UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22693-HUCK

MIGUEL ANGEL SANCHEZ
OSORIO, et al.,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC.,
et al.,

Defendants.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DOLE FOOD COMPANY, INC. AND THE DOW CHEMICAL COMPANY'S MOTION FOR ENTRY OF PROTECTIVE ORDER PURSUANT TO F.R.C.P. 26(C)

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INTRODUCTION

Although this case was originally filed in Nicaragua in February 2002, a judgment obtained in August 2005, and an enforcement begun in Florida in August 2007, it is not until now, nearly two years after the enforcement was filed and over seven years after the case originally began, that Plaintiffs finally learn of the alleged fraud Defendants claim was committed in Nicaragua. Tellingly, when all four Defendants originally answered, they each included a one sentence fraud defense plead with absolutely no particularity. *See* D.E.# 1-4. After the Court ordered the parties to amend their answers, only Dole continued to assert a fraud defense— Dow Chemical, Occidental Chemical, and Shell Oil dropped it entirely from their Amended Answers. *See* D.E. # 50-53. And Dole, the only one to still assert it, again included a one sentence defense that did not state the who, what, when, and where of the fraud as required by Fed. R. Civ. P. 9(b). Clearly, they possessed no credible evidence of fraud.

Yet now, based on secret, unprecedented proceedings that took place in California in a different case involving different plaintiffs and different counsel— and in which Plaintiffs has absolutely no involvement— Dole and Dow come before this Court in order to submit all of this secret discovery that was the product of a flawed discovery process and request, once again, that the very individuals that can unmask its inaccuracies be excluded. This was their game plan all along: to use the California proceedings more to impugn Provost— and more importantly, this judgment— than for anything else. Dominguez' judgments in California totaled a mere $1.5 million; this one here, totals $97 million. If, as Defendants maintain, the goal is to investigate the alleged fraud, then submission of *Mejia* discovery will only obstruct that process as will excluding the very people that can shed some light on it. It is rather curious that Defendants seem so intent on keeping this evidence hidden from Provost despite their absolute certainty that a massive fraud was orchestrated in Nicaragua. What do they have to hide? A quick perusal of this secret "evidence" and how it was obtained helps to answer that question.

FACTUAL BACKGROUND

I. All of Defendants' Attached "Evidence" was Collected *Ex Parte*, Separate From These Plaintiffs and Lawyers, and All Pursuant to an *Ex Parte* Order

Plaintiffs— including the Provost & Umphrey Law Firm, L.L.P. ("Provost") and its U.S. lawyers– are for the first time seeing "evidence" on the record that Defendants recklessly suggest implicate them in some sort of threatening or fraudulent conduct in Nicaragua.[1] Every single deposition

[1] Far too long the Defendants have been in control of the exchange of this "evidence," despite the requirement that it be plead with particularity. Plaintiffs contend that all of this evidence, as it were, not only fails to plead particulars, but comes too late. Moreover, to the extent the Defendants are holding back any

transcript— meticulously gathered, edited and redacted by Defendants via discovery without Provost— attached to Dole and Dow's Motion for Entry of Protective Order Pursuant to F.R.C.P. (26)(C) and Memorandum of Law in Support Thereof (hereinafter "Protective Order Motion") was collected under an unprecedented "protective order" that was, in fact, originally written by Gibson Dunn, Dole's counsel, and submitted *ex parte* to Judge Victoria Chaney in violation of California's procedural rules. The very terms of Gibson Dunn's protective order precluded Provost and its clients from participating in the collection— and cross-examination— of this "evidence" gathered in Nicaragua.

Plaintiffs never had the opportunity to participate in the drafting of any of these orders in the California trial cases, let alone effectively participate in any of the secret depositions that took place in Nicaragua. Plaintiffs never had the opportunity to object to any of this "evidence" pouring into the California record (and now into this record) despite a plethora of evidentiary failings, not the least of which is it is based on hearsay upon hearsay unvetted by effective cross-examination. And Plaintiffs, as well as their counsel from Provost, were never allowed to see this secret evidence that Defendants told this court was evidence of "intrinsic and extrinsic fraud" by Provost and Nicaraguan counsel–fraud allegations which have yet, despite missed deadlines and Court orders, to be pled with particularity.[2]

What is more, and equally important to demonstrating how Plaintiffs' due process rights are being violated by this *Mejia* evidence, is the basis upon which Judge Chaney signed the protective order— threats of intimidation and reprisal of witnesses by J.J. Dominguez and his group. *See* Ex. 28 to Protective Order Motion. But Provost is not J.J. Dominguez. Never— and it is worth repeating never— have Mr. Sparks, Mr. Fisher, or the Provost law firm worked on any cases with J.J. Dominguez, Mr. Ordeñana (his Nicaraguan counsel), or any of Dominguez' Nicaraguan co-counsel.

II. Mark Sparks, Joe Fisher, and the Provost Law Firm Are Not J.J. Dominguez

The Provost & Umphrey Law Firm, L.L.P. and its U.S. lawyers— including Sparks and Fisher— are not J.J. Dominguez, nor have they ever joint-ventured any cases with J.J. Dominguez. Provost is a Texas law firm with its principal office in Beaumont, Texas; Mark Sparks and Joe J. Fisher, II are Texas lawyers not licensed to practice law in California. The Dominguez firm is a California firm

more of this "evidence," Plaintiffs reserve the right to object to any later pled "evidence."

[2] The suggestion that Judge Chaney's order somehow prevented Defendants from pleading with particularity any of this "evidence" about "fraud" is belied by the ease with which they could have simply redacted the names of the witnesses to protect their identities while stating the "who, what, when, and where" of the "fraud." The reason Defendants have not pled any with particularity— except for this alleged March 2003 meeting— is quite simple. There is none to plead, and Defendants seek delay.

with its principal office in Los Angeles, California; Dominguez is a California lawyer not licensed to practice law in Texas. Provost and Dominguez never referred cases to one another; they never joint-ventured any cases; and they certainly never "conspired" on any cases together. Long before Dominguez even made entry into the Nicaraguan banana-worker's litigation, Provost and its Nicaraguan lawyers had already signed up and filed *all* of its Nicaraguan banana-worker cases— vetted, signed, and tested at great expense to Provost. *See* Declaration of Mark Sparks ("Sparks Declaration"), Ex. A, at ¶6; D.E. 1, Nicaraguan Judgment, at p.1 (stating that the case was filed February 18, 2002).

Nonetheless, and despite Provost having vetted, signed, and filed its three thousand seven-hundred and nine (3,705) cases, Dominguez proceeded to sign up over ten thousand (10,000) "banana-workers." It is unclear how many of Dominguez' ten-thousand-plus cases were tested since Provost never coordinated its Nicaraguan activities with him.

In fact, that their disassociation was real is evidenced by what occurred in 2002. After a client meeting, Mr. Sparks learned that J.J. Dominguez was attempting (either wittingly or unwittingly) to sign Provost clients. *See* Sparks Declaration, Ex. A, at 3. In response, in April 2002, Mr. Sparks sent Defendants a letter identifying with particularity the Provost clients so there would be no confusion about representation. *See* Letter, Ex. B. In response, J.J. Dominguez sued the Provost firm as well as Sparks and Fisher on May 6, 2002, which action was removed to federal court on June 16, 2002 and ultimately dismissed on October 16, 2002. *See* Dominguez Complaint, Ex.C; Order of Dismissal, Ex. D. Suffice it to say that Sparks, Fisher, and Provost never worked with Dominguez in Nicaragua on any level, especially not in late 2002 or thereafter, lest they be sued again. *See* Sparks Declaration, Ex. A, at ¶9. Yet, remarkably, it was only months later in March 2003 that the alleged meeting with Judge Toruño took place. There will be more on this alleged "fraud" meeting later, but since the stated purpose of the California "protective order" was to "protect" the witnesses from threats or intimidation by Dominguez, Ordeñana, and their associates, it is to those allegations that we now turn.

