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MAR 21 2008

UNITED STATES COURT OF APPEALS

MOLLY DWYER, ACTING CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS V. GIRARDI; GIRARDI &  
KEESE; WALTER J. LACK; PAUL A.  
TRAINA; SEAN A. TOPP; ENGSTROM,  
LIPSCOMB & LACK,

Respondents,

SONIA EDUARDA FRANCO FRANCO;  
et al.,

Plaintiffs - Appellants,

v.

DOW CHEMICAL COMPANY; et al.,

Defendants - Appellees.

No. 03-57038

DC No. CV 03-05094 NM

REPORT AND  
RECOMMENDATION OF  
THE SPECIAL MASTER

(Special Master Proceedings)

TASHIMA, Circuit Judge:

The panel<sup>1</sup> in the underlying appeal issued an order that Respondents Thomas V. Girardi, Girardi & Keese, Walter J. Lack, Paul A. Traina, Sean A. Topp, and Engstrom, Lipscomb & Lack (collectively, "Respondents") show cause

<sup>1</sup> Kozinski, C.J., Reinhardt, and Berzon, JJ.

“why it or he should not be required to reimburse the appellees for fees and expenses incurred in defending this appeal, and why it or he should not be suspended, disbarred, or otherwise sanctioned, under Federal Rules of Appellate Procedure 38 and 46, and 28 U.S.C. § 1912 and § 1927, for filing a frivolous appeal, falsely stating that the writ of execution issued by the Nicaraguan court named Dole Food Company, Inc. as a judgment debtor, falsely stating that the writ corrected mistakes in the judgment, and falsely stating that the notary affidavit constituted an accurate translation of the writ.” Thereafter, the panel appointed a special master to conduct such proceedings as may be required and to make a report and recommendation to the panel whether sanctions and/or discipline should be imposed and, if so, what those sanctions and disciplinary actions should be.<sup>2</sup>

After extensive pre-hearing proceedings and discovery, the Special Master held a

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<sup>2</sup> Pursuant to the Special Master’s Order filed on October 17, 2006 (the “Bifurcation Order”), this Report and Recommendation does not address issues relating to discipline under Rule 46. The Bifurcation Order provides that “issues related *solely* to discipline” will be bifurcated and addressed at a later time. Bifurcation was ordered in response to Respondents’ motions to disqualify Defendants from participating in these Special Master Proceedings. In those motions, Respondents contended that permitting Defendants to participate in the Special Master Proceedings would violate their right to a disinterested prosecutor, right to a full and fair hearing, and their clients’ (*i.e.*, the plaintiffs in *Franco*) interest in confidentiality. The Bifurcation Order was issued to protect those interests, which are implicated more with respect to potential discipline than with Defendants’ motion for sanctions, while, at the same time, recognizing Defendants’ right to participate in prosecuting their motion for sanctions.

five-day evidentiary hearing, which ended on October 25, 2007. This is the Special Master's Report and Recommendation to the panel.

### PROCEDURAL AND FACTUAL BACKGROUND

Based on the record in these proceedings, the Special Master makes the following findings of fact:<sup>3</sup>

Thomas V. Girardi and Walter J. Lack are Los Angeles-based lawyers who have known each other for 30 years and have practiced law together for 25 years. Tr. 417:25–18:2.<sup>4</sup> They have worked together on nearly 80 cases, including representing the plaintiffs in the high-profile case against Pacific Gas & Electric Co. (the so-called Erin Brockovich case), representing California energy rate-payers in the *Sempra Energy* case, and serving as plaintiffs' nationwide coordinating counsel in the *Vioxx* litigation. Tr. 420:21–21:14. They are highly experienced and highly successful practitioners.

Typically, in the cases they take on jointly, Girardi and Lack divide responsibilities between their respective law firms, Girardi & Keese (the "Girardi

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<sup>3</sup> Fed. R. Civ. P. 52(a) recognizes the sufficiency of findings of fact in narrative form, *i.e.*, which appear in a "memorandum of decision filed by the court."

<sup>4</sup> "Tr." refers to the Reporter's Transcript of the evidentiary hearing held in October 2007.

