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No. 06-0344

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ANDREW WEBER, Clerk  
By \_\_\_\_\_ Deputy

IN THE  
SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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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

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**RELATORS' REPLY**

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ATTORNEYS FOR RELATORS  
Date: June 2, 2006

**ORAL ARGUMENT REQUESTED**

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## ARGUMENT

### I. JUDGE LAKE'S F.N.C. DECISION IS VALID AND ENFORCEABLE.

Missing from the plaintiffs' response is Judge Lake's plainly stated finding that his 1995 judgment and f.n.c. dismissal is "neither void nor invalid." *Delgado v. Shell Oil Co.*, 322 F. Supp.2d 798, 814-15 (S.D. Tex. 2004). Judge Lake explains that his 1995 Order is both valid and enforceable:

- "Despite the change in Supreme Court decisional law effected by [*Dole Food Co. v. Patrickson*, 123 S. Ct. at 1655, the court's f.n.c. dismissal remains valid and enforceable." *Id.*, at 814 (citing *Stoll v. Gottlieb*, 59 S. Ct. at 137, and *Gschwind v. Cessna Aircraft Co.*, 232 F.3d [1342] at 1346 [10th Cir. 2003]);
- "[B]ecause the f.n.c. dismissal became final before the change in decisional law effected by *Patrickson*, 123 S. Ct. at 1655, the court concludes that the return jurisdiction clause remains available as an avenue for plaintiffs to reinstate their claims in other American fora." *Delgado*, 322 F. Supp.2d at 814 (citing *Stoll*, 59 S. Ct. at 137, and *Gschwind*, 232 F.3d at 1346); and
- "While the court is persuaded that *Patrickson* precludes it from resuming jurisdiction over plaintiffs' substantive claims, the court is not persuaded either that *Patrickson* requires it to vacate the f.n.c. dismissal, or that vacatur is needed to preserve the plaintiffs' ability to return to an American forum if and when foreign fora are-or become-unavailable or inadequate." *Delgado*, 322 F. Supp.2d at 814-15.

Judge Lake also concluded "that the question posed by plaintiffs' motion to reinstate, i.e., whether plaintiffs' claims should be returned to an American forum, must now be addressed by the only courts to which those claims can be returned, i.e., the state courts of Texas." *Id.*, at 815. Thus, contrary to plaintiffs' one-sentence selection from his opinion, Judge Lake is clear that his Order is a final,

valid and enforceable judgment. The order is also clear that only Texas courts can answer the question: Did the plaintiffs comply with the return jurisdiction clause?

To evade the return jurisdiction clause's requirement to proceed in good faith, the plaintiffs rely on several inapposite authorities. *All* the authority cited by plaintiffs involve direct appeals of a district court's action. Here, the plaintiffs' direct appeal was denied. *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000). *None* of the cases cited by plaintiffs dealt with a change in the decisional law by the United States Supreme Court after the losing party has completed all direct appeals to the Supreme Court. Furthermore, *none* of the cases deal with situations where a Rule 60(b) motion is dismissed after the change in the decisional law. *Delgado v. Shell Oil Co.*, 537 U.S. 1229 (2003) (denial of motion to reconsider certiorari after *Patrickson*); see *Tomlin v. McDaniel*, 865 F.2d 209, 211 (9th Cir. 1989) (denying Rule 60(b) relief based on subsequent change in Supreme Court decisional law).

At bottom, Judge Lake's decision was final years before the United States Supreme Court issued the *Patrickson* decision. The Supreme Court decided *Patrickson* after Judge Lake's decision was final, had been appealed, and acted upon. *Patrickson* was issued:

- After the dismissal for *forum non conveniens* was final;
- After plaintiffs acted on the f.n.c. dismissal by filing petitions in Costa Rica;
- After the Fifth Circuit affirmed Judge Lake's conclusion that the Dead Sea entities were "foreign states" under the FSIA and the

resulting f.n.c. dismissal. *Delgado v. Shell Oil Co.*, 231 F.3d at 176; and

- After the Supreme Court denied plaintiffs' application for certiorari. *Delgado v. Shell Oil Co.*, 532 U.S. 972 (2001).