III. There is No Evidence That Mark Sparks, Joe Fisher, or the Provost Law Firm Threatened Anyone

Defendants conflate Dominguez for Provost in their motion, mainly because they have no evidence that Sparks, Fisher, or Provost threatened or intimidated anyone, anywhere, anyhow. This is telling on many levels. Defendants had free reign to troll Nicaragua for years for the best evidence of "intimidation" and "fraud" they could find. Yet, there is not a single shred of evidence that Provost or any of its U.S. lawyers "threatened" or "intimidated" anyone, which was the basis for Judge Chaney's

unprecedented protective order. The John Doe witness testimony submitted by Dole and Dow, or at least the pieces they are allowing us to see, utterly fail to even *mention* Sparks, Fisher, or Provost as threatening or intimidating anyone.[3]

The only submitted evidence— and one would hope Defendants are *still* not concealing any— of any possible threats or intimidation from the referring attorneys for Provost comes in the form of a conflation of Provost with Dominguez and his local Nicaraguan attorney, Ordeñana. It is absurd, and frankly offensive, to contend that Sparks, Fisher, or anyone with Provost would harm someone in Nicaragua when the only evidence points to Dominguez and Ordeñana, both of whom have never worked on any Provost cases. Provost's Nicaraguan referral attorneys, including Martha Patricia Cortez, Barnard Zavala,[4] Gustavo Tony Lopez, Jacinto Obregon Sanchez, and Orlando Cardoza, are never mentioned in any of Defendants' secret witness depositions as threatening anyone. The reason is as equally simple as it is for Sparks, Fisher, and Provost— none of them ever threatened anyone.[5]

Take, for example, Exhibit 27 to the Protective Order Motion (with accompanying DVD). This exhibit is a protest apparently organized by Dominguez and his local Nicaraguan attorney, Ordeñana. *See* Protective Order Motion, Ex. 27, at p.D25.16, time-stamp 20:28 & p.D.25.17, time-stamp 22:56 to 23:04. Nowhere in this entire transcript are the names of Sparks, Fisher, or Provost even mentioned— mainly because they had nothing to do with it. Yet this is evidence submitted to the Court to justify keeping the Provost firm excluded.

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[3] *See John Doe 1*, at p. 87:13 to 88:9 (vague reference in a Dominguez deposition to "plaintiffs" who said whoever testified for the transnationals, "let them suffer the consequences"); *John Doe 2*, at p.75:12 to 76:.6 & p.124 (vague reference in a Dominguez deposition to "people in the lawsuit" who will "turn against him"); *John Doe 3*, at p. 99:17 & 100:20-22 (another vague reference to "plaintiffs" in a Dominguez deposition who will "lynch him" if he testifies); *John Doe 5*, at p. 52-54 & p. 119:22 to 120:25 (another vague reference in a Dominguez deposition to "plaintiffs" who will "lynch him"); *John Doe 11*, at pp. 110-111 (testifies in Dominguez deposition that "Mr. Ordeñana and Mr. Blanco" and some "Nicaraguan lawyers" will not let him "back up"); *John Doe 14*, at p. 100:16-23 (testifies in Dominguez deposition that "Ordeñana," who works with Dominguez and not Provost, is a "very violent man" and has concerns for his "safety"); *John Doe Exhibit 15*, at p.74:18 to 76:18 & p.76: 20 to 77:18 (testifies in Dominguez deposition he could get shot by someone); *John Doe 17*, at p. 34:11-12 & p.40:5-9 (no specific information about threat); *John Doe Witness 18*, at 93:3-23 (testifies in Dominguez deposition Nicaraguan attorneys "will be angry").

[4] Zavala worked with Dominguez for a brief period between March and August of 2002 (at which time he had ceased working on the Provost-referred cases), but never shared any information between the offices. *See* Sparks Declaration, Ex. A, at ¶20.

[5] Incidentally, just because a witness is "afraid" of someone else, does not mean that you penalize the parties and lawyers who have nothing to do with that fear.

Defendants, including their investigators Madrigal and Valadez, incessantly scoured Nicaragua for witnesses willing, for a price, to say remarkable things under oath (more on that later). Not a single witness links any threats or intimidation to Sparks, Fisher, Provost or anyone even loosely affiliated with them in Nicaragua for a very simple reason, they never threatened or intimidated anyone.

IV. Flawed Discovery Protocols Make For Flawed Discovery

Yet, with no evidence of threats, the unprecedented *Mejia* protective order not only let the Defendants conceal these witnesses from practically everyone (including Provost), it also hamstrung *Mejia* plaintiff's counsel from any effective investigation or cross-examination. Here's how.

The law firm of Miller, Axline, & Sawyer paired up with Dominguez to try his Nicaraguan cases on the merits, somewhat similar to the Podhurst Orseck firm pairing up with Provost in this enforcement case. Duane Miller and Daniel Boone of that firm knew very little about Nicaragua, as evidenced by Judge Chaney's complete exoneration of them from any of the "fraud" she says Dominguez committed in Nicaragua. As a result, the deposition excerpts attached to Defendant's motion are the tainted product of an order that did not allow for proper cross-examination.

Exhibit 28 of Defendants' motion is the amended order setting out the unprecedented protocol erected to protect the "safety" of these witnesses. *See* Protective Order Motion, Ex. 28, at p. 11. Pursuant to the order, Dole's counsel was allowed to give just a ten-day notice of the secret witness, but only to Miller, Axline, & Sawyer (who knew the least about Nicaragua). *Id.*, at ¶16(a). Moreover, the order specifically allowed the Defendants to conceal all information about this secret witness prior to the ten-day period. *Id.*, at ¶17. Miller-Axline was, in turn, specifically prohibited from sharing any of this information with "any Nicaraguan attorney, associate, employee, agent, or independent contractor working on Messrs. Dominguez and/or Ordeñana's behalf." *Id.*, at ¶16(c). Apparently, a California law firm with little to no experience or connections in Nicaragua was to prepare for a foreign deposition within ten days without coordinating with their Nicaraguan counsel. Moreover, the Miller-Axline firm based in California was then required to produce, seven days before the just-noticed deposition, any statements or recordings of these Nicaraguan witnesses in *their* possession (in California, apparently) without any communication with Dominguez or Nicaraguan counsel. *Id.*, at ¶17(b).

No one else could ever know the "names of the John Doe witnesses," or "information that would allow another person to identify" them, or "the substance of the John Doe Witnesses' anticipated testimony or given testimony." *Id.*, at ¶18(a)-(f) & ¶.20. The mere three lawyers from Miller-Axline could not tell a soul about these witnesses, let alone anyone in Nicaragua where they had scant

experience, because the order said these witnesses could be revealed to no one— well, no one except Judge Chaney herself, four lawyers for Dole, Dole's Vice President Michael Carter, Dole's in-house representative Rudy Perrino, six lawyers for Dow, three lawyers for AMVAC, and of course all their investigators like Valadez and Madrigal who had long since found, prepared, and assisted them in appearing at their depositions at the Hotel Intercontinental in Managua. But even if Miller had more than ten days to know the identity of this heretofore unknown Nicaraguan, so what?

Assume Mr. Miller is sitting in his California office and gets an email from one of Dole's lawyers. In the email is a Latin American name unseen by Miller himself, or at least unfamiliar to him. Miller has just ten days to prepare for a deposition of a person whom he cannot investigate for he cannot call anyone to prepare for the Nicaraguan deposition. And, with respect to Nicaraguan people, there is probably very little on Google about rural Nicaraguans living well below poverty. Indeed, unless these witnesses had already given sworn testimony that was somehow in the possession of Mr. Miller in California— a stretch at best— he could do nothing but walk into the hotel conference room with a blank legal pad and pen, politely shake the hand of Defendants' witness, and listen to things previously unknown to him. The cross-examiner is, all of a sudden, a mere spectator in the discovery process. But not the Defendants and their lawyers. No, at least fifteen representatives of the Defendants were granted the privilege of knowing the witness' identity long before they testified.