Firm”) and Engstrom, Lipscomb & Lack (the “Lack Firm”). Tr. 422:14–23:8. In some cases, the Girardi Firm has the primary responsibility; in others, the Lack Firm has the primary responsibility. Tr. 422:14–:21. On November 13, 2000, Lack and Girardi agreed to engage in one such legal joint venture, signing a Master Fee Agreement with the Nicaraguan law firm of Ojeda Gutierrez and Espinoza (the “Ojeda Firm”) to represent Nicaraguan claimants in DBCP<sup>5</sup> litigation.<sup>6</sup> TE 15.<sup>7</sup> Lack and the Lack Firm would have “complete responsibility for the complaint and all other filings in the case.” Girardi Post-Hearing Brief 10: *see also* Tr. 96:16–97:6 (“I [Lack] was ultimately responsible for everything that was filed in this case, including at the appellate level.”).

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<sup>5</sup> As Chief Judge Kozinski has described it: Dibromochloropropane [DBCP] is a powerful pesticide. Tough on pests, it’s no friend to humans either. Absorbed by the skin or inhaled, it’s alleged to cause sterility, testicular atrophy, miscarriages, liver damage, cancer, and other ailments that you wouldn’t wish on anyone. Originally manufactured by Dow Chemical and Shell Oil, the pesticide was banned from general use in the United States by the Environmental Protection Agency in 1979. But the chemical companies continued to distribute it to fruit companies in developing nations.

*Patrickson v. Dole Food Co.*, 251 F.3d 795, 798 (9th Cir. 2001).

<sup>6</sup> Before signing the agreement, Lack and Girardi traveled to Nicaragua, to meet with members of the Ojeda Firm. Tr. 427:19–428:6.

<sup>7</sup> “TE” refers to Trial Exhibits introduced into evidence at the evidentiary hearing.

I. THE NICARAGUAN PROCEEDINGS

In September 2001, Sonia Eduardo Franco and 465 other Nicaraguan plaintiffs sued several American companies for injuries allegedly caused by the companies' use of DBCP on banana plantations in Nicaragua. TE-5-112 to -117 (Spanish); TE 5-134 to -165 (English). Lack coordinated with the Nicaraguan counsel, directing them "as to who [Lack] knew, based upon our other pending litigation around the world, the proper party defendants were." Tr. 103:24-104:3. To Lack, the proper defendants were five in number: Dole Food Company, Shell Oil Company, Shell Chemical Company, Dow Chemical Company, and Standard Fruit Company. Tr. 104:6-05:2. The Nicaraguan complaint, however, named as defendants Dole Food *Corporation* and Shell *Oil* Company, but not Dole Food *Company* or Shell *Chemical* Company. TE 5-117 (Spanish); TE 5-140 (English).<sup>8</sup> While the Nicaraguan complaint mentions "Dole Food Company," it lists "Dole Food Corporation," and not "Dole Food Company" as a defendant in the action. See TE 73-044 (Spanish), 73-060 (English) (listing "Dole Food Corporation Inc. domiciled at 331364 Oak Crest Drive, Westlake, California 91361-4313, USA" as a defendant); TE 73-043 (Spanish), 73-057 (English) (stating that "[i]n mid-1979, .

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<sup>8</sup> Dole Food Corporation does not exist. TE 5-166; TE 6-003; Tr. 294:19-:23.

. . . Dole Food Co Inc.[, among others] purchased DBCP with the objective of using it in Nicaragua”).

Facing service of a complaint that listed Dole Food Corporation as a defendant, Dole Food Company authorized Dr. Roberto Arguello Hurtado, Dole Food Company’s Nicaraguan counsel, to appear in the Nicaraguan proceeding on behalf of Dole Fresh Fruit Company, a Dole entity. *See* Tr. 306:6–09:4. Because Plaintiffs believed that Dole Fresh Fruit Company did not operate in Nicaragua when the banana plantations were in operation, Angel Espinoza,<sup>9</sup> the Nicaraguan lawyer for Plaintiffs, moved, on October 25, 2002, to exclude Dole Fresh Fruit Company from the proceedings, *see* Espinoza Dep. 68:12–70:1, which the judge granted, *see* TE 334 (granting the motion and stating that Dole Fresh Fruit Company is “not . . . a party to this action”).

