No. 06-0344

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

In re Standard Fruit Company,
Standard Fruit and Steamship Co.,
Dole Food Company, Inc.,
and Dole Fresh Fruit Company

On Mandamus Review
From Cause No. 93-CV-0030
212th Judicial District Court
Galveston County, Texas

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Fred Misko, Jr.
THE MISKO LAW FIRM, LLP
Turtle Creek Centre, Suite 1000
3811 Turtle Creek Boulevard
Dallas, Texas 75219
(214) 443-8000 Telephone
(214) 443-8010 Fax

Dennis C. Reich
State Bar No. 16739600
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, Texas 77027
(713) 622-7271 Telephone
(713) 623-8724 Fax

Harold W. Nix
Edward L. Hohn
THE NIX LAW FIRM
P.O. Box 679
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333 Telephone
(903) 645-5389 Fax

Charles S. Siegel
WATERS & KRAUS, LLP
3219 McKinney Avenue, Suite 3000
Dallas, Texas 75204
(214) 357-6244 Telephone
(214) 871-2263 Fax

David W. Holman
State Bar No. 09902500
GODWIN GRUBER, LLP
1401 McKinney Street
5 Houston Center, Suite 2700
Houston, Texas 77010
(713) 425-7400 Telephone
(713) 425-7700 Fax

Counsel for Real Parties in Interest

Date: May 22, 2006

ORAL ARGUMENT REQUESTED

Table of Contents

Index of Authorities

Statement of the Case

This is a case brought by 476 Costa Rican banana workers against Standard Fruit Company, Standard Fruit and Steamship Co., Dole Food Company, Inc., and Dole Fresh Fruit Company (collectively, "Dole"), seeking to recover damages for personal injuries resulting from exposure to a chemical used by Dole on its banana plantations.

Following removal to federal court, plaintiffs' claims were dismissed on the basis of forum non conveniens by U.S. District Judge Sim Lake, in an order dated July 11, 1995. Judge Lake's order provided that if the Costa Rican courts rejected plaintiffs' claims for lack of jurisdiction, plaintiffs could move to reinstate their claims in the United States.

After the Costa Rican courts rejected plaintiffs' claims for lack of jurisdiction, plaintiffs moved for reinstatement in Judge Lake's court. Judge Lake deferred ruling on the motion for several years as various appellate proceedings took place. Judge Lake remanded the case to state court last year after a U.S. Supreme Court ruling made it clear that there was not federal subject-matter jurisdiction over plaintiffs' claims.

The case is now pending before Judge Susan Criss in the 212th Judicial District Court in Galveston County, Texas. On June 1, 2005, Judge Criss granted plaintiffs' motion to reinstate. Dole unsuccessfully sought mandamus in the Fourteenth Court of Appeals.

Issues Presented

1. A federal court dismissed plaintiffs' claims on the basis of forum non conveniens, but provided that plaintiffs could move for reinstatement of their claims in the United States if they were rejected by the Costa Rican courts for lack of jurisdiction. The federal court did not have subject-matter jurisdiction. Must a state court give *res judicata* effect to a forum non conveniens dismissal entered prior to remand by a federal court which lacked subject-matter jurisdiction?

2. Plaintiffs refiled in Costa Rica, and the Costa Rican courts rejected their claims for lack of subject-matter jurisdiction. Following remand, Judge Criss granted plaintiffs' motion for reinstatement. Can Dole obtain mandamus relief with respect to Judge Criss's discretionary, fact-based forum non conveniens ruling?

3. Plaintiffs served their Costa Rican petition on Dole in the manner required by Judge Lake's orders. Judge Lake found that plaintiffs had met the requirements of his orders. Although Dole was required to waive or accept service in Costa Rica, Dole failed to do so in a timely manner. Dole asserted no objections to lack of service of process at any level of the Costa Rican judiciary. Judge Lake held that defendants could not obtain U.S. "due process" review of the results of the Costa Rican litigation. In these circumstances, can Dole now obtain denial of reinstatement by arguing for the first time that U.S. constitutional safeguards regarding service of process were not met in Costa Rica?