V. Flawed Discovery Protocols Encourage *Ex Parte* Depositions of Known Clients

In addition to knowing their identities, they also succeeded in deposing a Provost client, outside of Provost's presence, about the subject of the representation. *See* Protective Order Motion, at p. 11 (regarding John Doe 18). Plaintiffs do not lodge the accusations raised here lightly, as Defendants have done against Sparks and Fisher in this Court sans particularized pleadings or credible evidence, but rather raise the issue based on information obtained from the client.

Irving Jacinto Castro Aguero is a Provost client— this is known to Defendants and has been known for years since both his name and his cedula[6] number appear directly in the lawsuits filed in Nicaragua and served (twice under Nicaraguan law) on these Defendants. And yet, they questioned him outside of Provost's presence in violation of the ethical rules of Florida, California, and Texas.[7] Attached is the affidavit of Mr. Castro where he discusses going to the Intercontinental Hotel in Managua and

[6] Cedula numbers are akin to our social security numbers, often used for identifying Nicaraguans.

[7] *See* Rule 4-4.2 of the Florida R. Prof. Cond., Rule 2-100 of the Cal. R. Prof. Cond., "Communication With a Represented Party," and Rule 4.02 of the Tex. R. Prof. Cond.,"Communication with One Represented by Counsel."

meeting with several lawyers to answer questions. *See* Affidavit of Irving Jacinto Castro Aguero, Ex. E.

Setting aside for the moment that there is now undisputed evidence that Defendants secretly contacted and deposed a person they *knew* to be a Provost client, Judge Chaney found in her June 17 Findings of Fact and Conclusions of Law Supporting Order Terminating Mejia and Rivera Cases for Fraud ("Findings") (presumably on the representation of the Defendants) that these witnesses were credible since they "testified under oath that they had not received money or anything else of value in exchange for their testimony." *See Findings*, Ex. F, at ¶122. Perhaps that is because no one has asked any of these witnesses— and no one *can* ask them as long as they remain Defendants' secret.

Fortunately, Provost discovered that Mr. Castro was paid. Here is what Defendants' own witness actually testified to about his "compensation" for giving his deposition:

> The appearing party states that subsequent to this, on October the eighth, a man by the name of Luis Carrizales, who also identified himself as Dole Representative, a Mexican citizen, turned up at his workplace located at Kilometer 120 on the Sébaco-Matagalpa highway to ask him to appear at a meeting to be held with US lawyers for Dole on October the eleventh in Managua. On October the eleventh, two thousand and eight, Mr. Carrizales turned up at the place of abode of the appearing part, and he took him to Managua in a vehicle, directly to the Metrocentro Inter-Continental Hotel; he was taken to a conference room in which nearly eight people were present, and he does not know their identities, as no one introduced himself/herself; there, he was initially questioned about his life as a labourer on the banana plantations and the work-related activities performed with respect to the application of Nemagon...
>
> The appearing party makes it clear that his entire interview was filmed at such hotel and that he signed said statement, even though the final contents of same were not read to him. At the conclusion of this last interview, Mr. Jose Luis Carrizales took him back to Matagalpa and gave him the sum of four thousand cordobas;[8] equal to his salary for one month.

Castro Affidavit, Ex. E.[9] Of course, no one could ever have found this out under the secret process erected by Defendants in California. It just so happens that because Defendants were unethically discussing the substance of the banana-worker's litigation with one (or more) of Provost's clients,

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[8] And it goes without saying that if Dole is driving the witnesses to and from their depositions in the same day, these cannot be "travel" or "hotel" expenses.

[9] Defendants will surely seek to now impugn the credibility of this witness as a Provost client, which is the same tactic that played out in California. In rejecting Nicaraguan affidavits submitted by Dominguez about bribery, Judge Chaney concluded "[t]hey do nothing to contradict or even challenge the testimony of the John Doe witnesses, all of whom testified under oath that they had not received money or anything else of value in exchange for their testimony." *See* Findings, Ex. F at ¶122. Well, that is not what happened. Dole's investigator paid this particular witness one month's salary after the deposition

Provost found out about it.[10] Apparently, the system set up in California and promoted by Defendants here would permit the *ex parte* contact of clients and then permit them to be paid *after* their deposition.

And so we return to Mr. Miller sitting in his California office. An email comes in. In that email is a name he has never seen before— Irving Jacinto Castro Aguero. Mr. Miller cannot confer with anyone about the identity of that witness. Thanks to the unprecedented secrecy erected in California, Miller was never able to know that, in fact, this was an actual *client* of the Provost firm that was being unethically contacted *ex parte* by Dole who had known his identity for years.

Little is known about the remaining "witnesses" that Dole used to convince Judge Chaney a "fraud" permeated Nicaragua with its "tentacles" reaching everywhere, mainly because no one who can *effectively* investigate and cross-examine these so-called witnesses has been allowed to do so. But, if Mr. Castro is anything like what we can expect to be the *truth* underlying this "evidence," then the "tentacles" of fraud have more to do with Defendants and their investigators *ex parte'ing* Provost clients and paying for the pleasure, than with any "fraud" that Plaintiffs or Provost committed.

VI. The Work Performed by Dole in Nicaragua

What is equally interesting in this regard are Defendants' own submissions that are not bracketed or highlighted. Take, for example, John Doe 3 describing how Dole's investigators approach him (and all witnesses):

> Q: Did Mr. Madrigal and Mr. Cascante tell you they worked for Dole or Standard Fruit?
> A: Yes, they told me they were working for the company. Yes.
> Q: And did they tell you that they couldn't talk to you about your claim[11] and they were only going to ask you about other people's claims?
> A: Yes. . .
> So what I told them yes, at least, you know I worked. I said "Do I have hopes that, you know, maybe some day I'll be compensated? And they told me "Well that's what we're doing, we're looking directly to see who worked there in order— to take court, as I said, you know, "to purge— have this cleared up in

[10] Incidentally, despite all these "concerns" for Mr. Castro's safety, no Defendant has bothered to check on him since they dropped him off and paid him after his deposition. For the record, he is doing just fine and has not been attacked by anyone. *See* Sparks Declaration, Ex. A.

[11] Here, the Defendant's attorney is apparently acknowledging that Dole's investigators are knowingly speaking to a client represented by an attorney about the substance of that litigation. Simply confining the conversation to that witness' specific claim, however, fails to qualify as any exception to the professional rules that prohibit this conduct in California, Florida, and Texas. *See supra*, fn.8.

> order to compensate the people who should be compensated."[12] That's what they told me.

Protective Order Motion, Exh. 3, at p.99:4-12 & p.100. Provost has long known Dole's investigators were trolling Nicaragua with a laptop computer that, according to them, had the true list of Nicaraguan banana workers. *See* Sparks Declaration, Ex. A. The tactic is effective. Dole's investigators locate a witness— here, apparently an active client of either Dominguez or Provost— pull out a laptop computer, and imply to the witness that they are compiling a true list of Nicaraguan workers to "have this cleared up in order to compensate the people who should be compensated." The witness, of course, quickly asserts himself as one of those people "who should be compensated," and thinks by excluding others his chances will increase. Effective. Unethical, but effective.