Realizing the problem with the complaint, Espinoza petitioned the Nicaraguan court on November 12, 2002, to change the names of Defendants from Dole Food Corporation and Shell Oil Company to Dole Food Company and Shell

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<sup>9</sup> Angel Espinoza was the “main” lawyer at the Ojeda Firm handling the *Franco* case. The lawyers at the Lack Firm, however, never spoke with him, instead communicating only with Walter Gutierrez, the nonlawyer-administrator of the Ojeda Firm. TE 15; Gutierrez Dep. 24:5–:11; Traina Dep. 72:16–73:9; Topp Dep. 18:12–:24, 71:6–:17; Espinoza Dep. 23:8–:12.

Chemical Company. TE 122-04 (English), 122-01 (Spanish). The Nicaraguan judge never ruled on that petition.<sup>10</sup> *See* Espinoza Dep. 198:1–:7.

Following the court’s exclusion of Dole Fresh Fruit Company from the case, Dole Food Company authorized Dr. Hurtado, to appear on behalf of Dole Food Company. Tr. 317:11–:15, 318:8–:13. Dr. Hurtado represented to the Nicaraguan court that Dole Fresh Fruit Company was confused by the initial complaint, continued to be concerned that Plaintiffs failure to sue the right person “could lead to injuries to its rights,” and therefore, Dr. Hurtado sought to “APPEAR ON BEHALF OF [HIS] PRINCIPAL, DOLE FOOD COMPANY, TO RATIFY ALL ACTIONS OF DOLE FRESH FRUIT COMPANY IN THE CLAIM FILED AND NOTIFIED TO DOLE FOOD CORPORATION, INC.” TE 174-04 to -05 (English) (emphasis in translation reflects emphasis in original); *see also* TE 174-01 to -03 (Spanish).<sup>11</sup> Moreover, Dr. Hurtado requested that the court “DECLARE

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<sup>10</sup> Nor are any responses to the petition part of the Nicaraguan court record. *See* TE 705 (DVD copy of complete Nicaraguan court record). It should be noted, however, that several pages are missing from the record. *See* TE 705E.10.

<sup>11</sup> Respondents Lack, Traina, and Topp contend that Dr. Hurtado represented to the Nicaraguan court that Dole Food Corporation is a subsidiary of Dole Food Company. *See* Lack Post-Hearing Brief 10. They base this assertion on the following passage from the document which Dr. Hurtado filed, seeking to appear on behalf of Dole Food Company:

(continued...)

AT THIS PROCEEDING WHETHER DOLE FOOD COMPANY IS THE DEFENDANT COMPANY.” TE 174-06 (English) (emphasis in the original).

In order to appear in a DBCP lawsuit in Nicaragua, Nicaraguan Law 364 requires that a defendant post a US \$100,000 bond, which Dole Fresh Fruit Company did before Dr. Hurtado appeared on behalf of that entity. See TE 332-01 to -05. Dole Food Company, however, did not want to post an additional \$100,000 to appear as Dole Food Company;<sup>12</sup> instead, on November 13, 2003, Dole Food

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<sup>11</sup>(...continued)

Inasmuch as the company on behalf of which I am acting today, DOLE FOOD COMPANY, has been notified of other claims by this office, although seemingly brought also against DOLE FOOD CORPORATION INC., MY PRINCIPAL IS ALARMED BY THE FACT THAT SUCH CONFUSION, CREATED BY CLAIMANT, COULD LEAD TO INJURIES TO ITS RIGHTS; NOTWITHSTANDING THE FACT THAT AS DOLE FRESH FRUIT COMPANY DID NOT EXIST AT THE TIME OF THE EVENTS; DOLE FOOD CORPORATION INC. NEVER HAD A PRESENCE OR BUSINESS IN NICARAGUA and, as both companies are subsidiaries and there has been no legal proceeding to declare the illegitimacy of the legal capacity of the power of attorney, as the defendant company never ordered to be heard, pursuant to Article 827 Pr; paragraph two and ample case law, I APPEAR ON BEHALF OF MY PRINCIPAL, DOLE FOOD COMPANY, TO RATIFY ALL THE ACTIONS OF DOLE FRESH FRUIT COMPANY IN THE CLAIM FILED AND NOTIFIED TO DOLE FOOD CORPORATION INC.