4. Plaintiffs in the Costa Rican case filed an accurate petition, which Dole's Costa Rican counsel agrees was not misleading. Dole did not complain to the Costa

Rican courts that plaintiffs' petition was misleading in any way. Dole did not raise any concerns with the Costa Rican courts about plaintiffs' good faith and the accuracy of plaintiffs' petition. In these circumstances, can Dole now obtain denial of reinstatement by arguing that plaintiffs' claims were not brought in good faith?

5. The Costa Rican Supreme Court, a court of limited jurisdiction, held that the trial court dismissal for lack of jurisdiction was "confirmed" or "firm." This means that the trial court order is final and is the last word of the Costa Rican judiciary on whether there is jurisdiction in Costa Rica over plaintiffs' claims. Can Dole nevertheless obtain denial of reinstatement merely because the Costa Rican Supreme Court's opinion did not expressly address the merits of the jurisdictional arguments?

6. Can Dole now seek mandamus relief even though it waited three months to file its mandamus petition?

Statement of Facts

Plaintiffs filed this suit in 1993. In 1994, one of the defendants impleaded Dead Sea Bromine Co., Ltd., a manufacturer of DBCP. Claiming to be a "foreign state" under the Foreign Sovereign Immunities Act (FSIA), Dead Sea removed this case to federal court, where it was consolidated with several other cases before Judge Sim Lake.

Defendants moved to dismiss on the basis of forum non conveniens. Judge Lake granted the motion. The dismissal was conditional:

> Although an adequate alternative forum exists in each country, the court concludes that these fora will only be available if defendants agree to waive all jurisdictional and certain limitations-based defenses and if the courts in those countries do not refuse to exercise jurisdiction over these actions.

Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1372 (S.D. Tex. 1995). The dismissal order contained a "return jurisdiction clause":

> Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed for f.n.c.

Id. at 1375.

The dismissal order required any plaintiff bringing an action in his home country to do so within thirty days, i.e., by August 10, 1995. *Id.* at 1373. Defendants were required within forty days (by August 20, 1995) to waive or accept service of process in the foreign countries, waive any other jurisdictional defense, waive limitations, stipulate to the use in foreign countries of discovery obtained in the United States, and agree to be bound by a foreign-court judgment. *Id.*

Plaintiffs met their deadline. The Costa Rican plaintiffs filed their claims in Costa Rica on August 9, 1995, in a case styled *Abarca v. Dow Chem. Corp.* (1:H). On August 16, 1995, plaintiffs sent defendants a letter informing them about the filing. (3:Z, Exh. C).

On August 22, 1995, Judge Lake granted additional time for compliance with the requirements of his dismissal order. He required plaintiffs to serve translated petitions on defendants by Friday, August 25, 1995. He required defendants to respond by waiving or accepting service on or before September 5, 1995. (1:C)

Plaintiffs again met their deadline. They served the Dole defendants with an English-language translation of the *Abarca* complaint on August 24, 1995. Judge Lake ruled that this service met "the timing and translation requirements" in his orders. (1:I, Exh. A, at 6 n.1). He also ruled that the foreign courts would have to decide whether service was adequate. (1:I, Exh. A, at 7).

On September 1, 1995 – four days before Dole's deadline to waive or accept service of process – the Costa Rican trial court dismissed the *Abarca* case for lack of subject-matter jurisdiction. (1:G).

Dole did not waive or accept service as required. Instead, Dole filed a document in Judge Lake's court titled: "The Dole Defendants' Agreements Regarding Conditions of Forum Non Conveniens Dismissal," which did not contain a waiver or acceptance of service. (1:D).

Plaintiffs objected to Dole's filing. Judge Lake sustained plaintiffs' objection to defendants' failure to designate an agent for service of process. (1:I, Exh. A, at 7).

Dole did not seek reconsideration of the Costa Rican dismissal, and did not appeal the decision. Plaintiffs, on the other hand, appealed the *Abarca* ruling to an intermediate appellate court. The court of appeals concluded that an appeal was not available because the trial court's ruling rejecting jurisdiction was not unfavorable to plaintiffs. (2:O, Exh. 4). The court of appeals did not, however, state that plaintiffs had proceeded in bad faith in the trial court, or that the trial court had made an erroneous jurisdictional decision.

Plaintiffs then filed an Appeal for Reversal in the Costa Rican Supreme Court. Most of the defendants also filed briefs in the Costa Rican Supreme Court. Chiquita, Dole, and Del Monte urged the Supreme Court not to hear the appeal on procedural grounds. These defendants did not inform the Costa Rican Supreme Court that they were willing to submit to jurisdiction in Costa Rica. (2:O, Exhs. 6-8).