The *modus operandi* of Defendants has not really changed and Provost has successfully documented via affidavits much of the work being performed by Defendants in Nicaragua. For example, Provost obtained the affidavit of the four-year employee of Judge Toruño who late in 2007 was approached by two investigators who threatened that they knew her name, knew whom she was, knew she had a child (and the child's name), and knew where she lived. *See* Affidavit of Pablita Raquel Salinas Hernandez, Ex. G. These two men told her they "knew" there had been fraud in the court and "they would pay [her] a good sum of money" for testifying about this "fraud." *Id.*

Having no luck with bribing court personnel, Dole's investigators next turned to the "captains" or leaders of the Provost clients, including Jose Francisco Palacios Ramos. *See* Affidavit of Jose Francisco Palacios Ramos, Ex. H. Luis Madrigal unethically communicated with Palacios, a known Provost client, and asked him "to work" for Madrigal since the pay was "very good." *Id.* Moreover, Madrigal told Palacios to investigate whether a secretary for Judge Toruño received a monthly salary from Provost, because if somebody would declare this under oath that person would receive a good quantity of money. *Id.* Moreover, Palacios— whom secret witnesses 13 and 17 place at this alleged March 2003 meeting— specifically denies under oath any such meeting. *Id.*

Next, Dole's investigators turned directly to offering Provost captains more money than Provost was reimbursing them.[13] For example, in late 2007 Luis Madrigal turned to Juan Ramon Ruiz Torres,

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[12] Curious for Dole's investigators to be telling Nicaraguans during evidence collection that they just want to "purge" the bad cases "to compensate the people who should be compensated." As made clear by what they have now accomplished in California, Dole is trying to do no such thing. Instead, it is trying to get away with just the opposite— never paying a dime for the harm they have inflicted in Nicaragua.

[13] Provost reimburses several leaders, or "captains," from Nicaragua to keep in contact and update clients who are located in difficult-to-reach areas. In addition, many are illiterate and do not receive

another Provost client, and offered to pay him to "work" for him. Specifically, he said he would pay him more than what Provost paid to its captains. *See* Affidavit of Juan Ramon Ruiz Torres, Ex. I. And for what would he pay handsomely? To declare that all the people over whom he had been a captain were not really banana workers. *Id.* Dole's investigators asked this witness about this alleged 2003 meeting and he denied any knowledge of it.[14] Dole's investigators also phoned an employee of the Chinandegan office and offered to pay him "for his time." *See* Affidavit Delgado Montiel, Ex. J.

With the brick walls being hit by Dole's investigators trying to bribe court personnel and pay witnesses, the tactic changed. Specifically, Dole's investigators next turned to impugning Provost and its cases. For example, in late 2007, Luis Fernandez working for Dole visited Juan Alberto Herrera Nuñez, another Provost client. *See* Affidavit of Juan Alberto Herrera Nuñez, Ex. K. In that improper meeting, Dole's investigator checked Nuñez' name in his laptop and confirmed Nuñez was "registered" as a true banana-worker in the Nicaraguan fields. *Id.* After telling him that falsehood, Fernandez then proceeded to offer him $25,000 to settle his case. *Id.* Then, *after the offer*, Fernandez asked him whether he was with any attorney, knowing full well he was. *Id.* After Nuñez said he was, Fernandez responded that such was a "pity" because he could no longer make the offer (he had just made) and told him that Provost would never get paid because the amounts requested by the firm were too high. *Id.*

Dole's new strategy of offering $25,000 to known Provost clients soon was accompanied by offers to pay for U.S. deposition testimony. *See* Affidavit of Guillermo Arnoldo Hernandez, Ex. L. Of course, deposition testimony for the California proceeding was valued the most as evidenced by Valadez' (another Dole investigator) *four* visits to known Provost client Hernandez. *Id.* Valadez paid Provost client Hernandez three hundred (300) cordobas for the "trouble caused." *Id.* Then, he proposed Hernandez go to the U.S. to testify about "not knowing" some of the banana workers and told him that his family would have everything guaranteed, not specifying a number. *Id.*

Defendants' "evidence"— the only "evidence" they have yet to share with Plaintiffs— amounts to nothing more than a well-prepared, unvetted, un-cross-examined, unethical communication with known clients, whose depositions were taken in secrecy. If Plaintiffs, through the resources of Provost, can bring these evidentiary failings to light *without having even participated* in these California depositions, imagine what can be done with full, open disclosure and discovery— the way it is supposed to be.

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newspapers or other media. The captains travel great distances to hold smaller, confidential meetings to update clients on the status of their cases, and to communicate questions or information back to the offices.

[14] Based upon Provost's investigation, it appears that this is when the concept of this March 2003 meeting was first floated by Dole's investigators–late 2007. Yet, it was never plead with particularity.

VII. The Alleged March 2003 Meeting

And finally, without further ado, we arrive at the alleged March 2003 meeting. In her Findings, Judge Chaney notes that Defendants took sixteen John Doe depositions under both her original and amended protective order. *See* Findings, Ex. F, at p.¶43. Attached to the Defendants' motion are twelve of these depositions, three of which discuss this purported meeting. According to these three witnesses, at some unspecified time in March of 2003 dozens of persons met in an "exclusive neighborhood" of Chinandega, Nicaragua at the home of Roberto Altimera. Here is a summary of all the witness testimony submitted by Defendants describing who was in attendance at this alleged meeting.

John Doe 13	John Doe 17	John Doe 18
Soccorro Turono (p. 83:21-23) Barnard Zavala (p.88:10) Jaime Gonzalez (p. 85:1-3) Juan Ramon Ruiz (p. 85:1-3) Francisco Palacios (p. 85:1-3) Jose _____ (p. 88:17) Juan Dominguez (p. 89:6-9) Bob Roberts (p. 90:14-16) Ordeñana Hernandez (p. 90:5-7) Martha Cortez (p. 88:10-14) Carlos Gomez (p. 91:16) Benton Musselwhite (p. 90:14-16) Claudia Salazaar (p. 87:5-11) Walter Guiterrez (p. 90:14–17) Jose Rodriguez (p. 85:1-3) Oscar Gomez (p. 87:1-3) Luis Callejas (p. 87:17-19) Francisco Tercero (p. 87:10)	Soccorro Turuno (p. 101:22) Barnard Zavala (p. 97:25) Juan Ramon Ruiz (p.99:6) Francisco Palacios (99:10-14) Juan Dominguez (92:22-24) Bob Roberts (p. 98:1-2) Martha Cortez (p. 97:24, 136:14) Benton Musselwhite (p. 98:1-2) **Mark Sparks** (p. 97:9-10) Walter Guiterrez (p. 98:23) Luica Mendoz (p. 97:25) Pablo Garcia (p. 98:4) Angel Espinoza (p. 98:25) Jacinto Obregon (p. 98:25) Antonio Hernandez (p. 99: 3) Belarmino Valdivia (p. 99:10) Francisco Fletes (p. 99:11) Luis Callejas (p. 99: 17) Carlos Tercero (p. 99: 18) Jose Antonio Gonzalez (p.99:6) Roberto Rosales (p. 99:3-4) Arturo Menezos (p. 99:12) Francisco Tercero (p. 100:12) Edwin Espinoza (p. 103:2)	Succorro Turuno (p. 154:2) Barnard Zavala (p.154:11) Bob Roberts (152:8) Benton Musselwhite (p. 152:4) Pablo Garcia (p. 157:3) Claudia Salazaar (p. 152: 23) Medae (p. 152:22) Dr. Burrios (p. 152:24) Tono Gonzalez (p. 155:8) Belarmino Valdivia (p. 155:8) Marcalino (p. 155:9) Jesus Burrios (p. 155:10) Jaime Gonzalez (p.155:11) Ascanoion Jose (p. 155:11) Ramon Altarano (p. 156:9) Francisco Tercero (p. 158:20-21) Chico Tercero (p. 158:20) Luis ____ (p. 158:1)

First, only one witness, John Doe 17, places Mr. Sparks at this meeting and he denies being at any such meeting. Sparks Declaration, Ex. A, at ¶8. Mr. Musslewhite was also allegedly at this meeting. Strange, however, Benton Musslewhite's passport indicates he was not even in Nicaragua for the entire month of March in 2003. *See* Sparks Declaration, Ex. A, at ¶22; Affidavit of Benton Musslewhite, Ex. M

(attaching passport). In Judge Chaney's recently issued findings, she noted that Dominguez had accused Dole's lawyers of bribing witnesses, but proceeded to exonerate them (Mr. Edelman and Ms. Neuman) after looking at their passports and taking "judicial notice" of them. *Findings*, at ¶122. Yet, Plaintiffs' counsel whom she accuses of fraud were never given an opportunity to do the same. Taking "judicial notice" of Mr. Musslewhite's passport should, as it did in California, put to rest any ill-founded accusations about this purported "meeting" in March 2003. Musslewhite's passport shows he was not even in the country; yet somehow all three (3) witnesses place him— by name— there. And if three witnesses all place Musslewhite at a meeting that he never attended, then that speaks volumes about their credibility on whether this meeting ever even occurred.

