Garro, Professor of Law, Columbia University School of Law to (Mar. 19, 2013) (on file with author).

<sup>150</sup> *Id.*

<sup>151</sup> *Coram Vobis Ruling, Tellez*, No. BC312852, at 29 (Cal. Super. Ct. L.A. Cnty. Mar. 11, 2011).

<sup>152</sup> *Id.* at 34, 41-42.

<sup>153</sup> *Id.* at 34.

in the open and on the record.<sup>154</sup>

Glaser challenged the “ridiculous” assumption about the community’s unity and cohesion during the *Tellez coram vobis* proceedings, saying that there is “absolutely no unity in these cases.”<sup>155</sup>

We note that Judge Chaney’s *coram vobis* ruling occurred after Glaser’s testimony, which she found credible. This appears to be an example of her cherry-picking Glaser’s testimony to support the major aspects of Dole’s story, while ignoring his testimony when it did not conform to the story. Glaser’s depiction is consistent with Vicent Boix’s account of the May 2003 gathering he attended.<sup>156</sup> He described the deep divisions and bitter hostility among various factions of the workers.<sup>157</sup> Judge Chaney held on to the assumption of community solidarity in the face of counter-evidence, which helped Dole’s case. It would have been much more difficult to accept the story of a vast, community-wide conspiracy while acknowledging that the community lacked the necessary cohesion to pull off such a monumental campaign of fraud.

Given Judge Chaney’s conception of the plaintiffs’ society, it is not surprising that she drew several other seemingly biased conclusions. For example, Judge Chaney’s fear of violence against witnesses was in part based on a traumatic past experience: a witness in her court from Colombia was murdered after testifying. According to Condie, Judge Chaney mentioned this incident several times and admitted that the experience made her “more sensitive than the average judge might be.”<sup>158</sup>

If she had had a better understanding of the crime situation in Nicaragua, perhaps she would have realized that the Colombia experience is irrelevant to a case involving plaintiffs and witnesses from Nicaragua. Unlike Colombia, which is one of the most dangerous countries in Latin America, Nicaragua is one of the safest.<sup>159</sup> Moreover,

<sup>154</sup> *Id.* at 41-42. Condie’s brief quotes an earlier statement by Judge Chaney: “[T]he community of Chinandega has been portrayed to me as being a very close-knit community where one member of the community supports another member of the community absolutely.” See Appellants’ Opening Brief, *supra* note 2, at 237.

<sup>155</sup> See Appellants’ Opening Brief, *supra* note 2, at 138.

<sup>156</sup> Boix & Bohme, *supra* note 9, at 157.

<sup>157</sup> For a detailed description of the divisions within the movement, see Bohme, *National Law, Transnational Justice?*, *supra* note 7.

<sup>158</sup> See Appellants’ Opening Brief, *supra* note 2, at 244.

<sup>159</sup> To illustrate the disparity in violent crime between the two countries, Nicaragua’s homicide rate in 2011 was in the range of zero to ten deaths per 100,000 residents, whereas Colombia’s rate was “greater than 30.” See U.N. DEV. PROGRAMME, REGIONAL HUMAN DEVELOPMENT REPORT 2013-2014 CITIZEN SECURITY WITH A HUMAN FACE: EVIDENCE AND

despite the widespread “threats of violence” against Dole collaborators and the fact that some of the secret witnesses admitted to lying to undermine the plaintiffs’ cause, those witnesses today live openly in Nicaragua, and there have been no acts of violence committed against them to date, according to Glaser.<sup>160</sup>

### C. PRO-U.S. CORPORATE BIAS

We believe Judge Chaney also, probably unconsciously, exhibited a pro-corporate bias. In our view, Judge Chaney made this bias apparent immediately after the *Tellez* jury verdict, when she accepted Dole’s attorney’s argument that the corporation should not pay punitive damages on grounds that California did not have an interest in punishing “a domestic corporation for injuries that occurred only in a foreign country” and that it was the “old Dole” that committed the abuses.<sup>161</sup> On the matter of whether awarding punitive damages for injuries inflicted by Dole would serve any California interest, we agree with Susanna Bohme’s observation: “Like FNC decisions before it, the dismissal reinforced national boundaries to the benefit of transnational corporations by defining their activities abroad as outside the ‘interests’ of US law.”<sup>162</sup>

Dole’s attorneys argued that the “new Dole” was a much-reformed version of its former self.<sup>163</sup> As such, it would not commit blatant human rights abuses in the pursuit of profit, as it did when taking advantage of the country’s exploitative operational environment and knowingly exposing its foreign workers to harmful chemicals.<sup>164</sup> We argue that this

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PROPOSALS FOR LATIN AMERICA 5 (2013); see also *Crime in Nicaragua: A Surprising Safe Haven*, ECONOMIST, Jan. 28, 2012, [www.economist.com/node/21543492](http://www.economist.com/node/21543492).