TE 174-05.

<sup>12</sup> Michael Carter, General Counsel of Dole Food Company, testified (continued...)

Company sought to appear under Dole Fresh Fruit Company's \$100,000 bond and ratify all acts performed on behalf of Dole Fresh Fruit Company.<sup>13</sup> See TE 403-001.

The Nicaraguan court, on November 25, 2002, denied Dole Food Company's intervention because the complaint was "not brought against" Dole Food Company. TE 5-170 (Spanish), 5-175 (English). The Judicial Notice states:

Having seen the power of attorney filed by Dr. Roberto Arguello Hurtado, of legal age, married, an attorney and of this domicile, whereby he evidences his capacity as general judicial representative of Dole Food Company Inc., and *given that the complaint heard in this case was not brought against this company*, the Court hereby denied legal intervention on the part of Dr. Arguello Hurtado. Furthermore, because this attorney has stated that the complaint may affect the interests of his client, the rights of that client should be exercised through relevant channel.

TE 5-170 (Spanish), 5-175 (English) (emphasis added).<sup>14</sup>

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<sup>12</sup>(...continued)

that he did not want to post an additional deposit because he considered the Nicaragua courts to be a "fraudulent legal system." See Tr. 338:21-39:3.

<sup>13</sup> Dole Fresh Fruit Company's \$100,000 bond was not returned until after the Nicaraguan court issued a judgment. TE 12-037.

<sup>14</sup> Respondents attempt to recast this judicial notice, arguing that despite its plain language, the judge refused Dole Food Company's intervention because it "told Dr. Hurtado to use his rights using proper legal means, depositing the money that serves as a procedural guarantee." Lack Post-Hearing Brief 11. For this notion, Respondents rely on Espinoza's deposition, in which he states:

My understanding is that the judge denied [Hurtado's] participation

(continued...)

On December 11, 2002, the Nicaraguan court issued a \$489 million judgment (“Judgment”) against Dole Food Corporation and Shell Oil Company. TE 12-011 (Spanish), 12-031 (English). The Judgment did not mention Shell Chemical Company, nor did it name Dole Food Company as a judgment debtor. Although the Judgment referred to Dole Food Company, it did so only to restate that Dole Food Company was not one of the defendants named in the complaint:

Doctor ROBERTO ARGUELLO HURTADO, as judicial representative of DOLE FOOD COMPANY appeared, stating that the interests of his client could be affected by the complaint requesting legal intervention. It was denied because his client was not one of the companies named in the complaint, and said attorney was advised to exercise the rights of his client in the appropriate forum.

TE 12-006 (Spanish), 12-026 (English).<sup>15</sup>

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<sup>14</sup>(...continued)

because he asked that everything that he had done during the past month as a representative of Dole Fresh Fruit Company be ratified in favor of his new company, Dole Fruit—I beg your pardon—Dole Food Company.

Espinoza Dep. 70:6–:12. The plain language of the notice, however, states otherwise: Dole Food Company was denied legal intervention not because it attempted to ratify Dole Fresh Fruit Company’s actions, but because “the complaint heard in this case was not brought against this company [Dole Food Company].” TE 5-170 (Spanish), 5-175 (English).

<sup>15</sup> Despite the judicial notice *and* the Judgment which states that Dole Food Company’s lawyer’s appearance was “denied because his client was not one of the companies named in the complaint,” Lack argues that it was a “false representation[] that Dole Food Company hadn’t been allowed to participate [in the  
(continued...)

Lack learned by January 15, 2003 that Dole Food Company claimed that the Nicaraguan Judgment named Dole Food Corporation, not Dole Food Company.

In an email to Gutierrez, Lack stated that the Judgment was “against the wrong entity.” TE 43; *see also* TE 19. As Lack put it in his January 15 email<sup>16</sup> to

Gutierrez:

I have studied your English translation of the judgment and I am VERY concerned. No U.S. Court could read or understand this translation. You have apparently secured a judgment against Occidental Chemical contrary to our earlier discussions and I can't imagine how this happened after you told me Occidental had been dismissed.