In contrast, Shell's brief stated that Shell "has no objection whatever to resolving the case in Costa Rica, which under the law, is where this case should be heard." Shell argued in support of Costa Rican jurisdiction based on Costa Rica's Procedural Code, and based on exposure to DBCP having occurred in Costa Rica. (2:O, Exh. 9).

On February 21, 1996, the Costa Rican Supreme Court denied the plaintiffs' appeal, and "confirmed" or held "firm" the trial court's order dismissing *Abarca* for lack of jurisdiction. (2:O, Exh. 10).

Because the Costa Rican courts denied jurisdiction over plaintiffs' claims, the plaintiffs on April 1, 1996 filed a motion for reinstatement of their claims. Judge Lake denied plaintiffs' motion without prejudice, electing to defer ruling on the motion until

after the Fifth Circuit resolved plaintiffs' appeal of the FSIA jurisdictional issue. On October 19, 2000, the Fifth Circuit affirmed Judge Lake's dismissal order. *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000). The Supreme Court then denied *certiorari*. *Delgado v. Shell Oil Co.*, 532 U.S. 972, 121 S. Ct. 1603 (2001).

In another banana-worker case removed to federal court by Dead Sea, the Ninth Circuit disagreed with the Fifth Circuit. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001). On April 22, 2003, the Supreme Court affirmed the Ninth Circuit's opinion and rejected the jurisdictional basis on which this case was removed to federal court. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655 (2003).

By the time the Supreme Court had issued its opinion, plaintiffs had settled with all defendants except Dole. Judge Lake acknowledged that he no longer had subject-matter jurisdiction to consider the motion to reinstate and remanded the Costa Rican plaintiffs' claims on June 21, 2004. *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 817 (S.D. Tex. 2004).

On June 1, 2005, Judge Susan Criss granted plaintiffs' motion. Dole then unsuccessfully sought mandamus from the Fourteenth Court of Appeals.

Argument

I. Judge Lake's interlocutory order has no *res judicata* effect.

The Fourteenth Court of Appeals correctly recognized that Judge Criss had no obligation to apply Judge Lake's forum non conveniens order.

Judge Lake did not have subject-matter jurisdiction over this case. He acknowledged this fact by remanding the case.

An order entered by a court lacking subject-matter jurisdiction is void and must be vacated. In *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238 (10th Cir. 2005), the Tenth Circuit reversed partial summary judgments which a district court entered four months before dismissing the case for lack of subject-matter jurisdiction. Those summary judgments were void because the court lacked jurisdiction:

> [A] judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the real parties to the action. . . .
>
> . . . We, therefore, must vacate all the district court's post-removal orders, as other circuits have done in similar circumstances.

Cunningham, 427 F.3d at 1245. The Tenth Circuit relied in part on cases in which the Fifth Circuit vacated all actions taken by a district court that was lacking in subject-matter jurisdiction. *See Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 694 (5th Cir. 1995) (holding that the district court was "without authority to enter its orders" in an improvidently removed case, and vacating those orders); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 192 (5th Cir. 1989) (vacating "all actions taken by the district court" because it lacked jurisdiction).

In trying to resuscitate a void order, Dole relies on several inapposite authorities. *All* of the cases cited by Dole pertained to final judgments on the merits. *All* of the cases involved attacks on a judgment after the appellate process had run its course. In *all* of the cases cited by Dole, the judgment at issue was *res judicata* and so could not be attacked. *None* of these factors is present here.

The cases cited by Dole recognize the validity of certain judgments in order to vindicate the interests of finality. Conversely, they show that a judgment may be attacked where, as here, the interests of finality are not implicated:

> Relief has also been found appropriate where the erroneous judgment has not yet been executed, where an appeal or remand of the case is still pending, or the judgment is not final.

Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 748 n.6 (5th Cir. 1995).

Judge Lake's dismissal order was merely a venue determination. *American Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S. Ct. 981, 988 (1994) (forum non conveniens is "nothing less than a supervening venue provision"). It has no *res judicata* effect. *Vasquez v. Bridgestone / Firestone, Inc.*, 325 F.3d 665, 676 (5th Cir. 2003). Judge Lake himself recognized this:

> In general, f.n.c. dismissals are without prejudice . . . [and] the ordinary f.n.c. dismissal is not accorded full res judicata effect.

Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 808 (S.D. Tex. 2004); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1374 (S.D. Tex. 1995). Judge Lake expressly left open the matters addressed in his order to be re-examined by means of a motion for reinstatement. The interests of finality do not here compel recognition of an order entered by a court which lacked subject-matter jurisdiction. Therefore, the order is void.

II. A forum non conveniens ruling does not provide a basis for mandamus.

Mandamus relief is not available from a forum non conveniens ruling such as Judge Criss's reinstatement order.

A ruling on forum non conveniens is committed to the "sound discretion" of the trial court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S. Ct. 252, 266 (1981).

Both sides presented extensive evidence to Judge Criss, including expert evidence, regarding the proceedings in Costa Rica. Judge Criss concluded, in her discretion, that Dole had not met its heavy burden to obtain denial of reinstatement. 15 CHARLES ALAN WRIGHT ET AL., FEDERAL RULES & PROCEDURE § 3828, pp. 291-92 (1986) ("The burden on a defendant moving to dismiss in favor of a foreign court or a state or territorial court is a strong one.") "An appellate court may not deal with disputed matters of fact in an original mandamus proceeding." *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991). Therefore, Judge Criss's decision is not suitable for mandamus review.

Mandamus also is not appropriate because forum non conveniens is simply a venue determination, which according to the U.S. Supreme Court, "goes to process rather than substantive rights." *American Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S Ct. 981, 988 (1994). Texas appellate courts "generally do not issue writs of mandamus to correct venue decisions unless a statute provides such a remedy." *In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004). No statute provides for such a remedy here. Therefore, the Court should not issue a writ of mandamus to reverse a forum non conveniens decision. *See In re Western Aircraft, Inc.*, 2 S.W.3d 382, 383 (Tex. App.—San Antonio, 1999, mand. denied) (declining to issue a writ of mandamus to reverse a denial of forum non conveniens dismissal).

In addition to being an unreviewable discretionary venue determination, a forum non conveniens decision is a ruling on a motion to dismiss. This Court has clearly stated:

> Absent extraordinary circumstances not present here, a denial of a motion to dismiss or a plea in abatement is a ruling incident to the ordinary trial process which will not be corrected by mandamus, but by the legal remedy of the ordinary appellate process. . . .

Hooks, 808 S.W.2d at 59-60 (emphasis in original).

Dole suggests that the Court should find the "extraordinary circumstances" allowing mandamus relief merely because this is a mass tort case. Dole is wrong. None of the cases relied on by Dole supports a reversal on mandamus of a district court's discretionary venue ruling. They all involved a district court either disregarding mandatory venue rules, or denying a special appearance when "personal jurisdiction is clearly and completely lacking." *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996).

III. Dole received all of the process it was due.

Plaintiffs served Dole before the deadline required by Judge Lake. Judge Lake found that plaintiffs had complied with his order. (1:I, Exh. A, at 6 n.1). Dole had ten days to waive or accept service, but Dole failed to do so. (1:I, Exh. A, at 7).

If Dole had a concern about service of process, Dole could have raised the issue with the Costa Rican courts—for example, in its brief to the Costa Rican Supreme Court. (2:O, Exh. 7). Dole declined to do so. This Court should not sit in review of the decisions of the Costa Rican judiciary—especially when Dole decided not to give the Costa Rican judiciary an opportunity to address its concerns.

Dole also did not present its complaints about service of process in Costa Rica to Judge Lake. Dole knew that Judge Lake would reject any complaint about service. Judge Lake had ruled that adequacy of service was an issue to be decided by the foreign courts. (1:I, Exh. A, at 7.) Judge Lake rejected Dole's attempt to condition its waiver of service of process on an overlay of American-style due process protections:

> The problem with this argument is that defendants are before foreign courts because they asked to be there. Defendants have no right to seek *forum non conveniens* dismissal and then to impose American procedural safeguards on the judicial systems of the foreign courts.

(1:I, Exh. A, at 8).