Since the f.n.c. order is valid and enforceable, the return jurisdiction clause—with its good-faith requirement, is “upon the same footing, . . . , with domestic judgments of the states, whenever rendered and wherever sought to be enforced.” *Embry v. Palmer*, 107 U.S. 3, 10 (1882); *Stoll*, 305 U.S. at 171-72. Accordingly, this Court does not have the power to reconsider Judge Lake's subject matter jurisdiction determination or his conclusion that his prior orders were not void. *See Stoll*, 305 U.S. at 172; *Durfee v. Duke*, 375 U.S. 106, 112 (1963).

This Court should not accept the plaintiffs' invitation to ignore valid and enforceable federal court judgments. Instead, this Court should find that Judge Lake's order—and its return jurisdiction clause—is neither void nor invalid. By ignoring the f.n.c. order and its return jurisdiction clause, the trial court abused its discretion, and the court of appeals was incorrect, by deciding to ignore Judge Lake's valid order.

## **II. PLAINTIFFS DID NOT PROSECUTE COSTA RICAN ACTION IN GOOD FAITH.**

Violating the return jurisdiction's clause's good faith requirement, the plaintiffs brought their claim in Costa Rica with the sole purpose of returning to the United States. Justice Richard Hidalgo, former Justice of the Supreme Court



of Justice in Costa Rica explained that the plaintiffs' purpose was to have the Costa Rican Court deny jurisdiction:

8. I have had the opportunity to read the complaint of the plaintiffs in the Abarca case and *in all my years of professional practice and teaching of law, I have not seen a presentation of this nature which has as its purpose the petition that the judge reject the suit because of lack of jurisdiction.* It is my judgment that the plaintiffs filed their petition in such a manner that the judge could only reject the case. [2:R, 2 (emphasis added)]

Plaintiffs' purpose was fulfilled when they secured an improper *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 to the proceedings. [App. B:7].

The Dole defendants had the right—granted to them by Judge Lake—to have these claims resolved in the more convenient and appropriate Costa Rican forum. Other brought-in-Texas-first DBCP cases moved to Costa Rica were heard by Costa Rican Courts. [2:R; 2:V]. Thus, if the plaintiffs were to bring and to serve their claims against the Dole defendants in Costa Rica, the plaintiffs' claims could be heard in Costa Rica.

### **III. THE DOLE DEFENDANTS ARE ENTITLED TO MANDAMUS.**

By depriving the Dole defendants of their Due Process rights and ignoring a valid federal court order, the trial court abused its discretion by unconstitutionally reinstating the plaintiffs' claims. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Judge Lake's f.n.c. order permitted reinstatement only after Costa

Rica's highest court affirmed the dismissal of the case for lack of jurisdiction. Rather than enforce the requirements of the f.n.c. order, the trial court effectively ignored Judge Lake's valid and enforceable order.

As in *In re AIU Ins. Co.*, only the plaintiffs benefit when the trial court ignores the requirements of the return-jurisdiction clause in the f.n.c. order. *See* 148 S.W.3d 109, 117 (Tex. 2004). In comparing the respective burdens on the parties, the Dole defendants' have the burden of participating in a series of trials for thousands of plaintiffs and then appealing to vindicate the rights granted by them by the binding federal court orders is great. On the other hand, any burden to the plaintiffs results solely from their purposeful efforts to undermine their own Costa Rican litigation to circumvent those binding federal court orders. *Id.*

The trial court also abused its discretion by reinstating the Costa Rican claims where the Costa Rican Court did not affirm a dismissal for lack of jurisdiction. Justice Hidalgo explained that the Costa Rican Supreme Court "could not begin to review, nor did it review the merits of the case, especially the issue of the jurisdiction of the [trial court]." [2:R, ¶ 10]. Plaintiffs' expert, Professor Garro, and the Costa Rican Court of Appeals agree with Justice Hidalgo that the Costa Rican Court did not affirm for lack of jurisdiction. [1:L:6-7, ¶ 4; App. D, ¶ 4].

