

FILED

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

---

<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

---

<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.”).

---

<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, .

---

<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

---

<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

---

<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

---

<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>

---

<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>

---

<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

---

<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).

---

<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

---

<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.

names of the named defendants to Shell Chemical Co., and Dole Food Co., Inc. Dow Chemical Co. has been correctly filed and served. The amendment request have been approved, I have the translated version, and all complaints have been corrected.

We will have to reserve the defendants, although it will be costly, it can be done expeditiously since all complaints will be served at once. There will be no grounds for the defendants to argue improper service.

I also brought correctly translated copies of the final judgment and the certified writ of execution. To my complete amazement and disbelief I was made aware of a grave mistake that I had been led to assume, due to improper pronunciation of what was required to execute the judgment in the US.

I was told by our attorneys that we needed an “ese cuatro” which translates into English as an “S4”. Therefore, I assumed (my big mistake) that an S4 was a required form that had to be filed with the Supreme Court before the default judgment could be sent to the US (to execute). I have spent the last three months trying to locate this form S4, because I wanted to be ready when the defendants’ last appeal was dismissed.

A week ago I discovered that the word is not “ese cuatro” but “exequatur” from the Latin word “exsequatur”, which means to execute. Therefore, it means the writ of execution, which I have had for the past month in my possession with all the other prerequisites required by law to execute the default judgment in the US.

I have brought the certified copy of the writ of execution correctly translated into English, and ready for execution.

TE 24-001 to -002.

Two days after transmission of this “report,” March, 20, 2003, Gutierrez brought the Writ to Los Angeles.<sup>23</sup> *See* Gutierrez Dep. 143:5–:9 (“I don’t know if it was in April, May, I don’t recall the date—I took it back with me to the United States to be—okay.”). There, the Nicaraguan Consulate authenticated the Writ. TE 13-028 (Spanish), 13-055 (English). Gutierrez, according to his testimony, then took the Writ back with him to Nicaragua. Gutierrez Dep. 144:6–:13.

Back in Nicaragua, Gutierrez claims to have prepared copies of the Writ, including a translation, and sent them to Lack and Girardi. As noted in an email he sent to Lack and Girardi on March 28, 2003:

I just completed getting the English translated copies of the writ of execution certified by the Supreme Court and the Ministry of the Exterior. One of the copies is a straight translation, and the other copy is a direct order from the District Court.<sup>24</sup>

Use the copy that you feel is appropriate. I am sending them via UPS today, and you should receive them on Monday (3/31) no later than Tuesday (4/1).

I told the banana workers that the lawsuit should be filed by Friday 4/11.

---

<sup>23</sup> Lack and Gutierrez agree that Lack never asked to see the Writ. *See* Tr. 176:21–80:19; Gutierrez Dep. 144:19–:20.

<sup>24</sup> Gutierrez was referring to the January 2003 Writ when he stated “the other copy is a direct order from the District Court.” Gutierrez Dep. 224:15–25:5.

If there are any issues you want me to address that I might have overlooked please let me know.

TE 25-001.

Gutierrez followed this up with another email to Lack and Girardi on April

1, 2003:

I would like to know whether you have received the UPS package today (the certified copy of the writ of execution)?

I have a meeting this Sunday, 4/6 with approximately 2,000 of our clients. I would like to give them a time that the lawsuit will be filed in the US. Initially I estimated that it would be 4/11.

If you could please verify before my meeting on Sunday if that is an accurate date, I would appreciate it.

TE 134-001.

Gutierrez followed this with yet another email to Lack and Girardi on April

2, 2003, which evinces an understanding on Gutierrez's part that Lack and Girardi

had received the package containing the Writ:

Since you received the certified copies of the writ of execution, please let me know your plans before my meeting on Sunday 4/6 with our clients.

If you have any questions please call me or e-mail me.

TE 46-001.



Despite admitting that he received the emails, and despite testifying that he never responded to the emails, Lack contends that he never received the Writ, claiming that he “had our Spanish-speaking law clerk call [Gutierrez] and tell him, ‘We don’t know what you are talking about. Nothing came here.’” Tr. 116:21–17:16, 183:16–:22, 197:7–:9.