Judge Lake specifically rejected the argument that Dole now makes—that it can collaterally attack a dismissal in a foreign forum on due process grounds:

> The Court notes that defendants and third and fourth party defendants have reserved the right to appeal the Court's ruling denying their requested modification that they not have to satisfy a foreign judgment obtained by fraud, without due process of law, or that resulted in the bill of attainder or ex post facto law.
>
> The Court has several observations about the defendants' concerns in this regard.
>
> First, as I tried to make clear in my October 6th order, defendants can raise these arguments before the foreign courts, to the extent that they are permitted under the local law of a particular foreign country. Defendants have many foreign law experts at their disposal, including at least one foreign law expert for each of the 12 countries in which plaintiffs may file foreign actions. All of these experts have testified by affidavits that the laws of their respective countries are fair and adequate.
>
> Notwithstanding this vast reservoir of legal talent available to them, none of defendants' papers arguing for this modification to the Court's terms for dismissal for forum non conveniens purposes have presented any evidence from a foreign law expert that defendants could not contest in the foreign courts a judgment on the basis that it had been obtained by fraud, that it was without notice to the defendants, or that they could not raise objections based upon the various other concerns that they have expressed.

(3:Y, Exh. 25, at 6-7).

Dole cites a few old cases for the proposition that U.S. courts will not enforce a judgment obtained *against a defendant* in a foreign court without some minimum amount of due process. Those cases manifestly have no bearing here—where the foreign

judgment at issue *dismissed plaintiffs' claims*. Judge Lake rightly concluded that the defendants—having sought a foreign forum—could not thereafter attack the results in that forum. Judge Lake could have conditioned the dismissal on Dole's relinquishment of any number of constitutional rights, and still not have offended due process, as Dole could have rejected the conditions and gone to trial in the United States.

If Dole had presented its service of process argument to Judge Lake or the Costa Rican courts, the argument clearly would have been rejected. A court's dismissal of a case for lack of subject-matter jurisdiction before the defendants are served is not unusual at all, and certainly does not make the dismissal void. *Zernial v. United States*, 714 F.2d 431, 433-34 (5th Cir. 1983) (rejecting appellant's contention that "dismissals before service of process on the defendants are improper," and noting that "[*s*]*ua sponte* dismissal for lack of subject matter jurisdiction is, of course, proper at any stage of the proceedings."). As in the United States, it is normal and appropriate for a Costa Rican judge to decide the issue of subject matter jurisdiction before ordering that the parties be served. (1:L, ¶¶ 19-25).

IV. Plaintiffs asserted their claims in Costa Rica in good faith.

Plaintiffs asserted their claims in Costa Rica in good faith. Dole's Costa Rican counsel from the *Abarca* case, when testifying as an expert for Dole in another case, found nothing misleading in the *Abarca* petition:

> Q. Was there anything in the pleading that the plaintiffs filed in the Abarca case that was dishonest or misrepresented something to the court?
>
> A. Well, I don't go into measuring the honesty of my colleagues, but I don't believe there was anything dishonest in that case.

Q. There was nothing misleading in that pleading, either, was there?

A. As far as I know, there's nothing that's misleading, no.

(2:O, Exh. 2, at 51-52).

Dole's response to the allegedly-misleading *Abarca* petition and the trial court order was . . . to do nothing. Dole did not seek reconsideration in the trial court. Dole did not raise any of these arguments to any Costa Rican appellate court. Even though Dole filed an appeal with the Costa Rican Supreme Court, Dole did not mention any of the issues which it now raises on this appeal. (2:O, Exh. 7). Judge Lake specifically told the defendants that any such concerns about due process or fraud were to be addressed to the judiciary of the foreign forum. (1:I, Exh. A, at 8-9; 3:Y, Exh. 25, at 6-7). Nevertheless, Dole apparently withheld its arguments for its current United States "appeal" of the decisions of the Costa Rican judiciary.

Dole's assertion that "the plaintiffs misrepresented the domicile of the Dole defendants and relationship with the plaintiffs" is flat wrong. The second paragraph of the *Abarca* petition made clear that the defendants included Dole. It alleged that Dole "distributed and used FUMAZONE and NEMAGON [DBCP] at the banana plantations of their branches in this country." (1:H, ¶ 2). There could be no mistaking that Dole was a banana grower with operations in Costa Rica which was domiciled in the United States (1:K:3, ¶¶ 8-11). There could be no mistaking that Dole was one of the employers of the banana workers (1:H, ¶ 6). And the trial court's dismissal order reflected these accurate facts. (2:O, Exh. 3).

