

No. _____

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,
Relators

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

PETITION FOR WRIT OF MANDAMUS

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Date: April 27, 2006

ORAL ARGUMENT REQUESTED

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NAMES OF PARTIES AND COUNSEL

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TABLE OF CONTENTS

Names and Parties of Counsel.....	ii
Index of Authorities.....	vi
Statement of the Case.....	x
Statement of Jurisdiction	xi
Issues Presented	xi
Statement of Facts	1
<i>In 1993, Banana Workers File Claims in Brazoria County.....</i>	1
<i>Banana Workers' Claims Removed to Federal Court in 1995.....</i>	1
<i>F.N.C. Dismissal and the Return Jurisdiction Clause.....</i>	1
<i>The Costa Rican Claims: The Abarca Petition.....</i>	2
<i>Before the Dole Defendants Received Service of Process, the Plaintiffs Procured an Ex Parte Dismissal in the Costa Rican Trial Court</i>	3
<i>Plaintiffs Pro Forma Appeal of Abarca In Costa Rican Appellate Courts.....</i>	4
<i>Other DBCP Cases Allowed to Proceed Against Dole Defendants.....</i>	5
<i>FSIA Appeal.....</i>	5
<i>Judge Lake Remands Reinstatement Issue.....</i>	5
<i>Judge Criss Grants Motion to Reinstate.....</i>	6
<i>Fourteenth Court of Appeals Denies Mandamus.....</i>	6
Summary of the Argument	6

Statement of Importance to Texas Jurisprudence	7
Argument	8
I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE MOTION TO REINSTATE	8
<i>The Court of Appeals is Wrong: The 1995 F.N.C. Order Is Not Void</i>	8
<i>Judge Lake’s Return Jurisdiction Clause</i>	9
<i>The Dole Defendants Were Not Provided Adequate Notice of Suit and an Opportunity To Defend In Costa Rica</i>	10
<i>Plaintiffs Did Not Prosecute Costa Rican Actions In Good Faith</i>	12
<i>Costa Rican Courts Did Not Review Jurisdiction</i>	13
<i>Other DBCP Cases Allowed to Proceed Against Dole Defendants</i>	14
II. THE DOLE DEFENDANTS HAVE NO ADEQUATE REMEDY ON APPEAL.....	14
Prayer.....	15
Certificate of Service	17

INDEX OF AUTHORITIES

Texas Cases

<i>Banco Minero v. Ross</i> , 106 Tex. 522, 172 S.W. 711 (1915).....	11, 12
<i>CSR Ltd. v. Link</i> , 925 S.W.2d 591 (Tex. 1996, orig. proceeding).....	14, 15
<i>In re E.I. Du Pont de Nemours & Co.</i> , 92 S.W.3d 517 (Tex. 2002).....	15
<i>In re Masonite</i> , 997 S.W.2d 194 (Tex. 1999).....	15
<i>In re Prudential Ins. Co.</i> , 148 S.W.3d 124 (Tex. 2004).....	8, 15
<i>In re Standard Fruit Co.</i> , 2005 WL 2230246 (Tex. App.—Houston [14th Dist.] Sep. 13, 2005) (reh’g denied Jan. 26, 2006).....	6, 8

Federal Cases

<i>Batts v. Tow-Motor Forklift Co.</i> , 66 F.3d 743 (5th Cir. 1995).....	9
<i>Cruz v. Maritime Co. of Phillipines</i> , 655 F.Supp. 1214 (S.D.N.Y. 1987).....	13
<i>Delgado v. Shell Oil Co.</i> , 890 F. Supp. 1324, 1372-75 (S.D. Tex. 1995).....	1, 9
<i>Delgado v. Shell Oil Co.</i> , 231 F.3d 165 (5th Cir. 2000).....	5, 9
<i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003).....	5
<i>Durfee v. Duke</i> , 375 U.S. 106 (1963).....	8