There is no adequate remedy on appeal for the reinstatement of plaintiffs' claims based upon an *ex parte* void Costa Rican judgment that was obtained in violation of Due Process. The large number of cases currently filed—and that

potentially may be filed—from Costa Rican banana workers alleging exposure in Costa Rica is a significant factor in this court’s determination that appeal is not an adequate remedy in this case. In *CSR Ltd. v. Link*, this Court recognized that “extraordinary circumstances” making any appeal inadequate stem from the problems inherent in “many, if not all, mass tort cases.” 925 S.W.2d 591, 596 (Tex. 1996). The instant case is the type of mass tort litigation placing a significant strain on the defendants and the justice system’s resources. This case also creates considerable pressure for the Dole defendants to settle the plaintiffs’ claims, regardless of the merits.

Consequently, the Dole defendants have no adequate remedy on appeal because, as this Court has explained, valuable constitutional rights, once lost at trial, cannot be restored by a favorable jury verdict or vindication on appeal. *See, e.g., Tilton v. Marshall*, 925 S.W.2d 672, 694 (Tex. 1996) (granting mandamus for violation of First Amendment rights).

This Court has previously conditionally granted mandamus relief for orders denying *forum non conveniens* in a mass tort case, *In re E.I. DuPont de Nemours & Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002), to enforce an arbitration clause in a contract, *Anglin v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992), and to overturn a gag order infringing on free speech. *Grigsby v. Coker*, 904 S.W.2d 619 (Tex. 1995) (per curiam); *Davenport v. Garcia*, 834 S.W.2d 4, (Tex. 1992). Mandamus will also issue to prevent a court from inquiring into the veracity of a defendants’ religious beliefs. *Tilton*, 925 S.W.2d at 694. The Due Process rights at issue are

as important as the interests protected in these other cases. As such, the Dole defendants are entitled to mandamus relief.

#### **IV. THE DOLE DEFENDANTS WERE DENIED DUE PROCESS**

The plaintiffs misused the Costa Rican judicial system and did not properly serve the Dole defendants with process. This failure to give notice violates the most rudimentary demands of Due Process: Notice and an opportunity to appear. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988).

Interestingly, plaintiffs attempt to distinguish United States Supreme Court and this Court's Due Process opinions as non persuasive because they are (1) old and (2) concern defendants. Due Process principles, however, apply equally to *all* judgments and *all* parties. One of these fundamental principles is that foreign judgments cannot be enforced unless they were obtained under a system compatible with the requirements of Due Process. *See Hilton v. Guyot*, 159 U.S. 113, 205-206 (1895). Since the Dole defendants did not receive constitutionally adequate notice of the Costa Rican suit, the *ex parte* Costa Rican judgment should not have been given preclusive effect because the court proceedings were "arbitrary in nature and summary in its execution." *Banco Minero v. Ross*, 106 Tex. 522, 172 S.W. 711, 715 (1915).

#### **V. LACHES DOES NOT BAR RELIEF.**

Finally, the doctrine of laches does not bar the Dole defendants' petition for mandamus. In each of the cases cited by plaintiffs, the delay was in bringing the initial mandamus proceeding. Plaintiffs' cases do not deal with bringing an

original proceeding in the Texas Supreme Court after receiving an adverse judgment in the court of appeals. There was no delay in bringing the mandamus petition to the court of appeals.

Unlike Appellate Rule 53.7(c)'s 45-day deadline for filing a petition for review, Appellate Rule 52 has no deadline for filing an original proceeding in this Court or the court of appeals. *Compare* TEX. R. APP. P. 52 *with* TEX. R. APP. P. 53.7(c); *see* McDonald & Carlson, TEX. CIV. PRAC. 2d, § 35:19. Rule 52 also has no mechanism for receiving an extension of time to file an original proceeding in this Court. Considering that the instant proceeding—which has made two trips to the United States Supreme Court—began in 1993, and that the Dole defendants' counsel were preparing for and in a four-week trial after the court of appeals' denied the motion for rehearing, the Dole defendants did not delay in filing this petition with this Court. As a result, laches does not preclude the Dole defendants' relief.


#### 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 Respondent 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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## CERTIFICATE OF SERVICE

I certify that today, June 2, 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 Petitioner's Reply via certified mail, return receipt requested:

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