Dole suggests that plaintiffs somehow procured an erroneous dismissal on the basis of lack of personal jurisdiction in Costa Rica. This is not true. Plaintiffs attached to their *Abarca* petition a copy of the *Delgado* opinion, which required Dole and the other defendants to submit to jurisdiction in Costa Rica. (1:H: unnumbered p. 10, ¶ 6; 2:O, Exh. 2, at 51). The trial court judge read the *Delgado* opinion, and so was aware that Judge Lake had ordered defendants, including Dole, to submit to jurisdiction in Costa Rica as a condition of *forum non conveniens* dismissal. (2:O, Exh. 3, at 2-3). He dismissed for lack of *subject-matter* jurisdiction, not lack of *personal* jurisdiction.

V. The result of the Costa Rican litigation supports reinstatement under Judge Lake's order.

The Costa Rican Supreme Court ruled that the trial court order was "firm" and "final," or to put it another way, the Supreme Court "confirmed" the trial court judgment. As stated by Alejandro Garro, an expert on Costa Rican law, "the merits analysis undertaken by the trial court stands as the final pronouncement of the Costa Rican legal system on the question whether its courts have jurisdiction to take the *Abarca* case." (1:L, ¶¶ 6-7).

Judge Lake's order states that "these [foreign] fora will only be available . . . if the courts in those countries do not refuse to exercise jurisdiction over these actions." *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1372 (S.D. Tex. 1995). In *Abarca*, the Costa Rican courts refused to exercise jurisdiction. Therefore, Judge Criss could conclude that Costa Rica was not an available forum.

In Costa Rica, the Supreme Court has limited jurisdiction, and—like this Court—does not review every matter presented to it on the merits. (1:L, ¶¶ 8-13). If plaintiffs

were required to await a written opinion from the Costa Rican Supreme Court on the merits of the jurisdictional decision, plaintiffs could be consigned to a permanent legal limbo, without the ability to pursue their claims in Costa Rica or the United States. This is not required. The Costa Rican Supreme Court's ruling is final: no more definitive statement can come from the Costa Rican judicial system. (1:L, ¶ 7). Even if the Costa Rican Supreme Court's opinion were akin to a denial of *certiorari*, it would still be the final word from Costa Rica in this litigation.

Judge Lake undoubtedly recognized that different countries would have different appellate systems, and that an appeal of a trial court dismissal would not necessarily yield a merits review in each foreign country's supreme court. Judge Lake's order was meant to provide for reinstatement upon sufficient evidence based on litigation in the foreign forum that the foreign forum was in fact unavailable. There is such evidence in this case, because there is a definitive rejection of jurisdiction by the Costa Rican judicial system in which all possibilities for appeal have been exhausted.

As stated by Judge Carl Barbier in the most extensive analysis of the *Abarca* case in a United States court opinion, the Costa Rican Supreme Court's order in *Abarca* was "a final order from the highest court in Costa Rica that the Costa Rican courts lacked jurisdiction." *Canales Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 729 (E.D. La. 2002). If such an order is not sufficient to trigger reinstatement, then the return-jurisdiction clause is illusory.

VI. Other DBCP cases in Costa Rica support reinstatement.

Dole has not pointed to a single decision in which a Costa Rican court has examined the jurisdictional issue and actually found jurisdiction in Costa Rica over a banana worker's claim. The three Costa Rican cases cited by Dole—*Rivas Ramirez*, *Rivas Ledezma*, and *Montero Mejias*—do not address whether there is jurisdiction in Costa Rica over the claims of banana workers injured by DBCP. Instead, they merely address whether such claims, if brought in Costa Rica, belong in the civil courts or labor courts. (1:L, ¶¶ 44-50; 2:S; 2:T). In finding that such claims belonged in the civil courts, these cases agreed with *Abarca*—thus demonstrating that the trial judge in *Abarca* was not confused about Dole's status as an employer of plaintiffs. (2:O, Exh. 3, at 2).

The only other Costa Rican case to address the jurisdictional issue found, as in *Abarca*, that there was no jurisdiction in Costa Rica over a banana worker's claim.