<i>Gschwind v. Cessna Aircraft Co.</i> , 232 F.3d 1342 (10th Cir. 2003).....	8, 9
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895).....	10
<i>Hunt v. BP Exploration Co. (Libya)</i> , 492 F. Supp. 885 (N.D. Tex 1980).....	11
<i>International Transactions, Ltd.</i> <i>v. Embotelladora Agral Regiomontana SA de CV</i> , 347 F.3d 589 (5th Cir. 2003).....	10
<i>Mullane v. Central Hanover Bank</i> , 339 U.S. 306 (1950).....	11
<i>Patrickson v. Dole Food Co.</i> , 251 F.3d 795 (9th Cir. 2001).....	5
<i>Robinson v. TCI/US West Communications Inc.</i> , 117 F.3d 900, 907 (5th Cir. 1997).....	7
<i>Stoll v. Gottlieb</i> , 305 U.S. 165 (1938).....	8
Constitution and Statutes	
28 U.S.C. § 1602 <i>et seq</i>	1
FED. R. CIV. P. 12(a).....	12
TEX. CONST. art. V, § 3	xi
TEX. GOV'T CODE §22.002	xi
TEX. R. CIV. P. 99(b).....	12
Restatement and Other Authority	
RESTATEMENT (SECOND) CONFLICT OF LAWS § 92(b)	10
RESTATEMENT (SECOND) CONFLICT OF LAWS § 104	11

Wright, Miller & Cooper, FEDERAL PRACTICE
AND PROCEDURE, § 4468 (2002)..... 10

STATEMENT OF THE CASE

Nature of the Case

This is a 1993 personal-injury case brought by thousands of foreign banana workers who allege they were harmed by exposure to toxic chemicals. After originally being brought in state court, the cause was removed to the federal district court in Houston. In its 1995 order granting a motion to dismiss for *forum non conveniens*, the federal district court included a return jurisdiction clause. This clause permitted the plaintiffs to return to the United States only if the highest court in their home country denied their claim for want of jurisdiction. The federal court also required the plaintiffs to prosecute their actions in the foreign jurisdiction in good faith.

Before providing the Dole defendants with service of process of their suit in Costa Rica, the plaintiffs manufactured a dismissal of their claims from the Costa Rican court system.

During the appellate process for the federal court case, an intervening United States Supreme Court decision from a related banana-worker claim revealed that the claim in the Houston federal district court was improperly removed. Before ruling on the reinstatement issue, and due to the change in decisional law, the federal court remanded to the state court the question of whether the plaintiffs had complied with the return jurisdiction clause.

The trial court abused its discretion by granting the plaintiffs' motion to reinstate because the plaintiffs failed to provide proper notice to the Dole defendants of the Costa Rica claims, and because the plaintiffs pursued dismissal for lack of jurisdiction in bad faith.

<i>Trial Court/Respondent</i>	Hon. Susan Criss, 212th Judicial District Court, Galveston County
<i>Relators</i>	Standard Fruit Company, Standard Fruit and Steamship Co., Dole Food Company, Inc., and Dole Fresh Fruit Company.
<i>Real Parties In Interest</i>	Franklin Rodriguez Delgado, et al. (plaintiffs in the trial court).
<i>Relief Sought</i>	Writ of Mandamus directing Respondent to deny plaintiffs' motion to reinstate.

STATEMENT OF JURISDICTION

Jurisdiction is proper under article V, section 3 of the *Texas Constitution* and Section 22.002 of the *Texas Government Code*. TEX. CONST. art. V, § 3; TEX. GOV'T CODE § 22.002.

ISSUES PRESENTED

The federal district court dismissed this case for *forum non conveniens*, requiring the plaintiffs to bring their claims in Costa Rica and specifically imposing an “obligation that plaintiffs prosecute those actions in good faith.” The plaintiffs subsequently secured the dismissal of their case in an *ex parte* proceeding in which the Dole defendants were not allowed to participate, leading the Costa Rica Court of Appeals to conclude that the plaintiffs’ “manifest interest” was to return this case to the United States. Relying on their *ex parte* dismissal, the plaintiffs sought to reinstate their case in the United States. The Hon. Susan Criss agreed to reinstate the case.