<sup>160</sup> Interview with Jason Glaser, *supra* note 102.

<sup>161</sup> *Tellez v. Dole Food Co.*, No. BC312852, 2008 WL 744051 (Cal. Super. Ct. L.A. Cnty. Mar. 7, 2008), *rev’d on other grounds*, *Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 (Cal. Ct. App. Mar. 7, 2014), *petition for review filed* (Cal. Apr. 15, 2014) (No. S217842); Rosencranz et al., *supra* note 27, at 172-74.

<sup>162</sup> Bohme, *National Law, Transnational Justice?*, *supra* note 7, at 34.

<sup>163</sup> Rosencranz et al., *supra* note 27, at 172-74.

<sup>164</sup> Standard Fruit Company (now “Dole”) operated in Nicaragua during two periods: from 1922 through the mid-1940s and from 1970 until 1982. The corporation also operated in the country during two U.S. military occupations (1912-1925 and 1926-1933), the Juan B. Sacasa administration (1933-1936), the Somoza family dictatorship (1937-1978), and the Sandinista Revolution (1979-1990). In their recount of the history of Nicaragua, Thomas Walker and Christine Wade characterize the pre-Sandinista economy as “externally oriented,” meaning the economy was not structured to meet domestic needs and demands, but rather to produce products for export. They wrote, “Under these dependent capitalist systems, the common citizen is important as a cheap and easily exploitable source of labor rather than as a consumer. Therefore, there is little or no economic incentive for the privileged classes that dominate most Latin American governments to make the sacrifices necessary

reasoning is divorced from the reality of Dole's contemporary corporate practice, as well as broadly held opinion regarding the nature of multinational corporations.<sup>165</sup>

We are persuaded that Judge Chaney exhibited a bias in favor of Dole by accepting this line of reasoning. The "new Dole" has been implicated in serious and widespread human rights abuses. A 2002 Human Rights Watch report documented abuses related to Dole's operations in Ecuador, then the largest exporter of bananas in the world.<sup>166</sup>

The report documented various abuses that occurred on Dole plantations. One of the major findings was the use of child labor on such plantations.<sup>167</sup> The report also documented their exposure to toxic chemicals and their receiving wages well below the legal minimum wage

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to improve the conditions of the majority of the people." Nicaragua was like other "banana republics" in being considered a favorable investment climate, meaning it had low labor, social, and environmental standards, of which Dole took advantage to maximize profits. THOMAS W. WALKER & CHRISTINE J. WADE, *NICARAGUA: LIVING IN THE SHADOW OF THE EAGLE* 85-86 (5th ed. 2011). For dates, see James E. Austin & Tomas O. Kohn, *Standard Fruit Company in Nicaragua*, in *STRATEGIC MANAGEMENT IN DEVELOPMENT COUNTRIES: CASE STUDIES* 205-30 (1990). For dates and discussion of the evolution of the Nicaraguan economy, see THOMAS W. WALKER & CHRISTINE J. WADE, *NICARAGUA: LIVING IN THE SHADOW OF THE EAGLE* 50 (5th ed. 2011).

<sup>165</sup> In our view, examining the "new" Dole's labor record is not necessary to find reason to punish the corporation. Their institutional imperative is to maximize short-term profits; all other considerations are secondary. Accordingly, corporations typically seek out favorable investment climates, which are characterized by stable, anti-labor regimes (friendly governments, low wages, slim to nonexistent safeguards and protections, pro-corporate legal systems, and so on). Without a legitimate threat of punishment, there is no reason for a corporation to account for these "costs." Simply put, the notion that Dole rehabilitated itself out of the goodness of its heart, as Dole's lawyers would have the court believe, is absurd. This reasoning is accepted international opinion. The UN has provided a (modest) structural account of the widespread and prevalent "business-related human abuses." The UN Secretary General has sponsored numerous reports on "the issue of human rights and transnational corporations" written by Harvard's John Ruggie. In his February 2007 report, he diagnoses the cause of the problem as a "fundamental institutional misalignment . . . between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed." John Ruggie, *Report of the Special Rep. of the Secretary-General on Issues of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 3, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007). In other words, without an institutional realignment that includes sanctioning and reparations, corporations will continue to take advantage of the "permissive conditions." In short, Dole's rehabilitation argument does not hold up to considered international opinion. That Judge Chaney was sympathetic enough to take the rather extreme step of vacating the punitive awards was quite a gift to Dole.