Lack further testified that he believed that Gutierrez was essentially acting out an email ruse: Lack contends that Gutierrez did not send the Writ, because “he was getting extreme pressure from the Union in Nicaragua who knew he had obtained a judgment, and so he was able to show them these e-mails and say it’s the lawyers in United States that are slowing everything up. But I had not yet received the translation.” Tr. 117:20–:25.

Thus, there are only one of two conclusions to be drawn: either Lack received the Writ in 2003—long before 2005, the year he claims to have first seen the Writ—or, Lack learned in 2003 that Gutierrez would create an elaborate deception in order to shield himself from pressure.

On April 18, 2003, Peter M. Schwartz,<sup>25</sup> emailed Lack:

---

<sup>25</sup> Peter M. Schwartz, a California lawyer and solo practitioner, considered himself the “referring attorney,” serving as the “primary liaison with the Nicaraguan law firm” and the Lack and Girardi Firms. *See* Schwartz Dep. 44:18–:24. Gutierrez cc’d Schwartz on his emails to Lack and Girardi.

commend[ing] Alex Gutierrez, [Lack's bilingual paralegal, (not to be confused with Walter Gutierrez, the nonlawyer administrator of the Ojeda Firm)] on . . . his attention to detail required to ferret out both major and minor inconsistencies between the certified translation of the judgment, and the materials provided by Walter Gutierrez.

TE 29. Schwartz continued:

I have been assured by Walter Gutierrez that most of the errors are clerical in nature, and were limited to the certified translation, are being rectified, with the issuance of a new certified translation that he will forward after the Easter break.<sup>26</sup>

TE 29. This, of course, suggests that Lack, or at least the Lack Firm, had possession of the Judgment and a certified translation, and that "errors" were known to the Lack Firm.

On April 24, 2003, a Nicaraguan notary public, Miguel Angel Caceres Palacios,<sup>27</sup> issued the Notary Affidavit. TE 14; Caceres Dep. 109:10–10:14. The Notary Affidavit is entitled "Testimonio," and begins (as translated into English):

#### AFFIDAVIT

PUBLIC RECORD NUMBER SIXTY, (60) (TRANSLATION OF WRIT OF EXECUTION INTO THE ENGLISH LANGUAGE). In the city of Managua, at eight o'clock in the morning on the twenty-

---

<sup>26</sup> Lack testified that he also did not ask Schwartz about the documents to which Schwartz refers. Tr. 199:24–200:8.

<sup>27</sup> Mr. Caceres is also an attorney and once served as a judge. See Caceres Dep. 10:11–12:18. He was not, however, a judge when he issued the Notary Affidavit. *Id.*

third day of April of the year two thousand three, before me, Miguel Angel Caceres Palacios, an attorney and Notary Public of the Republic of Nicaragua, duly authorized by the Honorable Supreme Court to practice as a Notary for a five-year period that expires on the fifth of September of two thousand three, appeared Angel Salvador Espinoza Guerra, who is of legal age, single, attorney, domiciled in this city and identified with Identification Document Number [illegible], and Jorge Nicolas Ballesteros Castillo, who is of legal age, married, a translator, domiciled in this city and identified with Identification Number 001-061260-0034U. I certify that the persons appearing are known to me personally and, in my opinion, have the civil capacity necessary to bind themselves and to contract, and especially for the execution of this act, in which they act in their own names and on their own behalf. The former presented to me a document that literally reads in its entirety . . . .

TE 14-001 (Spanish), 5-359 (English).

The Notary Affidavit, therefore, purports to provide an exact transcription of the Writ. The Notary Affidavit, however, is not an exact transcription. Where the names “Dole Food Corporation” and “Shell Oil Company” appear in the Writ, the Notary Affidavit substitutes “Dole Food Company” and “Shell Chemical Company.” *Compare* TE 13-016, *with* TE 14-016. Because of the substitution of Dole Food Company for Dole Food Corporation, the Notary Affidavit states both that Dole Food Company is a judgment debtor, *see e.g.*, TE 02-033, *and* that Dole Food Company was denied the opportunity to appear because it was “not one of the companies sued,” TE 02-028.