1. As a question of first impression, what is the proper standard governing a motion to reinstate after a *forum non conveniens* dismissal with a return jurisdiction clause?

2. In this case with a return jurisdiction clause in the *forum non conveniens* order, did the trial court abuse its discretion by granting the motion to reinstate, when the plaintiffs failed to provide them, under principles of Due Process, with adequate notice of and an opportunity to defend the foreign suit?

3. Did the court of appeals misapply federal law by holding a federal judgment can be collaterally attacked at any time based on a jurisdictional rule that did not exist—and was in fact explicitly rejected—during the direct appeal?

STATEMENT OF FACTS

In 1993, Banana Workers File Claims in Brazoria County

In 1993, on the eve of the effective date of Texas' *forum non conveniens* statute,¹ thousands of foreign banana workers, allegedly injured by exposure to the chemical dibromochloropropane ("DBCP"), filed actions in Texas state courts.² In each case, a defendant impleaded Dead Sea Bromine Co., Ltd. and its American affiliate, Ameribrom, Inc. (the "Dead Sea Entities"), and asserted that they were instrumentalities of the State of Israel under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1602 *et seq.*

Banana Workers' Claims Removed to Federal Court in 1995

After the Dead Sea Entities removed each case under the FSIA, federal District Judge Sim Lake concluded that removal was proper because the Dead Sea Entities were a foreign sovereign. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1372-75 (S.D. Tex. 1995); (App. A). Defendants also filed motions to dismiss based on *forum non conveniens*, which Judge Lake conditionally granted. *Id.*

F.N.C. Dismissal and the Return Jurisdiction Clause

Judge Lake's f.n.c. order required plaintiffs to re-file their claims in their home countries within thirty days. *Id.* at 1373. Importantly, the order included a return jurisdiction clause allowing reinstatement only if the highest court of the plaintiffs' home country affirmed a dismissal for lack of jurisdiction:

¹ TEX. CIV. PRAC. & REM. CODE § 71.051.

² This petition for writ of mandamus is filed simultaneously with a similar petition for writ of mandamus in the *Franklin Rodriguez Delgado, et al, v. Shell Oil Co., et al.*, in the 212th District Court of Galveston County, Texas, Civil Action No. 93-CV-0030, the Honorable Susan Criss presiding.

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 this 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 [*forum non conveniens*].

Id. at 1375.

From the day Judge Lake entered his f.n.c. order, July 11, 1995, until entering a final order of dismissal on October 27, 1995, a number of orders were issued and agreements made in the federal litigation. *See* (1:B-F; App. C). Specifically, there was an agreement by the Dole defendants designating their Costa Rican agent for service of process. (1:E).

Plaintiffs Required to Prosecute Their Foreign Actions In Good Faith

On September 5, 1995, while the parties were still negotiating the terms for proceeding in the foreign countries and awaiting Judge Lake's rulings, the Dole defendants notified Judge Lake that plaintiffs were prosecuting their foreign claims in a manner designed to procure dismissal based on lack of jurisdiction.³ In response, Judge Lake cautioned plaintiffs that the return jurisdiction clause was not an "automatic right." He explained that "[i]f the court were to conclude that the dismissal of a foreign action was due to the failure of plaintiffs to prosecute the action in good faith, the court could deny plaintiffs' request to return to this court."

³ Following the July 11, 1995 Order conditionally dismissing the action based on *forum non conveniens*, plaintiffs from the *Carcamo* action filed the *Abarca* suit in Costa Rica.

(App. B:2-3). Furthermore, plaintiffs were obligated to prosecute their foreign actions “in good faith.” (App. B:3).

Contrary to this good faith requirement, the Costa Rican plaintiffs secured an *ex parte* dismissal for lack of jurisdiction. (1:G, Second Whereas Paragraph). This dismissal was entered one month and thirteen days before Judge Lake required the Dole defendants to provide the names of their agents for service of process, depriving Dole of any notice of the proceedings. (App. B:7).

