UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-01916-MD-MARRA/JOHNSON

IN RE: CHIQUITA BRANDS
INTERNATIONAL, INC. ALIEN
TORT STATUTE AND SHAREHOLDER
DERIVATIVE ACTION
_________________________________/

This Document Relates to:

DERIVATIVE ACTIONS.
_________________________________/

THE SPECIAL LITIGATION COMMITTEE OF CHIQUITA BRANDS INTERNATIONAL, INC.'S NOTICE OF FILING JOINT DECLARATION OF HOWARD W. BARKER, JR., WILLIAM H. CAMP AND DR. CLARE HASLER

The Special Litigation Committee of nominal defendant Chiquita Brands International, Inc., through undersigned counsel, hereby files its Joint Declaration of Howard W. Barker, Jr., William H. Camp, and Dr. Clare M. Hasler in support of The Special Litigation Committee of Chiquita Brands International, Inc.'s Motion to Dismiss and Incorporated Memorandum of Law.

Respectfully submitted,

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By: s/Joseph A. DeMaria
Joseph A. DeMaria, Esq.
Fla. Bar No. 0764711
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system on February 25, 2009. I also certify that the foregoing document is being served this day on all counsel of record registered to receive electronic Notices of Electronic Filing generated by CM/ECF, and in accordance with the Court's First Case Management Order ("CMO") and the June 10, 2008 Joint Counsel List filed in accordance with the CMO.

By: s/Joseph A. DeMaria
Counsel

520113.1

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JOINT DECLARATION OF HOWARD W. BARKER, JR., WILLIAM H. CAMP, AND CLARE M. HASLER

HOWARD W. BARKER, Jr., WILLIAM H. CAMP, and CLARE M. HASLER hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. I, Howard W. Barker, Jr., was appointed to serve as a member of the Special Litigation Committee (the "SLC") of Chiquita Brands International, Inc. ("Chiquita" or "the Company") by the Board of Directors of Chiquita (the "Board") on April 3, 2008.

2. I, William H. Camp, was appointed to serve on the SLC by the Chiquita Board on April 3, 2008.

3. I, Clare M. Hasler, was appointed to serve on the SLC by the Chiquita Board on April 3, 2008.

4. The SLC was authorized by the Board to consider and determine the Company's response to the filing of six derivative complaints between October 12, 2007 and

January 15, 2008 in federal and state courts throughout the country. In March and April 2008, the four federal derivative actions were transferred to this Court by the multi-district litigation panel, and, on September 11, 2008, plaintiffs filed the Verified Consolidated Shareholder Derivative Complaint (the "Amended Complaint").[1]

5. We jointly submit this declaration in support of the SLC's Motion to Dismiss the Amended Complaint. The statements in this Joint Declaration are based upon our personal knowledge.

6. Attached as Exhibit A to this Joint Declaration is the final Report of the SLC, which summarizes the SLC's investigative efforts and findings, and its determinations as to whether, in exercising its business judgment in the best interests of Chiquita and all of its shareholders under New Jersey law, the claims alleged in the Amended Complaint against 26 current and former Chiquita directors and officers should be pursued, dismissed, or otherwise resolved (the "SLC Report"). An Executive Summary is also attached.

7. The SLC Report is organized as follows:

- Section I sets forth an Introduction to the SLC Report. It constitutes a brief summary of the claims alleged in the Amended Complaint, the investigation conducted by the SLC, and the structure of the SLC Report;
- Section II sets forth the process by which the SLC was formed and how the SLC, with the assistance of its counsel, evaluated the independence of its members;
- Section III sets forth the work plan that the SLC followed in investigating the claims alleged in the Amended Complaint;
- Section IV sets forth the factual findings of the SLC;

1 In addition to this multi-district lawsuit centralized in the U.S. District Court for the Southern District of Florida, the SLC's authorization covers the following other state court actions: (i) *Serv. Employees Int'l Union v. Hills, et al.*, No. A07-11383 (Ct. of Common Pleas, Hamilton County Ohio) and (ii) *Hawaii Annuity Trust Fund for Operating Engineers v. Hills, et al.*, No. c-379-07 (N.J. Super Ct. Ch. Div.).

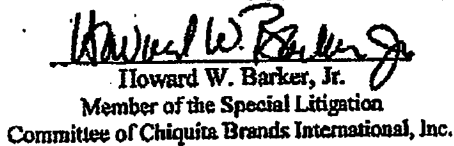
- Section V sets forth the legal analysis of the SLC with respect to each of the claims set forth in the Amended Complaint against each of the 26 defendants named therein.

8. The factual statements and findings contained in the SLC Report are based upon our personal knowledge as to the SLC's formation, independence, and investigative steps, and upon the evidence that the SLC developed and analyzed during its investigation.

9. Attached as Exhibit B to this Joint Declaration is a true and correct copy of the resolution of the Board, dated April 3, 2008, whereby the Board created the SLC and authorized the SLC to, among other things, consider and determine the Company's response to these actions.

10. Attached as Exhibit C to this Joint Declaration is a true and correct copy of the Company's Form Def 14-A, filed April 15, 2008, which, among other things, states that the Company determined that each of the SLC members is an independent director.

Dated: Coral Gables, Florida
February 19, 2009



Howard W. Barker, Jr.
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Forsyth, Illinois
February ___, 2009

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William H. Camp
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Woodland, California
February ___, 2009

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Clare M. Hasler
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

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Dated: Coral Gables, Florida
February ___, 2009

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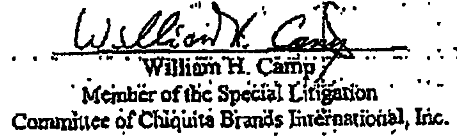
Howard W. Barker, Jr.
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Forsyth, Illinois
February 18, 2009



William H. Camp
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Woodland, California
February ___, 2009

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Clare M. Hasler
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

7203610

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Dated: Coral Gables, Florida
February ___, 2009

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Howard W. Barker, Jr.
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Forsyth, Illinois
February ___, 2009

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William H. Camp
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

Dated: Woodland, California
February 19, 2009

Clare M. Hasler
Member of the Special Litigation
Committee of Chiquita Brands International, Inc.

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EXHIBIT "A"

REPORT OF THE SPECIAL LITIGATION COMMITTEE
CHIQUITA BRANDS INTERNATIONAL, INC.

EXECUTIVE SUMMARY

SPECIAL LITIGATION COMMITTEE

HOWARD W. BARKER, JR.
WILLIAM H. CAMP
DR. CLARE M. HASLER

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

MICHAEL R. BROMWICH
DAVID B. HENNES
WILLIAM G. MCGUINNESS

FEBRUARY 2009

This report summarizes and synthesizes the facts that have been developed in the investigation conducted by the Special Litigation Committee (the "SLC") of the Board of Directors (the "Board") of Chiquita Brands International, Inc. ("Chiquita" or the "Company") of allegations contained in the Verified Consolidated Shareholder Derivative Complaint (the "Amended Complaint" or "Am. Compl."). The Amended Complaint was filed on behalf of the Company in the U.S. District Court for the Southern District of Florida on September 11, 2008. This report also presents the SLC's determinations, based on the exercise of its business judgment under New Jersey law, taking into account the best interests of Chiquita and its shareholders, as to whether the claims alleged in the Amended Complaint should be pursued, dismissed, or otherwise resolved.

The claims in the Amended Complaint arise principally out of payments made by Chiquita's Colombian subsidiary, C.I. Bananos de Exportación S.A. ("Banadex"), from approximately 1989 through January 2004 to left-wing guerrilla and right-wing paramilitary groups, including the Fuerzas Armadas Revolucionarias de Colombia, or the Revolutionary Armed Forces of Colombia, known as the "FARC," and the Autodefensas Unidas de Colombia, or the United Self-Defense Forces of Colombia, known as the "AUC." As a result of certain of those payments to the AUC, Chiquita pled guilty in March 2007 to violating U.S. anti-terrorism laws and agreed to pay a $25 million criminal fine. The primary focus of the SLC's investigation was to determine whether any of the named defendants, who were senior officers and directors of Chiquita at various points during this period, breached their duties of care or loyalty to the Company as a result of these payments, and to form a judgment as to whether it is in the best interests of Chiquita to pursue any such claim.

I. FORMATION OF THE SLC

By resolution dated April 3, 2008, the Board formed the SLC in response to the filing of six derivative complaints between October 12, 2007 and January 15, 2008 in federal and state courts throughout the country (the "Derivative Litigation"). In March and April 2008, the four federal derivative actions were transferred to this Court by the multi-district litigation panel, and, as stated above, on September 11, 2008, plaintiffs filed the Amended Complaint, which alleges claims on behalf of Chiquita for different forms of breach of fiduciary duty against twenty-six current and former Chiquita officers and directors.

The SLC is comprised of three non-management Chiquita directors: (i) Howard W. Barker, Jr., a former partner at KPMG LLP, (ii) William H. Camp, a former senior executive at Archer-Daniels Midland Company, Inc., and (iii) Dr. Clare M. Hasler, the Executive Director of the Robert Mondavi Institute for Wine and Food Science at the University of California, Davis. All three directors were appointed to the Board after

Chiquita had ceased making the payments that the Amended Complaint alleges to be wrongful.

In its April 3 resolution, the Chiquita Board authorized the SLC to investigate the claims made in the Amended Complaint, and to determine the Company's response to those claims. The Board granted the SLC "the full and exclusive authority to consider and determine whether or not the prosecution of the claims asserted in the Derivative Litigation . . . is in the best interests of the Company and its shareholders, and what action the Company should take with respect to the Derivative Litigation." The SLC was also given the authority to engage whatever resources it considered necessary to assist with its investigation.

II. THE SLC'S INVESTIGATION

The claims set forth in the Amended Complaint formed the basis for the scope of the SLC's investigation, but the SLC considered all of the relevant facts gathered during the course of its investigation even if those facts did not fall precisely within one of the asserted claims. The Amended Complaint alleges generally that the defendants breached their fiduciary duties, and committed corporate waste, beginning in at least 1989 and continuing to the present, by:

(1) causing Chiquita to make payments to the FARC and the Ejército de Liberación Nacional, or the National Liberation Army ("ELN"), from 1989 to 1997, or failing to be aware of those payments (Am. Compl. ¶ 100);

(2) causing Chiquita to make payments to the AUC, from approximately 1997 through February 2004, or failing to be aware of those payments (Am. Compl. ¶ 100);

(3) conducting an alleged "fire sale" of Chiquita's Colombian operations (Banadex), in June 2004 as a result of the pending Department of Justice investigation (Am. Compl. ¶ 127);

(4) causing Chiquita to enter a guilty plea and pay a $25 million fine in March 2007 in order to protect individual officers and directors from prosecution (Am. Compl. ¶ 118);

(5) acquiring Atlanta AG, a German fruit distribution business, in 2003, which allegedly turned out to be an unprofitable transaction, to offset the financial effect of a potential sale of Banadex (Am. Compl. ¶ 129);

(6) causing Chiquita to make false or misleading statements in its public filings regarding (i) the nature of the payments to the AUC and (ii) Chiquita's efforts to comply with the law in general, or allowing such false statements to be made (Am. Compl. ¶ 60-99); and

(7) paying severance to departing executives who allegedly engaged in wrongdoing, failing to pursue claims against executives who allegedly engaged in wrongdoing, and allowing executives who allegedly engaged in wrongdoing to remain at the Company and to receive excessive compensation (Am. Compl. ¶ 119).

During the course of its investigation, the SLC members and its counsel consulted with Lead Counsel for the plaintiffs, appointed by Order dated August 13, 2008, to confirm that the scope of the SLC's investigation was appropriate, and the SLC was assured that it was.

The SLC, through and with the assistance of counsel, conducted an independent, in-depth, and extensive factual investigation of these allegations, including conducting seventy interviews of fifty-three of Chiquita's current and former directors, officers, employees, and outside advisors, and reviewing more than 750,000 pages of documents. The SLC hired the international law firm of Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank" or "SLC Counsel") to assist it in all facets of its investigation and to provide legal advice regarding whether the pursuit of the claims alleged in the Amended Complaint would be in the best interests of the Company.

During its investigation, the SLC received the full cooperation of the Company, the Company's current and former outside counsel, and all of the individual defendants named in the Amended Complaint. The SLC benefited substantially from the work previously done by others in reviewing the payments made by Chiquita's Colombian subsidiaries to guerrilla and paramilitary groups in Colombia. Many of the facts underlying the Amended Complaint were the subject of a lengthy Department of Justice ("DOJ") investigation of the payments, which culminated in the Company's March 2007 guilty plea. The SLC has been able to make use of the materials generated by Chiquita and its outside counsel during that investigation, to the extent the SLC found them reliable.

Because there is no serious dispute that the payments were made to both guerrilla groups and paramilitaries at various times during the period 1989 to 2004, the focus of the SLC's investigation was to determine the role and culpability, if any, of each of the defendants named in the Amended Complaint. The SLC fully understood that it was required to evaluate the reasonableness of the conduct of the various participants, which required an understanding of facts well beyond those contained in the criminal information and factual proffer entered in connection with the Company's guilty plea.

III. THE SLC'S FACTUAL FINDINGS[1]

Overview. Between 1989 and 2004, Chiquita, through its Colombian affiliates and its subsidiary, Banadex, made payments to left-wing guerrilla groups, generally the FARC and the ELN, and right-wing paramilitary groups associated with the AUC. During this period, the political situation in Colombia, violent and tumultuous for some time as a result of drug trafficking and other causes, saw the rise of both left-wing guerrillas, which sought to overthrow the elected Colombian government, and right-wing paramilitaries, which were initially formed in response to the extreme lawlessness caused by guerrilla violence. The payments were justified within the Company on the grounds that they were necessary to protect the Company's employees and infrastructure from violence. The Company's operations were located near the towns of Turbo and Santa Marta, in, respectively, the northwest and northern regions of Colombia, rural areas conducive to banana growing but generally outside the Colombian government's ability to provide security and protection.

The SLC found that, from the time they began in approximately 1989, these payments were known to certain members of senior management at Chiquita (which is headquartered in Cincinnati, Ohio), and to other members of management and the Board at different times. Since the mid-1970s, Chiquita had developed detailed internal reporting and monitoring practices designed to satisfy the requirements of the Foreign Corrupt Practices Act of 1977 (the "FCPA"). The Company's FCPA compliance program, which was supervised by the Company's Internal Audit and Legal Departments, gathered information on all legal "facilitating payments" to government officials, which are generally permitted under the FCPA, as well as information on other "sensitive" payments. Beginning in the early 1990s, the Company's FCPA reporting system captured the payments to the guerrilla groups and later the payments to paramilitary organizations.

The FARC Payments. The payments to the guerrillas began in or around 1989 and stopped in or around 1997, diminishing and then ending as the paramilitary organizations gained strength. During that period, the Company sought and obtained opinions from both in-house and outside counsel that the payments to the guerrilla groups did not violate Colombian law because they were the product of extortion. In October 1997, around the time the guerrilla payments were ending, both the FARC and the ELN, the main guerrilla groups to which payments were made, were designated by the U.S. Department of State as a Foreign Terrorist Organization ("FTO"). With this

[1] The factual findings contained in this Executive Summary relate only to the first four claims summarized above, which lie at the core of the allegations in the Amended Complaint. The facts relating to the remaining three claims – the acquisition of Atlanta AG, alleged false statements in public disclosures, and alleged excessive compensation – are treated at length in the body of the SLC Report.

designation, it became a felony under U.S. law to knowingly provide "material support" to the FARC and the ELN.

The Convivir-AUC Payments. The SLC found that, in late 1996 or early 1997, two senior Banadex employees were summoned to a meeting in Medellín, Colombia with the well-known and notorious leader of the AUC, Carlos Castaño. At this meeting, Castaño told the Banadex managers that the AUC was expelling the FARC from the region, and that the AUC knew that Banadex had been making payments to the FARC. Castaño made it clear to the Banadex managers that the AUC expected that Banadex would pay the AUC from that point forward.

Based on Castaño's reputation for violence and the tone of the meeting, the Banadex personnel, having experienced murders, kidnapping, and property destruction for many years at the hands of the guerrillas, sincerely believed that the AUC would harm Banadex's people and property if the payments were not made. They took the implied threat very seriously. A short time later, after being contacted by an AUC representative, Banadex employees made four cash payments to the AUC, although the SLC found no evidence that Chiquita management in Cincinnati knew of these payments.

The SLC was unable to determine why, after only four payments, the direct payments to the AUC stopped. However, around that time, Banadex began making payments to a "convivir," a government-licensed and promoted security organization. While the Banadex personnel became aware early on of the close relationship between the convivir and the AUC, that connection was not initially made clear to Chiquita executives in Cincinnati, who at first believed that the Company was paying for legitimate security services. The convivir payments began in Turbo no later than 1997 and continued to be made on a regular basis thereafter.

The Company's Internal Audit and Legal Departments in Cincinnati promptly identified the convivir payments. As a result, from May 1997 through early September 1997, senior Chiquita management engaged in a review of the payments. The Chiquita Legal Department reviewed materials distributed by the government of Colombia attesting to the legality of the convivir. In addition, the Legal Department sought and received legal opinions from in-house counsel concerning their legality. Finally, during a visit to Colombia, a Chiquita lawyer discussed the matter directly with senior Banadex lawyers. In early September 1997, as part of its normal FCPA reporting process, the convivir payments were disclosed to the Audit Committee, which was told that the payments were made for security services and were legal. These periodic reports to the Audit Committee continued over time.

In the spring of 2000, a member of Chiquita's Legal Department noticed a payment to a new convivir on an FCPA report, this time in Santa Marta, and when he inquired further about the payment, the explanation he received from Banadex

employees made him suspicious that there might be a link between the convivir and the paramilitaries. As a result, [Chiquita Employee #1]* traveled to Colombia to investigate the possible link between the convivir and the paramilitaries, a link he confirmed based on how the Castaño meeting was related to him during his interviews of Banadex personnel. Chiquita then sought guidance from in-house and outside Colombian counsel regarding the legality of these payments, at least some part of which were now understood to be going to the paramilitaries, and received opinions stating that the payments were justified under Colombian law because, like the guerrilla payments in earlier years, they were the product of extortion. This conclusion was communicated to Chiquita's Audit Committee in mid-September 2000.

The FTO Designation. On September 10, 2001, the U.S. Department of State designated the AUC as an FTO, just as it had previously designated the FARC and ELN.[2] The designation made it a felony to knowingly provide material support to the AUC. Even though the designation was reported in major national and local newspapers in the U.S., the SLC found no evidence that anyone in the Chiquita Legal Department, in senior management, or on the Board was aware of the designation until almost eighteen months later, in late February 2003.

The Company's payments to the AUC, through two separate convivirs, continued following the FTO designation. In the spring of 2002, a faction of the AUC based in Santa Marta began demanding direct cash payments, rather than receiving payment through the convivir. New payment procedures were developed, and Banadex began making cash payments directly to the AUC in Santa Marta; the payments to the convivir in Turbo were not affected. In April 2002, a new group of directors, appointed to the Board after the Company emerged from Chapter 11 bankruptcy proceedings in mid-March 2002, were briefed about the payments, including the recent demand for cash payments in Santa Marta. These directors, like those before them, were told that the payments were legal.

FTO Discovery. The SLC found that on February 20, 2003, while searching the Internet for information concerning the AUC (in connection with potentially changing the payment process in Santa Marta), [a Chiquita lawyer] discovered the FTO designation. [The Chiquita lawyer] told Robert Olson, the Company's General Counsel,

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* The names of certain people have been redacted in the publicly-filed version of this Report. The redactions have been made based on the SLC's understanding that the publication of the names of these individuals, and the description of their roles, could pose serious risks to their safety and the safety of members of their families. An unredacted version of the Report is being filed with the Court.

2 Shortly thereafter, on September 23, 2001, President Bush issued Executive Order 13224, which prohibited any U.S. person from, among other things, engaging in transactions with any foreign organization determined by the Secretaries of the State and Treasury to be a "Specially-Designated Global Terrorist" ("SDGT"), without first obtaining a license from the U.S. government. The AUC was designated an SDGT on October 31, 2001.

the next day. Olson then promptly sought the advice of the Company's regular outside counsel, Kirkland & Ellis LLP ("K&E"), which advised the Company that it could not make further payments unless it disclosed them to the government. Immediately upon learning of the FTO designation, Olson directed that the cash payments to the AUC in Santa Marta be suspended, although he did not order that the payments to the convivir in Turbo stop, because he failed to recall the connection between the convivir in Turbo and the AUC that had been explained to him in September 2000. Two more payments were made to the convivir before Olson was reminded of the connection.

Audit Committee Response. Five weeks after it was discovered, on April 3, 2003, Olson informed the full Board about the AUC's FTO designation at a regularly scheduled Audit Committee meeting. At that point, the Chairman of the Audit Committee, Roderick Hills, a former Chairman of the SEC, concluded that this was a matter to be handled by the Audit Committee. On April 24, 2003, the Company fully disclosed the payments to DOJ at a meeting that was set up by Hills and attended by senior DOJ officials, including the then-Assistant Attorney General for the Criminal Division, Michael Chertoff.

At the meeting, Hills made the argument that if the Company could not continue to make the payments, its people and property would be in grave jeopardy and it would have to leave Colombia, which would result in a foreign policy problem for the U.S. Hills argued that other U.S.-based multinational companies would likely not be able to operate in Colombia because of the reach of the AUC and the Company's understanding that they too were making payments to the AUC for similar reasons. The result would be a mass corporate exodus from the country, which in turn would threaten the relations of the U.S. with Colombia, a strong ally in South America. During the meeting, Chertoff clearly told the Chiquita representatives that the payments were "illegal," but also acknowledged that the situation was "complicated," and that DOJ would consult with other agencies of the government on the policy issue raised by Hills and get back to Chiquita.

DOJ's response to Chiquita's disclosure at this meeting later became the subject of bitter controversy between the Company and the government. While the SLC concluded that there was no dispute over the words that were spoken at the meeting, the Company and DOJ sharply disagreed about whether DOJ clearly understood, or, at a minimum, should have understood, that Chiquita would have to continue to make the payments to the AUC while DOJ resolved the policy issue the Company had raised. The evidence showed that the Company believed that it had implicit permission to continue making the payments until the policy issue was resolved. Although DOJ did not say anything to the contrary at the time, it ultimately took the position that the payments made after the April 24 meeting were illegal and that nothing said at the meeting provided even the suggestion that the Company had a safe harbor to make the payments while the policy issue was resolved. These post-disclosure payments were

aggressively investigated by DOJ and formed a central part of the factual basis for Chiquita's guilty plea.

Following the April 24 meeting, the Company awaited a response on the policy issue it had raised. On April 30, Hills and Olson reported to the Audit Committee on the meeting with Chertoff. They advised the Committee that based on the meeting, they believed prosecution for historical payments was unlikely, but the issue of continued payments was left open. In the meantime, after a two-month delay, the Company resumed making the payments because it believed they could no longer be deferred without serious risk of harm to its employees and infrastructure, and because neither Chertoff nor any other DOJ official had explicitly said that the payments must stop. The payments resumed in May 2003 and continued through January 2004. However, the SLC could not conclusively establish who authorized the payments to resume or, ultimately, to stop.