There are graver problems regarding the attendance at this alleged 2003 meeting. For example, secret witnesses 13 and 18 place one of the lab directors, Claudia Salazar, at this alleged 2003 meeting. First, attached is the affidavit from Dr. Salazar where she already swore— over a year ago— that she was never at such a meeting. *See* Affidavit of Claudia Patricia Salazar Maineri, Ex. N. As Dr. Salazar testified over a year ago, "it bothers me that other people said I attended such meeting since they can not confuse me; I am the only one who works at the lab and who uses a wheelchair."[15] *Id.*

What is also curious is that these three, secret witnesses describe something even more remarkable. Here, Sparks attended this meeting with dozens of Nicaraguans, and Dominguez himself, to hatch this conspiracy to manipulate the evidence submitted in Nicaragua. This Court is to believe that all these adverse parties and virtually every player in the banana-workers' litigation in Nicaragua set aside their mutual animosity to openly hatch a conspiracy in front of adversaries, strangers, lab technicians, judges, doctors, and clients. Assuming, for the moment, that the March 2003 meeting actually took place with virtually every plaintiffs' firm operating in Nicaragua, let's look at what the witnesses say Judge Toruño instructed the lawyers, labs, and clients to do.

John Doe 17:

> A: And since she was the person in charge so that the lawsuit would be credible in the United States, that the labs had to come up with at least 40 percent of the cases as complete azoospermia and 30 percent oligospermia, and then another 30 percent of cases that were— it was doubtful if they could procreate...
> ... That she said that work would begin on Lawsuits 214 and 215, and they had to be credible with the support and the effort of everyone...

[15] Note that Dr. Salazar correctly identifies these men "from Costa Rican origin," and directly identifies Luis Madrigal by photograph. One need look no further than Judge Chaney's recently signed order to see these are Dole's investigators. *See* Findings, Ex. F, at ¶¶109 & 110.

Q: When Judge Toruño stated that the lab results should be 40 percent azoo, 30 percent oligo, and 30 percent other, was it your understanding that she was indicating those should be the results, regardless of what the tests really showed?
A: Falsified.

Protective Order Motion, Ex. 17, p.104:3-9; p.104:23 to105:1; p.106:10-17.

So at this March 2003 meeting, Judge Toruño commanded all the labs to issue sterility in the following manner:

1) Azoospermia— 40%
2) Oligospermia— 30 %
3) Other Damages— 30%

Moreover, according to secret witness 17, she *expressly* commanded it for both lawsuits 214 (the judgment before this court) and 215 (the other one not before this court). Everyone— the labs, the lawyers, the clients, and even legislators— were in on it; and Toruño was to issue the judgment in accordance with the "falsified" lab reports.

There are several problems with this ill-cross-examined story. First, a vast number of the Provost exams *were already complete* by the time of this alleged March 2003 meeting. Specifically, our review indicates the sterility exam dates for lawsuit 214 were:

1st Exam		2nd Exam	
Before March 2003	134 clients	Before March 2003	3 clients
After March 2003	23 clients	After 2003	118 clients

If there was to be this fraud by *all the labs* for *all the clients* for *both lawsuits 214 and 215*, then why would all these exams for lawsuit 214— the one at issue here— have already been conducted before this meeting took place where the conspiracy was hatched? Defendants will undoubtedly reply "of course the exams pre-date this 2003 meeting, they are all falsified." Well, if all these labs were fraudulently manufactured *after* this 2003 meeting, then the numbers simply do not bear out the percentages that Toruño commanded. One would expect that the judgment before this Court— the product of this mass "fraud" controlled by Toruño and the labs and Dr. Salazar would easily comport with these results (since the labs were in on it too). It does not. Here are the actual percentages in this Judgment:

1) Azoospermia— 4.4%
2) Oligospermia— 22.9 %
3) Other Damages— 73%

See Nicaraguan Judgment, D.E. 1, at "Consideration VII", p. 37-87.

There are several other discrepancies between these three secret witnesses who testify about this alleged 2003 meeting. For example, secret witnesses 17 and 18 testified this alleged meeting lasted a full two hours, while secret Witness 13 says "the meeting didn't last all that long." See John Doe 17, Ex. 17 to Protective Order Motion, at p.109:5-6; John Doe 18, Ex. 18, at p.159:1-4;[16] *but see* John Doe 13, Ex. 13, at p. 95:12-13. And why was Jacinto Obregon Sanchez at this meeting? He's a Managuan lawyer who referred numerous cases to Provost, but all of those are filed in Manauga (two and a half hours away); none were or are before Toruño.[17] *See* Sparks Declaration, Ex. A, at ¶12.

Sure, these are all salient points about these three transcripts, and Defendants may have more waiting in the wings since these are so easily debunked even without effective cross-examination. Just shedding a little light on this secret "evidence" reveals its inadequacy. If Judge Toruño did preside over this fanciful conspiracy hatched at the alleged 2003 meeting, it was the most poorly executed conspiracy in the history of conspiracies since not one of these conspirators could get right the one instruction that she gave them.

And on the topic of conspiracies, is it not curious that in this one meeting in March 2003 Defendants manage to collect every single Nicaraguan banana-worker litigant group to openly hatch this conspiracy in front of strangers, lawyers, judges, and legislators? The Provost group, the Lack Group, the Dominguez Group, and the Gomez Group— all of them happened to be at this meeting before Judge Toruño, even though only one of them had any cases at all before her and even though two (Provost and Dominguez) had just got finished suing each other. Then, with this lone, magic bullet invented in this 2003 Chinandega meeting, Defendants manage to mortally wound every last banana-worker litigation group in Nicaragua. Magic bullets do not exist; and neither did this conspiracy.

ARGUMENT

I. DEPOSITIONS TAKEN IN ANOTHER ACTION INVOLVING DIFFERENT PARTIES AND DIFFERENT COUNSEL CANNOT BE SUBMITTED IN THIS CASE AS SUBSTANTIVE EVIDENCE; DISCOVERY MUST TAKE PLACE HERE

Defendants seek a Protective Order to allow them "to offer all of the evidence obtained in *Mejia* showing that the judgment that Plaintiffs seek to enforce in this case was obtained by fraud."

[16] Remarkably, this particular witness has Judge Toruño speaking for a full two (2) hours.

[17] Also, John Doe 17 says Jacinto Obregon Sanchez is "Attorney for Roberto Ruíz, but they all go together with the Provost Firm." Protective Order Motion, Ex. 17, at p. 88:3-6. Two pages later, his story changes and he testifies Jacinto Obregon Sanchez is "from the Gutiérrez firm: Angel Espinoza, Jacinto Obregón." *Id.*, at p.98: 17-25.