The Costa Rican Claims: The Abarca Petition.

While the parties and Judge Lake were resolving various procedural issues related to the f.n.c. order, the Costa Rican plaintiffs filed a petition in the Fourth Civil Court of San Jose. (1:H) [hereinafter referred to as the “Abarca” suit]. In this claim, the plaintiffs misrepresented the domicile of the Dole defendants and relationship with the plaintiffs.⁴

*Before the Dole Defendants Received Service of Process,
the Plaintiffs Procured an Ex Parte Dismissal
in the Costa Rican Trial Court.*

Before the Dole defendants received service of process, and as the parties were completing the required federal court agreements to proceed in the foreign countries, the Costa Rican trial court issued an *ex parte* judgment dismissing the *Abarca* petition for lack of jurisdiction. (1:G, Second Whereas Paragraph). The

⁴ Similarly, Plaintiffs also misrepresented the nature of defendants’ contacts with Costa Rica in their Costa Rican petition, erroneously asserting that “defendants [including the Dole Defendants] have no assets or stable representation in [Costa Rica].” (1:H:6, ¶ 11). In contrast, Plaintiffs’ counsel asserted the exact opposite proposition to Respondent: “Dole, of course, is the largest business in Costa Rica, and is represented by literally dozens of extremely capable American and Costa Rican counsel.” (1:I:8).

Costa Rican trial court rejected jurisdiction because it held there were no requisite “connective criteria” because: (1) the case did not involve a Costa Rican employer, (2) the defendants were not domiciled in Costa Rica, (3) the defendants did not perform any acts in Costa Rica, and (4) the defendants had not agreed to submit to Costa Rican jurisdiction. (1:E, Fourth Whereas Paragraph). This dismissal was based on the representations of plaintiffs in their complaint that Dole was not their employer in Costa Rica, that Dole was not domiciled in Costa Rica, that the alleged wrongful conduct did not occur in Costa Rica and that Dole had not agreed to submit to the jurisdiction of Costa Rican courts.

Plaintiffs’ Pro Forma Appeal of Abarca In Costa Rican Appellate Courts

To complete their mission to return to the United States, the plaintiffs filed a pro forma appeal of the ex parte dismissal. In rejecting the plaintiffs’ appeal, a unanimous Costa Rica Court of Appeals explained that the plaintiffs obtained the dismissal relief they sought, and, as a result, they did not suffer an adverse ruling. (App. D). The Court of Appeals concluded that plaintiffs’ emphasis upon Judge Lake’s ruling “confused the [Costa Rican trial court] Judge into making the analysis which he did.” (App. D, Third Whereas Paragraph), and ruled plaintiffs’ appeal “inadmissible”. In doing so, the court acknowledged that it appeared plaintiffs’ “manifest interest” was to proceed in the United States. *Id.*

Finishing their quest to return to the United States, plaintiffs appealed the “inadmissibility” of their appeal to the Costa Rica Supreme Court, but that court also denied review. (App. E, First and Second Whereas Paragraphs).

Other DBCP Cases Allowed to Proceed Against Dole Defendants.

Although the *Abarca* decision was permitted to stand, in three other related Costa Rican DBCP personal injury cases, *Rivas Ramirez*, *Rivas Ledezma*, and *Montero Mejias*, the Costa Rican courts maintained jurisdiction. (App. I). *Rivas Ledezma* and *Rivas Ramirez* were originally part of the *Delgado* suit.

FSIA Appeal

Meanwhile, back in the United States, the plaintiffs did not appeal Judge Lake's *forum non conveniens* dismissal. Instead, the plaintiffs appealed the finding that the Dead Sea Entities were "foreign states." The Fifth Circuit affirmed Judge Lake's finding that the Dead Sea Entities were "foreign states" under the FSIA. *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000). Plaintiffs did not appeal this decision.

A few months later, the Ninth Circuit reached a different conclusion regarding FSIA removal. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001). Ultimately rejecting the Fifth Circuit's reasoning, the Supreme Court affirmed the Ninth Circuit's *Patrickson* opinion. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003).