DOJ Investigation. Throughout the spring and summer of 2003, Hills and K&E continued to have encouraging, high-level contacts with DOJ, which included two conversations between Chertoff and Hills around the time Chertoff left DOJ for the U.S. Court of Appeals for the Third Circuit. During these contacts, Chertoff commented favorably on the Company's disclosure and gave comfort that the policy issue raised by the Company was still being considered. In August 2003, Hills and Olson met with then-Deputy Attorney General Larry Thompson, who said that Chiquita had done the right thing in self-disclosing and that the Company was at that time neither a subject nor a target of the DOJ investigation. Thompson left DOJ less than a week later. No meaningful further guidance from the government was forthcoming.

Following its meetings with Chertoff and Thompson, Chiquita entered into a period of voluntary cooperation with DOJ, producing numerous documents and ultimately making its employees available for the government to interview. While DOJ requested that the Company refrain from conducting its own investigation, the Audit Committee began limited fact gathering, including retaining KPMG LLP to perform a forensic analysis. The Audit Committee, led by Hills, actively managed the Company's response to the DOJ investigation, and met repeatedly during 2003. However, by early December 2003, DOJ had raised concerns about the nature and extent of the Company's cooperation; around the same time, the Board determined to sell Banadex and exit Colombia, even though DOJ had not yet resolved the policy issue that the Company raised back in April.

Sale of Banadex. In late January 2004, the Company made its last payment to the AUC. At the same time, the Company publicly announced that it was in negotiations to sell Banadex to C.I. Banacol S.A. ("Banacol"), a Colombian-based fruit producer. Banacol had initially approached Chiquita about buying Banadex in 2002, but the two companies did not engage in serious discussions until June 2003. In May 2004, after

nearly eleven months of discussion and negotiations, the Board approved the sale. Chiquita ended its operations in Colombia in June, when the sale closed.

The DOJ Investigation Continues. While the sale of Banadex was being negotiated, the Company continued to engage in discussions with DOJ, but in March 2004, the Company was notified for the first time that it was the subject of the DOJ's investigation. Even so, the SLC found that, towards the end of 2004 and in early 2005, the investigation appeared to be heading towards a favorable outcome for the Company. At that time, at the invitation of DOJ, Chiquita made written submissions as to why it should not be prosecuted. In early 2005, one of the DOJ lawyers suggested to K&E that a settlement was being discussed inside DOJ that would resolve the matter and that a settlement proposal was forthcoming. No settlement proposal came from DOJ in the weeks and months that followed.

Instead, after close to six months without any contact from DOJ, the investigation was resumed in September 2005, and was marked by far greater aggressiveness than before. In October 2005, the new prosecutor responsible for the investigation demanded (and received) an extended privilege waiver from the Company, covering the advice that it received from K&E in early 2003. DOJ then informed Chiquita that its directors were subjects of its investigation and, in November 2005, the Company's directors were subpoenaed to testify before a grand jury. Ultimately, when DOJ sought to take testimony from the lead K&E attorney representing Chiquita, the Company was forced to retain new counsel, and moved quickly to consider and negotiate a settlement.

The Guilty Plea. Beginning in November 2006, the Company entered into extended negotiations with DOJ regarding the terms of a potential plea agreement. The two main issues were the charge to which the Company would plead and the size of the fine it would pay. DOJ initially demanded that Chiquita plead to a charge of materially aiding a terrorist organization (18 U.S.C. § 2339B), the most serious charge available, and to pay a fine in excess of $70 million. Chiquita's initial offer included a plea to a charge of engaging in transactions with a specially-designated global terrorist without a license (50 U.S.C. § 1705(b)) and a fine of approximately $1 million. Over months of intense negotiations, the gap was narrowed – DOJ ultimately agreed to allow the Company to plead guilty to violating § 1705(b) and pay a fine of $25 million, payable over five years, after the Company demonstrated that it could not afford a larger fine. The SLC found that while there was some early negotiation over whether DOJ would terminate its investigation of individual officers and directors as part of the plea agreement, DOJ demanded and received the Company's full cooperation in its continuing investigation of the individuals.

On March 19, 2007, Chiquita pled guilty in the U.S. District Court for the District of Columbia to one count of knowingly Engaging in Transactions with a Specially-Designated Global Terrorist, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204. However, the DOJ's investigation of the individuals continued. During July and

August 2007, five then-current and former Chiquita officers and directors made submissions to DOJ seeking to persuade it not to pursue criminal charges against them. Ultimately, no criminal charges were filed against any of the individuals. The Company was sentenced on September 17, 2007, in accordance with the terms of the plea agreement. This litigation followed.

IV. The SLC's Analysis and Conclusions

After establishing the relevant facts, the SLC reviewed the factual and legal merits of each claim and considered whether each claim should be pursued, dismissed, or otherwise compromised. In reaching its decisions, the SLC was mindful of its fundamental mission – to determine whether the pursuit of claims is in the best interests of the Company and its shareholders.

Accordingly, in addition to the factual and legal validity of the claims, the SLC also considered other relevant factors, including: the motivation of the defendants in engaging in the allegedly wrongful conduct; the reputational harm to the Company caused by continued focus on events that occurred years ago; the costs to the Company of continued litigation, including legal fees for Company counsel and potential advancement of defense costs to individual defendants; the Company's focus on compliance and remedial measures and the potential deterrent effect of a lawsuit; and the continued interference with the Company's ongoing operations by diverting management time and focus. In the end, after considering the factual and legal merits of each claim, in conjunction with the factors outlined above, the SLC, in the exercise of its business judgment, concluded that the Amended Complaint should be dismissed in its entirety.

A. Payments Made Prior to the September 2001 Designation of the AUC as an FTO

The SLC, in analyzing the conduct of each of the defendants with regard to the payments, divided its inquiry by time period. The SLC first examined whether the relevant defendants breached their fiduciary duties in connection with the payments made to the guerrilla groups beginning in approximately 1989 and continuing through 1997, when the AUC and convivir payments began. The SLC then examined those payments from 1997 to the AUC's FTO designation, which occurred on September 10, 2001.

Under New Jersey law,[3] which closely follows Delaware law, the decision to authorize, or allow, the payments is protected by the business judgment rule, a judicial

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[3] Chiquita is incorporated in New Jersey, and thus New Jersey law governs the conduct of Chiquita's directors and officers. *See Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.19 (11th Cir. 1989) (providing that the law of the state of incorporation governs the conduct of the officers or directors of the corporation).

presumption that the defendants acted in a manner consistent with the duty of care – that is, "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citations omitted). In order to rebut this presumption, it must be shown that the defendants acted with fraud, illegality, a conflict of interest, gross negligence or without a rational business purpose. Accordingly, the SLC sought to determine whether there was evidence that any of these factors existed such that the protections of the business judgment rule would not apply.

The FARC Payments. The SLC found that the decision to authorize the payments to the guerrillas beginning in the late 1980s was informed and rational, and made in good faith. The SLC found that the initial demand for payment was communicated from Colombia to senior management in Cincinnati, and that, upon receiving the demand, senior management brought [Banadex Employee #10] to Cincinnati to gather additional information. After meeting to discuss the issue, the payment was authorized. The SLC found ample evidence, including specific incidents of violence against Banadex employees and the FARC's reputation generally, to support the conclusion that approval was given in good faith and with the honest belief that the failure to do so would result in harm to the Company's employees and infrastructure. At the same time, the SLC found no evidence that the decision was motivated by self-interest or otherwise tainted by fraud. Accordingly, the SLC concluded that this decision was supported by a rational business purpose and was not the product of gross negligence. *See Albert v. Alex Brown Mgmt. Serv., Inc.*, 2005 WL 2130607, at * 4 (Del. Ch. Aug. 26, 2005) ("Gross negligence . . . involves a devil-may-care attitude or indifference to duty amounting to recklessness") (internal quotations omitted).

Further, the SLC determined that the continuation of the payments in the belief that they were necessary in order to safeguard the welfare of the Company's employees and to protect its property, and that they were not illegal under U.S. and Colombian law, was reasonable and in good faith. Indeed, following the initial payment, the Company retained Control Risks, a leading U.K.-based security consulting firm, which, after conducting a security assessment, advised senior management that the Company had no meaningful choice but to continue to make the payments. Throughout this period, senior management continued to be apprised of the violent conditions in Colombia, and continued to believe that its employees and operations were at risk.

In addition, Chiquita's Legal Department monitored and considered the legality of the payments at various points in time. It sought and received opinions from Colombian counsel concerning the legality of the payments, which uniformly concluded that, under Colombian law, the Company would not be held liable for making the payments because they were the product of extortion. As to U.S. law, although the payments were reported within the Company as part of its FCPA compliance program (which also tracked "sensitive payments"), there was nothing to

suggest that the payments implicated the FCPA or any other U.S. law.[4] Indeed, the Company's payments to the FARC were disclosed to the Securities and Exchange Commission (the "SEC"), DOJ, and the U.S. Attorney's Office for the Southern District of New York during an investigation commenced by the SEC in 1998 relating to certain payments made by Banadex employees to Colombian port officials. None of these agencies ever suggested that the payments were illegal, or were otherwise improper, and no enforcement action was ever brought as a result of the payments.

Although the SLC developed no evidence that the payments during this period were illegal, it concluded that it would have been prudent, at some point, for senior management to have seriously considered whether Chiquita should continue doing business in Colombia in view of the rampant violence and continued instability. Indeed, the SLC questioned why there appeared to be no serious discussion about the possibility of selling its farms in Colombia earlier and purchasing fruit rather than making extortion payments. However, whether or not it would have made the same decision, the SLC concluded that the defendants did not breach their duty of care in making the payments.

The Convivir-AUC Payments. The SLC also found that none of the defendants breached their duty of care when, in 1997, the Company began paying the convivir.[5] The SLC found that, once members of senior management learned of the convivir payments in approximately April or May of 1997, it took reasonable steps to better understand the nature of the convivir and the legal implications of the payments. They participated in detailed discussions regarding the documentation, budgeting, and approval required for the payments. They conducted an inquiry into the nature of the payments, which included speaking directly with Banadex personnel in Colombia, and reviewing government-generated documents related to the payments. Further, they obtained legal opinions from local in-house counsel, continued monitoring the payments through FCPA reporting procedures, and reported the convivir payments to the Audit Committee as part of the FCPA reporting process.

Based upon these efforts, senior management reasonably and in good faith believed, at least initially, that the convivir was a legitimate government-sponsored security provider and that the payments were, under both Colombian and U.S. law, legal in all respects. There is no evidence that the defendants knew of the Castaño meeting or the connection between the convivir and the AUC at this time. Accordingly,

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4 As noted above, the U.S. Department of State designated the FARC as an FTO on October 8, 1997. While the evidence is mixed, the weight of the evidence suggests that the Company had stopped making payments to the FARC by this time. In any event, the SLC found no evidence that anyone at Chiquita became aware of the FARC's FTO designation at or around the time it occurred.

5 As noted above, before the convivir payments began, Banadex made four payments to the AUC, although the SLC found no evidence that Chiquita management knew of these payments.

with respect to the convivir payments, the SLC found no evidence of gross negligence, a conflict of interest, or any other basis to overcome the protections of the business judgment rule.

As noted above, in the spring of 2000, a senior in-house lawyer responsible for the Legal Department's FCPA monitoring became suspicious of a new convivir payment and began a new inquiry. Based on information gathered by [Chiquita Employee #1] during a trip to Colombia, senior management learned of the Castaño meeting and that the Company's payments to the convivir were actually being funneled to the AUC. As a result, the Company sought and received additional opinions from Colombian counsel regarding the payments. Those opinions concluded that the Company had been extorted to make payments to paramilitary organizations, that the Company had no meaningful choice but to make the payments and, therefore, would not be subject to liability under Colombian law. These findings were then reported to the Audit Committee.

Based on its review of these activities, the SLC concluded that the defendants acted reasonably and in good faith, did not act with gross negligence, and did not suffer from a conflict of interest – and therefore did not breach their duty of care during this period of time. In reaching this conclusion, the SLC relied on the reasonable steps taken to gather information about the payments; the legal opinions received, which confirmed that the payments were not prohibited by Colombian law; the consistent monitoring of the payments by the Legal Department; management's consistent reporting about the payments to the Audit Committee; and the continuing belief that stopping the payments would place the Company's people and property at risk.

The Board's Oversight. The SLC also examined the oversight exercised by Chiquita's directors during the period prior to the FTO designation. Under the law, a failure of oversight occurs when "either (1) the directors knew, or (2) should have known that violations of the law were occurring *and*, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, *and* (4) that such failure proximately resulted in the losses complained of." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (emphasis added).

This test can be satisfied by showing either that (i) "the directors utterly failed to implement *any* reporting or information systems or controls," or "having implemented such a system or controls, *consciously* failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention," *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis added), or (ii) that the directors "had notice of serious misconduct and simply failed to investigate," *i.e.*, intentionally ignored "red flags." *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, at *5 (Del. Ch. Feb. 13, 2006). A violation of the duty of oversight constitutes a breach of the duty of loyalty (not care), and, as such, intentional bad faith conduct on the part of the directors must be shown.

As an initial matter, prior to September 10, 2001, the Company committed no violation of law with respect to the payments. Therefore, because the payments did not violate U.S. or Colombian law during this period, there was nothing for the directors to act upon or detect, a prerequisite for liability. Thus, the SLC has concluded that this claim lacks legal merit. Even so, the SLC examined the adequacy of the reporting systems and controls in place at the Company during the period, and found that the Board had legally adequate reporting systems in place at the time.

During this period, Chiquita had a duly constituted Audit Committee, which met periodically throughout each year. The Company had in place a robust FCPA compliance and reporting program, which included reporting on non-FCPA "sensitive" payments. As part of this program, the Audit Committee received quarterly, and later semi-annual, reports from the Legal Department regarding all facilitating payments made by the Company. The Audit Committee also received periodic updates from the Company's Internal Audit Department and the FCPA and other sensitive payments were subject to internal audits. Chiquita's Audit Committee retained Ernst & Young, LLP ("E&Y") as the Company's independent, outside accountant. Given these separate but interrelated oversight mechanisms, there is no basis for the SLC to conclude that Chiquita's Board "utter[ly] fail[ed] to attempt to assure a reasonable information and reporting system exist[ed]." *Caremark,* 698 A.2d at 971.

Conclusion. For this period, the SLC concluded that the management defendants did not breach their duty of care in authorizing and allowing the payments to continue to be made, and that the director defendants did not breach their duty of loyalty in exercising oversight over the Company's operations as a whole. In addition, as detailed in this Report, the SLC found other significant legal impediments that raise serious doubts about the viability of any claim based on these payments.[6]

B. Payments Made After the FTO Designation on September 10, 2001

The legal framework for the Company's payments in Colombia changed on September 10, 2001, when the U.S. Department of State designated the AUC as an FTO.

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6 While the SLC viewed none of these legal issues as necessarily dispositive, they each add substantial uncertainty as to the viability of any claim based on conduct during this period and raise serious questions as to whether the costs of pursuing any such claim outweigh any potential benefit. The impediments include (i) that the Company has not yet suffered any harm as a result of these payments, because they were not the subject of the Company's guilty plea, (ii) that the defendants are protected by a release from liability contained in the Company's Chapter 11 bankruptcy plan covering all conduct that occurred prior to March 19, 2002, (iii) under the exculpatory clause contained in Chiquita's Certificate of Incorporation, Chiquita's directors and officers cannot be held monetarily liable for breaches of the duty of care, and (iv) absent the uncertain application of a tolling doctrine, the six-year statute of limitations period may bar claims arising out of events that occurred prior to October 12, 2001.

At that point, knowingly making such payments to the convivir/AUC became a felony under U.S. law. Accordingly, the SLC first investigated when and how the defendants became aware of the designation. After a thorough review of available evidence, the SLC found no evidence that senior Chiquita management or the Board was aware of the FTO designation at any time prior to late February 2003. This conclusion is based upon the DOJ's extensive inquiry into this issue, but also, and more importantly, on the SLC's own independent review of relevant documentary evidence and interviews of numerous witnesses. Having found that the defendants were not aware of the designation for almost eighteen months after it occurred, the SLC next considered whether the defendants breached their fiduciary duties by that very failure to become aware of the designation while continuing to make the payments during that period.

Senior Management. As an initial matter, the SLC found that senior management reasonably and in good faith relied on the Legal Department to keep the Company aware of material legal developments.[7] The SLC concluded that this reliance was reasonable given that the Legal Department was generally well regarded by senior management. Indeed, from all outward indications, the Legal Department seemed to be adequately informed about, and to be appropriately managing, the situation in Colombia. Senior management was kept informed of legal issues relating to the payments during this period, and was aware that the Legal Department had conducted two inquiries into the payments, the results of which were reported at Audit Committee meetings. Because the SLC concluded that senior management appropriately relied upon Olson and the Legal Department to alert it to changes in the law, the SLC concluded that these defendants did not breach their duty of care by failing to be aware of the designation and allowing the payments to continue during this period.

Olson. Given senior management's reliance on Olson and the Legal Department, the SLC was troubled by Olson's performance during this period. The SLC was concerned that, as the Company's chief legal officer, he had not put in place a system to monitor developments in U.S. law relating to the Company's overseas operations. This was particularly true given that the events of September 11, 2001 should have put Olson on notice that additional steps needed to be taken to determine whether the U.S. government's fight against terrorism had any impact on the Company's exposure arising from its extensive overseas operations. Had he implemented such a system, Olson might well have learned of the AUC's designation as an FTO at an earlier point in time and lessened the harm ultimately suffered by the Company.[8]

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7 The SLC's findings with respect to the conduct of Robert Olson, the Company's General Counsel, are discussed separately below.

8 Though he did not implement a system, Olson said that he recalled seeking guidance from an outside law firm after September 11, 2001 regarding whether legal changes enacted post-September 11 imposed new legal requirements on the Company. Although there is some support

Nevertheless, while the SLC believes that Olson could have done more to protect the Company, it also concludes that Olson did not breach his duty of care during this period. First, Olson's Legal Department was comprised of senior lawyers who oversaw the affairs of the Company's Colombian operations. These lawyers twice investigated the payments and reported that the payments did not violate applicable law. Second, Olson, on the whole, diligently worked to ensure that the Company had effective compliance systems, including Chiquita's robust FCPA compliance system. Finally, the statute that the Company violated was, in the SLC's view, obscure, which was reflected by the fact that it had not been used as a prosecutive tool by DOJ prior to 2003 and was not widely known even among criminal law specialists. Thus, for these and other reasons, the SLC concluded that Olson's conduct does not warrant litigation against him based on his failure to put additional legal monitoring systems in place.

The Board's Oversight. As with the prior period, the SLC examined the oversight exercised by the Board during this period in which, for the first time, the Company was making payments to an organization on the FTO list, although it was not yet aware of the AUC's designation.[9] As with the prior period, the Board continued to have a fully-functioning Audit Committee, a robust FCPA compliance and reporting program, E&Y as its outside auditor, and periodic reporting by the Internal Audit Department. At all times, the directors continued to believe that the payments, which were reported to the Audit Committee as part of the Company's FCPA program (both pre- and post-bankruptcy), were legal, and the directors had no reason to believe otherwise.

The SLC also considered whether there were any "red flags" that would have alerted the Board to the fact that the Company was violating the law during this time.[10] In that regard, the SLC identified two potential red flags: (i) the events of September 11, 2001 themselves and their impact on the political, social and legal climate in the U.S., and (ii) coverage of the AUC's FTO designation in U.S. national and local media in the fall of 2001.

The SLC considered whether the events of September 11, 2001 should have prompted the Board to direct a review of Chiquita's international operations to ensure

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for Olson's claim in the outside law firm's billing records, the lawyer on Olson's staff who dealt with the law firm recalled the request for such guidance being limited to licensing issues.

9 This period covered two different groups of directors, since upon the Company's exit from bankruptcy, on March 19, 2002, a majority of the Board was replaced and new directors were appointed.

10 The Amended Complaint does not specify any alleged "red flags" or events that should have alerted the director defendants to the fact that the payments violated U.S. law and were intentionally ignored. *See* Am. Compl. ¶ 155. However, as part of its investigation, the SLC independently sought to discover if any of these events existed and to examine the adequacy of the Board's response to those events.

compliance with applicable anti-terrorism laws. In the SLC's view, conducting such a review would have been advisable, and indeed, the SLC was aware of examples of multinational companies that, in fact, conducted such reviews. However, the events of September 11 concerned fundamentalist Middle Eastern terrorism, not local groups operating in rural areas of South America that posed no direct threat to U.S. territory. Accordingly, the SLC determined that September 11 did not constitute a "red flag" alerting the directors to the possibility that the Company was breaking the law in Colombia, especially because they had been told that the payments were legal. *See Stone*, 911 A.2d at 370 (defining "red flags" as "facts showing that the board [] was aware that [the company's] internal controls were inadequate, [and] that these inadequacies would result in illegal activity").

Next, the SLC found that the pre-bankruptcy directors were not aware of the news reports of the designation in the fall of 2001, and thus, those reports could not have been a "red flag" to them. *See In re Citigroup, Inc. S'holders Litig.*, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003) ("'[r]ed flags' are only useful when they are either waived in one's face or displayed so that they are visible to the careful observer"). Further, even if the directors had read those reports, it is doubtful whether news reports of the designation, without more, constituted a "red flag" for purposes of this claim. *See McCall v. Scott*, 239 F.3d 808, 819-20 (6th Cir. 2001) (applying Delaware law) (finding press reports were a "red flag" only when taken as a whole with other compelling facts, including, alleged internal audit reports of fraud and a DOJ investigation).[11]

Thus, the SLC concluded that the directors engaged in legally adequate oversight during this period and therefore did not breach their duty of loyalty.

C. Post Discovery of the FTO Designation: February 2003 – January 2004

The February 20, 2003 discovery of the FTO designation again changed the legal framework in which the SLC analyzed the defendants' conduct. In the absence of the FTO designation, or knowledge of it, the decision to make the payments would continue to be protected by the business judgment rule. However, where a knowing violation of the law exists, the business judgment analysis no longer applies, and.

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11 The SLC also investigated the allegations in the Amended Complaint explicitly imported from the ATA/ATS litigation that the defendants caused or allowed the Company to provide or facilitate the provision of weapons and drugs to the AUC. *See* Am. Compl. ¶¶ 15, 126. The SLC found evidence of only three specific incidents of smuggling, all of them by third parties. The SLC found no evidence that any Chiquita employees committed wrongdoing in connection with these incidents or that any member of senior Banadex or Chiquita management had prior knowledge of or involvement in them. The evidence shows that, in each instance, the event was reported internally, appropriately investigated, and any necessary remedial steps were taken. Despite requests made by the SLC to all lead counsel in the ATA/ATS cases for any evidence supporting claims that Chiquita was involved in drugs and arms smuggling, no such evidence was provided.

director liability may be premised on a breach of the duty of loyalty. *See, e.g., Desimone v. Barrows*, 924 A.2d 908, 934-35 (Del. Ch. 2007) ("[B]y consciously causing the corporation to violate the law, a director would be disloyal to the corporation and could be forced to answer for the harm he has caused. . . . The knowing use of illegal means to pursue profit for the corporation is director misconduct"); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs, Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004) (same); *Roth v. Robertson*, 118 N.Y.S. 351, 352-53 (N.Y. Sup. Ct., Erie County 1909) (directors and officers of a corporation who engage in an illegal transaction that causes a loss to the corporation "must be held jointly and severally liable for such damages").