> . . . [T]he *Abarca* case is not isolated. In a similar and possibly related case, the Second Civil and Labor Court of Limón likewise dismissed a DBCP claim case brought by David Austin Aguilar. Making reference to the district court's decision in *Delgado*, the Limón court expressly found that because Costa Rican courts do not recognize forum non conveniens, and plaintiff's claims were properly brought in the United States in the first instance, it was not competent to hear the case.

Canales Martinez v. Dow Chem. Co., 219 F. Supp. 2d at 719.

If Dole believed that the *Abarca* decision conflicted with other Costa Rican case law, Dole should have made that argument to the *Abarca* trial and appellate courts, rather than waiting ten years to raise the issue in a U.S. court.

VII. Laches bars relief.

Dole waited three months from the Fourteenth Court of Appeals' denial of rehearing in order to file this mandamus petition. It has now been nearly a year since

Judge Criss entered her order reinstating the case. The parties have worked toward establishing a scheduling order for a bellwether trial a few months hence. Dole's unreasonable delay should preclude relief. *See Rivercenter Assoc. v. Rivera*, 858 S.W.2d 366 (Tex. 1993) (unexplained delay of four months was too long); *Bailey v. Baker*, 969 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1985, orig. proceeding) (unexplained delay of over three months was too long).

Prayer

Plaintiffs, Real Parties in Interest, pray that Dole's Petition for Writ of Mandamus be denied.

Respectfully submitted,

FRED MISKO, JR.
State Bar No. 1420400
CHARLES E. AMES
State Bar No. 00795221
THE MISKO LAW FIRM, LLP
Turtle Creek Centre, Suite 1000
3811 Turtle Creek Boulevard
Dallas, Texas 75219
(214) 443-8000 Telephone
(214) 443-8010 Fax
misko@misko.com
ames@misko.com

DENNIS C. REICH
State Bar No. 16739600
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, Texas 77027
(713) 622-7271 Telephone
(713) 623-8724 Fax
dreich@reichandbinstock.com

DAVID W. HOLMAN
State Bar No. 09902500
GODWIN GRUBER, LLP
1401 McKinney Street
5 Houston Center, Suite 2700
Houston, Texas 77010
(713) 425-7400 Telephone
(713) 425-7700 Fax
dholman@godwingruber.com

HAROLD W. NIX
EDWARD L. HOHN
THE NIX LAW FIRM
P.O. Box 679
205 Linda Drive
Daingerfield, Texas 75638
(903) 645-7333 Telephone
(903) 645-5389 Fax
edhohn@nixlawfirm.com

CHARLES S. SIEGEL
State Bar No. 18341875
WATERS & KRAUS, LLP
3219 McKinney Avenue, Suite 3000
Dallas, Texas 75204
(214) 357-6244 Telephone
(214) 871-2263 Fax
siegel@awpk.com

ATTORNEYS FOR REAL PARTIES IN INTEREST
(Plaintiffs in the trial court)

Certificate of Service

On this 22nd day of May, 2006, the undersigned certifies that a true and correct copy of this brief, was served via certified mail, return receipt requested:

Randy Moore
The Moore Law Firm
#7 West Way Court, Suite C
Lake Jackson, TX 77566

Jeffrey D. Kyle
Kyle P.C.
6302 Broadway, Suite 245
Pearland, TX 77584

James S. Teater, Esq.
Melissa B. Hagan
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002

Judge Susan Criss
212rd Judicial District Court
600 59th Street, 4th Floor
Galveston, Texas 77550-2388

Fred Misko, Jr.

Verification

State of Texas

Dallas County

Before me, the undersigned notary, on this day personally appeared Fred Misko, Jr., a person whose identity is known to me. After I administered an oath to him, upon his oath he said the following:

1. My name is Fred Misko, Jr. I am capable of making this affidavit, and the facts in this affidavit are true and correct.

2. I am an attorney for the Real Parties in Interest. I have read the Response to Petition for Mandamus and the facts stated in it are within my personal knowledge and are true and correct.

Fred Misko

Fred Misko, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 19th day of May, 2006, to certify which witness my hand and seal of office.

Pamela Ridgell

Notary Public in and for the
State of Texas

PAMELA RIDGELL
MY COMMISSION EXPIRES
October 24, 2009

(Print Name) Pamela Ridgell

My Commission Expires: 10/24/09