Judge Lake Remands Reinstatement Issue

After the *Abarca* dismissal in Costa Rica, plaintiffs moved to reinstate their claims in the United States. Due to the change in decisional law resulting from *Patrickson*, Judge Lake concluded that he could no longer consider plaintiffs' motion for reinstatement request. (App. G:20); *see also* (2:M:8). As such, Judge

Lake remanded the reinstatement decision to the 23rd Judicial District in Brazoria County.

Judge Criss Grants Motion to Reinstate

In the instant proceeding, the Costa Rican plaintiffs filed their motion to reinstate on November 20, 2004, and the Dole defendants filed their brief in opposition to plaintiffs' motion on January 24, 2005.⁵ Argument on the motion was heard on March 3, 2005. (2:N). On June 15, 2005, Respondent granted plaintiffs' motion to reinstate. (App. H).

Fourteenth Court of Appeals Denies Mandamus

Citing no authority, the Fourteenth Court of Appeals denied the Dole defendants' petition for mandamus, concluding that Judge Lake's f.n.c. orders were void because the federal court lacked subject matter jurisdiction. *In re Standard Fruit Co.*, 2005 WL 2230246 (Tex. App.—Houston [14th Dist.] Sep. 13, 2005). On January 26, 2006, the Fourteenth Court of Appeals denied the Dole defendants' motion for rehearing and motion for rehearing en banc.

SUMMARY OF THE ARGUMENT

This Court should issue a writ of mandamus because the trial court abused its discretion in granting the plaintiffs' motion to reinstate and the Dole defendants have no adequate remedy on appeal. After issuing his order dismissing the plaintiffs' claims for *forum non conveniens* in 1995, Judge Lake included a return

⁵ The plaintiffs were from Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, the Philippines, Saint Lucia, and Saint Vincent. Only the Costa Rican plaintiffs are seeking reinstatement.

jurisdiction clause. This clause permitted the plaintiffs to return to the United States if they received a dismissal for want of jurisdiction from the highest court in the jurisdiction. He also required the plaintiffs to prosecute their foreign actions in good faith. After a change in the decisional law supporting Judge Lake's f.n.c. dismissal, he remanded the case to the Texas trial court to have it decide the motion to reinstate. The trial court improperly granted the motion to reinstate because the Dole defendants were (1) never served with constitutionally adequate notice of the Costa Rican lawsuit and (2) the plaintiffs manipulated the judicial process in bad faith in Costa Rica to obtain the dismissal.

STATEMENT OF IMPORTANCE TO TEXAS JURISPRUDENCE

This is a case of first impression dealing with how Texas state courts should review return jurisdiction clauses after a court dismisses a cause for *forum non conveniens*. *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) (requiring return jurisdiction clauses in each order dismissing for *forum non conveniens*). To reach its decision, this Court will have to decide whether it is appropriate for the plaintiffs to fail to provide the Dole defendants with constitutional Due Process when serving the Costa Rican lawsuit. Because of the court of appeals' opinion, this Court will address the effect of Judge Lake's f.n.c. order where it was later determined that his Court lacked subject matter jurisdiction.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE MOTION TO REINSTATE.

Along with having no adequate remedy on appeal, the Dole defendants can show the trial court abused its discretion by granting the plaintiffs' motion to reinstate. *In re The Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004).

The Court of Appeals is Wrong: The 1995 Judgment Is Not Void.

The court of appeals allowed itself to be sidetracked into deciding that Judge Lake's 1995 judgment was voided by the intervening change in decisional law in *Patrickson*. *In re Standard Fruit Co.*, 2005 WL 2230246 (Tex. App.—Houston [14th Dist.] Sep. 13, 2005) (reh'g denied Jan. 26, 2006). The court of appeals' opinion is flat wrong. As a matter of federal law, when a jurisdictional issue is litigated on direct appeal and affirmed, subsequent changes in the law do not act retroactively to void the judgment. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2003); *see* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4468 (2002). The Fourteenth Court may not disregard Judge Lake's judgment dismissing the plaintiffs' claims for *forum non conveniens*. The Fourteenth Court's decision that Judge Lake's f.n.c. order is void is a collateral attack prohibited by the United States Supreme Court in *Stoll* and its progeny. *See Durfee v. Duke*, 375 U.S. 106, 112 (1963).