The SLC reviewed the conduct of management after the designation was discovered on February 20, and the conduct of the Board, after it was advised of the designation at the April 3 Audit Committee meeting. After considering all of the evidence, the SLC could not conclude that the conduct at issue would constitute a violation of the duty of loyalty because the SLC found that the defendants acted in good faith in resuming the payments after the Company disclosed them to senior DOJ officials, including Assistant Attorney General Michael Chertoff, on April 24, 2003.

Olson and Hills. Olson and Hills, more than anyone else at Chiquita, were responsible for directing the Company's legal strategy. Both provided several similar reasons for allowing the payments to continue following the Chertoff meeting. Olson and Hills both said that, as a result of the Chertoff meeting, they believed in good faith that DOJ understood that the payments would have to continue as long as Chiquita remained in Colombia. In addition, they were both aware of the repeated assurances received from senior DOJ officials, including Chertoff and Deputy Attorney General Larry Thompson. Further, at a September 4, 2003 meeting, K&E specifically informed DOJ that the payments were continuing and invited a directive to stop the payments, which was not provided. While these discussions were occurring, beginning in June 2003, the Company began the process of exploring the sale of Banadex. Finally, K&E, which had strongly counseled the Company to stop the payments before the April 24 meeting, did not repeat that advice in the months that immediately followed it. Based on these facts, the SLC found that Hills and Olson held the good faith belief that the Company was not exposing itself to additional risk by continuing the payments after the April 24 meeting.

Above all else, the SLC found, on the basis of more than twenty-five hours of interviews spread over four separate occasions, that Olson held the sincere belief that Banadex employees would be physically harmed if the payments stopped. Based on what he had been told by Olson and others, Hills also held the good faith belief that Banadex employees would be harmed if the payments were not made. Faced with this dilemma, Hills and Olson allowed the Company to continue to make the payments. Under those circumstances, the SLC did not find that Hills or Olson acted in blatant disregard for the law or to advance any personal interest, the hallmarks of a breach of the duty of loyalty.

In addition, the SLC found that, following the April 3 Audit Committee meeting, Olson appropriately played a role that was subordinate to Hills, who, at that point, took charge of the Company's response to the DOJ investigation. Indeed, the SLC believes that although his conduct was not without its flaws and shortcomings, Hills provided strong and dedicated service as an outside director, taking charge of the situation in Colombia, which he had no role in creating, and providing active and thoughtful direction of the Company's response.

However, in the SLC's view, Olson committed several key errors in judgment along the way. The SLC was troubled by the fact that Olson inadvertently allowed two payments to be made to the convivir in February and March 2003, prior to disclosure to DOJ, even though it credited his explanation that he had forgotten the AUC-Turbo convivir connection. The SLC was also concerned that it took Olson five weeks to inform the Audit Committee of the FTO designation, while he waited for a regularly scheduled meeting to occur. The SLC again credited Olson's explanation for the delay in informing the Audit Committee – that he wanted to collect all of the relevant information prior to raising the issue – but believes it would have been a far better practice to inform the Committee much earlier. Finally, the SLC found that Olson did not make clear to the Audit Committee members that the payments would continue pending further guidance from DOJ. Given the exposure to the Company created by the continued payments – each one constituted a violation of federal law – Olson (along with Hills) should have ensured that the Audit Committee explicitly understood, and approved of, the resumption of the payments. However, given the evidence of his good faith, the SLC concluded that none of these errors in judgment rose to the level of a breach of duty.[12]

As to Hills, the SLC was troubled by the fact that he did not make clear to the Audit Committee that payments had continued and did not keep himself fully informed about the status of the payments. The SLC was further troubled by certain evidence indicating that, in December 2003, Hills had heard from DOJ, both directly or indirectly, that it wanted the Company to stop making the payments, but that he took no steps to act on that information (indeed, five more payments were made after he received this news). To the SLC, this message signaled a shift in DOJ's position, and was the type of guidance that the Company had been seeking from DOJ. Ultimately, the SLC concluded that the central message communicated clearly to Hills at that time was that DOJ was dissatisfied with the Company's cooperation with its investigation, and, in that context, conveyed the message that the payments could not continue indefinitely, which Hills viewed as unremarkable. As a result, Hills did not view these comments as a directive to stop the payments, but instead focused on what he took to

12 The SLC also considered Olson's performance as a whole in assessing whether he breached his duty of care to the Company, a claim not raised in the Amended Complaint, and concluded that, while he made several errors of judgment relating to his handling of Colombia, he did not breach his duty.

be the core problem – DOJ's view that the Company was not cooperating sufficiently with its investigation.

In sum, the SLC found that Hills and Olson believed, in good faith, that the Company could continue to make the payments while DOJ considered the issue, directed the Company's response to the DOJ investigation and kept substantially informed about it, and sought and received guidance from, among others, K&E, neither of which advised the Company that it should stop making the payments between the Chertoff meeting in April 2003 and January 2004. Under these circumstances, the SLC could not conclude that, even though the payments were a violation of the law, the actions of Hills and Olson in allowing them to be made constitute a breach of the duty of loyalty.[13]

Other Directors. The remaining non-management directors relied heavily on Hills to direct the Board's response to the DOJ investigation, perhaps too heavily at times. The SLC was not able to pinpoint exactly when each of the then-directors learned that the payments had resumed after the Chertoff meeting. Certain of the directors assumed, based upon Olson and Hills' statements that the payments were illegal, that the Company had suspended making them indefinitely. Others believed, based upon Olson and Hills' statements that the payments were necessary to protect lives, that the Company was continuing to make them. The SLC was troubled by the lack of clarity at the Board level regarding the status of the payments during this critical time, and the Audit Committee's failure in not taking steps to ensure that it was kept fully and contemporaneously informed about the status of the continuing payments throughout this period.[14]

However, the SLC concluded that, in allowing the payments to be made, the directors acted in good faith, and to advance the best interests of the Company. At the April 3, 2003 Audit Committee meeting (attended by the full Board) at which the Board was first informed of the FTO designation, the directors appropriately allowed Hills to take control of the Board's response to the situation, and, with his guidance, directed the Company to disclose the fact of the payments to DOJ. At the April 30, 2003 Audit Committee meeting, Hills and Olson reported on the Chertoff meeting, including their shared view that criminal liability for past payments was unlikely, and that the

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13 Beyond Olson, senior management played a minimal role in causing, or allowing, the payments to continue during this period. Senior management relied upon the Audit Committee to direct the Company's actions with respect to the payments. The SLC found this reliance on the Audit Committee, and Hills in particular, to be reasonable and appropriate under the circumstances given Hills' extensive governmental experience, and active role in overseeing the situation, including his regular contact with DOJ officials, outside counsel, and Olson.

14 In the end, the SLC found that each of the directors, at some point prior to January 2004 learned that the Company was in fact continuing to make the payments, and caused, or allowed, the Company to make further payments knowing that those payments were in violation of federal law, and analyzed the claim on that basis.

government had, in effect, deferred a final answer on the question of continuing payments pending consultations with other agencies in the federal government. After this, the Audit Committee continued to receive regular updates on relevant developments, including the status of the Company's communications with DOJ, the adequacy of the Company's disclosures regarding Colombia, the possible sale of Banadex, and the security situation in Colombia. Finally, the Audit Committee sought advice and assistance from numerous outside professionals, including K&E and KPMG, and none of those professionals advised the Board that the payments had to stop prior to January 2004 when the payments ended.

Thus, the SLC found that, on the whole, the non-management directors were informed with respect to the Colombia issue; justifiably relied, in good faith, on Roderick Hills, as Chair of the Audit Committee, to direct the Company's response to the DOJ investigation; received and relied upon advice from outside counsel and outside consultants; and believed, in good faith, that the Company was acting appropriately under the circumstances, including to protect the Company's employees and infrastructure. In addition, the directors moved promptly to stop operating in Colombia, while protecting the Company's interests, once it became apparent that it would not receive a substantive response from DOJ on the policy issue it had raised. While the SLC in hindsight might have acted differently and relied less on the assurances of DOJ officials in allowing the payments to continue as long as they did, the SLC could not conclude that this conduct constitutes a breach of the duty of loyalty on the part of these directors.

The SLC is fully aware that the facts gathered, and conclusions reached, during its investigation may appear anomalous in the wake of the factual proffer and criminal information that accompanied Chiquita's guilty plea, and indeed in light of the guilty plea itself. DOJ, of course, was focused on the relatively narrow question of whether the payments violated 18 U.S.C. § 2339B on 50 U.S.C. § 1705(b). However, the SLC approached the facts relating to the payments from a very different perspective: the SLC's task was to investigate and analyze the facts in order to determine if there is any basis to hold the individual defendants civilly liable for their actions as a result of a breach of duty to the Company and its shareholders. In assessing the reasonableness of the defendants' conduct, it was necessary to look at all surrounding facts and circumstances, including the reasons and motives for making the payments. In engaging in this analysis, the SLC had the benefit of substantial evidence never sought or obtained by DOJ – multiple interviews with Olson and Hills, during which the SLC was able to explore all the relevant dimensions of their roles in connection with the payments. Thus, the SLC took into account all the facts surrounding the decision to continue to make the payments, which included, most fundamentally, the Company's voluntary disclosure at the Chertoff meeting.

D. The Decision to Sell Banadex to Banacol

The next issue that the SLC analyzed was whether the defendants breached their fiduciary duties to the Company when, in May 2004, during the DOJ investigation, they authorized the sale of Banadex to Banacol. In the Amended Complaint, the plaintiffs claim that this was a "fire sale" that deprived the Company of fair value for the asset. *See* Am. Compl. ¶ 17. As an initial matter, this claim appears to be at odds with plaintiffs' claim that the Company should not have made the payments, because continuing to do business in Colombia without making the payments was not a viable option. In any event, based on its detailed review of the sale process, the SLC found the sale of Banadex was orderly and rational and reflected a sustained effort to produce the best value for the Company's shareholders.

The SLC found that Banacol approached Chiquita about a sale nearly a year before the DOJ investigation had begun. After Chiquita contacted Banacol in June 2003 to begin serious discussions about a potential sale, the parties negotiated for nearly a year, with Chiquita trying to obtain the best terms possible. During these negotiations, the Board received regular updates on the status of the negotiations, including at least six presentations by management. Because the Company was concerned that premature disclosure of the DOJ investigation might provide Banacol with leverage in the negotiations, it waited until the very end of the negotiation process to advise it of the investigation. Finally, the deal was subject to a market-check when the negotiations were publicly disclosed in a January 26, 2004 press release, five months before the agreement with Banacol was signed. Based on all these facts, the SLC concluded that the Board did not breach its fiduciary duty in authorizing the sale of Banadex.

E. The Decision to Plead Guilty in March 2007

The final claim that is asserted in the Amended Complaint arising directly from the payments is that the defendants breached their fiduciary duties by causing the Company to enter into the plea agreement in March 2007, pursuant to which the Company agreed to, among other things, pay a $25 million fine. The plaintiffs allege, specifically, that the defendants acted with a conflict of interest in authorizing the plea because it was sought solely to protect themselves from prosecution. *See* Am. Compl. ¶ 118-19. The SLC examined this issue and found that the Board did, at the outset, seek to avoid the prosecution of individual officers and directors, but that its motivation for doing so was not self interest, rather, it was concern about the harm to the Company that would result from such prosecutions, including substantial cost and additional reputational harm. Regardless, there was no such protection, as the allegations in the Amended Complaint are directly contradicted by the terms of the plea agreement itself, which specifically required the Company to cooperate in any continuing investigation of the individuals, which it did.

On the whole, the SLC found the Board to have engaged in a careful and reasonable process in approving the plea. The Board met repeatedly to consider and analyze offers and counter offers; the directors engaged in numerous conversations amongst themselves and with management; and they were advised by experienced counsel, including the current U.S. Attorney General Eric Holder and former U.S. Attorney General Dick Thornburgh. Ultimately, through extended and contentious negotiations, senior management and the Board, all of whom participated actively in the process, were able to reduce the amount of the fine sought by the government from $70 million to $25 million, paid over five years, and plead to a lesser statutory offense than originally demanded by the government. In short, the facts do not support a finding of conflict of interest or gross negligence in connection with the decision to enter into the plea.

Moreover, under the circumstances, the Company's only choice was to enter into a plea agreement or proceed with a criminal trial. The Company had made payments to an FTO in violation of federal law and DOJ had made clear that, in the absence of an acceptable settlement, it would prosecute the Company. Under those circumstances, the SLC found that the defendants decided to enter into plea negotiations based primarily upon the consequences of losing a trial, including the potential for a crippling and potentially catastrophic criminal fine. The SLC concluded that these reasons were rational and valid, and do not suggest a breach of duty in any respect.[15]

V. CONCLUSION

Chiquita has suffered significant harm as a result of the payments that were made in Colombia after the AUC was designated as an FTO. Over the course of the last six years, the Company has endured a costly and exhaustive DOJ investigation, which resulted in the Company pleading guilty to a felony and paying a substantial fine, and continued litigation. This has significantly diverted senior management and the Board from its main mission – working to grow and improve Chiquita's business for the benefit of all of its shareholders.

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15 The remaining three ancillary claims – the acquisition of Atlanta AG, alleged false statements in public disclosures, and alleged excessive compensation – are treated at length in the body of the SLC Report. In sum, the decision to acquire Atlanta, contrary to plaintiffs' allegations, had nothing to do with Colombia (it was approved six months before the discovery of the FTO designation) and was made for good faith business reasons and on an informed basis after several months of consideration. Decisions regarding compensation were likewise made on an informed basis, typically with the advice of an outside consultant, and were not, in fact, excessive under the circumstances. Finally, the SLC found nothing improper about the Company's disclosures or that any of the defendants knew, or should have known, that they were false or misleading.

The SLC began its work with an exhaustive investigation and analysis of the factual and legal basis for any potential claims, as well as possible defenses to those claims. As noted above, in many cases, there are formidable, if not insurmountable obstacles to the assertion of those claims. Ultimately, the SLC was asked to decide whether, if the facts supported such claims, it is in the Company's best interests to pursue them, which is a much more complex question.

After careful consideration, the SLC has determined, in the exercise of its business judgment, to seek dismissal of the Amended Complaint in its entirety. That dismissal is based largely on the factual and legal merits of the claims as outlined above. However, in exercising its business judgment, the SLC also took into account additional factors that are relevant to the analysis.

First, the fact that there was no evidence that any defendant, at any time, acted in bad faith or was motivated by self-interest weighed heavily in the SLC's deliberations. While the SLC believes that, at times, the defendants made mistakes, some more significant than others, those mistakes were made in the belief that the actions being taken were in the best interests of the Company and were to protect the lives of the Company's employees.

Second, the SLC concluded that the reputational harm associated with prolonging what has already been six continuous years of investigation and litigation, with continued emphasis on the Company's actions in Colombia, would inflict substantial further damage on the Company. Rather than pursuing these claims, which the SLC found to be at best questionable and to have significant factual and legal flaws, the SLC concluded that the Company's interests are better served by moving forward with efforts to restore its image as a leading seller of bananas, tropical fruit, and other food products.

Third, the SLC concluded that the costs that will be incurred in connection with these claims, including legal fees for the Company to pursue the claims effectively and for counsel for the individual defendants – for whom, under its charter and New Jersey law, the Company may be required to advance fees – outweigh any potential recovery that may be obtained in the future, especially given the weaknesses of the claims.

Fourth, the SLC found that management and the Board appropriately focused on the adequacy of the Company's compliance measures and remedial actions implemented following this episode. As a result, the SLC believes that an event of this nature is unlikely to recur, and therefore, the deterrent effect of bringing a claim against former officers and directors, whom the SLC concluded acted in good faith, is outweighed by the negative impact such claims would have on the Company's current management. Moreover, the SLC, in a project led by Mr. Barker, who also serves as the Chair of the Board's Audit Committee, is in the process of reviewing the improvements to the Company's compliance program that have already been made to determine

whether any further enhancements are necessary, and will make recommendations to management as the SLC concludes are appropriate.

Finally, as noted above, the SLC carefully considered the fact that, in its view, continuing with this litigation would serve to further divert management from its core mission, which is to increase shareholder value by expanding the profits of the business.

Accordingly, the SLC, in the exercise of its business judgment, taking all of these factors into account, is now seeking by motion filed February 25, 2009 to dismiss the Amended Complaint in its entirety.

EXHIBIT "A"

Continuation - Part 2

REPORT OF THE SPECIAL LITIGATION COMMITTEE
CHIQUITA BRANDS INTERNATIONAL, INC.

SPECIAL LITIGATION COMMITTEE

HOWARD W. BARKER, JR.
WILLIAM H. CAMP
DR. CLARE M. HASLER

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

MICHAEL R. BROMWICH
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FEBRUARY 2009

Table of Contents

Page

I. INTRODUCTION 1

II. THE SLC AND ITS FORMATION 3

A. Board Resolution 3

B. The Members of the Special Litigation Committee 4

C. SLC Independence Review 6

D. SLC Compensation 15

E. Retention of Counsel 15

III. SLC INVESTIGATIVE WORK PLAN 16

A. Overview 16

B. Meetings with Company and Audit Committee Counsel 16

C. Documents Reviewed 17

D. Interviews 18

E. The SLC's Good Faith Attempts to Cooperate with Lead Counsel 24

F. SLC Meetings 26

IV. FACTUAL FINDINGS..27

A. The Formation of Banadex and the Early Security Situation in Colombia 27

B. Payments to Guerrilla Groups 30

C. The Company's Payments to Convivirs and the AUC 45

D. 1998 – The SEC Investigation Begins 56

E. Santa Marta Convivir Payments...60

F. Robert Thomas's Investigation into the Convivir Payments 62

Table of Contents

(continued)

Page

G. Corporate Responsibility Initiative – 2000 69

H. May 7, 2001 [Outside Law Firm] Legal Opinion 70

I. May 8, 2001 Audit Committee Meeting 71

J. Arms and Drug Smuggling 72

K. FTO Designation – September 10, 2001 75

L. The Company's Bankruptcy Reorganization and the New Board 78

M. The New Audit Committee Learns of the Payments 80

N. Acquisition of Atlanta AG 81

O. Discovery of the FTO Designation 82

P. Disclosure to DOJ 90

Q. Payments in Colombia Resume 95

R. Additional Public Disclosures Regarding Colombia 96

S. Further Contact with the Government 97

T. Initial Banacol Proposal 100

U. Additional Public Disclosure 103

V. Further Communication with the Government 104

W. September 2003: Retention of K&E and KPMG By the Audit Committee 107

X. Document Collection and the Concerns Raised by Colombian Employees 111

Table of Contents

(continued)

Page

Y. November 2003 – January 2004: Growing Concerns About the Investigation 113

Z. Continuing Concerns About Continuing the Payments and Chiquita's Cooperation 119

AA. Winter 2004: Aguirre Becomes CEO, End of Payments, Continued Investigation into Banacol Deal 122

BB. Spring 2004: Subpoenas are Issued and the Sale of Banadex is Approved 129

CC. OFAC Presentation and Thompson Memorandum Submission....133

DD. Supplemental Thompson Memorandum Submission 135

EE. Quiet Period: November 2004 – Summer 2005....136

FF. Fall 2005: Transition of Chiquita Investigation to AUSA Malis....136

GG. Covington & Burling LLP Takes Over For K&E....138

HH. Plea Negotiations....139

II. Compensation & Severance 146

JJ. Remedial Measures 153

V. APPLICABLE LAW AND ANALYSIS OF THE CLAIMS 156

A. Summary of Relevant Legal Standards....157

B. Breach of Duty in Connection with Payments to the FARC and the ELN From Approximately 1989 to 1997....165

C. Breach of Duty in Connection with Payments to the AUC From Approximately 1997 Through February 2003....184

Table of Contents

(continued)

Page

D. Breach of Duty in Connection with Payments to the AUC After Discovery of the FTO Designation in February 2003 Through January 2004....199

E. Analysis of Olson's Performance as General Counsel....214

F. Allegations Concerning Drugs and Arms Smuggling....217

G. Breach of Duty in Connection with Conducting an Alleged "Fire Sale" of Chiquita's Colombian Operations....219

H. Breach of Duty in Connection with the Guilty Plea....225

I. Breach of Duty in Connection with the Acquisition of Atlanta AG....232

J. Breach of Duty For Causing or Allowing Chiquita to Make False Statements in its Public Filings....236

K. Breach of Duty in Connection with Compensation and Severance Decisions....250

L. Business Judgment Considerations....259

VI. CONCLUSION....261

I. INTRODUCTION

This report summarizes and synthesizes the facts that have been developed in the investigation conducted by the Special Litigation Committee (the "SLC") of the Board of Directors (the "Board") of Chiquita Brands International, Inc. ("Chiquita" or the "Company") of allegations contained in the Verified Consolidated Shareholder Derivative Complaint (the "Amended Complaint"). The Amended Complaint was filed on behalf of the Company in the U.S. District Court for the Southern District of Florida on September 11, 2008. This Report also presents the SLC's determinations as to whether the claims alleged in the Amended Complaint should be pursued, dismissed or otherwise resolved, based on the exercise of its business judgment under New Jersey law, and taking into account the best interests of Chiquita and its shareholders.

The allegations in the Amended Complaint arise principally out of payments made by Chiquita's Colombian subsidiary, C.I. Bananos de Exportación S.A. ("Banadex"), to left-wing guerrilla and right-wing paramilitary groups, including the Fuerzas Armadas Revolucionarias de Colombia, or the Revolutionary Armed Forces of Colombia, known as the "FARC," and the Autodefensas Unidas de Colombia, or the United Defenses of Colombia, known as the "AUC," from approximately 1989 through January 2004. Following a work plan developed at the outset of the investigation with SLC counsel, Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank" or "SLC Counsel"), the SLC's investigation included the collection of a broad array of relevant documents, the review of those documents, and the interviews of witnesses with knowledge of the matters under investigation. At the conclusion of the interview process, the SLC met with its counsel to review and analyze the factual findings of the investigation, and to discuss the legal conclusions that followed from those findings. This Report summarizes the factual findings, factual conclusions, and legal analysis of the claims contained in the Amended Complaint and others identified by the SLC.

The SLC Report is organized as follows:

Section II describes the process by which the SLC was formed, identifies the members of the SLC and their professional backgrounds, and describes how the SLC, with the assistance of Fried Frank, evaluated the independence of its members.

Section III describes the work plan that the SLC followed in investigating the claims alleged in the Amended Complaint, describes the documents that were collected and reviewed, the interviews that were conducted, and the process by which the SLC and counsel analyzed the evidence and reached its conclusions.

Section IV describes in detail the factual findings reached by the SLC as a result of its investigation. Because the events investigated span the period 1989 to the present, the presentation of the SLC's factual findings is divided chronologically into three

sections. The first section describes relevant events during the period 1989 to 1997, during which time payments were made by Banadex to guerrilla groups in Colombia, and includes details of the security situation that caused the Company to make the payments. The second section describes the payments to the convivirs and the AUC starting in or around 1997 and extending through September 2001, when the U.S. Department of State designated the AUC as a Foreign Terrorist Organization (an "FTO"). The third section describes and analyzes the events that took place after the Company's discovery of the designation of the AUC as an FTO, including the Company's disclosure of the payments to the Department of Justice ("DOJ") in April 2003, the investigation of the Company by DOJ, and the Company's decision to enter into a guilty plea in March 2007.