The judgment needs to be against Dole Food Co., the entity that was served. There must be a perfect match between the names of the entities served and the names of the entities against whom judgment has been obtained.<sup>17</sup> If this form of judgment has been submitted to the Supreme Court for certification it must be modified now which might require a meeting with the trial judge to correct “clerical error.”

This is a simple legal step that your lawyers should be taking care of. From your email it is apparent that everything has fallen on you to do

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<sup>15</sup>(...continued)

Nicaraguan proceedings].” *See* Lack Br. 12.

<sup>16</sup> Girardi received the email exchange which discussed issues pertaining to naming Dole Food Corporation in the Judgment, initialing the emails as they crossed his desk. Girardi Dep. 111:10–12:4, 121:7–22:1.

<sup>17</sup> It is unclear why Lack is so adamant that Dole Food Company was “served” because Dole Food Corporation, and not Dole Food Company, was named in the initial complaint. *See* TE 73-044 (Spanish), 73-060 (English).

when the lawyers you are working with really must assist and focus on this important task.

It seems to Tom [Girardi] and I that we should have a meeting<sup>18</sup> in Los Angeles when you return for the Staples Concert. . . . Until then, if our judgments are against the wrong entity Dole will continue to pretend it has nothing to worry about.

TE 43; *see also* TE 19.

On January 23, 2002, at Espinoza's request, the Nicaragua court issued the "Ejecutoria," or Writ of Execution,<sup>19</sup> to Plaintiff's counsel. *See* TE 13-001 (Spanish), 13-029 (English). The Writ,<sup>20</sup> like the Judgment, named Dole Food Corporation and Shell Oil Company as judgment debtors, TE 13-016 (Spanish), 13-045 (English), and stated that "HURTADO, as judicial representative of DOLE FOOD COMPANY appeared, stating that the interests of his client could be affected by the complaint requesting legal intervention. It was denied because his client was not one of the companies named in the complaint," TE 13-038 (English).

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<sup>18</sup> Lack testified that he "d[id]n't recall" whether the meeting to discuss the problems with the Judgment took place. Tr. 174:1-:2.

<sup>19</sup> "Ejecutoria" mean Writ of Execution. *See* Espinoza Dep. 84:20-:22.

<sup>20</sup> Judge Benavente signed both the Writ, *see* TE 13-026, and the Judgment, *see* TE 12-017.

On January 27, 2003, Gutierrez notified Lack and Girardi by email that he “had arrived back in the US,” and that he would like to meet with them to discuss, among other things, the “[a]ctual correction [*sic*] translation of the judgment and execution thereof[.]” TE 131-001. Lack annotated, in his own handwriting, his copy of the email, noting that there was a “Meeting w/ W.G. & TVG - discussed all issues : 2 hrs. 1/28 5:00PM - Principe [*sic*].” *Id.*; Tr. 177:17–78:24. Lack admits that a meeting took place, that Girardi attended the meeting,<sup>21</sup> and that the items on the agenda were discussed, including the original Judgment and the writ of execution, but he claims that he never saw the actual Writ until 2005, *see* Tr. 176:21–80:19; although his memory of the meeting was spotty, *see id.*<sup>22</sup>

In preparation for another meeting, on March 18, 2003, Gutierrez faxed to Lack and Girardi a document Gutierrez characterized as “[his] report before our meeting[.]” TE 24-001. In it, he reported:

I have brought back translated copies of the motions by Attorney Espinoza requesting the amendments to our complaints, correcting the

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<sup>21</sup> In a later memo, Gutierrez referred to Girardi’s participation at the meeting, stating that “[l]ike Mr. Girardi so wisely stated at our last meeting ‘ . . . defendants know one these days we are going to get it right’—and we will.” TE 024-003.

<sup>22</sup> On January 31, 2003, Lack and Girardi met with Dole Food Company representatives “to discuss a possible settlement of claims pending in Nicaragua, which included the Franco action.” TE 173.