There is no authority, and none cited by the Fourteenth Court, for the proposition that a judgment is void *ab initio* for lack of jurisdiction following a change in the decisional law by the United States Supreme Court. Indeed, the law is to the contrary. See *Gschwind*, 232 F.3d at 1346; *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 749 (5th Cir. 1995) (denying Rule 60(b) relief based on subsequent change in Supreme Court decisional law).

The Fifth Circuit affirmed Judge Lake's 1995 f.n.c. judgment in an opinion that the United States Supreme Court declined to review before it decided *Patrickson*. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000). As a result, Judge Lake's decision to assert subject matter jurisdiction over this action and his decision that plaintiffs' claims be dismissed for *forum non conveniens* are not void. As a valid judgment, the trial court—and the Fourteenth Court—had no choice but to give it full effect.

Judge Lake's Return Jurisdiction Clause

Judge Lake's return jurisdiction clause provided the standard for permitting the Plaintiffs to bring their actions back to the United States. Under this clause, if "the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction . . . ," the plaintiffs would be able to file their claim back in Texas. *Delgado*, 890 F.Supp. at 1357.

Here, the plaintiffs did not obtain a valid dismissal for lack of jurisdiction from the Costa Rican Supreme Court. The Dole defendants were never properly provided with constitutionally adequate notice and an opportunity to be heard in

the Costa Rican Court. Instead of providing the basic Due Process requirements, the plaintiffs obtained an *ex parte* dismissal from the trial court *before* the Dole defendants were required to designate their agent for service in Costa Rica.

***The Dole Defendants Were Not Provided Adequate Notice of Suit
and an Opportunity To Defend In Costa Rica***

Under the law of the United States, a foreign judgment cannot be enforced unless it was obtained under a system with procedures compatible with the requirements of due process of law. *Hilton v. Guyot*, 159 U.S. 113, 205-206 (1895). One element of the American notion of due process is notice. As such, United States courts should not enforce a judgment obtained without the bare minimum requirements of notice. *International Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003); *see* RESTATEMENT (SECOND) CONFLICT OF LAWS § 92(b).

In *Hilton*, the United States Supreme Court held that principles of comity allow recognition of a foreign judgment only if:

[T]here has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, *after due citation* or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment[.]

159 U.S. at 202-03 (emphasis added).

This Court previously used *Hilton* to deny giving a Mexican judgment preclusive effect where the Mexican court proceeding appeared to have been

“arbitrary in its nature and summary in its execution.” *Banco Minero v. Ross*, 106 Tex. 522, 537, 172 S.W. 711, 715 (1915). In reaching this conclusion, this Court explained the general principles of law governing the standing of a foreign judgment. *Id.*, 106 Tex. at 536, 172 S.W. at 714. Three of these principles are applicable here: (1) jurisdiction of the parties and the cause, (2) an opportunity for a full and fair trial, and (3) fraud in the procurement of the judgment. *Id.*; *see, e.g., Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 894 (N.D. Tex. 1980) (listing *Hilton* factors); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS, § 104. The most important of these requirements is “that an opportunity for a full and fair trial was afforded.” *Banco Minero*, 106 Tex. at 537, 172 S.W. at 714.

This Court’s and the United States Supreme Court’s requirements for comity prevented the trial court from recognizing the *ex parte* Costa Rican judgment because there was no service of process meeting the due process requirements under the U.S. Constitution. The notice the Dole defendants received was not “reasonably calculated, under all the circumstances,” to afford them a “reasonable time in which to make [an] appearance” in the Costa Rican suit. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950).