The SLC's factual findings also include evidence developed by the SLC concerning various other issues alleged to constitute wrongdoing in the Amended Complaint, including the Company's alleged facilitation of the provision of weapons and drugs to the AUC in Colombia, the sale of Banadex in June 2004, and the acquisition of a German fruit distributor, Atlanta AG, in March 2003. Finally, the factual findings summarize evidence developed by the SLC relevant to allegations that the defendants caused the Company to make false and misleading public statements, and caused the Company to pay excessive compensation and make wasteful severance arrangements with senior officers and directors alleged to have committed wrongdoing related to the Colombia payments.

Finally, Section V describes the legal standards applicable to the claims set forth in the Amended Complaint and applies those legal standards to the facts developed during the investigation. This section also details the other business considerations that the SLC considered in reaching its determinations.

II. THE SLC AND ITS FORMATION

This section of the report sets forth the authorization provided to the SLC by the Chiquita Board, describes the background of the SLC members, details the independence review conducted by SLC Counsel, and summarizes the compensation of the SLC.

A. Board Resolution

Following the filing of the Derivative Litigation,[1] on April 3, 2008, the Chiquita Board adopted a resolution (the "Resolution") that established the SLC. *See* Chiquita Brands Int'l, Inc., Resolution of the Board of Directors Forming Special Litigation Committee (Apr. 3, 2008). The Resolution delegated to the SLC the authority and power to:

> investigate, review, and analyze the facts, allegations, and circumstances that are the subject of the Derivative Litigation, as well as any additional facts, allegations, and circumstances that may be at issue in any related inquiry, investigation or proceeding

Id.

The Board further delegated to the SLC:

> the full and exclusive authority to consider and determine whether or not the prosecution of the claims asserted in the Derivative Litigation or any other claims related to the facts, allegations, and circumstances of the Derivative Litigation is in the best interests of the Company and its shareholders,

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[1] In addition to this multi-district lawsuit centralized in the U.S. District Court for the Southern District of Florida, the term "Derivative Litigation," as defined in the Resolution, includes the following other state court actions: (i) *Serv. Employees Int'l Union v. Hills, et al.*, No. A07-11383 (Ct. of Common Pleas, Hamilton County Ohio) and (ii) *Hawaii Annuity Trust Fund for Operating Engineers v. Hills, et al.*, No. c-379-07 (N.J. Super Ct. Ch. Div.). The SLC reviewed the complaints filed in the pending Ohio state court action (*Serv. Employees Int'l Union v. Hills, et al.*) and the New Jersey state court action (*Hawaii Annuity Trust Fund for Operating Engineers v. Hills, et al.*) and found that all of the substantive allegations against Chiquita's officers and directors asserted therein are also contained, in far greater detail, in the Amended Complaint filed in the multi-district federal litigation. Therefore, the SLC's conclusions in this Report apply with equal force to the allegations contained in the Ohio and New Jersey state court actions. In any event, the action filed in the New Jersey state court has been dismissed, and that dismissal has been affirmed by the Appellate Division (a discretionary appeal to the New Jersey Supreme Court is pending).

> and what action the Company should take with respect thereto. . . .

Id. The Resolution also gave the SLC the authority to retain outside counsel and other advisors it deemed necessary to perform its duties. The Resolution designated non-management Chiquita directors Howard W. Barker, Jr., William H. Camp, and Clare M. Hasler, all of whom are independent of Chiquita management, as the members of the SLC.[2]

B. The Members of the Special Litigation Committee

1. Howard W. Barker, Jr.

Howard W. ("Skip") Barker joined the Chiquita Board on September 21, 2007 as an independent director, and has served as the Chair of the Board's Audit Committee since that time.

Barker graduated from Florida State University in 1972 with a B.S. in Accounting. Upon graduation, Barker joined Peat, Marwick, Mitchell & Co., the accounting firm that, in 1987, became KPMG LLP. Barker spent thirty years at Peat Marwick and KPMG, and served in numerous positions of increasing responsibility at the firm. In 1982, Barker became a partner at Peat Marwick, and spent three years in the company's Executive Education Program in New York, where he developed training programs for clients. Barker then transferred to KPMG's Stamford, Connecticut office, where he worked primarily on audits and mergers and acquisitions, but also remained involved in teaching and training KPMG employees. He retired from KPMG in 2002.

Since 2003, Barker has served on the boards of directors of (i) Medco Health Solutions, Inc., a pharmacy benefit manager with the nation's largest mail order pharmacy operations, and (ii) priceline.com, Inc. ("Priceline"), a leading online travel service. He is Chair of the Audit Committees of both boards, and also serves on the Compensation Committee of the Medco board, and the Nominating and Corporate Governance Committee of the Priceline board.

Barker is also a member of several professional societies, including the American Institute of Certified Public Accountants, the Connecticut Society of Certified Public Accountants, and the Florida Society of Certified Public Accountants.

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[2] Applying standards adopted by the Board that are consistent with New York Stock Exchange criteria for independence, the Company has found Barker, Camp, and Hasler each to be an "independent director." *See* Chiquita Brands Int'l, Inc., Proxy Statement (Form Def 14-A) (Apr. 15, 2008).

2. William H. Camp

William H. Camp joined the Chiquita Board on April 3, 2008 as an independent director and has served as the Chair of the Board's Compensation Committee since November 2008.

In 1967, Camp enrolled at Danville Area Community College, in Danville, Illinois, but left after one year to join the United States Navy. Camp served in the Navy for four years, and was honorably discharged in 1972. Following his discharge, Camp returned to the Danville Area Community College and earned his Associate's Degree in 1975. In 1977, Camp received a B.S. in Business Administration from the University of Illinois, Champaign-Urbana. Upon graduation, Camp joined the A.E. Staley Manufacturing Company, an oilseed and corn refiner headquartered in Decatur, Illinois. In 1985, Archer Daniels-Midland Company, Inc., a leading agricultural processor ("ADM"), bought a division of A.E. Staley.

Camp held various positions of increasing authority and responsibility during his career at A.E. Staley and then at ADM. Some of the highlights are: from 1985 to 1990, he held responsibility for ADM's North American Soybean Merchandising; from 1991 to 1999 he was Vice President of ADM's Rail Transportation, with responsibility for all of ADM's rail transportation throughout North America, Canada, and Mexico, President of the American River Transportation Company, and President of ADM Trucking; from 1999 to 2000, he was President of ADM South America, with responsibility for ADM's operations in Brazil, Argentina, Bolivia, and Paraguay; from 2000 until 2002, he was President of ADM's North American Oilseed Group; from 2002 until 2005, he was Senior Vice President of ADM's Global Oilseeds, Cocoa, and Wheat Milling, including ADM's North American, South American, European, and Asian operations; in 2005, he became the Executive Vice President of Global Processing; in 2007, he became the Executive Vice President – Asian Strategy, the position that he held until his retirement from ADM in 2007.

Camp currently serves as Chairman and CEO of Accelegrow Technologies, Inc., a start-up located in West Point, Georgia. From 2006 to 2007, he served on the boards of directors of (i) Wilmar International Limited, Singapore, a soybean and palm oil manufacturer and trader in Asia, and (ii) Agricore United, Canada, an agricultural grain cooperative.

3. Dr. Clare M. Hasler

Dr. Clare M. Hasler joined the Chiquita Board on October 11, 2005 as an independent director, and has served on the Board's Compensation Committee since that time.

Hasler enrolled at Central Michigan University in fall 1975 where she spent one-and-a-half years. She transferred to St. Clair Community College for one semester. Hasler then attended Michigan State University beginning in fall 1977 and received her B.S. in Nutrition in 1981. In 1984, Hasler earned a masters degree in Nutrition from Penn State University. She then obtained a dual Ph.D. in Environmental Toxicology and Human Nutrition from Michigan State University in 1990.

After obtaining her dual Ph.D., Hasler served a two-year post-doctoral fellowship at the National Cancer Institute in Bethesda, Maryland. In October 1992, she became an Assistant Professor in the Department of Food Science and Human Nutrition at the University of Illinois, Champaign-Urbana, and served in that position until 2003. In 2003, Hasler received a Masters in Business Administration from the University of Illinois. Hasler then became the first Executive Director of the Robert Mondavi Institute for Wine and Food Science (the "Mondavi Institute") at the University of California, Davis, the position that she currently holds. As Executive Director of the Mondavi Institute, Hasler is responsible for programming and vision-development efforts, as well as serving as the University's primary liaison to the wine and food industries. Hasler is an international authority on "functional foods," which are foods or dietary components that may provide a health benefit beyond basic nutrition.

In addition to her post at the Mondavi Institute, Hasler has performed outside consulting work, primarily for scientific advisory boards. She is currently the Women's Wellness Advisor for Nature Made Vitamins; serves on the Scientific Advisory Board of Reliv International, Inc., a leading manufacturer of proprietary nutritional supplements; serves on the Nutrition Committee of the Almond Board, an organization supervised by the U.S. Department of Agriculture; serves on the Scientific Advisory Board of both the Mushroom Council, a trade group funded by mushroom growers, and the Cranberry Group, a cooperative of Ocean Spray and Wisconsin cranberry growers; and serves on the board of the Journal of Medicinal Food and of several nutraceutical journals, including the Journal of the American Nutraceutical Association.

Hasler is also a member of a number of professional societies, including the American Association for Cancer Research, the American Association of Cereal Chemists, the American Association for the Advancement of Science, the American Nutraceutical Association, the American Society for Nutritional Sciences, and the Institute of Food Technologists.

C. <u>SLC Independence Review</u>

Prior to conducting any substantive investigative work, the SLC and its counsel, Fried Frank, engaged in a thorough review of the independence of each SLC member with respect to the defendants named in the Amended Complaint. In conducting the independence review, the SLC was guided by principles of New Jersey and Delaware

law regarding the independence of special litigation committees. Accordingly, the SLC and its counsel sought to determine whether its members were, "for *any* substantial reason, incapable of making a decision with only the best interests of the corporation in mind." *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003) (emphasis in original); *see also In re PSE&G S'holder Litig.*, 801 A.2d 295, 314 (N.J. 2002) ("Directorial independence 'means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous consideration or influence'") (quoting *Aronson v. Lewis,* 473 A.2d 805, 816 (Del. 1984)).[3]

The factors that the SLC considered in its independence review included: (i) the SLC members' involvement, if any, in the actions at issue in the Derivative Litigation; (ii) the SLC members' financial interest, if any, in the actions at issue in the Derivative Litigation; (iii) the SLC members' professional and personal relationships, if any, with the defendants in the Derivative Litigation; (iv) the SLC members' mutual connections with the defendants in the Derivative Litigation, if any, to institutions, businesses, charitable organizations, or other entities; and (v) the judgments made by the SLC members, if any, about the veracity of the claims alleged in the Derivative Litigation.

The SLC and its counsel also considered any other factors that would "weigh on the mind of a reasonable special litigation committee member . . . in a way that generates an unacceptable risk of bias." *Oracle*, 824 A.2d at 938-39 ("a director may be compromised if he is beholden to an interested person. Beholden in this sense does not mean just owing in the financial sense, it can also flow out of personal or other relationships to the interested party") (internal quotations and citations omitted).[4] To explore these issues, Barker, Camp and Hasler separately met with SLC Counsel in mid-

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[3] As noted above, Chiquita is incorporated in New Jersey, and thus New Jersey law governs the conduct of Chiquita's directors and officers. *See Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.19 (11th Cir. 1989). However, New Jersey courts seek guidance from the Delaware courts, which are preeminent in analyzing and interpreting corporate law. *See, e.g., IBS Financial Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 949-50 (3d Cir. 1998) ("When faced with novel issues of corporate law, New Jersey courts have often looked to Delaware's rich abundance of corporate law for guidance"). New Jersey courts look to New York law as well. *See Francis v. United Jersey Bank,* 432 A.2d 814, 821 (N.J. 1981).

[4] *See also Beam v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) (doubts about a director's independence may arise "because of financial ties, familial affinity, a particularly close or intimate personal or business affinity"); *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. Ch. 2003) (finding that an SLC lacked independence where the SLC Chairman "publicly and prematurely issued statements exculpating one of the key company insiders whose conduct [was] supposed to be impartially investigated by the SLC"), *aff'd*, 847 A.2d 1121 (Del. 2004); *Katell v. Morgan Stanley Group, Inc.*, 1995 WL 376952, at *8 (Del. Ch. June 15, 1995) ("When a special committee's members have no personal interest in the disputed transactions, this Court scrutinizes the members' relationship with the interested directors") (citation omitted).

May to review each of their respective backgrounds, and to discuss their relationships with current and former Company officers and directors.

1. Howard W. Barker, Jr.

Based upon Fried Frank's review of Barker's background, Fried Frank and Barker jointly concluded that he was independent and financially disinterested from the defendants in the Derivative Litigation. Specifically, Barker: (i) with one minor exception discussed below, had no involvement in any of the actions at issue in the Derivative Litigation; (ii) had no financial interest in the actions at issue in the Derivative Litigation; (iii) had no professional or personal relationship with any of the defendants; (iv) was not aware of any mutual connections to any institutions, businesses, charitable organizations, or other entities with any of the defendants; and (v) had made no pre-judgments about any of the claims alleged in the Derivative Litigation.

Although Barker joined the Board after the Company had stopped making the payments in Colombia, he is named as a defendant in the Amended Complaint. The Amended Complaint does not actually mention Barker by name in any substantive allegation, but the SLC inferred his inclusion as a defendant to relate to its claim that certain severance decisions made by the Board following discovery of the Colombia issue were improper, a claim that is subordinate to the primary claim, which is that the payments in Colombia were a breach of duty.

The Amended Complaint alleges, in general, that the Board improperly granted severance to Chiquita executives who were involved in making, or were aware of, the payments to the FARC and AUC. See Am. Compl. ¶ 119. The only severance decision in which Barker participated was for defendant Robert Kistinger, which was made at the October 25, 2007 Board meeting, the first meeting Barker attended as a Chiquita director.[5] Based upon a review of the facts, Fried Frank and Barker concluded that, given that the issue was decided at his first Board meeting and that he had no prior experience with Chiquita's Colombia issues, or with Kistinger, he could fairly and impartially consider this claim. Nonetheless, out of an abundance of caution, Barker recused himself from the SLC's deliberation and decision-making with respect to this claim.

In any event, the fact that Barker served on the Board at the time the challenged action took place does not render him interested under the law. *See Kaplan v. Wyatt*, 499

5 With respect to Kistinger, the Amended Complaint also alleges that the Board improperly allowed him to remain employed by the Company. *See* Am. Compl. ¶ 144. However, Kistinger left the Company in March 2008, and thus, the SLC analyzed this claim as one relating to his severance.

A.2d 1184, 1189 (Del. 2005) ("The mere fact that a director was on the Board at the time of the acts alleged in the complaint does not make the director interested or dependent so as to infringe on his ability to exercise his independent business judgment of whether to proceed with the litigation"); *Kindt v. Lund*, 2003 WL 21453879, at *3 (Del. Ch. May 30, 2003) (upholding the SLC's independence even though one of its two members "was on the board, approved the challenged transactions, and is a defendant" because that member "had no financial interest in any of the transactions"); *Katell*, 1995 WL 376952, at *7 (affirming the SLC's independence notwithstanding the fact that its sole member was "not only a defendant in this lawsuit, but is the very general partner who approved the disputed transactions" because the undisputed facts demonstrated that the SLC member had no financial interest in the underlying transaction).

The plaintiffs, in the Amended Complaint, allege that Barker lacks independence for several additional reasons, none of which have merit. *See* Am. Compl. ¶¶ 137, 141(g).

First, the plaintiffs allege that Barker lacks independence because he "spent his entire career as a 'Big Six' accountant," and thus "he had an ingrained hostility toward shareholder suits." Am. Compl. ¶ 141(g). This conclusory allegation – that accountants are inherently opposed to shareholder suits and thus cannot act independently – is unsupported by fact or law and makes no logical sense. *See, e.g.*, *Kaplan*, 499 A.2d at 1189-90 ("Allegations of natural bias not supported by tangible evidence of an interest on the part of the Committee in the outcome of the litigation do not demonstrate a lack of independence").

Second, the plaintiffs claim further that Barker, who retired from KPMG in 2002, would be reluctant to recommend that the Company sue his fellow directors because "KPMG is the independent auditor of several companies on whose boards several of the Chiquita Defendants currently serve." Am. Compl. ¶ 137. Courts routinely reject this type of vague, unsupported and insubstantial argument as insufficient to raise a serious question regarding independence. *See, e.g.*, *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 822 (Del. Ch. 2005) ("the plaintiffs attempt to rely on a mere inference that because a former executive of a major corporation owns a small percentage of the corporation's outstanding shares and that corporation does business with a national bank, somehow that former executive could not act independently of the bank's CEO as a director of the bank. The allegations . . . are simply not enough").

Third, the plaintiffs allege that Barker is a "close personal friend" of Aguirre, and thus he may be disabled from vigorously investigating the defendants. Am. Compl. ¶ 137. The plaintiffs cite "media reports" as their source for this allegation, but do not identify which "media reports," and the SLC has not found any media reports that would support this claim. Most significantly, however, Barker is not, in fact, a close personal friend of Aguirre. Barker first met Aguirre when Barker joined the Chiquita

Board in September 2007, one month before the first derivative action was filed. Barker and Aguirre have never socialized outside of Board-related events. Moreover, the plaintiffs fail to explain how a friendship with Aguirre would preclude Barker from independently investigating the claims alleged against *all* defendants. Finally, even if true, "[a]llegations of mere personal friendship . . . standing alone [ ] are insufficient to raise a reasonable doubt about a director's independence." *Beam*, 845 A.2d at 1050 (citation omitted).

Fourth, the plaintiffs allege that Barker lacks independence because defendant and former Chiquita director Gregory C. Thomas, who served as a director from November 2000 to March 2002, also worked at KPMG at one time. *See* Am. Compl. ¶ 137 n.8. Thomas worked at KPMG (then Peat, Marwick, Mitchell & Co.) from 1969 to 1977, reaching the level of senior manager. Barker joined KPMG in 1972, but did not know Thomas at KPMG, and in fact, has never met Thomas. The plaintiffs fail to explain how Barker's independence would be compromised by the fact that he and Thomas once worked for the same large accounting firm. This allegation is not enough to raise a serious question about Barker's impartiality. *See Kaplan*, 499 A.2d at 1189 (finding that a party challenging an SLC member's independence must show that the factor allegedly affecting independence was "such an influence on [the SLC member] or the Committee that [it] prevented them from basing their decisions on the corporate merits of the issues"); *see also Oracle*, 824 A.2d at 938.

Fifth, the plaintiffs allege that Barker lacks independence because both he and defendant Robert Kistinger are past and current members of the American Institute of Certified Public Accountants ("AICPA"). *See* Am. Compl. ¶ 137, n.8. As an initial matter, Barker had never met Kistinger until Kistinger was interviewed by the SLC on November 11, 2008. More fundamentally, AICPA is a national, professional organization for Certified Public Accountants, much like the American Bar Association is a national, professional organization for lawyers. According to its website, AICPA currently has over 338,000 members. Thus, the plaintiffs are, in essence, asserting that an SLC member cannot be independent if he or she is part of the same profession as one of the defendants. This is illogical, impractical, and unsupported by law.

2. William H. Camp

Based upon Fried Frank's review of Camp's background, Fried Frank and Camp jointly concluded that he was independent and financially disinterested from the defendants in the Derivative Litigation. Specifically, Camp, who joined the Board on April 3, 2008, months after the Derivative Litigation was filed: (i) had no involvement in any of the actions at issue in the Derivative Litigation; (ii) had no financial interest in the actions at issue in the Derivative Litigation; (iii) had no professional or personal relationship with any of the defendants; (iv) was not aware of any mutual connections to any institutions, businesses, charitable organizations, or other entities with any of the

defendants; and (v) had made no judgments about any of the claims alleged in the Derivative Litigation. This conclusion is consistent with the Amended Complaint, as the plaintiffs made no allegation that Camp lacks independence for any reason.

3. Dr. Clare M. Hasler

Based upon Fried Frank's review of Hasler's background, Fried Frank and Hasler jointly concluded that she was independent and financially disinterested from the defendants in the Derivative Litigation. Specifically, Hasler: (i) with two minor exceptions discussed below, had no involvement in any of the actions at issue in the Derivative Litigation; (ii) had no financial interest in the actions at issue in the Derivative Litigation; (iii) had no professional or personal relationship with any of the defendants; (iv) was not aware of any mutual connections to any institutions, businesses, charitable organizations, or other entities with any of the defendants (other than the nominal defendant, Chiquita, as discussed below); and (v) had made no pre-judgments about any of the claims alleged in the Derivative Litigation.

The SLC identified two potential issues concerning Hasler's independence, which Fried Frank and Hasler concluded did not adversely affect her ability to serve on the SLC.

First, the Amended Complaint alleges two claims, in general, which apply to Hasler based on the timing of her service on the Board. Those claims are based on Hasler's role in approving (i) the Company's entering into the plea agreement in March 2007, and (ii) the severance arrangements of Robert Olson and Robert Kistinger in 2006 and 2007, respectively, and the compensation of Fernando Aguirre in 2006 and 2007. Am. Compl. ¶¶ 118, 141(d). Because Hasler was not on the Board when any of the payments in Colombia were made, Fried Frank and Hasler concluded that she could fairly and impartially consider these claims. Moreover, as discussed above, the fact that Hasler served on the Board at the time these actions were taken does not render her interested under the law. *See Kaplan*, 499 A.2d at 1189; *Kindt*, 2003 WL 21453879, at *3; *Katell*, 1995 WL 376952, at *7. Nonetheless, out of an abundance of caution, Hasler recused herself from the SLC's deliberation and decision-making with respect to these claims as to all the defendants.

Second, the SLC and its counsel carefully considered the relationship between Chiquita, and its subsidiary Fresh Express, and UC Davis, where Hasler is the Executive Director of the Mondavi Institute within the College of Agricultural and Environmental Sciences (the "CAES"). In particular, the SLC examined certain charitable contributions made by Chiquita and Fresh Express to the CAES, which Hasler identified during her initial independence review conducted by Fried Frank before the Amended Complaint was filed. In order to gather additional information regarding this issue, counsel for the SLC interviewed the following witnesses: (i) Jim Lugg, Executive Vice President of

Global Food Safety at Chiquita, (ii) Melissa Haworth, Director of Major Gifts at UC Davis, and (iii) Tanios Viviani, former President of Fresh Express and currently the President of Global Innovation and Emerging Markets and Chief Marketing Officer at Chiquita. In addition, SLC Counsel requested and received documents relating to the contributions from both Chiquita and UC Davis. The following is a summary of the facts related to the contributions.