## II. THE STATE COURT AND DISTRICT COURT PROCEEDINGS

Armed with the Notary Affidavit,<sup>28</sup> on May 14, 2003, Lack and Girardi<sup>29</sup> filed an enforcement action in Los Angeles Superior Court to enforce the foreign judgment. *See* TE 2. The complaint contained a number of material omissions and inaccuracies.

First, the complaint attached the Notary Affidavit as Appendix A. Appendix A, however, does not contain the entire text of the Notary Affidavit; rather, the entire introductory paragraph, quoted above, is excised from the version found in Appendix A. *See supra* p. 15; TE 14-001 (Spanish), 5-359 (English). The missing introductory paragraph explicitly states that the document is (1) an affidavit by a notary public, (2) a transcription of the Writ, and (3) was issued on April 23, 2003. *Id.* Instead, the complaint states that Appendix A is the Writ itself. *See* TE 2-012 to -13 (“On December 11, 2002 a final judgment was entered by the Third Civil District Court for Managua, Nicaragua. Subsequently, on January 23, 2003, a Writ

---

<sup>28</sup> Lack obtained the Notary Affidavit from Gutierrez sometime in “late April or May” 2003. Lack Dep. 39:25–40:19, 118:6–9.

<sup>29</sup> Girardi’s signature appears on the complaint, *see* TE 2-015, although he may have signed or authorized Lack to sign it for him, *see* Girardi Dep. 152:18–20. Moreover, Girardi testified that he signed the complaint without reading it, Tr. 431:4–7, and that he is not sure that he understood that the complaint commenced an action to enforce a foreign judgment, Tr. 448:17–49:10. To Girardi, Lack had primary responsibility for the *Franco* case; therefore, he did not concern himself with the details of that litigation.

of Execution issued which incorporated the judgment *in haec verba*, a copy of which is attached hereto as Appendix 'A.'").

Second, the complaint states that the Nicaraguan court "entered judgment . . . against all defendants." TE 2-010. Lack, however, knew that the judgment named Dole Food Corporation and not Dole Food Company, *see* TE 43 (saying that he was "very concerned" about the Judgment and that it must name "Dole Food Company"); *see also* TE 19:001 (same); Tr. 174:21–75:7 (testifying that he told Gutierrez to fix the judgment), and Lack never saw a judgment naming Dole Food Company, *see* Tr. 175:24–76:13. Lack also testified that Gutierrez never told him that the name changes appearing in the Notary Affidavit were approved by the court. *See* Lack Dep. 158:11–:20.<sup>30</sup> Indeed, the express terms of the Notary Affidavit state that it was issued by a notary public in the presence of Plaintiffs' lawyers. *See supra* pp. 18-19. As noted, however, those express terms were omitted from Appendix A.

Third, the complaint states that "[t]he original certified copy of the Writ of Execution is within the custody of Plaintiffs' counsel[.]" TE 02-013. Lack, however, repeatedly testified that he never saw the Writ. *See, e.g.,* Tr. 176:11–:13.

---

<sup>30</sup> Lack also testified that Gutierrez provided "no explanation [as to] how it got from Shell Oil to Shell Chemical. None." Tr. 204:23–05:2.

Indeed, Gutierrez testified that he took the Writ, after it was issued, “back to Nicaragua and showed it to the banana workers.” Gutierrez Dep. 144:12–:13.

On June 25, 2003, at Defendants’ request, Lack sent defense counsel a complete copy of the Notary Affidavit. *See* TE 352-001. As Lack stated in his letter:

Pursuant to your request, I’m transmitting herewith an exact photocopy of what I refer to as a Judgment and Writ of Execution. Apparently, we deleted certain portions of the Spanish part since they were deemed superfluous to the Judgement [*sic*]. I believe that this is everything you have asked for.