The Costa Rican suit was dismissed twenty-three days after it was filed, seven days after the Dole Defendants received a courtesy copy of plaintiffs’ Costa Rican petition, and forty-two days before the Dole Defendants were required to designate an agent for service the process. Seven days informal notice of suit violates United States Due Process because it did not afford the Dole Defendants

a reasonable time to make an appearance in the Costa Rican suit. *See Mullane*, 339 U.S. at 314.⁶ This informal notice, a week before the dismissal, makes this Costa Rican proceeding appear to be “arbitrary in nature and summary in its execution.” *Banco Minero*, 106 Tex. at 537, 172 S.W. at 715.

Without adequate notice of suit, the Dole defendants were denied the opportunity to appear and defend the suit in Costa Rica, despite having agreed to submit to Costa Rican jurisdiction. While the harm from failure to provide notice usually manifests itself in the form of a judgment against the absent defendant, these circumstances are equally as harmful.

Depriving the Dole defendants of the fundamental Due Process right to notice constitutes a clear abuse of discretion for which there is no adequate remedy on appeal. Plaintiffs’ failure to provide adequate notice of suit and an opportunity to defend violates fundamental Due Process. Thus, by relying on the Costa Rican *ex parte* void judgment to reinstate this case, the trial court violated the Dole defendants’ Due Process rights, and as a result, committed a clear abuse of discretion.

Plaintiffs Did Not Prosecute Costa Rican Actions in Good Faith.

After the f.n.c. order, Judge Lake issued another order requiring the Plaintiffs to prosecute their action in good faith in the foreign countries. (App. B, p.3). Bringing a claim in a foreign court was not to be a “perfunctory act designed

⁶ Because the Dole Defendants only received informal notice of the suit, they had no notice of the procedures for filing an answer in Costa Rica. If the Dole Defendants had guessed and followed Texas or federal procedures for filing an answer, they would have been too late. *See* TEX. R. CIV. P. 99(b); FED. R. CIV. P. 12(a).

to result in the dismissal of the actions.” Judge Lake’s admonishment to plaintiffs to proceed in good faith is a “guiding rule and principle of law” that the trial court is required to follow.⁷ Plaintiffs’ actions were not in good faith. *See supra*, pp. 2-4; App. F (Due Process timeline). As a result, Respondent abused his discretion by reinstating plaintiffs’ claims.

Costa Rican Courts Did Not Review Jurisdiction

The Dole defendants’ expert, former Costa Rican Supreme Court Justice Ricardo Vargas Hidalgo, explained that the Costa Rican Supreme Court “could not begin to review, nor did it review the merits of the [plaintiffs’] case, especially the issue of the jurisdiction of the [trial court].” (2:R, ¶ 10). Plaintiffs’ expert, Professor Garro, agrees with Vargas, stating:

The defendants emphasize that neither Costa Rican Superior Second Civil Court, Second Section (the “Appellate Court”) nor the First Chamber of the Supreme Court (the “Supreme Court”) in the *Abarca* case ever passed judgment on the merits of the jurisdictional questions. *I agree with that contention.*

(1:K:6-7, ¶ 4)(emphasis added). Indeed, the Costa Rican Court of Appeals recognized that plaintiffs did not even appeal the jurisdictional ruling made by the trial court. (App. D, Fourth Whereas Paragraph). As the Costa Rica Court of Appeals explained dismissing plaintiffs’ appeal, it was plaintiffs’ petition that “confused the Judge into making the analysis which he did” and that it appeared to

⁷ Other courts have denied reinstatement where the plaintiff procures dismissal in the foreign court. *See Cruz v. Maritime Co. of Philippines*, 655 F.Supp. 1214, 1215 (S.D.N.Y. 1987) (The plaintiffs’ deliberate procurement of a dismissal to lack the good faith necessary to allow reinstatement).

be plaintiffs' "manifest interest" to proceed in the United States. (App. D, Third and Fourth Whereas Paragraph).

Other DBCP Cases Allowed to Proceed Against Dole Defendants.