History of Contributions. Between 1970 and June 2005, Chiquita made two gifts to UC Davis – $1,000 in October 1992, and $17,650 in August 2003. Hasler did not become affiliated with UC Davis until she became the Executive Director of the Mondavi Institute in February 2004. In June 2005, Chiquita acquired Fresh Express, Inc., including its subsidiary, Trans-Fresh. At the time, Fresh Express and Trans-Fresh had a long history of making contributions to fund agricultural research at UC Davis. Between 1970 and 2005, Fresh Express and Trans-Fresh had contributed $167,466 to UC Davis for research. According to Lugg, who worked for Trans-Fresh beginning in the late 1960s, and was involved in making the contributions, most of the contributions made to UC Davis at that time were so-called *quid pro quo* gifts, common in the agricultural gifting community, targeted at specific research areas in the hopes of employing the recipients upon graduation. At least six current employees came to Fresh Express as the result of such programs.

Fresh Express Scholarship Fund. Following Chiquita's acquisition of Fresh Express, Haworth, Director of Major Gifts at UC Davis, contacted Fresh Express in the hope that it would continue to contribute to the college's programs. During 2006, Lugg and Viviani had several conversations about continuing Fresh Express's connection with UC Davis. They believed that Fresh Express should continue to make contributions and further its relationship with UC Davis, but shift those contributions away from narrow research grants in favor of unrestricted scholarship grants, in order to facilitate an increase in highly qualified food scientists, and thus strengthen the industry as a whole.

In June 2006, Fresh Express executives, including Viviani and Lugg, visited UC Davis. While recollections vary slightly as to the extent of Hasler's participation in this meeting, all agreed that her role was minimal. In December 2006, Dean of the CAES Neal Van Alfen and Haworth met with Fresh Express executives at Fresh Express's offices. Hasler was not involved in planning, and was not present at, this meeting. Ultimately, in January 2007 and February 2008, the Chiquita Brands International Foundation made two $25,000 contributions to UC Davis to establish the Fresh Express Graduate Student Fund.

Viviani had complete autonomy to make the gifts (no one else at Chiquita approved or ratified the gift). Viviani did not contact Hasler regarding the decision to contribute to the scholarship fund, nor did Viviani contact her to inform her that the donations had been made. The decision regarding which student(s) will receive the

scholarship funds will be made solely by the Graduate Group at UC Davis, a committee that acts independently from Department Chairs and selects students based on need and merit. Hasler does not have any involvement in, or influence over, the Graduate Group. Hasler did not, and does not, receive any direct benefit from these donations. [6]

To put these contributions in perspective, UC Davis defines "major gifts" as no less than $25,000. Over $100 million in private funds were donated to UC Davis in the 2007 fiscal year (July 2006 to June 2007) and approximately $200 million more was donated in the 2008 fiscal year (July 2007 to June 2008). In the 2008 fiscal year, at least 2,012 different entities made philanthropic donations to the CAES. Thus, the Fresh Express grants amount to a *de minimis* amount of the CAES's overall corporate donations.

Similarly, the gifts represented a small fraction of Chiquita's overall giving. In 2007, the Chiquita Brands International Foundation gave $380,091 in donations to various educational and charitable institutions, including at least fifteen universities. In 2006 and 2007, Chiquita made annual charitable contributions of approximately $1.3 million, and additional in-kind contributions of rejected produce. For example, Fresh Express recently donated $200,000 to Hartnell College, a California agricultural school, to help build a new wing of the school dedicated to agricultural study.

E. coli Research Grants. In January 2007, prompted by a recent E. coli outbreak in spinach, Fresh Express announced that it would provide up to $2 million for multidisciplinary research to help the fresh-cut produce industry avoid future E. coli outbreaks. In April 2007, Fresh Express awarded $2 million to fund nine separate research projects designed to further the understanding of contamination by E. coli in lettuce and leafy greens. The projects were chosen by an independent and voluntary panel of scientific advisors from a total field of sixty-five proposals. All proposals were required to address one or more areas of needed research identified by the panel. One of the proposals selected by the panel of scientific advisors, out of the sixty-five applications, came from a research team at the Western Institute for Food Safety and Security at UC Davis. Hasler played no role in making this decision and had no influence over the independent panel. Hasler does not benefit from this grant in any way.

SLC Conclusion. On June 24, 2008, the SLC held a telephonic meeting to, among other things, review the facts relating to these contributions and consider Hasler's independence; Hasler did not participate. At the conclusion of this meeting, SLC

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6 The plaintiffs allege that director defendant Robert Fisher personally visited the Mondavi Institute and donated $25,000 on behalf of Chiquita to provide financial support to graduate students. *See* Am. Compl. ¶ 137. This did not happen. In fact, Fisher was not involved in any way in establishing the Fresh Express Graduate Student Fund.

members Barker and Camp determined that Chiquita's contributions to UC Davis did not affect Hasler's ability to fairly and impartially consider the claims asserted in the Amended Complaint given (i) the nominal amount of the contributions, both from the perspective of Chiquita and UC Davis, (ii) Hasler's lack of involvement in soliciting the contributions, (iii) Hasler's lack of involvement in approving the contributions, (iv) that Hasler does not benefit directly from the contributions, (v) that future contributions will not be impacted by the outcome of the Derivative Litigation, and (vi) that Hasler believed that the donations would have no affect on her ability to fairly and impartially consider the claims against the defendants.

This conclusion is consistent with special litigation committee independence case law. For example, in *Oracle*, 824 A.2d at 947-48, in denying the SLC's motion to dismiss the case, the court determined that a material issue of disputed fact existed as to whether the SLC members were independent due, in part, to the significant ties to Stanford University that two of the defendants and the two SLC members shared. At the time, both SLC members were professors at Stanford, and two of the defendants were significant donors. *Id.* One defendant director received his undergraduate and graduate degrees from Stanford (and was a student of one SLC member), and had donated over $14 million to Stanford through his foundation and personal funds, $50,000 of which was donated in appreciation for a speech made by one of the SLC members at the defendant director's request. *Id.* at 931-32. The second defendant, Larry Ellison, Oracle's CEO, had donated almost $10 million to Stanford through the Ellison Medical Foundation. *Id.* at 932. At the time the litigation was pending, Ellison was reportedly considering donating $150 million or more to create the "Ellison Scholars Program" at Stanford. *Id.* at 933.

Because the two members of the SLC were both professors at Stanford, the Court found that the connections between the SLC members and the defendants, viewed together, "would weigh on the mind of a reasonable special litigation committee member . . . in a way that generates an unacceptable risk of bias." *Id.* at 947; *see also Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985) (independence of single member SLC was questionable given that he was the President of Duke University, which had recently received $10 million from the primary defendant director, who was also a Trustee of the University).

The web of relationships that created doubts as to the independence of the SLC members in *Oracle* do not bear any meaningful resemblance to those presented here: in *Oracle*, the amounts of the donations were significantly larger, they were made directly by the individual defendants (not the nominal defendant, as here), and, at least in one instance, were specifically tied to a speech given by one of the SLC members. In addition, both the defendants and the SLC members had significant institutional ties (to Stanford), which do not exist here. *See, e.g.*, *In re J.P. Morgan Chase & Co. S'holder Litig.*,

906 A.2d at 822-23 (rejecting challenge to the independence of two directors who were the President and a trustee of the American Museum of Natural History, because plaintiffs "never state how JPMC's contributions [to the museum] could, or did, affect the decision-making process of the [directors]," and in fact did not "even go so far as to indicate what percentage of the museum's overall contributions are made by [the corporation]").

Finally, the Amended Complaint alleges that Hasler, like Barker, is also a close personal friend of Aguirre. *See* Am. Compl. ¶ 137. There is no evidence to support this claim. Like Barker, Hasler met Aguirre when she joined the Chiquita Board in October 2005 and does not socialize with Aguirre outside of Board-related events. Further, as noted above, even if true, allegations of mere personal friendship are insufficient to raise a reasonable doubt about a director's independence. *See Beam*, 845 A.2d at 1050 (citation omitted).

D. <u>SLC Compensation</u>

As approved by Chiquita's Compensation Committee, each of the SLC members is being compensated as follows in connection with their service on the SLC: (i) a $3,000 per month fee; (ii) a $1,000 in-person meeting fee; and (iii) a $500 telephonic meeting fee. This compensation was determined following a review of compensation paid to special litigation committee members at comparable companies.

E. <u>Retention of Counsel</u>

After interviewing several law firms, on May 5, 2008, the SLC retained Fried Frank as counsel in connection with its investigation of the claims alleged in the Amended Complaint. Fried Frank had no prior attorney-client relationship with any of the individual defendants or with any of the members of the SLC. With one minor exception, Fried Frank had no prior attorney-client relationship with Chiquita. Fried Frank's representation of Chiquita ended in the mid-1990s; was handled by a partner who is no longer with the firm; and had nothing to do with Chiquita's Colombian operations.

III. SLC INVESTIGATIVE WORK PLAN

A. Overview

The SLC, with the assistance of SLC Counsel, conducted a detailed and thorough factual and legal investigation in order to determine whether it is in the best interests of the Company and its shareholders to pursue, settle, or dismiss any or all of the claims asserted in the Amended Complaint. The SLC members have been involved in every aspect of planning and executing the investigation. At the outset of the investigation, the SLC reviewed and authorized a plan of investigation for SLC Counsel. SLC Counsel conducted seventy interviews of fifty-three individuals, and one or more SLC members participated in a significant number of these interviews, including the interviews of, among others, (i) former and current executives of the Company, (ii) former and current directors of the Company, and (iii) other former and current Company employees, both from the Company's U.S. and Colombian operations.

In addition, SLC Counsel reviewed approximately 750,000 pages of documents, and the SLC members themselves have reviewed a substantial number of pertinent documents. The SLC members also received summaries of each of the interviews conducted by SLC Counsel, regardless of whether an SLC member participated. SLC Counsel performed a substantial amount of legal research and analysis, the results of which were considered by the SLC periodically throughout the investigation. The SLC held nine formal meetings during the course of its investigation, and held additional informal conference calls during which issues raised throughout the investigation were discussed. The investigation was directed by the SLC members in all respects.

B. Meetings with Company and Audit Committee Counsel

At the outset of its investigation, SLC Counsel met with current and former counsel to the Company and the Audit Committee, including attorneys from Kirkland & Ellis LLP ("K&E"), Covington & Burling LLP ("Covington"), and Kirkpatrick & Lockhart Preston Gates Ellis LLP ("K&L Gates"). The purpose of these meetings was to enable the SLC to benefit from the knowledge and experience of these firms in dealing with many of the events and issues relating to the Amended Complaint and to identify the universe of potentially relevant documents. Given the substantial amount of overlap between the allegations in the Amended Complaint and the investigation conducted by DOJ, the SLC determined that it would be in the best interests of the Company's shareholders to avoid duplication and draw upon those materials to the extent practical and appropriate.

C. Documents Reviewed

Based on its document requests, the SLC requested and received (or was permitted to review) over 750,000 pages of documentary evidence from the Company, outside counsel to the Company and Audit Committee, the Company's former outside auditor, Ernst & Young ("E&Y"), and the individual defendants.

By category, the documents reviewed by the SLC and its counsel include:

Documents	
1.	Minutes of Chiquita's Board, Audit Committee, Compensation Committee, and Nominating and Governance Committee meetings from 1990 to 2007.
2.	Talking points and agendas for Board and Audit Committee meetings.
3.	Foreign Corrupt Practices Act reports reviewed by the Audit Committee and the Board from 1990 through 2007.
4.	E&Y reports, presentations, memoranda, and management letters.
5.	KPMG reports, presentations, and memoranda.
6.	Certain publicly-available information, including SEC filings and news media reports.
7.	Over 50,000 documents gathered and produced to DOJ during its investigation from 2003 through 2007 in response to informal requests and subpoenas.[7]
8.	E-mails, memoranda, and handwritten notes produced by current and former directors, including notes taken at Board and Audit Committee meetings.
9.	Chiquita's correspondence with DOJ, the U.S. Attorney's Office, and the SEC regarding the investigation.
10.	Internal audit reports and memoranda.
11.	Correspondence, memoranda, and internal documents relating to the Company's Colombian operations.
12.	Reports and memoranda created by certain outside consultants to the Company and the Audit Committee.
13.	Debriefs of the grand jury testimony given by Chiquita directors and personnel in connection with the DOJ investigation.
14.	Deloitte Touche Tohmatsu reports, presentations, and memoranda.
15.	Accounting documents regarding the acquisition of Atlanta and the sale of Banadex.

[7] During the course of the DOJ investigation, DOJ requested from the Company all documents relating to the guerrilla and paramilitary payments, which the Company produced. SLC Counsel reviewed the DOJ subpoenas (and voluntary requests), and the Company's responses, and believes that the Company's responses were thorough and complete, and therefore did not believe it necessary to request additional documents on this issue.

16.	Deposition transcripts from the SEC investigation of the Company that began in 1998 and lasted until October 2001.

D. Interviews

At a meeting on July 28, 2008, based upon a preliminary review of pertinent documents and the recommendation of SLC Counsel, the SLC determined which witnesses to interview to advance the purposes of the investigation. The SLC directed its counsel to seek interviews with fifty-six individuals, including the twenty-six defendants and thirty non-defendants, whom it believed had relevant knowledge of the underlying facts, with the understanding that the list might be modified as new facts were learned and the investigation proceeded. The SLC and its counsel conducted interviews of the following defendants, all of whom are or were employed by or affiliated with Chiquita, between September 2008 and January 2009:[8]

DEFENDANT	ROLE	DATES OF EMPLOYMENT
Fernando Aguirre	Chairman, Chiquita	May 2004 – present
	Director, CEO, Chiquita	January 2004 – present
Morten Arntzen	Director, Audit Committee Member, Chiquita	March 2002 – May 2008
Jeffrey Benjamin	Director, Audit and Compensation Committee Member, Chiquita	March 2002 – February 2007
John Braukman III	SVP and CFO, Chiquita	August 2004 – June 2005
Robert Fisher	COO, Chiquita	March 2002 – October 2002
	Director, Chiquita	March 2002 – present
Cyrus Freidheim	Chairman, Chiquita	March 2002 – May 2004
	CEO, Chiquita	March 2002 – January 2004
Clare Hasler	Director, Chiquita	October 2005 – present
	Compensation Committee Member, Chiquita	November 2005 – present
	Special Litigation Committee Member, Chiquita	April 2008 – present
Roderick Hills	Director, Audit Committee Member, Chiquita	March 2002 – May 2007

8 The SLC initially considered interviewing SLC member Barker, who is also a defendant, but ultimately decided that such interview would not be necessary. Because he only joined the Board on September 24, 2007, the only relevant event about which Barker could conceivably have knowledge is the decision to grant a severance award to Robert Kistinger at a Board meeting on October 25, 2007 (his first Board meeting as Chiquita director). As noted above, out of an abundance of caution, Barker recused himself from deliberations and decision-making on the severance issue as to Kistinger.

DEFENDANT	ROLE	DATES OF EMPLOYMENT
Durk Jager	Director, Chiquita	December 2002 – present
	Compensation Committee Member, Chiquita	December 2002 – 2004
	Audit Committee Member, Chiquita	2004 – present
Robert Kistinger	Various financial/operations positions, Chiquita	1980 – 1989
	Executive VP, Operations, Tropical Products Div., Chiquita	1989 – 1994
	Senior Executive VP, Banana Group, Chiquita	1994 – 1997
	President and COO, Fresh Group, Chiquita	1997 – March 2008
Warren Ligan	VP of Tax, Chiquita	1992 – May 1998
	CFO, Chiquita	May 1998 – September 2000
Carl Lindner	CEO and Chairman, Chiquita	1984 – August 2001
	Chairman, Chiquita	August 2001 – March 2002
	Director, Chiquita	March 2002 – May 2002
Keith Lindner	President and COO, Chiquita	1981 – March 1997
	Vice Chairman, Chiquita	March 1997 – March 2002
Rohit Manocha	Director, Audit Committee Member, Chiquita	January 2001 – March 2002
Robert Olson	VP and General Counsel, Chiquita	August 1995 – August 2006
James Riley	SVP and CFO, Chiquita	January 2001 – August 2004
Fred Runk	CFO, Director, Chiquita	1984 – 1989
	Director, Chiquita	1984 – March 2002
Jaime Serra	Director, Compensation Committee Member, Chiquita	January 2003 – present
Steven Stanbrook	Director, Chiquita	December 2002 – present
	Audit Committee Member, Chiquita	April 2003 – June 2005
	Compensation Committee Member, Chiquita	April 2003 – November 2008
Gregory Thomas	Director, Audit Committee Member, Chiquita	November 2000 – March 2002
William Tsacalis	Director, Financial Control, Chiquita	January 1980 – January 1983
	Assistant Controller, Chiquita	January 1983 – July 1984
	Controller, Chiquita	July 1984 – April 1987
	VP, Financial Administration & Operations Control, Chiquita	April 1987 – May 1989

DEFENDANT	ROLE	DATES OF EMPLOYMENT
	VP and Controller, Chiquita	May 1989 – 2005
	VP, Finance & Treasurer, Chiquita	2005 – November 2007
	VP, Finance & Enterprise Risk Management, Chiquita	November 2007 – January 2008
William Verity	Director, Audit Committee Member, Chiquita	May 1994 – March 2002
Steven Warshaw	Director of Corporate Planning, Chiquita	1985 – 1990
	CAO and CFO, Chiquita	1990 – March 1997
	President and COO, Chiquita	March 1997 – August 2001
	CEO, Chiquita	August 2001 – March 2002
	Director, Chiquita	1997 – March 2002
Jeffrey Zalla	Various positions, Chiquita	1990 – 2000
	VP and Corporate Responsibility Officer, Chiquita	2000 – 2003
	VP, Treasurer and Corporate Responsibility Officer, Chiquita	2003 – 2005
	SVP and CFO, Chiquita	2005 – present

The SLC also conducted interviews of the following non-defendants between September 2008 and January 2009.[9] A brief description of each individual's position at the Company or role in the events at issue (and period in which they served, where appropriate) is detailed below:

INDIVIDUAL	ROLE	DATES OF EMPLOYMENT OR ENGAGEMENT WITH CHIQUITA
[Banadex Employee #10]*	[Redacted]	1998 – November 2001
	[Redacted]	November 2001 – June 2004
	[Redacted]	June 2004 – present
[Banadex Employee #3]	[Redacted]	March 1992 – October 1999

9 This list does not include individuals interviewed by the SLC in connection with its independence review, described above.

* The names of certain people have been redacted in the publicly-filed version of this Report. The redactions have been made based on the SLC's understanding that the publication of the names of these individuals, and the description of their roles, could pose serious risks to their safety and the safety of members of their families. An unredacted version of the Report is being filed with the Court.

INDIVIDUAL	ROLE	DATES OF EMPLOYMENT OR ENGAGEMENT WITH CHIQUITA
[Banadex Employee #5]	[Redacted]	February 1998 – October 1999
	[Redacted]	November 1999 – June 2004
	[Redacted]	June 2004 – present
[Banadex Employee #2]	[Redacted]	1990 – June 2004
	[Redacted]	June 2004 – present
Jack Devine	Outside consultant, The Arkin Group	N/A
Dennis Doyle	In-house counsel, Chiquita	1984 – 1987
	VP and COO, Banana Group, Chiquita	1987 – 1989
	Chiquita President, Far East, Middle East, Australia & Asia Region, Chiquita	1989 – 2002
	SVP, Regulatory Affairs, Chiquita	2002 – 2003
	Outside consultant	2003 – present
[Banadex Employee #4]	[Redacted]	1977 – 1997
	[Redacted]	1997 – present
Ronald Goldstock	Independent outside consultant	N/A
Jennifer Hammond	Outside consultant, KPMG LLP	N/A
Audrey Harris	Outside counsel, Kirkland & Ellis LLP	N/A
David Hills	Senior Counsel and Assistant General Counsel, Chiquita	1991 – July 2001
Barbara Howland	Paralegal, Chiquita	1988 – 1992
	Administrator, Corporate Secretary's Office, Chiquita	1992 – 1998
	Assistant Corporate Secretary, Chiquita	1998 – present
[Banadex Employee #1]	[Redacted]	1980 – 1989
	[Redacted]	1989 – February 2000
	[Redacted]	February 2001 – present
Michael Kesner	Outside consultant, Deloitte Touche	N/A

INDIVIDUAL	ROLE	DATES OF EMPLOYMENT OR ENGAGEMENT WITH CHIQUITA
	Tohmatsu	
Steven Kreps	Internal Audit, Chiquita	January 1991 – September 1991
	Manager, Management Reporting, Chiquita	October 1991 – March 1996
	Director, Financial Controls, Chiquita	April 1996 – September 1998
	Director, Finance & Operations Control, Chiquita	October 1998 – January 2000
	Director, Internal Audit, Chiquita	January 2000 – June 2000
	VP, Internal Audit, Chiquita	June 2000 – August 2006
Elliott Leary	Outside consultant, KPMG LLP	N/A
Jeffrey Maletta	Outside counsel, K&L Gates	N/A
[Chiquita Employee #3]	[Redacted]	1994 – 1996
	[Redacted]	1996 – December 2001
	[Redacted]	December 2001 – July 2006
	[Redacted]	July 2006 – December 2007
	[Redacted]	December 2007 – present
[Chiquita Employee #2]	[Redacted]	1975 – 1978
	[Redacted]	1978 - 1980
	[Redacted]	1980 - 1984
	[Redacted]	May 1975 – June 1987
	[Redacted]	July 1987– June 1989
	[Redacted]	July 1989 – January 2003
	[Redacted]	January 2003 – January 2006
Edwin Pisani	Auditor, Ernst & Young	N/A
[Chiquita Lawyer]	[Redacted]	1992 – present
Christopher Reid	Auditor, Ernst & Young	N/A
Indra Rivera	Internal Audit, Chiquita	March 2002 – November 2007
Thomas Schoenbaechler	Auditor, Ernst & Young	N/A
Jorge Solergibert	Assistant General Counsel, Chiquita	1990 – present

INDIVIDUAL	ROLE	DATES OF EMPLOYMENT OR ENGAGEMENT WITH CHIQUITA
James Thompson	SVP and Chief Compliance Officer, Chiquita	April 2006 – August 2006
	General Counsel, Chiquita	August 2006 – present
Robert Thomas	Senior Counsel, Chiquita	1988 – December 2000
Dick Thornburgh	Outside counsel, K&L Gates	N/A
Laurence Urgenson	Outside counsel, Kirkland & Ellis LLP	N/A

The SLC interviewed Aguirre, Arntzen, Benjamin, Fisher, Harris, Roderick Hills, Kreps, Kistinger, Maletta, Olson, Thompson, and Stanbrook on more than one occasion. Hills and Olson have each been interviewed on four separate occasions.

Of the original interviews authorized by the SLC, only one individual has refused the SLC's request to be interviewed, namely, Wilfred "Bud" White, who served as Chiquita's Vice President of Internal Audit from 1988 until 1997. Three other witnesses were unavailable to the SLC. The SLC was unable to interview [Chiquita Employee #1] who passed away in November 2008 before he could be interviewed. The SLC was likewise unable to interview [Chiquita Employee #1's assistant], who passed away in April 2007. Finally, the SLC was unable to interview defendant Oliver Waddell, who served as a Chiquita director and member of the Audit Committee from 1994 to March 2002, due to a debilitating mental illness that has been documented by Waddell's physician and attorney.