*Id.*

On July 17, 2003, then possessing a copy of the complete Notary Affidavit, Dow Chemical Company (“Dow”) and Shell Chemical Company (“Shell”) removed the action to federal court. *See* TE 005-001 to -027. In their notice of removal, Dow and Shell argued that although Dole Food Company, a California corporation, was a local defendant, there, nevertheless, was complete diversity because Dole Food Company was fraudulently joined. *See* TE 005-014 (“Under § 1441(b), removal on the basis of diversity is unavailable if one of the properly joined defendants ‘is a citizen of the State in which such action is brought.’ If a party is fraudulently joined, however, its presence as a resident defendant is ignored for removal purposes.”). The removal notice identified, *in July 2003*, all

of the problems with Respondents' actions: it states that (1) Dole Food Company was incorrectly substituted for Dole Food Corporation, *see* TE 05-015 ¶ 13; (2) Dole Food Company was denied intervention in the Nicaraguan proceeding because it was not a party, *see* TE 005-018 ¶ 19; and (3) Appendix A is not the Writ, but is a "facially inaccurate *post hoc* recitation of the judgment, incorporated within a transcribed and translated version of a writ of execution, all contained in a form secured *ex parte* from a notary public," TE 05-021 ¶ 23.

Moreover, attached to the Notice of Removal were originals and English translations of the Judgment itself, *see* TE 5-203 to -220 (Spanish), 5-222 to -240 (English), the complete Notary Affidavit, *see* TE 5-306 to -356, the November 25, 2002 Judicial Notice which states that "the complaint heard in this case was not brought against" Dole Food Company, *see* TE 5-170 (Spanish), 5-175 (English), and a copy of one of the Nicaraguan complaints, which lists Dole Food Corporation, but not Dole Food Company, as a defendant, *see* TE 5-112 to -130 (Spanish), 5-135 to -160 (English).

On July 24, 2003, Defendants moved to dismiss the complaint. *See* TE 72. The motion to dismiss, like the notice of removal, pointed out that the Notary

Affidavit attached as Appendix A was not the Writ,<sup>31</sup> that Dole Food Company and Shell Chemical Company were substituted for Dole Food Corporation and Shell Oil Company, respectively, *see* TE 72-014 to -016, and that both the Judgment and the Notary Affidavit stated that Dole Food Company was denied legal intervention because it “was not one of the companies named in the complaint,” *see* TE 179-008.

On August 8, 2003, Gutierrez emailed Lack and Girardi concerning the actual names on the Judgment:

I received a call from Betsy [Crooke, an attorney at the Lack Firm] yesterday. She needed to verify the actual name on the judgment, dates, and addresses of each defendant. I am currently preparing a request from [*sic*] the court to issue a signed and sealed affidavit by judge Vida Benavente, of the 3rd District Court in Managua giving all that information.

TE 708.21.

---

<sup>31</sup> As Defendants note in their motion to dismiss:  
[W]hat the plaintiffs attach as Appendix A—and what they now ask an American court to “recognize”—is at least four steps removed from the actual Judgment. It is a portion of an affidavit signed by a notary public, . . . , in the presence of the plaintiffs’ lead Nicaraguan attorney, . . . , and the court-appointed translator[.]

TE 72-014. And, as Defendants correctly point out in a footnote:

This is plain from the first page of the *complete* Notary Affidavit that the Plaintiffs did not provide to the California court, but which was later supplied to the defendants upon request.

TE 72-014 to -015 n.16.



On August 11, 2003, the clerks of the Nicaraguan court issued an order confirming that Dole Food Corporation and Shell Oil Company were the judgment debtors:

The undersigned court clerks and records official of the Third Civil District Court of Managua certify that a judgment was issued at ten a.m. on December eleventh, two thousand two, in the cases . . . which have been consolidated in File No. 1159-01. The judgment awarded payment of damages totaling FOUR HUNDRED EIGHTY-NINE MILLION FOUR HUNDRED THOUSAND DOLLARS NET (USD \$ 489,400,000.00), with the following companies being liable for the aforementioned payment: Dow Chemical Company, Shell Oil Company, and Dole Food Corporation, Inc. . . . Managua, August eleventh, two thousand three.