Defendants' motion, D.E. # 245, at p. 1. As evident from the exhibits submitted along with their motion, this evidence consists of depositions obtained in the *Mejia* case. Such evidence is inadmissible in this case as dictated by the Federal Rules of Civil Procedure themselves. Rule 32(a)(8), dealing with depositions taken in an earlier action, clearly states that such depositions "may be used in a later action involving *the same subject matter between the same parties*, or their representatives or successors in interest." Fed. R. Civ. Proc. 32(a)(8) (emphasis added). Rule 32(a)(1)(A) also provides that depositions may be used at a hearing or trial against a party on the condition that "the party was present or represented at the taking of the deposition or had reasonable notice of it." None of these requirements are me here.

Neither the subject matter nor the parties are the same. This is an enforcement proceeding, whereas the *Mejia* action was an original action filed in California. As Plaintiffs have already pointed out in prior pleadings, it is inappropriate to relitigate the case at the enforcement stage. It is for this reason that courts have repeatedly found that only extrinsic fraud is relevant at this stage.[18] The *Mejia* inquiry, thus, was a different inquiry. Discovery in that case involved the underlying merits of the California cases and dealt with the specific plaintiffs and attorneys involved in those cases (J.J. Dominguez to be exact), none of whom are or ever were involved in this case. Just because all of the plaintiffs are Nicaraguan plantation workers does not signify that the subject matter is the same and the inquiry is the same. This is precisely the problem with Defendants' game plan on this issue: they want to lump all Nicaraguan workers together and invalidate all Nicaraguan claims (even though it is undisputed that Dole and Dow manufactured and/or applied DBCP in Nicaragua) based on secret discovery that was conducted in another case involving different parties, different attorneys, and a different inquiry.

Rule 32 does not permit Defendants to do this, however. The Eleventh Circuit Court of

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[18] *See Canadian Imperial Bank of Commerce v Saxony Carpet Co., Inc.*, 899 F. Supp. 1248, 1254 (S.D.N.Y. 1995); *De la Mata v Am. Life Ins. Co.*, 771 F. Supp. 1375, 1388-89 (D. Del. 1991) ("Courts have held that only extrinsic, as opposed to intrinsic, fraud will bar the recognition of a foreign judgment."); *Norkan Lodge Co. Ltd. v Gillum*, 587 F. Supp. 1457, 1461 (N.D. Tex. 1984); *In re D. Purviance*, No. 04-20665-TLM, 2005 WL 2178802, *7 (D. Id. June 9, 2005) ("Nonrecognition is prompted by 'extrinsic fraud'"); *The Standard Steamship Owners' Protections and Indem. Assoc. v C & G Marine Servs. Inc.*, No. 92-0144, 1992 WL 111186, *3 (E.D. La. May 13 1992) ("There is no evidence that the English judgment was procured by extrinsic fraud, and thus the third *Hilton* factor is satisfied."); *Tonga Air Services, Ltd. v Fowler*, 826 P.2d 204, 210 (Wash. 1992). *See also Society of Lloyd's v Sumerel*, No. 2:06-cv-329-FtM-29DND, 2007 WL 2114381, *7 (M.D. Fla. July 20, 2007) ("Florida public policy is not offended because defendant's fraud on the court argument must be addressed to the courts who suffered the alleged fraud–in this case the federal courts in Ohio . . . . Defendant will not be allowed to collaterally attack the Judgement by collaterally attacking the Ohio decisions in Florida."); *Fairchild, Arabatzis & Smith, Inc. v Prometco*, 470 F.Supp. 610, 615 (S.D.N.Y. 1979) ("The fraud must relate to matters other than issues that could have been litigated and must be fraud on the court.")

Appeals has clearly stated that a "deposition taken in a different proceeding is admissible if the party against whom it is offered was provided with an opportunity to examine the deponent." *Nippon Credit Bank, Ltd. v Matthews*, 291 F.3d 738, 751 (11th Cir. 2002). Here, Plaintiffs did not receive an opportunity to adequately examine these witnesses.

First, by the time the issue was raised in this Court, extensive discovery and many depositions had already taken place in *Mejia*. Because Defendants conveniently leave out the dates of these depositions, it is unclear which of these depositions took place before Plaintiffs in this case even knew about the *Mejia* discovery. At one point, undersigned counsel received approximately fifteen deposition transcripts that had already been taken in *Mejia*. Under the clear dictates of the Eleventh Circuit and Rule 32, the Court should not allow Defendants to submit any of these deposition transcripts.

In addition, even with respect to those that took place after the issue was raised, the record reveals that we repeatedly opposed discovery taking place in conjunction with *Mejia* and under a stringent protective order precisely because we could not properly cross-examine these witnesses and defend against allegations of fraud (unpled at that time) if we could not confer with our clients and colleagues at Provost who were knowledgeable about the matter. The Protective Order that Defendants obtained, and that we moved to vacate because it violated First Amendment and Due Process rights, prevented us not only from revealing the names of the witnesses, but also "the substance of John Doe Witnesses' anticipated testimony or testimony" as well as any documents generated through the discovery process. *See* Protective Order, D.E. 189, at ¶14(f) and (g). It prevented us from talking to anyone about the allegations— our clients, other Nicaraguan witnesses that might have relevant and contrary evidence, and our co-counsel who tried the cases in Nicaragua. How could we possibly engage in discovery (largely underway at that point) and effective cross-examination meant to flesh out critical information if we could not discuss the matter with our clients or with the very co-counsel who prepared and tried the cases in Nicaragua?

It is precisely the ability to effectively cross-examine a deponent that is behind Rule 32's requirements.[19] Here, Plaintiffs were not given an opportunity to effectively cross-examine these

[19] *See, e.g. Jefferson Amusement Co. v Lincoln Nat'l Life Ins. Co.*, 409 F.2d 644 (5th Cir. 1969) (finding deposition admissible where "[t]he parties in the proceeding and the case at bar are different, the issues are not substantially the same, and there was no motive in the divorce action to cross-examine [individual] on the issues involved in the present suit."); *Mid-West Nat'l Life Ins. Co. v Bretton*, 199 F.R.D. 369 (N.D. Fla. 2001) (excluding depositions because party in a prior lawsuit did not have the same motive to develop testimony); *In re Paramount Payphones, Inc.*, 256 B.R. 341 (M.D. Fla. 2000) (same); *see also LaBelle v Philip Morris, Inc.*, 243 F.Supp.2d 508, 520 (D.S.C. 2001) (deposition testimony taken in another case was inadmissible in

witnesses and elicit information critical to defend against the allegations of fraud. Similarly, as explained above, *Mejia* plaintiffs' counsel was himself unable to effectively cross-examine these witnesses (one of whom, unbeknownst to him, was a Provost client). And, even if he could, he did not have the same motivation in cross-examining them.[20] Having absolutely no knowledge of our Plaintiffs or their cases, California counsel could not possibly cross-examine these secret witnesses in relation to our cases, especially when (1) he was dealing with a different fraud inquiry specific to the California action and J.J. Dominguez; (2) had absolutely no knowledge of the relationship or involvement of these witnesses with our cases; and (3) had no one at all to turn to in order to obtain necessary information for proper cross-examination. Allowing Defendants to submit this evidence when the parties and subject matter in *Mejia* are not the same and when Plaintiffs in this case never received an opportunity for effective cross-examination would be the height of unfairness and the antithesis of Rule 32. *See Paramount Payphones*, 256 B.R. at 345 (considering the "unfairness" of permitting prior depositions to be used). The Federal Rules of Civil Procedure do not permit this.