While the SLC has reason to believe these individuals may have had information relevant to its investigation, the SLC believes this information would be largely cumulative or corroborative of information provided by other witnesses, and thus does not believe that the unavailability of these witnesses has materially affected its ability to gather the facts necessary to conduct its investigation or reach its conclusions.

In addition, the SLC directed its counsel to seek interviews of certain current and former DOJ personnel that it believed might have information relevant to its investigation. To that end, the SLC followed the procedures set forth at 28 C.F.R. §§ 16.22, 16.24 and 16.26 to seek information from DOJ personnel relevant to their professional and employment responsibilities. In accord with those procedures, the SLC filed a written request with DOJ (a "*Touhy* request"), dated July 31, 2008, seeking the interviews of the following current and former DOJ officials:

DOJ Personnel	Position
Michael Chertoff	Former Assistant Attorney General, Criminal Division
Larry Thompson	Former Deputy Attorney General
Alice Fisher	Former Deputy Assistant Attorney General, Criminal Division
Jonathan Malis	Assistant U.S. Attorney, District of Columbia
Michael Taxay	Former Trial Attorney in the Counterterrorism Section, Criminal Division

DOJ denied this request on September 25, 2008. The SLC appealed the denial by letter dated November 28, 2008, narrowed the scope of its request to Chertoff and Thompson, and provided DOJ with certain supplemental information on January 15, 2009. At this time, the SLC's appeal is pending.

Nonetheless, while the SLC believes the interviews of Chertoff and Thompson would be useful, the SLC does not believe that its inability to interview these individuals has materially affected its ability to gather the facts necessary to conduct its investigation or reach its conclusions. This is due to the extensive documentary and testimonial evidence received and reviewed by the SLC regarding the defendants' contacts with DOJ and the substantial testimonial and documentary evidence of what transpired at the April 24, 2003 and August 26, 2003 meetings between DOJ and Company representatives. Indeed, given this evidence (and as detailed below), the SLC believes that there is no material dispute about what occurred or was said at these meetings. In the event that the SLC's *Touhy* request is granted after this report is filed with the Court, the SLC will seek to complete those interviews as promptly as possible and determine what, if any, impact they have on its conclusions.

E. <u>The SLC's Good Faith Attempts to Cooperate with Lead Counsel</u>

The SLC also made a good faith effort to cooperate and obtain input from Lead Counsel in this action. To that end, counsel for the SLC met with court-appointed Lead Counsel – Cohen Placitella & Roth, P.C.; Coughlin Stoia Geller Rudman & Robbins LLP; and Rigrodsky & Long, P.A. (collectively, "Lead Counsel") – on three separate occasions.[10] The SLC members also met directly with Lead Counsel.

10 The firm of Rigrodsky & Long, P.A. was not appointed Lead Counsel in this action. However, at the request of the Cohen Placitella firm, the SLC agreed to allow Rigrodsky & Long to participate in the process on an equal footing with the other firms.

On September 22, 2008, counsel for the SLC met with Lead Counsel to provide an update on the status of the SLC's investigation and to receive input regarding Lead Counsel's view of the scope of the SLC's investigation and the basis for the claims set forth in the Amended Complaint. Lead Counsel advised that its claims were based solely on matters appearing in the public record and that it did not have any non-public documents on which it was relying that might assist the SLC in its investigation. To date, Lead Counsel has not provided the SLC with any factual information relating to the allegations contained in the Amended Complaint.

Pursuant to a cooperation agreement, on October 31 and November 17, 2008, counsel for the SLC again met with Lead Counsel (in-person and telephonically, respectively) to provide an update on the SLC's investigation and receive input from Lead Counsel regarding the scope of its investigation. During these meetings, counsel for the SLC provided Lead Counsel with an oral summary of the list of witnesses that the SLC intended to interview, the groups of documents requested and reviewed by the SLC, the SLC's understanding and analytical approach to the claims alleged in the Amended Complaint, and a detailed summary of the facts adduced to date regarding those claims. At both meetings, counsel for the SLC requested Lead Counsel's view regarding potential additional areas of inquiry on which the SLC should focus, and at both meetings Lead Counsel stated that it appeared that the scope of the SLC's inquiry was appropriate and did not recommend that the SLC take any additional investigative steps.

Between December 5 and December 19, 2008, pursuant to a confidentiality agreement, the SLC allowed Lead Counsel to review certain documents collected and reviewed by the SLC, including a selection of:

Documents Shared with Lead Counsel	
1.	Minutes, agendas and presentation materials from Chiquita's Board, Audit Committee, Compensation Committee, and Nominating and Governance Committee meetings from 1990 to 2007.
2.	FCPA reporting materials.
3.	Accounting materials.
4.	Documents used by the SLC during its witness interviews.
5.	Materials from the SEC investigation of the Company conducted between 1998 and 2001.
6.	Materials submitted to DOJ during the course of the investigation that resulted in the Company's 2007 guilty plea.

Attorneys from each of the three firms comprising Lead Counsel engaged in review of those documents over the course of approximately seven days. Following this review, on December 22, 2008, Lead Counsel and counsel for the SLC participated

in a conference call, during which counsel for the SLC provided an update on the status of the SLC's investigation.

On January 13, 2009, the members of the SLC (along with SLC Counsel) met with Lead Counsel. At that time, among other things, the SLC requested that Lead Counsel provide them with their view of the claims alleged in the Amended Complaint, and the scope of the inquiry conducted by the SLC. Lead Counsel informed the SLC that, based on the information they had been provided, it appeared that the SLC's investigation covered all of the issues and topics addressed by the Amended Complaint.

F. SLC Meetings

As noted above, in total, during the course of its investigation, the SLC met formally nine times, either in person or telephonically.[11] During those meetings, the SLC, with the aid of SLC Counsel, among other things, planned the scope of its investigation, reviewed pertinent documents and legal memoranda, reviewed the results of its investigation on an ongoing basis, planned additional investigative steps needed, and deliberated as to what course of action was in the best interests of the Company with respect to the claims made in the Amended Complaint.

Two of these meetings (one of which lasted two days) were dedicated, in whole or in substantial part, to deliberations as to what course of action to take with respect to the various claims. During these meetings, the SLC members deliberated for over fifteen hours (the "Deliberation Meetings"). Following the first of the Deliberation Meetings, which took place on January 13 and 14, the SLC directed its counsel to obtain further information regarding the communications between DOJ and the Company during the December 2003 and January 2004 time period. As a result, SLC Counsel conducted five additional interviews, each attended by one or more of the SLC members. After this additional work was completed, the SLC met again telephonically on January 30 to complete its deliberations. The results of the SLC's factual findings and deliberations are detailed below.

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11 The SLC members reside in geographically disparate locations. Camp resides in Decatur, Illinois, Barker resides in Coral Gables, Florida, and Hasler resides in Woodland, California.

IV. FACTUAL FINDINGS

A. The Formation of Banadex and the Early Security Situation in Colombia

The Company. Chiquita Brands International, Inc. ("Chiquita" or the "Company") is a leading producer of bananas, tropical fruit, and other value-added produce. The Company was founded in 1899, as the United Fruit Company, following the merger of the Boston Fruit Company and a banana and railroad enterprise that owned large plantations in Central America and Colombia. Until the mid-1960s, United Fruit's Colombian operations were located exclusively in the city of Santa Marta (in the Magdalena department) but, beginning in 1966, it began operating out of the Urabá region in the city of Turbo (in the Antioquia department) as well.[12] In March of 1989, ninety years after it first began operating in Colombia, the Company – then called United Brands – formed Banadex, an export company that consolidated all of the Company's Colombian operating divisions.[13] Ultimately, in or around the mid-1990s, the separate management structures of the Company's Colombian subsidiaries were consolidated under the management of [Banadex Employee #1].[14] *See* K&E Warehouse Presentation (Sept. 18, 1999).

During the late 1980s and the early 1990s, Chiquita began to change its banana production model in Colombia, shifting from a predominantly purchased-fruit operation to a largely owned-farm operation. Between approximately 1989 and 1994, Chiquita purchased a number of farms in Colombia and eventually owned over 9,500 acres of farmland in Turbo and Santa Marta. As a result, the number of employees working in Chiquita's Colombia operations grew dramatically during this period. In the late 1980s, the Company had approximately sixty employees in Colombia, but by the mid-1990s, the Company had approximately 4,000 employees based there.

During this period, the security situation in rural areas of Colombia, including the regions in which Chiquita operated, became dangerous as a result of the rise of violent, left-wing guerrilla groups. As the Company expanded its farm ownership in Santa Marta and Turbo, the presence of the guerrilla groups became an increasingly

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12 Turbo and Santa Marta are coastal cities in, respectively, the northwestern and northern regions of Colombia.

13 *See* http://www.chiquita.com; MARCELO BUCHELI, BANANAS AND BUSINESS: THE UNITED FRUIT COMPANY IN COLOMBIA, 1899-2000 (2005).

14 [Biographical and professional information on Banadex Employee #1]

important factor in the management of Banadex. *See* Memorandum of KPMG Interview of [Banadex Employee #9] (Mar. 17, 2003).[15]

The FARC. The largest guerrilla group operating in Santa Marta and Turbo was Fuerzas Armadas Revolucionarias de Colombia, or the Revolutionary Armed Forces of Colombia, known as the FARC. The FARC was founded in 1964 and dedicated to a Marxist ideology hostile to business and landowners, as well as to the overthrow of the Colombian government. From its founding in 1964, and through the early 1980s, the FARC expanded slowly. However, after 1982, the FARC expanded its operations with the goal of establishing an organized front in each of Colombia's fifty-one political divisions. From 1984 to 1987, the FARC took advantage of a cease-fire with the Colombian government to expand and consolidate its operations in resource-rich areas, such as Urabá, a commercial agriculture center, and the oil-producing Magdalena valley.[16]

The FARC engaged in a variety of illegal activities to support its political and military goals. For example, the FARC developed connections with the illegal narcotics industry and imposed taxes on the drug trade. The FARC also supported its activities by engaging in kidnapping for ransom.[17] In addition, it is a matter of public record that the FARC routinely extorted local and multinational businesses operating in Colombia,[18] a practice known as the "vacuna," which translates literally to "vaccine."[19]

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15 This report uses the following citation forms: (i) memoranda are cited as, for example, Memorandum from Jorge Solergibert to Robert Thomas (Aug. 2000); (ii) emails are cited as, for example, E-mail from Laurence Urgenson to Roderick Hills, *et al.* (May 13, 2004); (iii) notes as, Notes of Audrey Harris (Aug. 4, 2003); (iv) minutes of Board and committee meetings as, for example, Minutes of Chiquita Board Meeting (May 13, 2004); (v) letters are cited as, for example, Letter from Cyrus Freidheim to Jeffrey Benjamin (July 23, 2003); and (vi) talking points as, for example, Robert Olson Talking Points (Dec. 4, 2003).

16 *See* PETER DESHAZO, *ET AL.*, BACK FROM THE BRINK: EVALUATING PROGRESS IN COLOMBIA 1999-2007 3-5 (Ctr. for Strategic and Int'l Studies, ed., 2007) (hereinafter "DeShazo"); GRACE LIVINGSTON, INSIDE COLOMBIA: DRUGS, DEMOCRACY AND WAR 180-81 (2004) (hereinafter "Livingston"); Angel Rabasa & Peter Chalk, COLOMBIAN LABYRINTH, RAND Corp., 23-24 (2001), *available at* http://www.rand.org/pubs/monograph_reports/MR1339 (hereinafter "Rabasa & Chalk").

17 *See* Livingston, at 180; Rabasa & Chalk, at 26. Indeed, in 2008, substantial public interest was generated by the rescue of one of the FARC's most prominent remaining hostages, former Colombian presidential candidate Ingrid Betancourt, who was kidnapped in 2002 while campaigning. *See* Simon Romero, *Colombia Plucks Hostages from Rebels' Grasp*, N.Y. TIMES, July 3, 2008, at A1.

18 For example, it has been reported that, "Marxist revolutionaries across the country are cashing in on Colombia's oil boom by extorting oil companies and seizing workers for ransom. . . . The ELN and the Revolutionary Armed Forces of Colombia (FARC) shake down the multinationals, state companies, and subcontractors and then use the funds to buy weapons and carry out subversive operations . . . . More often, the guerrillas go after construction workers, geologists, and

It is estimated that, during the 1990s, FARC derived hundreds of millions of dollars in revenue from its numerous illegal activities.[20] In 1986, the FARC had approximately 3,600 fighters operating in thirty-two fronts; by 1995, that number had increased to approximately 7,000 fighters operating in sixty fronts.[21]

As the FARC grew in size and its participation in illegal activities expanded, its propensity for violence also increased.[22] Throughout the 1990s, the FARC committed numerous acts of extreme violence and captured and destroyed state military bases, seized a number of towns, and captured 5,000 members of state forces as prisoners of war.[23]

The ELN. Although the FARC was the largest guerrilla group in Urabá, during the period in which Chiquita expanded its farm ownership, the Ejército de Liberación Nacional, or the National Liberation Army, known as the ELN, also had a significant presence, particularly in the areas surrounding the ports. The ELN was founded by urban intellectuals in 1964 as a pro-Cuban revolutionary group.[24] The ELN, like the FARC, supported itself through kidnapping and extortion. After a period of dormancy, in the 1980s, the ELN reemerged under new leadership and grew substantially. The ELN grew from approximately 800 combatants operating in three fronts in 1986 to approximately 3,000 combatants in 1996.[25] As a result of its expansion, the ELN became Colombia's second-largest guerrilla group and has traditionally been strongest in northeastern Colombia. The ELN also committed numerous violent acts throughout the

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engineers working in Colombia's remote jungles and mountains." Patti Lane, *As Guerrillas Tap a Gusher . . . Oil Companies Go on the Defensive*, BUSINESS WEEK, Sept. 30, 1996.

19 *See Desfinanciar la Guerra: Blindaje de rentas* [*De-financing the war: Armor of revenues*], in U. N. Dev. Program, EL CONFLICTO, CALLEJÓN CON SALIDA [The Conflict, Alley with an Exit] 290 (2003).

20 *See, e.g.,* Edgar Trujillo Ciro & Martha Elena Badel Rueda, Departamento Nacional de Planeació, *Los Costos Económicos de la Criminalidad y la Violencia en Colombia: 1991-1996* [*The Economic Costs of Criminality and Violence in Colombia:* 1991-1996], Archivos de Macroeconomía, Mar. 10, 1998, at 32 (during the period 1991-1996, the FARC derived approximately $390 million per year on average, most of it from drug trafficking, based on conversion of 390.6 billion 1995 Colombian pesos to U.S. dollars at the average exchange rate in 1995).

21 *See* Rabasa & Chalk, at 26-27. By 2000, the FARC had grown to between 15,000 and 20,000 combatants in over seventy fronts. *Id.* In 2003, the FARC was Colombia's largest guerrilla group, with control over about a third of Colombia. *See* Livingston, at 179.

22 *See* Livingston, at 184.

23 *See* Alfredo Rangel Suárez, *Parasites and Predators: Guerrillas and the Insurrection Economy in Colombia*, 53 J. INT'L AFFS. 577 (2000) (hereinafter "Suárez").

24 *See* Livingston, at 186.

25 *See* Rabasa & Chalk, at 30-31. By 2000, the ELN had approximately 3,500 combatants in 30 fronts. *See* Suárez, 53 J. INT'L AFFS. 577.

late 1980s and 1990s. It was particularly notorious for blowing up pipelines, and in one highly publicized incident, in October 1998, the ELN blew up an OCENSA oil pipeline, killing seventy-three civilian peasants, including thirty-six children.[26]

This was the political and security environment in which Chiquita was operating in the late 1980s and early 1990s. Not surprisingly, the Company's experience was consistent with the public reporting about Colombia. Chiquita personnel based in Central America and Colombia were well aware of the guerrilla groups' violent acts before the Company received its first demand for payment. Each of the Colombian-based employees interviewed by the SLC credibly related their experience with the guerrilla groups and stated that, during this time period, the FARC was responsible for daily acts of violence, including killings.

B. Payments to Guerrilla Groups

1. Initial Payments to Guerrilla Groups[27]

Against this backdrop, at some point between 1987 and 1989, Banadex received a demand for payment from the FARC in the amount of $10,000, delivered by a FARC representative to [a Banadex farm manager]. [The Banadex farm manager] told [Banadex Employee #1] about the demand. According to [Banadex Employee #1], it was apparent to "everyone" that if the payment was not made, "people would be kidnapped." As Banadex's farm ownership had expanded, the Company's personnel had become increasingly aware of the growing risk that it would face extortion demands. This was the first demand.

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26 *See* Livingston, at 185-88. According to witnesses interviewed by the SLC, in addition to the FARC and the ELN, the Ejército Popular de Liberación, or the Popular Liberation Army ("EPL"), was also active in the areas where Chiquita's banana plantations were located and was particularly successful in infiltrating its farms.

27 During the course of its investigation, the SLC examined guerrilla payments going back to the late 1980s, even though there are serious questions as to whether, among other things, claims premised on these payments, which ended sometime between 1997 and 1999, are barred by the bankruptcy release issued in connection with Chiquita's Chapter 11 plan of reorganization (discussed below in Section V.B.1.C.ii.), which covers all conduct prior to March 19, 2002, and the statute of limitations (discussed below in Section V.B.1.C.v.). Because the FARC payments were not the subject of the DOJ's investigation of the Company, and because there was never any government enforcement action relating to the FARC payments, despite the fact that they were fully disclosed to the SEC and DOJ during the 1998-2001 investigation of the Company, the SLC did not attempt to reconstruct every aspect of the payments to the guerrilla groups in the same manner as it did for payments to the convivir/AUC in the later period. The SLC did, however, make a thorough effort to understand, among other things, (i) the security issues relating to guerrilla activity in Colombia in areas where the Company operated going back to the late 1980s; (ii) the personnel in the Company responsible for approving and making the payments during that period; and (iii) the Company's assessment of the legality of the payments.

[Banadex Employee #1] then called [Chiquita Employee #2], and told him that the FARC had demanded an "extortion payment" in Turbo.[28] In turn, [Chiquita Employee #2] called Robert Kistinger, who, at the time, was head of Chiquita's Latin American operations based in Cincinnati.[29] According to Kistinger, [Chiquita Employee #2] told him that the Company had been "approached for protection money."

Several weeks after learning about the demand for payment from the FARC, [Banadex Employee #1] was told to travel to Cincinnati to meet with members of senior management to discuss the demand. In Cincinnati, [Banadex Employee #1] met with Kistinger, Dennis Doyle, then-Vice President and Chief Operating Officer ("COO") of the Banana Group,[30] and Charles Morgan, the Company's then-General Counsel.[31] [Banadex Employee #1] said that this meeting was brief and memorable, at least for him. He said that when he communicated the amount of the demand, Doyle responded, "Let's pay it."[32] While he did not recall the specifics of this meeting at which the payment was approved, Kistinger said that executives at the Company had a "number of discussions" about how to respond to this demand and the future demands that the Company anticipated. He said, "Everyone understood this was clearly extortion money. We had an ongoing situation where people were being killed, infrastructure was being damaged." According to [Banadex Employee #1], no alternatives to making the payment were discussed at the meeting.

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28 [Biographical and professional information on Chiquita Employee #2]

29 Robert Kistinger joined Chiquita in 1980 and, after holding a series of positions with increasing responsibilities, became President and COO of the Fresh Group in 1997, the position he held until he left the Company in March 2008.

30 Dennis Doyle joined Chiquita as an in-house lawyer in 1984 and was the Vice President and COO of the Banana Group from 1987 to 1989, during which time he oversaw the Colombia operations, in addition to operations in other regions. From 1989 to 2002, he was the President in charge of the Far East, Middle East, Australia, and Asia Region and also had responsibilities for the Company's European Region. He served as Senior Vice President for Regulatory Affairs from 2002 until 2003, when he left the Company. Doyle currently serves as a consultant for the Company.

31 Although [Banadex Employee #1] said that [Chiquita Employee #2] also attended this meeting, [Chiquita Employee #2] did not recall whether or not he attended. [Chiquita Employee #2] said that he believed that he discussed what transpired at the meeting with both [Banadex Employee #1] and Kistinger, who both told him that a decision was reached to make the payment.

32 Doyle said that he did not recall (i) the meeting, (ii) the initial demand for payment, or (iii) that the Company continued to make payments to guerrilla groups after the initial demand. The SLC found the mutually reinforcing accounts of [Banadex Employee #1], [Chiquita Employee #2], and Kistinger on how the initial payment was approved to be highly credible.

After the meeting, [Chiquita Employee #2] instructed [Banadex Employee #1] to meet him at a hotel in Guatemala in order to put the payment process in motion. [Chiquita Employee #2] had come from Honduras, where he had obtained $10,000 from the General Manager's Fund (generally, an account in a division's general ledger from which the General Manager is permitted to make discretionary payments), which he gave to [Banadex Employee #1], who brought it back to Colombia. [Banadex Employee #1] then delivered the cash (which he arranged to be converted from dollars to pesos) to [the Banadex farm manager], who in turn delivered the payment to the FARC.

Around the time of the Company's first payments to the FARC, the Company sought outside professional help on how to deal with the FARC and the other guerrilla groups. The Company engaged the services of Control Risks, a UK-based security consulting company, to assess the security situation in Colombia and advise the Company on how to deal with what it correctly anticipated to be continuing demands for payments. Control Risks advised the Company that, while it should negotiate with the groups to reduce the amount and delay payments as much as possible, in light of the security situation in Colombia, it had no meaningful choice other than to make the payments.

Following the initial payment, Banadex continued to make payments in response to extortion demands on a more or less regular basis, mostly to the FARC but also to other guerrilla groups. [Banadex Employee #1] believed the initial authorization he received was sufficient to cover subsequent payments of the same type and for approximately the same amounts if necessary to ensure the safety of Company employees and property. [Banadex Employee #1] said that he knew that senior management in Cincinnati was aware of the payments, the payments were recorded in the Company's books, and they were reviewed periodically by [Chiquita Employee #2] and the Company's internal auditors.

All payments to guerrilla groups were delivered by an intermediary and were made in cash. The SLC believes that the total amount of guerrilla payments ranged from $100,000 to $200,000 per year.

2. Security Situation in Colombia in the 1990s

Banadex continued to make payments to the FARC and other guerrilla groups through the early and mid-1990s. During that time period, guerrilla groups in Colombia continued their state of violent conflict with the Colombian government and, on numerous occasions, targeted Banadex's employees and infrastructure.

Witnesses interviewed by the SLC recalled that between 1990 and 1996, guerrilla groups kidnapped several Banadex employees. For example, in 1990 or 1991, Banadex's first Security Director was kidnapped by a group believed to be the ELN. The Security

Director was able to pass a note to his wife with [Banadex Employee #1's] phone number and instructions to call him. [Banadex Employee #2], negotiated the Security Director's release.[33] According to [Banadex Employee #1], shortly after his release, the Security Director "had a nervous breakdown" and quit. [Banadex Employee #1] recalled consulting on the negotiations for the release of at least three other Banadex employees who were kidnapped.