TE 705E.5850 (English); *see also* TE 705S-5794 (Spanish); Espinoza Dep. 124:16.

Despite this, on August 14, 2003, Plaintiffs moved to remand the action to state court and filed a reply to Defendants' motion to dismiss. *See* TE 73. In their Motion to Remand, Plaintiffs, as they did in the Complaint, falsely assert that the Complaint attaches "[t]he actual Judgment/Writ of Execution which names Dole Food Company Inc. as a party,"<sup>32</sup> TE 73-007; *see also* TE 73-016, and that the Writ named Dole Food Company and Shell Chemical as judgment debtors, *see* TE 73-016. Plaintiffs' opposition and reply briefs, like the motion to remand, repeat these false statements. *See* 74-026 ("Plaintiffs attached the Writ of Execution to the

---

<sup>32</sup> The motion to remand, however, admits that "Dole Food Corporation is the entity named in the Judgment." *See* TE 73-016.

Complaint. See Complaint, Appendix A.”); TE 74-012 (“As recited in the Writ of Execution, judgment was entered against Shell Chemical.”); TE 75-011 (“The Writ of Execution properly corrected the name of Dole [Food Company] to reflect that they were the entity whom the Judgment could be enforced against.”); *see also* TE 075-004 (referring to “Dole” as “Dole Food Company”).

Although Lack’s signature appeared on Plaintiffs’ Motion to Remand, Opposition Brief to Defendants’ Motion to Dismiss, and Reply to Defendants’ Opposition to Plaintiffs’ Motion to Remand, the “primary responsibility” for preparing these briefs fell on Respondent Paul Traina.<sup>33</sup> *See* Traina Dep. 19:23–20:2; *see also* TE 057-008 (“I am the person who drafted all of the pleadings in the action giving rise to the [*Franco*] appeal and am the attorney most knowledgeable from my office regarding the issues on appeal.”). In preparing to draft the briefs, Traina “read the entire contents of the removal papers,” the exhibits that were attached to the Notice of Removal, and the Motions to Dismiss, and reviewed the complaint filed in the California Superior Court. Traina Dep. 18:15–19:12. He did not request the actual Writ from Nicaragua, even though it always available to him and the other Respondents. Traina Dep. 193:12–94:10; *see*

---

<sup>33</sup> Although Lack refers to him as a “partner,” Traina is, in fact, an employee of the Lack Firm and has worked for it since May 1996. *See* Traina Dep. 9:20–10:18.

also Tr. 576:20–:23 (testifying that Respondents never asked for the Writ until a court ordered them to produce it). In short, Traina did virtually nothing to investigate and determine the veracity of the statements made in the Complaint, even though the Notary Affidavit, on its face, presents questions as to its authenticity and even though Defendants’ central argument called into question the accuracy of the statements made by Respondents in Plaintiffs’ Complaint.<sup>34</sup>

Instead, Respondents filed the reply brief, which as noted, repeated the inaccurate statements appearing in the Complaint. To support the inaccurate statements, Respondents attached three declarations to their reply brief: an “expert” declaration from Lorena Centeno, a California lawyer who had graduated from a Nicaraguan law school, a declaration from Orlando Corrales Mejia, a former Vice President of the Nicaraguan Supreme Court, and a declaration from Espinoza of the Ojeda Firm.

---

<sup>34</sup> Traina never asked Nicaraguan counsel if Appendix A was the Writ, as the Complaint contends, *see* Traina Dep. 69:18–:22, 144:6–:16; *see also* Espinoza Dep. 23:8–:12, nor did he even ask why, assuming that Appendix A was the Writ, it would be titled “Affidavit,” *see* Traina Dep. 51:10–:12, 55:13–:15, 68:9–70:22, 146:24–47:3.