If the goal is to get to the bottom of these fraud allegations (as Defendants themselves maintain) and provide both sides with an equal opportunity to present their cases, then this is not the way to do it. The way to accomplish that is by having discovery take place in this case. Allowing Defendants to simply submit the depositions of these secret witnesses that were conducted in another case under a stringent protective order excluding the very counsel with the information necessary to effectively defend against the allegations is not a recipe for truth-finding. Discovery must take place on an even playing field where the rights of both parties are safeguarded. Here, not all Nicaraguan cases could possibly be fraudulent. Yet, Plaintiffs have never been given a chance to show that Defendants' evidence is misleading and untrue because every time they file evidence, Defendants seek the entry of a protective order stopping the Provost firm from showing its inaccuracies.

The only way to get to the bottom of these allegations is to start from scratch in this Court and

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subsequent products liability action against cigarette manufacturer to show existence of safer alternative design for cigarettes, inasmuch as manufacturer never had opportunity to cross-examine deponent); *GAVCO, Inc. v Chem-Trend Inc.*, 81 F.Supp.2d 633 (W.D.N.C. 1999) (depositions taken in earlier, related action involving same plaintiff but different defendants were inadmissible against current defendants, since current defendants had not been present nor represented at depositions).

[20] The Ninth Circuit Court of Appeals has even indicated that the presence of an adversary with the same motive for cross-examination would be insufficient and in violation of Rule 32, finding such a test troubling not only because it "disregard[s] the 'same parties' requirement of Rule 32(a), but it also fails to take into account the possibility that the prior opponent mishandled the cross-examination." *Hub v Sun Valley Co.*, 682 F.2d 776, 778 n.* (9th Cir. 1982).

allow discovery to take place in this Court with the involvement of the Provost law firm. There is no need to address the *Mejia* protective order. That order and the discovery taken under it can remain in California. And the Court need not even consider Defendants' request for the entry of a protective order simply so they can submit *Mejia* discovery.

II. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING GOOD CAUSE FOR THE ENTRY OF A SWEEPING GAG ORDER THAT CONSTITUTES A PRIOR RESTRAINT ON SPEECH AND PREVENTS PLAINTIFFS FROM DEFENDING AGAINST SUCH SERIOUS ALLEGATIONS OF FRAUD

With respect to this case and the need for a protective order governing discovery in this case, an independent evaluation must be made. In this regard, Defendants have yet again failed to meet their burden of demonstrating good cause for the entry of a stringent protective order that restricts communications with our clients and with our-counsel, prevents the involvement of Plaintiffs' counsel of choice, and inhibits Plaintiffs' ability to defend against allegations that could leave them with absolutely no recovery for the harm they suffered.

As Defendants themselves acknowledge, the Federal Rules of Civil Procedure set forth a "good cause" standard for the entry of a Protective Order. The Supreme Court has been very clear in this regard and has stated that "good cause" for a protective order under Rule 26(c) necessitates "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *See Gulf Oil Co. v Bernard*, 452 U.S. 89, 102 n.16 (1981). Numerous lower courts have agreed.[21] In *GOPAC, Inc.*, for instance, the Federal Election Commission sought from defendant the names, addresses, and telephone numbers of the largest contributors and charter members of defendant during a particular cycle. 897 F. Supp. at 618. The defendant argued that these individuals would not likely contribute if in doing so they would be subjected to harassing phone calls. *Id.* To support this argument, plaintiff submitted the affidavit of its executive director stating only that she "believe[d]" that their willingness to continue to be contributors has been adversely affected. *Id.* The court found this to be an insufficient, conclusory statement and stated that the "injury must be both certain and great; it must be

[21] *See Glenmede Trust Co. v Thompson*, 56 F.3d 476, 483 (3rd Cir. 1995) (stating that broad allegations of harm will not suffice); *Federal Election Comm'n v. GOPAC, Inc.*, 897 F.Supp. 615, 617 (D.D.C. 1995) ("To obtain relief, therefore, [party] must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on merely conclusory statements.") (citations omitted); *Bucher v. Richardson Hosp. Authority*, 160 F.R.D. 88, 92 (N.D.Tex. 1994) ("Conclusory assertions of injury are insufficient" for entry of protective order).

actual and not theoretical." *Id.* at 619. And, when Constitutional rights are at stake, as discussed further below, the showing that must be made is even greater. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (the danger cannot be "merely likely," "remote," or "even probable;" it must be imminent).

Here, Defendants have failed to provide any concrete evidence that any of these witnesses has or ever will be harmed. In fact, one of these secret deponents (a Provost client) has come forward regarding his meeting with defense attorneys and he has suffered no repercussions–not only was he not afraid to talk, he was never harmed. Because Defendants have failed to meet their burden in support of sweeping protective order that violates Constitutional rights, Defendants' request for a protective order governing future discovery should be denied.

A. No Concrete Evidence That Witnesses Will Suffer Harm

For starters, Defendants have failed to demonstrate that witnesses who will come forward in this case will be jeopardized and face risk of harm. From the excerpts submitted by Defendants, it appears that the majority of these witnesses do not provide testimony that has anything to do with this case; vague fears suffered by individuals that will not testify in this case is irrelevant. Moreover, all of these superfluous witnesses claim to be afraid of no one in particular, and their fears are directed at unnamed Nicaraguan plaintiffs— the people "over there" (John Doe 1, at p. 87) or "these people" (John Doe 16, at p. 77).[22] John Doe 1, for example, was not threatened by anyone and when questioned further simply stated that he was "told" by some people at some redacted location that some unidentified person made some reference to consequences.

The same holds true for the remaining witnesses that raise the alleged March 2003 meeting (John Does 13, 17, and 18). None of them were ever threatened by anyone. John Doe 13 simply claims that if the "Nicaraguan lawyers" find out, his safety "might" be threatened (p. 16). John Doe 18 claims to be afraid of other banana workers and states that if the "Nicaraguan attorneys" find out, "they'll be angry." The same could be said for any witness; attorneys are disappointed by testimony all the time, but that does not mean that they in turn hurt, intimidate, or threaten such individuals. Turning to John Doe 17, he simply testifies to having been threatened, but any additional information provided by the deponent regarding this matter has been redacted. By whom exactly was this individual threatened?

[22] With respect to any fears of Ordeñana and J.J. Dominguez, such fears have no bearing because this case does not involve either of them and there is no reason for Defendants to be calling witnesses to testify in this case about their Nicaraguan practices. Nonetheless, if the Court finds that there is credible evidence that these two individuals have threatened witnesses, then the solution is to keep the information confidential from these individuals. It is certainly does not justify excluding Provost.

How was he threatened? Presumably it was not by anyone from Provost for surely the additional information would not be redacted, but would be in bold, underlined, highlighted, and waived around.

Such vague, indefinite allegations do not constitute good case to conduct secret discovery that excludes the entire world but for the twenty individuals hand-picked by Defendants. This is especially true when Constitutional rights are at stake. *See Bernard*, 619 F.2d at 474. It is also worth noting that many of these depositions were taken months ago and absolutely nothing has happened to these individuals. Even the Plaintiff (and Provost client) that Defendants unethically deposed outside of the presence of his counsel regarding this case, Irving Jacinto Castro Aguero, spoke out about his deposition testimony and nothing at all has occurred to him— by any plantation worker or by any attorney. *See* Castro Affidavit, Ex. E. Thus, the one secret witness that Plaintiffs learned about given that he was a client was not afraid to discuss his deposition with the very people alleged to be harmful. What is more, no harm befell him when he spoke.[23]

The same holds true for the remaining secret witnesses (if they are even relevant to this case). Relying on deposition transcripts taken months ago of witnesses who have no information specific to this case and who simply claim generalized fears that may no longer exist is not good cause. Yet, because we have been kept in the dark about these deponents, there is simply no way for us to demonstrate to the court that these fears are unsubstantiated. It cannot be that in every case an individual alleges general fear, unspecified and unsupported by any evidence of actual or potential harm, that a protective order is entered excluding the entire world but the cherry-picked individuals chosen by one side.