During this time period, Chiquita's facilities and infrastructure also sustained substantial damage at the hands of guerrilla groups. In approximately 1992 or early 1993, [Banadex Employee #1] and [Banadex Employee #3] decided that Banadex should not make further payments to the ELN because they were no longer viewed as a credible threat.[34] They were wrong. As a result of the refusal to pay, the ELN first defaced and then destroyed Banadex's wharf in Turbo. In addition, guerrillas groups bombed one of Banadex's packing stations in 1995 and another in 1996. *See* Memorandum of KPMG Interview of [Chiquita Employee #3] (Mar. 23 – 24, 2004).

The incident that provided the most dramatic and enduring support for the belief that there would be serious consequences for a failure to pay the FARC occurred in 1995. At that time, according to numerous witnesses, approximately twenty-five passengers traveling on a bus were killed in an attack attributed to the FARC. The recollection of witnesses varied as to whether most or all of the passengers killed were Chiquita employees.

No witness interviewed by the SLC was able to confirm that the bus was targeted solely because it was carrying Chiquita employees, but several witnesses believed that the FARC targeted the bus because the group believed that the passengers sympathized with groups with which it was in conflict. The massacre had a major impact on personnel both in Colombia and Cincinnati in reinforcing the reality of the threat of violence.

[Banadex Employee #1] described another incident, which the SLC believes occurred in October 1997, around the time that the payments to the guerrillas ended, in which Charles Didier, the Company's then-Quality Control Director in Colombia, was driving in a Company car while inspecting farms when he was ambushed and shot in the shoulder. Didier climbed out of the car into a ditch, and the guerrillas who had shot him approached. According to [Banadex Employee #1], upon seeing Didier, the guerrillas recognized that he was not their intended target and spared his life. [Banadex Employee #1] said that he believed that he, in fact, had been the intended

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33 [Biographical and professional information on Banadex Employee #2]

34 [Biographical and professional information on Banadex Employee #3]

target of the attack. Didier's bodyguard was also badly wounded during this incident. *See* Thompson Memorandum Submission to the U.S. Dept. of Justice (Oct. 4, 2004).

[Banadex Employee #1] said that the guerrilla group that attacked Didier was one to which the Company made payments. After this incident, [Banadex Employee #1] requested that Company vehicles in Colombia be equipped with level-three bulletproofing, which is the second-highest level of bulletproofing that exists. *See* Memorandum from [Banadex Contract Employee #1] to Colonel Wealker (Sept. 24, 2001); E-mail from [Chiquita Employee #1] to Robert Olson (Dec. 3, 2003).

Finally, [Banadex Employee #1] described an incident that likely followed the attack on Didier, in which [Banadex Employee #1] and several other employees, including [Banadex Employee #3], were traveling to a Company farm in Santa Marta in two separate cars, when the lead car was ambushed by guerrillas. *See* Memorandum of KPMG Interview of [Banadex Employee #9] (Mar. 17, 2003). [Banadex Employee #1] said that the men in the lead car radioed back to the trail car, where [Banadex Employee #1] was riding, describing the attack at the very moment that men with automatic weapons opened fire on his car. [Banadex Employee #1] said that no one was hurt because the cars were bulletproof.[35]

During this time period, the Colombian military did not – and apparently could not – defend Chiquita against attack by the guerrilla groups. For example, after the 1992 or 1993 destruction of the Banadex wharf in Turbo, Banadex immediately contacted the Colombian military for assistance, but was told that the military could not promptly inspect the wharf because it lacked flashlights and fuel. The Army was direct in its statements to the Company that it was not able to provide protection. On January 8, 1995, General Brigadier Alvarez Vargas of the Colombian Army sent a letter to [Banadex Employee #4][36] stating that the Army had knowledge of a threat against Chiquita facilities in Zungo and Nueva Colonia. It also stated that the Army, while "capable of supporting the normal development of [the Company's] banana operations," recommended that the Company "make a greater commitment to increase

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35 [Banadex Employee #1] told the SLC that this incident occurred in approximately 1996. However, he also said that he was kept safe during this incident by the bulletproofing of his car following the Didier incident. [Banadex Employee #3] also told the SLC that the Didier incident occurred prior to their ambush by guerrillas. In addition, certain documentary evidence supports this view and places the Didier incident in 1997 and the ambush of [the Banadex employees] in 1998. *See* E-mail from [Chiquita Employee #1] to Robert Olson (Dec. 3, 2003).

36 [Biographical and professional information on Banadex Employee #4]

and improve [its] own security." Letter from General Brigadier Alvarez Vargas to [Banadex Employee #4] (English translation) (Jan. 8, 1995).[37]

Based on the ample evidence of repeated acts of violence against the Company's employees and facilities, and the acknowledged inability of the Colombian government to provide protection, the SLC found that the Company had a more than sufficient basis to fear attack by the guerrilla groups on its employees and property.

3. Internal Procedures and Accounting Relating to Guerrilla Payments

Due to security concerns stemming from the incidents described above, and the possibility that there could be retaliation if the fact of the payments became known to opponents of the various factions being paid, the guerrilla payments were considered "sensitive" payments and given special and confidential treatment. Even though the Company made efforts to limit the number of people who had knowledge of the guerrilla payments, the SLC believes that personnel in the Internal Audit and Accounting Departments were able to track the payments on the Company's books and records adequately.

Outside Auditor. E&Y, the Company's outside auditor from at least 1985 to 2008, was generally aware that the Company's Colombian division was making "sensitive" payments, but did not regard them as material, either in quantitative or qualitative terms. Indeed, because, during this time period, Colombia made up a small percentage of the Company's revenue relative to other, larger divisions – such as Panama and Honduras – E&Y considered the Colombian operational results and expenditures to be largely immaterial to the Company as a whole. For this reason, and because Colombia did not require the Company to perform statutory audits, E&Y and the Company's Audit Committee jointly determined that the Company's Internal Audit Department should be responsible for auditing the Colombia division.[38] E&Y reviewed all of Internal Audit's work to ensure that it followed appropriate auditing procedures.[39]

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37 There was apparently never a question about the inability of Colombian National Police or any local law enforcement agencies to provide protection. During this period, the Colombian government was well-known to be ineffective in protecting against guerrilla activity, in part due to rampant corruption. *See* Suárez, 53 J. INT'L AFFS. 577; DeShazo, at 4, 35-36.

38 In the late 1990s, as the Colombian division came to account for a larger percentage of the Company's revenue, E&Y began performing targeted, on-site audits of certain "sensitive balance accounts" as part of its consolidated audit procedures. This was not a full-scale audit, and was performed with the assistance of Chiquita's Internal Audit department.

39 Although the SLC interviewed three E&Y partners, Edwin Pisani, Christopher Reid, and Thomas Schoenbaechler, and reviewed relevant documents produced by E&Y to DOJ, the SLC did not

Payment Procedures. Guerrilla payments were initiated within the Company by completing a document called a "1016," which was required by Chiquita's accounting procedures for virtually every disbursement. *See, e.g.*, Banadex Form 1016. Each 1016 was approved by [a Banadex employee] and typically included the following information: (i) the purpose of the payment, (ii) an accounting code, (iii) the date, (iv) the person requesting payment, and (v) an authorizing signature. For guerrilla payments, the description on the 1016 was coded (for example, as a payment for "military transport") in order to conceal the nature of the payments from local staff in Colombia. As suggested above, [Banadex Employee #1] and others were concerned that some Banadex personnel might have had hidden loyalties to differing guerrilla groups, which could cause them to disclose the payments being made to one group, and result in retaliation by competing guerrilla groups or factions of the same group against Banadex.

Once a properly authorized 1016 was submitted to the Accounting Department, the funds were disbursed. As noted above, all payments to guerrilla groups were delivered by an intermediary and were made in cash.[40]

Accounting for Sensitive Payments. The Company's Internal Audit Department developed a special accounting process for recording "sensitive" payments, which were described as payments requiring an "appropriate level of confidentiality" that "would not fall into other account classifications such as Contributions, Donations, Consulting Services, Public Relations, etc." As a general matter, the accounting process involved (i) ensuring the adequacy of supporting documentation for purposes of compliance with the Foreign Corrupt Practices Act ("FCPA"), (ii) conducting a quarterly review of

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otherwise investigate the auditing services provided by E&Y to the Company or the allegations pertaining to E&Y in the Amended Complaint. The Amended Complaint alleges that E&Y "acquiesced in the making or concealment of the improper or illegal payments and their mischaracterization in Chiquita's accounting books and records" and "repeatedly certified Chiquita's false and misleading financial statements . . . while misrepresenting that they had been properly audited." Am. Compl. ¶ 1. However, E&Y is not named as a defendant in the Amended Complaint and Lead Counsel has advised the SLC that E&Y will not become a party because its addition would defeat the diversity jurisdiction on which this Court's jurisdiction is based. *See* Am. Compl. ¶ 20. Moreover, E&Y was named as a defendant in a derivative action filed in New Jersey state court, which, as noted above, has since been dismissed. That action was filed by one of the firms named as Lead Counsel in this multi-district proceeding. For these reasons, the SLC concluded it should not expend additional resources of Chiquita or its shareholders investigating E&Y. In any event, the SLC found no facts suggesting that any illegal payments were improperly recorded on Chiquita's books or that Chiquita issued false or misleading financial statements.

40 [Banadex Employee #1] told the SLC that [Banadex Contract Employee #2] and [Banadex Contract Employee #1] were two intermediaries that Banadex used to make the guerrilla payments. [Banadex Contract Employee #2] was[ ]. [Banadex Contract Employee #1] was hired by the Company to [ ].

sensitive payment transactions, and (iii) providing the underlying payment documentation to the General Counsel in Cincinnati. This process was described in memoranda authored by Bud White and distributed widely throughout the Company, which were redistributed on an annual basis by the Internal Audit Department.[41] *See, e.g.*, Memorandum from Bud White to Distribution List (Apr. 19, 1990); Memorandum from Steven Tucker to Distribution List (Feb. 20, 1998); Memorandum from Steven Kreps to Distribution List (Nov. 12, 1999); Memorandum from Steven Kreps to Distribution List (Nov. 30, 1999). The process applied to payments to guerrilla groups.

Payment Recording. The evidence gathered by the SLC, from documents and testimony, varies as to how guerrilla payments were recorded in Banadex's books. The evidence suggests that the payments were recorded on Banadex's General Ledger as either: (i) general manager's expenses drawn from the General Manager's fund or (ii) security payments drawn from an operations account. *See* Memorandum from [Banadex Employee #3] to Bud White (May 16, 1995); Notes of Bud White (May 7, 1997). The guerrilla payments were not explicitly recorded as "guerrilla payments" in Banadex's accounting records for the security reasons described above. There is no evidence, however, that the way in which the Company recorded the guerrilla payments prevented the Company's internal auditors from tracking the payments in the Company's accounting records.[42]

Audits. The evidence shows that during routine audits of Banadex's internal controls, the Company ensured that "sensitive" payments were appropriately recorded. For example, as part of the Company's routine audit schedule, [Chiquita Employee #3], was sent to Colombia in 1995 with a team to conduct an audit of Banadex.[43] [Chiquita Employee #3] performed the portion of the audit that dealt with "sensitive" and FCPA payments, and determined that all such payments were properly recorded in Banadex's books. [Chiquita Employee #3] and his team identified certain other deficiencies concerning internal control processes (which he attributed, in part, to the complex legal structure of the Company's Colombia operations) and a task force was established to monitor the division's internal controls and to reduce general overhead in Colombia,

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41 Wilfred "Bud" White was Chiquita's Vice President of Internal Audit from 1988 until 1997.

42 In addition, during the SEC's investigation of the Company from 1998 to 2001 (*see infra* Section IV.D.), the SEC learned about the Company's accounting for the guerrilla payments through witness testimony and documentary evidence, but did not pursue a books and records action on the basis of these payments.

43 [Biographical and professional information on Chiquita Employee #3]

particularly in the areas of finance and accounting.[44] Following the 1995 audit, [Chiquita Employee #3] became Banadex's [ ], a position he held until late 2001.

In connection with the payment and accounting processes described above, the SLC concluded, based on documents and testimony, that Banadex adequately documented and recorded the guerrilla payments and that the Internal Audit Department monitored and reviewed "sensitive payments," a category which included guerrilla payments.

4. Legality of Payments to Guerrilla Groups

As noted above, then-General Counsel Charles Morgan was involved in the initial decision to approve the guerrilla payments. In or around 1992, the Chiquita Legal Department in Cincinnati focused on the payments being made to guerrilla groups when then-in-house counsel Robert Thomas noticed what turned out to be a guerrilla payment recorded on an FCPA report received from Banadex.[45]

FCPA Reporting. The Company's FCPA monitoring practices were comprehensive and detailed. Indeed, Chiquita's business activities (through its predecessor, United Brands) were central to the enactment of the FCPA by Congress. In early 1976, following an investigation by the Securities and Exchange Commission (the "SEC") into bribery payments made by United Fruit employees to a Honduran dictator and other officials, the Company entered into a consent decree, pursuant to which it instituted certain enhanced compliance measures. On February 19, 1976, the Company's Board adopted a "Board Policy," which prohibited, among other things, the making of political contributions and payments to government officials in foreign countries by Company employees. *See* United Brands Co., Board Statement of Policies and Procedures (Feb. 19, 1976). These same guidelines were later codified in the FCPA, enacted shortly thereafter in 1977. As a result, the Company created formalized FCPA reporting practices, which were maintained and extended in the years that followed.

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44 [Banadex Employee #1] told the SLC that the main concern identified in the 1995 audit was how to properly report guerrilla payments to Cincinnati and that, as a result of the audit, Banadex began to send certain information about the payments directly to Cincinnati. [Chiquita Employee #3], who led and recalls the 1995 audit, did not recall the concern about reporting guerrilla payments being raised. The SLC was unable to determine, from documents or additional testimony, what, if any, information about the payments was sent to management in Cincinnati as a result of this audit. It is possible that [Banadex Employee #1] was thinking of the audit work performed by Bud White and Robert Thomas in mid-1997. (*See infra* Section IV.C.4.).

45 Robert Thomas began working as a lawyer at John Morell, a Chiquita subsidiary, in the fall of 1988, and then joined the Chiquita Legal department in 1989, where he worked until December 2000.

Under Chiquita's FCPA reporting regime, all employees of a certain salary grade were required to complete a quarterly form detailing any payments that might potentially be covered by the FCPA. The quarterly report forms submitted by individuals contained both (i) payments to government officials and (ii) "sensitive" payments, or payments that the Company treated as confidential, regardless of whether they were covered by the FCPA, pursuant to the Accounting for Sensitive Payments memoranda. *See* Memorandum of KPMG Interview of [Chiquita Employee #3] (Mar. 23 – 24, 2004). Once filled out and returned, these forms were analyzed by Thomas and Bud White and compiled in a comprehensive FCPA report summary, organized by country and division, which was then shared with Robert Olson, the Company's General Counsel. Olson, who joined Chiquita in August 1995 and served as General Counsel until August 2006, said that he learned about the guerrilla payments shortly after joining the Company in 1995, likely in connection with these monitoring practices.

Thomas then presented the FCPA summary reports to the Audit Committee. Initially, Thomas made these reports on a quarterly basis, but, at some point before Olson joined the Company in 1995, the Audit Committee requested that they be made on a semi-annual basis. At the Audit Committee meetings, but not before, Thomas distributed summary reports to each Audit Committee member and explained the summaries and any trends in the payments. While documentary evidence shows that certain employees reported the payments to guerrilla groups on FCPA forms (*see, e.g.*, FCPA Questionnaire from [a Banadex employee] (Oct. 20, 1992)), guerrilla payments were not reported on the quarterly FCPA summaries that were presented to the Audit Committee.[46]

Legal Opinions. After Thomas began to focus on the guerrilla payments as a result of the FCPA reports, the Legal Department began examining the legality of the payments under Colombian law. On February 4, 1993, David Hills, an in-house lawyer in Cincinnati with responsibility for Colombia, drafted a memorandum that had been requested by [Chiquita Employee #1] summarizing but not analyzing a recently enacted Colombian law ("Law 40") that set forth penalties for paying, concealing, or failing to disclose kidnapping ransom and extortion payments.[47] *See* Memorandum from David Hills to [Chiquita Employee #1] (Feb. 4, 1993). According to Hills, [Chiquita Employee

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46 According to Robert Thomas, as a general matter there was "tremendous confusion" in the Colombia division about whether to report "sensitive" or security payments for FCPA purposes. Certain Colombian personnel told the SLC that guerrilla payments were included on FCPA reports provided to Cincinnati, along with other "sensitive" payments. As noted below, Thomas said that the guerrilla payments did not implicate the FCPA because they were not being made to government officials.

47 David Hills was an in-house lawyer at Chiquita from 1991 until July 2001, with substantial responsibility for Colombia. Hills was fluent in Spanish. [Biographical and professional information on Chiquita Employee #1]

#1's] primary concern in requesting this memo was whether paying ransom for a kidnapped employee through its anti-kidnapping insurance policy would be a violation of the new law. This was not an abstract concern, given the number of kidnappings that had occurred at Banadex prior to this time.

The Legal Department continued to track Law 40 (the subject of Hills' memorandum). On June 10, 1994, [a Banadex lawyer] wrote a memorandum to Thomas, stating that the Constitutional Court of Colombia had recently found Law 40 to be unconstitutional and held that a person who makes kidnapping ransom or extortion payments "acts in a 'State of Necessity' and, therefore, cannot be penalized." Memorandum from [Banadex lawyer] to Robert Thomas (June 10, 1994).

According to Thomas, over the years, scrutiny of guerrilla payments by personnel in Cincinnati increased, and questions were raised about the legal consequences of the payments. For example, in early 1997, Thomas requested that [the Banadex lawyer] update and expand on his June 10, 1994 memo. In response, [the Banadex lawyer] prepared a memorandum titled, "Crime of Extorsion and Kidnapping in Colombia" (translated from Spanish), dated February 3, 1997, which he addressed to Thomas. *See* Memorandum from [Banadex lawyer] to Robert Thomas (Feb. 3, 1997). As with his 1994 memo, [the Banadex lawyer's] memo stated that "no punishment will be applied" when one makes ransom and extortion payments "in a state of necessity." The memo concluded that one who makes extortion payments cannot be punished under Colombian law because "such payment takes place without free consent, and under threat of immediate injury." *Id.*

Finally, Thomas and Olson asked Hills to obtain another legal opinion on the guerrilla payments because, according to Hills, [the Banadex lawyer's] "credibility was a bit shot" after an incident involving improper payments to renew a port license, discussed further below,[48] and Thomas and Olson wanted to confirm [the Banadex lawyer's] previous conclusions concerning the legality of these payments. Thus, Hills asked Baker & McKenzie ("B&M"), an international law firm with which Banadex had worked in the past, for an opinion from its lawyers based in Colombia who were familiar with Colombian law.

On September 9, 1997, B&M sent a memorandum to Hills regarding the legality of payments to guerrillas under Colombia law. In Hills' view, this memo was an "historical piece" because, from his perspective, the Company was, at this time, no longer paying the guerrillas. In the memo, B&M concluded that payments to guerrilla groups were not illegal if made to "defend the life and freedom of individuals." Letter

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48 [The Banadex lawyer] was found to have had some knowledge of two bribery payments made by Banadex to customs officials in Colombia in 1996 and 1997 in connection with the renewal of a port license. (*See* discussion *infra* Section IV.D.1.).

from [Outside Counsel #1] to David Hills (Sept. 9, 1997). This was the third legal opinion prepared or obtained by the Company that concluded that the payments to the guerrilla groups were not illegal because the Company had been extorted.

In contrast to the reviews of Colombian law performed by the Company and its outside counsel, the evidence shows that the only U.S. law considered in relation to the payments was the FCPA. Thomas handled FCPA compliance issues at the Company and was considered by his supervisor, Olson, as an expert in that area of the law. Thomas determined that, because the guerrilla payments were not made to government officials or entities, they did not violate the FCPA. Olson and Hills shared Thomas's assessment of this issue.

However, neither Thomas nor Olson made any further inquiry into the potential legal consequences of making the payments under U.S. law. While this omission did not result in any harm to the Company during the period when the Company made payments to the FARC and the other guerrilla groups, because making the payments was not against U.S. law, similar payments created an enormously important issue when the Company later began to make payments to the AUC.

Thus, the legal opinions that in-house Company and outside counsel prepared during this time universally concluded that the Company could invoke the defense of justification under Colombian law to any claims that the payments were illegal and that, therefore, it would not be penalized under Colombian law for making the payments. No separate review was conducted under U.S. law, and none was thought to be needed.

The FARC and ELN Are Designated as FTOs. On October 8, 1997, the U.S. Department of State issued its first list of Foreign Terrorist Organizations ("FTOs"), and the list included the FARC and ELN. As a result, it became a felony to knowingly provide material support to either group.[49] The SLC found no evidence that any Chiquita executive, or any of the defendants, learned about the designation at the time it occurred. Company personnel learned about the designation at varying times, mostly

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[49] 18 U.S.C. § 2339B(a)(1), as amended in 2004, provides, in relevant part, as follows: "Unlawful conduct – Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989)." When the FARC and ELN were designated FTOs, the statute provided for ten years imprisonment. The term of imprisonment was increased to fifteen years on October 26, 2001.

many years after it occurred and after the Company stopped making payments to those groups.[50] Only [Banadex Employee #2] said that he likely read contemporaneous Colombian media reports discussing the designation, although he did not specifically recall doing so, and did not recall reporting it to anyone in Cincinnati. In any event, as discussed below, the SLC has found that the weight of the evidence does not support that any regular payments were made to the guerrilla groups after the designation.[51]

5. Management and Board Knowledge of Guerrilla Payments

As discussed above, due to perceived security concerns, and the reluctance to share information about something so sensitive, very few individuals at Banadex and at Company headquarters in Cincinnati were aware of the payments to guerrilla groups. As documented above, [Banadex Employee #1], [Banadex employee #3], [Chiquita Employee #2], and Kistinger knew about the payments, in part because of their involvement in the original decision to approve the payments or in making the payments thereafter. The Legal and Internal Audit Departments knew about the payments due to their roles in monitoring the FCPA reports. William Tsacalis, then-Controller and Chief Accounting Officer, also knew about the payments.[52] Tsacalis said that he was generally aware of the guerrilla payments and was "under the impression that if we didn't make payments to guerrillas, people would get killed." [Chiquita Employee #3] was also aware of the guerrilla payments, which he learned about while preparing to conduct the 1995 audit of Banadex. *See* Memorandum of KPMG Interview of [Chiquita Employee #3] (Mar. 23 – 24, 2004).

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50 David Hills did not know about the designation until after he left the Company in July 2001. Robert Thomas did not know about the designation until after he left the Company in December 2000. [The Chiquita lawyer] did not know about the designation until after February 2003. Robert Olson did not know about the designation until after February 2003. Robert Kistinger did not know about the designation until his SLC interview. [Chiquita Employee #2] did not know about the designation until 2002, when he first learned of the existence of a list of foreign terrorist organizations, although he did not fully understand the significance of such a list. [Banadex Employee #1] did not learn about the designation until after 2003.

51 As described in greater detail at Section IV.Y.5., a single ransom payment was made to FARC in January 2004 in connection with the kidnapping of a Chiquita employee. At the time, DOJ was already investigating the Company, was notified in advance of the Company's intention to make the ransom payment, and did not object.