<sup>166</sup> See HUMAN RIGHTS WATCH, *TAINTED HARVEST: CHILD LABOR AND OBSTACLES TO ORGANIZING ON ECUADOR'S BANANA PLANTATIONS* 13-14 (Apr. 2002).

<sup>167</sup> *Id.* at 16, 18.

for banana workers.<sup>168</sup> These acts constituted violations of numerous international legal conventions, such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.<sup>169</sup> Thus, the “new Dole” has been complicit in potential international crimes. Moreover, according to Human Rights Watch, Dole violated its own corporate responsibility policies regarding labor conditions on their plantations.<sup>170</sup>

Since Dole left Nicaragua in the early 1980s, the only way to assess whether the “new Dole” was a rehabilitated version of its former self would have been to examine its record in other countries marked by poor environmental and labor protections.<sup>171</sup> Given Dole’s heavy reliance on Ecuador as a source of bananas, its operations in that country disconfirm Dole’s rehabilitation.<sup>172</sup>

As the case progressed, Judge Chaney continued to give Dole the benefit of the doubt. An example is Judge Chaney’s conclusions about which actors were susceptible to the corrupting influence of financial incentives. As we have already shown, Judge Chaney concluded that due to Nicaragua’s extreme poverty, the poor communities rallied behind the DBCP plaintiffs because they expected the lawsuits to result in a windfall. According to the Judge Chaney, the community was seduced by the financial incentives and, therefore, supported the campaign to sue “Dole and Dow for the general conditions of poverty in Nicaragua and illness in Nicaragua.”<sup>173</sup>

Dole, on the other hand, is apparently not susceptible to the corruptible influence of financial incentives. In her *Mejia* written ruling, Judge Chaney responded to the Dole bribery allegations. Judge Chaney accepted Dole’s contention that “the accusation that these witnesses were offered an alleged \$50,000 to \$60,000—an amount far exceeding the lifetime earnings of the average Nicaraguan—strikes the Court as *implausible on its face*.”<sup>174</sup> Why is this “implausible on its face”? The DBCP cases coming from Nicaragua presented Dole cases alleging over \$9 billion in damages.<sup>175</sup> As the first DBCP case from the country, its

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<sup>168</sup> *Id.* at 2-3, 15, 21.

<sup>169</sup> *Id.* at 22.

<sup>170</sup> *Id.* at 80.

<sup>171</sup> *Id.* at 1.

<sup>172</sup> *Id.* at 1, 13-14.

<sup>173</sup> Written Ruling, *Mejia v. Dole Food Co.*, No. BC340049, at 27 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>174</sup> *Id.* at 52 (emphasis added).

<sup>175</sup> Carol Lawrence, *Dole Settles Lawsuits Alleging Injuries from Crop Chemical*, VENTURA COUNTY STAR, Sept. 6, 2012, available at [www.vcstar.com/news/2012/sep/06/dole-settles-lawsuits-](http://www.vcstar.com/news/2012/sep/06/dole-settles-lawsuits-)

outcome would be consequential for future cases. By successfully contaminating all of the cases, Dole had the opportunity to save billions of dollars. Is it really implausible that Dole would pay what amounts to pittance in comparison to avoid absorbing such a deep financial hit?

The plaintiffs claimed that Dole's payments to the John Doe witnesses it relocated to Costa Rica were excessive. Judge Chaney concluded that "at most, Dole's investigator did not understand the value of money in Nicaragua and Costa Rica," adding that "although Dole may have been naive in its generous outlay of expense money to protect these John Doe witnesses, the court does not believe it suborned perjury."<sup>176</sup>

In our view, the assumption that Dole and its investigator did not understand the value of money in the two countries is implausible on its face. The company had operated in the Central American region throughout the twentieth century. We think it is safe to assume that the company was familiar with basic economic matters like the cost of living and exchange rate. Moreover, the investigator in question was a native of Costa Rica.<sup>177</sup>

Dole also received the benefit of the doubt in Judge Chaney's conclusion that the John Doe witnesses were the only members of the Chinandega community who resisted financial temptation. Judge Chaney wrote in her *Mejia* written ruling,

In response to questions on cross-examination by [p]laintiffs' counsel, each of the John Doe Witnesses confirmed under oath that they had not received money or anything else of value in exchange for their testimony. Instead, each explained that he or she was testifying for personal reasons that had nothing to do with money.<sup>178</sup>

She drew this conclusion in the face of proof that parts of the testimony were unreliable, and the fact that several witnesses admitted on numerous occasions that they lied on the expectation that Dole would pay them for doing so.

In sum, when taking into account these biases, along with Judge Chaney's undermining of the adversarial system, the argument presented in Steve Condie's appeal that the plaintiffs were denied due process appears sound.

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<sup>176</sup> Written Ruling, *Mejia*, No. BC340049, at 38 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).