B. No Evidence That Participation of the Provost Umphrey Firm Will Result in Intimidation of Nicaraguan Witnesses

Worse still, Defendants have presented absolutely no evidence that Provost should be excluded from discovery taken in this case. There does not exist a single shred of evidence that Mark Sparks or any other attorney of the Provost firm has or ever will intimidate anyone. Nowhere in the documents submitted does a single word appear of threats made by Mr. Sparks or anyone from Provost. Mr. Sparks has already told this Court in the Affidavit he submitted along with his Pro Hac Vice Admission, as well as in his attached Affidavit, that he has never threatened, intimidated, or dissuaded any witness in any case from testifying under oath. *See* D.E. # 203.

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[23] Similarly, in *GOPAC*, in response to the affidavit submitted by GOPAC's director alleging only that she "believe[d]" that members would be unwilling to contribute if they received harassing calls, the FEC submitted a declaration containing facts showing that every contributor to whom it spoke voluntarily answered the questions and none complained of harassment. 897 F.Supp. at 618-19.

In the evidence submitted, the only specific individuals that have ever arguably threatened anyone have no relation to these cases— Mr. Ordeñana and Mr. Dominguez. Defendants devote multiple pages of their motion cataloguing everything that these two individuals have done – including offering a bounty to hurt Dole investigator Luis Madrigal, distributing flyers with Mr. Madrigal's picture, threatening violence against Dole's investigators, making threats over the radio, filing a slander complaint, and organizing a public protest. None of these things has ever been done by the Provost law firm or by any Nicaraguan referral attorneys. At no time has Provost threatened Dole's investigators, distributed flyers, encouraged individuals to hurt them, conducted threatening radio broadcasts, or done anything at all to prevent the truth from coming out. This is because they have nothing to hide.

Without any evidence to support a finding that the Provost law firm will threaten witnesses, all Defendants can argue is that "it is highly likely that the identities of the John Doe Witnesses will become known to people who will hurt them if the protected information is revealed to Provost Umphrey or others involved in the fraud." *See* D.E. # 245, at p.7. A conclusory statement such as this one is not enough to support the entry of a protective order regarding future discovery that impinges on First Amendment rights, prevents Plaintiffs from having access to chosen counsel with knowledge to counter these allegations and safeguard their rights and interests, and inhibits Plaintiffs' ability to defend against these allegations. *See Gulf Oil*, 452 U.S. at 104 ("mere possibility of abuses" in class communications does not "justify routine adoption of a communication ban that interferes . . . with prosecution of a class action. . . "); *GOPA C*, 897 F. Supp. at 618 (mere "belief" that harassment was possible was not enough). With respect to Mr. Sparks especially, such a conclusory, unsubstantiated statement falls short for the added reason that he is now before this Court. If Mr. Sparks ever threatens or intimidates anyone, or in any way violates the dictates of this Court, the Court has the ultimate power to sanction him.

Based on the evidence submitted, therefore, Defendants have failed to demonstrate good cause for entering a protective order governing any future discovery.

III. IF THE COURT DETERMINES THAT GOOD CAUSE EXISTS FOR A PROTECTIVE ORDER GOVERNING ANY FUTURE DISCOVERY, THE LEAST ONEROUS ALTERNATIVE REQUIRES INCLUSION OF THE PROVOST FIRM

The Eleventh Circuit has stated that before entering a protective order, a court must evaluate the severity and the likelihood of a perceived harm; the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order. *See In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987). It also involves balancing the interests of the respective

parties. *See id.*; *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). In making this evaluation, "great care" must be taken to avoid unnecessary infringement of a party's ability to prepare a case or defense for trial. *Farnsworth*, 758 F.2d at 1547. And when the protective order impinges on Constitutional rights, the analysis is even more stringent.

This point was made clear in *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (en banc), *aff'd.*, 452 U.S. 89 (1981). In that case, a class action, the district court had entered an order prohibiting the parties and their counsel from communicating orally or in writing concerning the lawsuit with actual or potential class members not a formal party. In reversing the order, the court observed that "[t]he order represents a significant restriction on First Amendment rights"; it observed further that a "[p]rior restraint has traditionally been defined as a 'predetermined judicial prohibition restraining specified expression . . . .'"; and it held that "the order entered in this case is an unconstitutional prior restraint." 619 F.2d at 466-67.

Although the Court recognized that there are limited exceptions to the rule, it stated, "'[b]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'" 619 F.2d at 474. And the prior restraint "must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so." 619 F.2d at 473.[24] In addition, although the *Bernard* Court found it unnecessary to reach other issues implicated by the district court's order, it suggested that the order also raised serious due process concerns: "In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process." 619 F.2d at 478 n. 34.[25]

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[24] Other courts have reached the same conclusion when faced with a protective order prohibiting counsel from communicating with their clients and other interested persons. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1438-40 (9th Cir.), *modified*, 742 F.2d 520 (9th Cir. 1984); *San Juan Star Co. v. Barcello*, 662 F.2d 108, 118 (1st Cir. 1981). *See also Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 162 (3d Cir. 1975) (suggesting that the imposition of a gag order upon counsel "certainly raises serious first amendment issues"); *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98-101 (3d Cir. 1988) (order barring litigants from making extra-judicial statements was an unconstitutional prior restraint).

[25] *See also Doe v. District of Columbia*, 697 F.2d 1115, 1119 ("District courts must be equally chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information," including due process rights "to obtain the assistance of a lawyer in determining the nature of the claims against

In this case, when balancing the interests of the parties, it becomes apparent that even if the Court finds that Defendants have met their burden of demonstrating an imminent need to impinge on Constitutional rights (which they have not), the least onerous alternative involves participation of Provost. Without Provost's involvement, not only will Plaintiffs' Due Process rights and right to chosen counsel be impinged (and Podhurst's First Amendment rights to discuss the matter), but so will the Court's "interest in investigating the fraud," as Defendants put it. Provost's participation (including knowing the identities of any future witnesses) is vital to Plaintiffs' ability to demonstrate that this evidence is misleading and untrue. Having no knowledge of who these individuals are or what relation, if any, they had to our cases or clients, effective cross-examination and presentation of a defense are practically impossible.

And because Defendants have presented no evidence to show that the Provost firm and attorney Mark Sparks will harm or threaten witnesses or will reveal confidential information, there is no justification to inhibit Plaintiffs' ability to present their case. The lack of evidence, in and of itself, precludes their exclusion for the case law is clear that when Constitutional rights are at stake the danger cannot be "merely likely," "remote," or "even probable;" it must be imminent and definite. *Bernard*, 619 F.2d at 474. Even the single case cited by Defendants in support of their position, *Brown v City of Oneonta*, 160 F.R.D. 18, 19-21 (N.D.N.Y. 1995), allowed the identity of a witness to be disclosed to "attorneys employed or retained by the parties and employees of the attorneys." Thus, at the very least, the Court should permit participation of the Provost Umphrey firm under the same confidentiality requirements imposed on everyone else.[26]

CONCLUSION

Because good cause" is lacking for the entry of the sweeping protective Defendants' seek and because *Mejia* discovery is not admissible, Plaintiffs request that the Court deny Defendants' motion.

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him, the opposing arguments available to him, and the manner in which his case would be most effectively presented" as well as the right of a litigant "to the assistance of hired counsel.").

[26] If the Court finds that a protective order is necessary, Plaintiffs request an opportunity to file their proposed version. Because we feel that none is necessary, we find it premature to submit one at this time.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 25, 2009, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. We also certify that the foregoing document is being served this day via transmission of Notices of Electronic Filing generated by CM/ECF on all counsel of record.

Respectfully submitted,

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