Along with manipulating their Costa Rican petition to ensure a dismissal, plaintiffs' lack of good faith is demonstrated by three other related Costa Rican cases, *Rivas Ramirez*, *Rivas Ledezma*, and *Montero Mejias*, wherein Costa Rican courts maintained jurisdiction over similar DBCP personal injury claims. Significantly, *Rivas Ledezma* and *Rivas Ramirez* were originally part of the Delgado suit that was dismissed by Judge Lake on *forum non conveniens*, and were filed on the same day as *Abarca*. With essentially the same facts, but different pleadings, the Costa Rican Supreme Court has never affirmed a dismissal for lack of jurisdiction in a DBCP personal injury matter. In fact, the Supreme Court did allow the *Rivas Ramirez* case, which was also part of the consolidated federal case dismissed by Judge Lake, to proceed in Costa Rica. (App. I). As such, Costa Rican courts could and should have jurisdiction over plaintiffs' claims.

II. THE DOLE DEFENDANTS HAVE NO ADEQUATE REMEDY ON APPEAL.

This is a mass toxic tort case involving at least 4,137 Costa Rican plaintiffs, and potentially more. This large number of claims to which the Dole defendants will be exposed if the trial court's abuse of discretion is not corrected is one reason why appeal is an inadequate remedy. *CSR Ltd. v. Link*, 925 S.W.2d 591, 596

(Tex. 1996, orig. proceeding); see *In re The Prudential Ins. Co.*, 148 S.W.3d at 136.

Additionally, mandamus is appropriate here due to the combination of the loss of a fundamental Due Process right—the right to notice and an opportunity to be heard—in a mass toxic tort case. As in *Link* and *Masonite*, mandamus is appropriate here because this mass toxic tort case meets the exceptional circumstances test because of the potential drain on public resources. See *In re Masonite*, 997 S.W.2d 194, 197 (Tex. 1999); *Link*, 925 S.W.2d at 596-97. The strain on the Dole defendants and the judicial system’s resources caused by being forced to litigate thousands of foreign claims in the United States virtually eliminates their ability to vindicate the loss on appeal of the fundamental right to notice. See *id.* at 694; *In re E.I. Du Pont de Nemours & Co.*, 92 S.W.3d 517, 524 (Tex. 2002). Exercising this Court’s discretionary review to evaluate and decide this case will be a prudent use of judicial resources. *Id.* at 524.

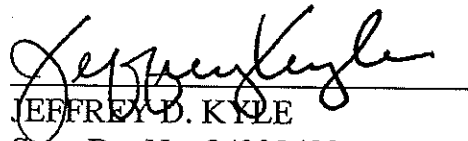
PRAYER

FOR THESE REASONS, Relators respectfully request that this Court request full briefing on the merits; grant their petition for writ of mandamus; issue an order directing Judge Criss to deny the motion to reinstate; and that it issue an order stating the factors to be addressed by a trial court when considering a motion to reinstate in these circumstances. Relators also request all other relief to which they may be entitled.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Jeffrey Kyle", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that today, April 27, 2006, a true and correct copy of the Petition for Writ of Mandamus was served on the following attorneys for the real parties in interest under the appropriate Texas Rules of Appellate Procedure by delivering the brief via certified mail, return receipt requested:

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JEFFREY D. KYLE

VERIFICATION

STATE OF TEXAS §

BRAZORIA COUNTY §

Before me, the undersigned notary, on this day personally appeared Jeffrey D. Kyle, a person whose identity is known to me. After I administered an oath to her, upon her oath she said the following:

1. "My name is Jeffrey D. Kyle, I am capable of making this affidavit, and the facts in this affidavit are true and correct.
2. I am an attorney for relators. All documents included with this petition for writ of mandamus are true copies.
3. I have read the petition for writ of mandamus and the facts stated in it are within my personal knowledge and are true and correct."

Sworn to and Subscribed before me by Jeffrey D. Kyle on April 26, 2006.



Jeffrey D. Kyle

Dayna Laughlin

Notary Public in and for
the State of Texas

My commission expires: *July 12, 2007*