<sup>177</sup> Interview with Jason Glaser, *supra* note 102.

<sup>178</sup> Written Ruling, *Mejia*, No. BC340049, at 51 (Cal. Super. Ct. L.A. Cnty. June 15, 2009).



## V. CONCLUSION

As recognized by the United Nations, a dominant feature of the contemporary global economic system is the impunity enjoyed by transnational corporations for the widespread human rights abuses they commit in the Global South. During the post-WWII era, foreign victims of corporate abuses committed abroad were denied access to the U.S. judicial system on grounds of the *forum non conveniens* legal doctrine.

After the Nicaraguan legislature countered this regime of impunity by passing the “anti-blocking statute,” *Special Law 364*, U.S. courts opened to Nicaraguan DBCP victims. The cases analyzed in this Article were the first of the thousands of DBCP cases emanating from Nicaragua.<sup>179</sup> The *Tellez* case is considered significant as a test of how well the U.S. judicial system could respond to abuses committed by domestic corporations operating in poor developing countries.

After an American jury found that Dole acted with malice and fraud in concealing the dangers of DBCP and awarded six Nicaraguan plaintiffs \$3.2 million in compensatory damages and five plaintiffs \$2.5 million in punitive damages, this case seemed to indicate that foreign victims of American corporate abuse could gain justice in American courts. The optimism then eroded as the case progressed.

Judge Chaney quickly struck the punitive damages award, finding they were “arbitrary.” This was followed by a dramatic reversal, in which the *Mejia* and *Rivera* cases were dismissed with prejudice on grounds that Dole was the victim of a widespread conspiracy that took root in Nicaragua, with the goal of defrauding Dole in U.S. courts. This dismissal led to Judge Chaney dismissing the *Tellez* case at the conclusion of the *coram vobis* legal procedure.

In this Article, we have suggested that Dole achieved this dramatic rollback due to the success of its lawyers, Gibson, Dunn and Crutcher, LLP, crafting their “contamination” legal defense. Judge Chaney facilitated this defense by disabling the adversarial system and through her own biases, all of which placed the foreign plaintiffs at a great disadvantage. In our view, this historic case demonstrates how even without the FNC doctrine denying justice to foreign plaintiffs, the U.S. legal system can still pose serious impediments to foreign victims of corporate abuses who are seeking justice on the corporations’ home turf.

One of the impediments is the defense strategy used by Dole. Some of Dole’s tactics were to attack the opponents’ attorneys; to portray the opponents’ foreign society—its people, culture, and institutions—as

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<sup>179</sup> *Banana Workers Win \$2.5 Million in Dole Lawsuit*, *supra* note 21.

irredeemably corrupt; and to delegitimize all activism in support of the opponents' cause. There is a danger that these tactics will become a playbook for corporate defendants to draw on when confronted by foreign plaintiffs. In addition, this case is being cited by pro-corporate legal observers as a reason for U.S. legislators to erect additional legal barriers to foreign plaintiffs.<sup>180</sup>

However, these impediments are surmountable. Indeed, there is reason to hope that foreign workers exposed to DBCP by U.S.-based multinational corporations can achieve some measure of justice in U.S. courts. In fact, last year Dole settled five lawsuits in the U.S. and thirty-three in Nicaragua over its use of DBCP thirty years ago.<sup>181</sup> The settlement reportedly included two Nicaragua judgments for \$907.5 million, but the total settlement remains confidential.<sup>182</sup> The cases were brought by Provost Umphrey Law Firm in Texas. Dole's attorneys claimed that some Provost Umphrey attorneys were co-conspirators in the supposed campaign to defraud the company.

Some of the obstacles that the foreign plaintiffs faced in these cases were exceptional, for example, the non-adversarial system erected by Judge Chaney, her willingness to denounce the entire Nicaraguan legal system, and her past experience with a Colombian witness who was killed. However, this case does suggest how foreign plaintiffs from the Global South confront socio-cultural obstacles that arise from American judges' prejudices toward their societies. We recommend that legal scholars place greater emphasis on these socio-cultural dynamics and how corporate defendants exploit them for tactical gain.

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<sup>180</sup> See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456 (2011). For a critical response to Drimmer and Lamoree, see EARTHRIGHTS INT'L, MISSING THE POINT: A RESPONSE TO THE U.S. CHAMBER OF COMMERCE REPORT "THINK GLOBALLY, SUE LOCALLY" (July 30, 2010), available at [dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Missing-the-point.pdf](http://dg5vd3ocj3r4t.cloudfront.net/sites/default/files/documents/Missing-the-point.pdf).

<sup>181</sup> Lawrence, *supra* note 175.

<sup>182</sup> *Id.*