52 William Tsacalis joined Chiquita in January 1980 and became Controller in 1984. At some point in the late 1980s, he added the titles of Vice President and Chief Accounting Officer. In early 2005, Tsacalis became Vice President of Finance and Treasurer, and in November 2007, he became Vice President of Finance and Enterprise Risk Management, a position he held until he left Chiquita at the end of 2007.

Other senior members of management told the SLC that they do not recall that the Company was making payments to guerrilla groups during this period. Neither Carl Lindner, then-Chairman and Chief Executive Officer, nor Keith Lindner, then-President and COO, recalled that the Company made payments to guerrilla groups in Colombia.[53] Steven Warshaw,[54] then-Chief Administrative Officer and Chief Financial Officer, said that he did not "specifically recall the terminology 'guerrilla,'" but did say that he recalled that Chiquita had to make "protection payments" in Colombia and that the FARC was threatening the lives of Company employees in Colombia.[55]

However, several witnesses, including their direct reports, said that they are virtually certain that Keith Lindner and Warshaw were aware of the guerrilla payments during the time that they were made, and they inferred that because Keith Lindner was aware of the payments, Carl Lindner was aware of them as well. The SLC believes that the evidence supports the conclusion that Keith Lindner and Warshaw knew the payments were being made. The evidence that Carl Lindner knew of them is suggestive but not compelling.

The SLC found conflicting evidence as to whether the Audit Committee was informed about the guerrilla payments. Payments to guerrilla groups were not included in the Company's FCPA report summaries that were presented to the Audit Committee, and Robert Thomas said that he did not make a separate presentation on the "sensitive" payments listed on the FCPA reports and did not specifically recall ever discussing guerrilla payments during an FCPA presentation. William Verity, who joined the Board and Audit Committee in May 1994, recalled that the Company made "security" payments in Colombia, but could not recall during exactly which years the Company made payments to guerrilla groups without relying on information that he

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53 Carl Lindner was Chiquita's CEO and Chairman of the Board from 1984 until August 2001, when he resigned as CEO. From August 2001 until March 2002, he continued to serve as Chairman. He stepped down as Chairman in March 2002, but remained on the Board as a director until May 2002. Keith Lindner was Chiquita's President and COO from 1989 to March 1997. In March 1997, he became Vice Chairman and remained in that position until March 2002.

54 Steven Warshaw joined Chiquita in 1985 as Director of Corporate Planning. From at least as early as 1990 until approximately 1997, he held the positions of Chief Administrative Officer ("CAO") and CFO concurrently. In March 1997, Warshaw became President and COO, as well as a director of Chiquita, and served as the CEO from August 2001 until he left the Company in March 2002.

55 Warren Ligan, who joined Chiquita in 1992 as the Assistant Vice President of Tax, and became Vice President of Tax approximately nine months later, said that, prior to becoming Chiquita's CFO in 1998, in which capacity he served from approximately May 1998 until September 2000, he "absolutely did not" know that the Company was making payments to guerrilla groups.

became aware of in connection with the DOJ investigation. Thus, it is not clear if Verity learned about the guerrilla payments at the time they were made.[56]

However, Olson said that when he was first told about the guerrilla payments soon after joining the Company in 1995, he was led to believe that the Audit Committee had been informed of the payments. He also said that this impression was confirmed when the guerrilla payments were discussed at a 1997 Audit Committee meeting in such a way that confirmed his impression that the Audit Committee had received reports of the guerrilla payments at an earlier date. Further, Kistinger said that he believed Jean Sisco, the long-time Chair of the Audit Committee, knew about the guerrilla payments because either he or someone else told her about them. Other than Verity, the SLC was unable to interview the Audit Committee members who served during this period, Sisco and Oliver Waddell, which might have helped resolve the issue. Waddell is seriously ill with a debilitating mental condition and Sisco passed away in April 2000. *See* Am. Compl. ¶ 54.[57]

Although there is therefore evidence that the Audit Committee and individual directors knew about the guerrilla payments, the SLC found no evidence that the payments were discussed with the full Board.[58] For example, Fred Runk, the Company's CFO from 1984 to 1989, who also served as a director from 1984 to March 2002, said that he did not recall the Company's having made payments to guerrilla groups in Colombia. This was consistent with the recollection of Robert Olson, who regularly attended Board meetings and did not recall the guerrilla payments being discussed at the Board level.

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Based on its review of the evidence described above and the conduct of the Company and its officers and directors during this period, the SLC reached several conclusions. ***First***, the payments to the guerrilla groups were made based on the good

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[56] William Verity served on the Chiquita Board from May 1994 until March 2002 and was a member of the Audit Committee during that time.

[57] Oliver Waddell joined the Chiquita Board in approximately May 1994 and was a member of the Audit and Compensation Committees until March 2002. Jean Sisco joined the Chiquita Board in 1976, and was Chair of the Audit Committee from approximately the mid-1980s until early 2000, when she retired due to illness. She also served on the Compensation Committee.

[58] During this period, the Board was comprised of Carl Lindner, Keith Lindner, Craig Lindner (another one of Carl Lindner's sons), Fred Runk, William Verity, Oliver Waddell, Jean Sisco, and Ronald Walker, who died in May 1997. The Audit Committee was comprised of directors Sisco, Verity, and Waddell. Prior to approximately mid-1994, when Verity and Waddell joined the Board and began serving on the Audit Committee, the Audit Committee was comprised of Sisco and Hugh F. Culverhouse, who died in August 1994.

faith, reasonable belief that, in their absence, Banadex employees would be harmed and Company property and facilities destroyed. ***Second***, at the time they were made, the payments did not violate either Colombian or U.S. law. ***Third***, Banadex established accounting procedures regarding sensitive payments, which allowed it to adequately monitor the payments. ***Fourth***, the Company's Legal and Internal Audit Departments at Chiquita headquarters adequately monitored the payments. ***Fifth***, there is some evidence that the guerrilla payments were presented to the Audit Committee, but no evidence that they were presented to the full Board.

C. The Company's Payments to Convivirs and the AUC

The deteriorating political and security situation in Colombia, caused largely by the high level of left-wing guerrilla activity, produced a political and security response. Starting as early as the late 1960s and 1970s, various right-wing "self-defense" groups emerged in areas where the Colombian government was unable to provide protection against left-wing guerrilla activity. Although the Colombian government outlawed self-defense groups in 1987 due to their increasing involvement in criminal activity, paramilitary groups continued to organize and expand in size and scope.[59] In 1997, the Autodefensas Unidas de Colombia, or the United Self-Defense Forces of Colombia, known as the AUC, was formed as an umbrella organization to consolidate various local paramilitary groups.[60] By 2001, the AUC had an estimated 8,000 to 11,000 members. As of 2003, the AUC was considered Colombia's largest paramilitary organization and operated throughout Colombia, with its strength concentrated in the north, where Banadex was based.[61]

Over time, paramilitary groups in Colombia earned a reputation – similar to that of their guerrilla counterparts – for employing brutal tactics in massacring civilians and intimidating survivors.[62] For example, in January 1999, AUC members reportedly swept through villages in six different areas of Colombia and killed 150 suspected guerrilla sympathizers.[63] In February 2000, according to reports, 300 paramilitaries terrorized the town of El Salado, on the Caribbean coast, torturing and raping some of the villagers and ultimately killing thirty-six people.[64] On January 17, 2002, in another

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59 *See* DeShazo, at 6; Rabasa & Chalk, at 53-54.

60 *See* Stephanie Hanson, Council on Foreign Relations (CFR), *Backgrounder: Colombia's Right-Wing Paramilitaries and Splinter Groups* (Jan. 11, 2008), *available at* http://www.cfr.org/publication/15239/colombias.

61 *See* Livingston, at 194.

62 *See Staying Alive,* ECONOMIST, May 25, 2002, at 35-37.

63 *See* Rabasa & Chalk, at 56 n.9.

64 *See Between Peace and Justice*, ECONOMIST, July 23, 2005, at 33-34.

reported incident, paramilitaries entered the village of Chengue and crushed the heads of twenty-six villagers with a sledgehammer before burning the village.[65]

In the mid-1990s, paramilitaries gradually moved into the areas controlled by the FARC, where Chiquita operated. *See* Memorandum of KPMG Interview of [Chiquita Employee #3] (Mar. 23 – 24, 2004). At first, many viewed this as a positive development, because the AUC was able to make significant progress in weakening the power and influence of the guerrillas and "did what the [Colombian] government could not do." However, the AUC soon came to be viewed as little different from the guerrillas in its willingness to threaten and murder civilians and damage property throughout Colombia.

The SLC found ample evidence supporting the existence of a pervasive and ever-present threat of violence created by the paramilitaries, as well as instances of violence against Banadex's employees and infrastructure. For example, [Banadex Employee #1] and [Chiquita Employee #2] recalled that several employees were killed by paramilitaries, but said that they did not believe that these individuals were targeted because of their employment with Chiquita. Other Banadex personnel interviewed by the SLC described general knowledge of the AUC's violence in Colombia, but not against Banadex. [Banadex Employee #3] said that while he was not aware of specific acts of violence perpetrated by the paramilitaries against the Company, it was well known in Colombia that the paramilitaries were "powerful, criminal groups," and that massacres committed by the paramilitaries were widely reported in Colombia. [Banadex Employee #5] said that, as the paramilitaries gained power in Santa Marta and began to expel the guerrillas from the region, they began to come in contact with Chiquita's farms, and that employees working on the farms "were very scared."[66] He also recalled that the paramilitaries would send armed, uniformed men to the farms, and that in some instances, they burned the Company's shipping containers.

Around the same time that paramilitaries were moving into the regions where Chiquita had farms, "convivirs" started to form. Convivirs were created by a 1994 decree of the Colombian Ministry of Defense and were originally viewed as similar to neighborhood watch organizations. They performed intelligence functions for Colombian security forces and were strongly supported by Alvaro Uribe, then-governor of Antioquia in the Urabá region, and now the President of Colombia.[67] Numerous witnesses told the SLC that banana growers at the time supported the formation of convivirs, because their purpose was to provide security and surveillance services in the

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65 *See* Jeremy McDermott, *Colombia's Self Defense Forces are the Country's Fastest Growing Illegal Army*, TELEGRAPH, June 11, 2002.

66 [Biographical and professional information on Banadex Employee #5]

67 Rabasa & Chalk, at 54.

Urabá region. Banadex employees generally believed that convivirs were legal, government-sponsored entities. *See, e.g.,* Memorandum of KPMG Interview of [Banadex Employee #10] (Jan. 30, 2004).

As described below, the Company began making payments to the convivirs no later than 1997, although the SLC reviewed documents and interviewed witnesses suggesting that the convivir payments may well have started somewhat earlier. Like the payments to the guerrillas, the payments to the convivirs were approved by [Banadex Employee #1], who viewed the convivir payments as within the authority he had been granted many years earlier to make payments necessary to preserve and protect the Company's personnel and property.

1. Meeting with AUC Leader Carlos Castaño

The relationship between the convivirs and the AUC was far from simple, both in reality and as perceived by Company personnel. As described above, convivirs were legal, government-sponsored entities that provided security and surveillance services. At some point, the convivirs became closely identified with the AUC and were viewed almost interchangeably by Company personnel and others. However, that did not happen right away, and the SLC was unable to pinpoint the precise time when it occurred.

The necessity of making payments to the AUC, on the other hand, was communicated in clear and dramatic fashion. According to [Banadex Employee #4], in late 1996 or early 1997, he was approached by Irving Bernal, a prominent banana producer in Colombia, who told him about "a very important meeting" regarding security issues. Bernal encouraged [Banadex Employee #4] to attend the meeting along with [Banadex Employee #1]. [The Banadex employees] met Bernal at Chiquita's office in Medellín, and then followed him in a separate car to a large house in Medellín, where they met with Carlos Castaño, the well-known leader and public face of the AUC. Both [Banadex employees] recognized Castaño.

During the meeting, Castaño described the origins and purpose of the AUC, and said that the AUC had begun a sustained offensive to drive the guerrillas out of Urabá because the Colombian army was ineffectual in controlling the guerrilla groups. Castaño said that he knew that Banadex had been making payments to guerrilla groups, but that he expected those payments to stop. According to both [Banadex employees], Castaño did not mention convivirs during this meeting; instead, he demanded that the Company pay the AUC. [The Banadex employees] both said that Castaño did not make any direct threats at the meeting, but, according to [Banadex Employee #1], Castaño said, "We are not demanding payments in the way the guerrillas demanded payments, but if you don't pay, no one will protect you."

[The Banadex employees] left the meeting believing that the AUC would soon be making more specific demands. Indeed, the meeting was memorable for both of them, and the SLC found their accounts of the meeting – neither of which included any statement directly linking the AUC and the convivirs – to be credible. The evidence establishes that Castaño issued a threat – whether implicit or explicit – at the meeting, and that the Banadex personnel took that threat seriously.[68]

Shortly after the meeting with Castaño, [Banadex Employee #1] told [Banadex Employee #3] that Banadex would have to begin making payments to the paramilitaries in Urabá. At [Banadex Employee #1's] direction, [Banadex Employee #3] then attended a meeting with the paramilitaries at a gas station near the Company's offices. At the meeting, a man who called himself "Michael" and who identified himself as a paramilitary commander, demanded that the Company pay his group 10 million pesos per month. [Banadex Employee #3] discussed the demand with [Chiquita Employee #1] and [Banadex Employee #1], and they authorized the payment.[69]

According to [Banadex Employee #3], he left the first cash payment for Michael with a guard outside Banadex's facilities. Thereafter, Banadex made three additional payments to the paramilitaries in cash through Michael. The cash payments to the AUC stopped suddenly after the four payments; no further demands were made by "Michael" or any other representative of the paramilitaries. The SLC found no evidence that anyone at Chiquita's headquarters in Cincinnati was told of these payments.

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68 A slightly different version of this meeting, which directly linked the AUC and the convivirs, is reflected in a memorandum written by Robert Thomas in September 2000 (the "Thomas Memo"), which is described in more detail below (*see infra* Section IV.F.4.). In the memo, Thomas summarized information about this and other events conveyed to him by [Chiquita Employee #1], who had conducted interviews of Company personnel that summer. According to the Thomas Memo, Castaño conveyed an even stronger message during the meeting: "Autodefensas was already well established in Antioquia . . . and supported the establishment of a Convivir organization in Urabá, Autodefensas expected Banadex to support Convivir, and if Banadex did not, Autodefensas would attack Banadex's people and property." Memorandum from Robert Thomas to File (Sept. 2000). As noted above, the description of the Castaño meeting in the Thomas Memo was based on [Chiquita Employee #1's] oral report to Thomas of his discussions with [Banadex Employee #4] and others in Colombia. The memo states that [Chiquita Employee #1] did not "keep any notes" of these discussions and the SLC is not aware of any such notes. Neither [Banadex Employee #4] nor [Banadex Employee #1] recalls speaking with [Chiquita Employee #1]. For these reasons, the SLC found that the description of the Castaño meeting set forth in the Thomas Memo, which is based on what the witnesses told [Chiquita Employee #1] and [Chiquita Employee #1] then told Thomas, is less reliable than the direct accounts provided to the SLC in its interviews of [the Banadex employees], both of whom attended the meeting.

69 [Banadex Employee #1] did not specifically recall the initial cash payments to the AUC as described by [Banadex Employee #3], but said that he had no reason to doubt [Banadex Employee #3's] account.

2. Initial Payments to Convivirs

As noted above, the documentary evidence does not definitively establish when the Company made its first payment to a convivir, but it suggests that Banadex was making payments to a convivir entity prior to the meeting with Castaño in late 1996 or early 1997.[70] According to handwritten notes taken by Bud White at a May 7, 1997 meeting in Cincinnati, the Company paid $21,763 to convivirs in 1996. *See* Notes of Bud White (May 7, 1997). But the SLC found no documentary evidence that supported or explained the 1996 convivir payments.

The SLC believes that a June 23, 1997 memorandum from [Banadex Employee #3] to [Banadex Employee #1], requesting that a payment be made to the Punte de Piedra convivir, which was based in Turbo, is the first recorded payment request memorandum for funds to pay a convivir. *See* Memorandum from [Banadex Employee #3] to [Banadex Employee #1] (June 23, 1997); KPMG Sensitive Payments Schedule.[71] The evidence is not clear when, in relation to the four cash payments that [Banadex Employee #3] made to "Michael," this payment to the Punte de Piedra convivir was made. Nor, more importantly, is it clear how payments made directly to the AUC came to be replaced by payments to the convivirs.[72]

[Banadex Employee #1] said he did not know when "the specific mechanism for paying [the AUC] through the convivir was set up." [Banadex Employee #4] said that "it became difficult to pay the AUC" after they arrived in Turbo but recalled meeting with other banana growers about making financial contributions to the convivir after the meeting with Castaño. Though the process by which payments to the AUC came to be funneled through the convivir remains unclear, by the end of 1997, Banadex was making regular payments to the Punte de Piedra convivir and there were no further demands directly from the AUC.

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70 Contrary to the claims in the Amended Complaint (*see* Am. Compl. ¶¶ 14, 94), the SLC found no evidence, documentary or testimonial, that Chiquita made payments to the convivir or AUC to ensure continuing labor peace at its Colombian farms or to improve generally its position vis-à-vis labor unions in Colombia. To the contrary, the evidence shows that the sole reason the Company paid the convivir/AUC was to ensure that its employees were not killed.

71 In connection with the DOJ investigation, KPMG engaged in an extensive analysis and prepared a spreadsheet summarizing all convivir and paramilitary payments from 1997 through 2004 (the "KPMG Sensitive Payments Schedule"). According to the KPMG Sensitive Payments Schedule, the first recorded payment to a convivir was made on June 23, 1997 to Punte de Piedra in the amount of $32,124.

72 [Banadex Employee #3] said that he was not initially certain about the relationship, if any, between the AUC and the convivir, an uncertainty shared by other witnesses interviewed by the SLC.

By late 1998, Banadex was no longer paying the Punte de Piedra convivir, but was instead paying the La Tagua del Darién convivir, which was also located in Turbo. The SLC was unable to determine the timing of the shift from one convivir to the other. According to the Thomas Memo, written in 2000, an AUC representative contacted [Banadex Employee #4] some months after the meeting with Castaño and demanded that Banadex pay three cents per box of bananas to a new convivir, La Tagua del Darién. Because it appears that the meeting with Castaño took place sometime between September 1996 and March 1997, this demand would likely have been made in 1997. *See* Memorandum from Robert Thomas to File (Sept. 2000). However, according to KPMG's forensic review, the first payment to La Tagua del Darién was made on September 21, 1998.[73] After that date, Banadex continued to make payments to La Tagua del Darién, but not to the Punte de Piedra convivir. *See* KPMG Sensitive Payments Schedule.

Finally, there also is uncertainty about the relationship between the two convivirs. [Banadex Employee #4] said that he assumed the convivirs operated independently, but that he was not certain. Other witnesses interviewed by the SLC said that they did not understand the precise relationship between the two convivirs, but that at some point, all the convivirs in the Urabá region merged. In short, the SLC could not determine why the Company stopped making cash payments directly to the AUC, why the Company stopped paying the Punte de Piedra convivir and started paying the La Tagua del Darién convivir, nor the relationship between the two convivirs.

3. Overlap of Guerrilla and Convivir/AUC Payments

The evidence available to the SLC was not sufficient to determine with certainty which groups – guerrilla and paramilitary – Banadex was making payments to immediately before and immediately after the Castaño meeting. [Banadex Employee #1] and [Banadex Employee #2] told the SLC that the Company made payments to a convivir prior to the Castaño meeting, and that the Company made both guerrilla and convivir payments in Urabá 1996 and 1997. [Banadex Employee #3] also told the SLC that the payments to the guerrilla groups and convivirs overlapped. In addition, [Banadex Employee #2] said that the Company may have made payments to the AUC as early as 1995, while [Banadex Employee #1] said that he believed that the

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73 It is unclear from the documentary evidence why the first recorded payment to the La Tagua del Darién convivir was made as late as September 1998 if, according to the Thomas Memo, the demand was made in 1997. The SLC was unable to conclude whether the Thomas Memo was incorrect about the timing of some of these events, or whether the documentation for some of the earlier payments to La Tagua del Darién did not clearly establish when payments to that convivir began.

Company continued to pay guerrillas in Santa Marta until approximately 1999, when the "AUC-like" group achieved more power.

In contrast, [Chiquita Employee #2] and [Banadex Employee #4] said that convivir payments began only after the Castaño meeting, and [Banadex Employee #4] said that there was no overlap between the two payment streams. According to a forensic analysis performed by KPMG, it could not confirm "whether Banadex made any extortion payments to guerrilla groups after the first FTO designation in October 1997," a fact that it attributed to the coding of these payments on 1016s to "protect Company personnel from retribution, given the real risk of Company infiltration by members of warring armed groups." Supplemental Thompson Memorandum Submission to the U.S. Dept. of Justice (Nov. 24, 2004) (*hereinafter* "Supplemental Thompson Submission").

Thus, while the SLC could not reach a definitive conclusion on when the guerrilla payments ended, the weight of the evidence suggests that after a brief period of overlap, Banadex paid the convivir exclusively and stopped paying the guerrillas.

4. 1997 Audit of Banadex and Meeting of Management

The convivir payments quickly came to the attention of the Legal and Internal Audit Departments at Chiquita headquarters. In early 1997, Bud White, in cooperation with Robert Thomas, conducted a review of General Manager's fund expenses for the Colombian operations to ensure that Banadex had maintained sufficient supporting documentation for payments, including the payments to the guerrilla groups. During the same time period as this review, Thomas saw the word "convivir" for the first time on an FCPA report received from Colombia. This prompted him to make preliminary inquiries into the nature of convivirs, which likely included discussing the issue with [a Banadex lawyer].[74]

Both the documentation issue and questions about the convivir were discussed at a May 7, 1997 meeting in Cincinnati, which Bud White, Robert Olson, Robert Kistinger, Robert Thomas and, most likely, William Tsacalis attended.[75] According to Thomas, the

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74 Consistent with Thomas's recollection, the first report of convivir payments on the Company's FCPA report summaries appears on the report for the second quarter of 1997. It shows payments totaling $29,894 to a "convivir," and describes the payments as "donation[s] to citizen reconnaissance group made at request of Army." FCPA Summary of Payments (Q1 and Q2 1997).

75 Tsacalis recalled being at a meeting where payments to guerrillas and convivirs were discussed, but he did not believe it was this meeting because he did not recall a discussion at the level of specificity memorialized in White's notes. However, in his SEC testimony on December 2, 1999, Tsacalis said that he recalled attending this meeting and that it was convened because White had just uncovered guerrilla payments. Given that his SEC testimony was nine years before his SLC

purpose of the meeting was to follow up on his and White's efforts to obtain supporting documentation for payments made by the Company in Colombia.

White's handwritten notes of the meeting reflect a detailed discussion about the guerrilla and convivir payments. In particular, the notes reflect a discussion concerning (i) the amounts paid to guerrillas and convivirs in 1996, (ii) the amounts that were budgeted for 1997, and (iii) the appropriate level of management approval for the payments, including approval by [Chiquita Employee #2] and Kistinger, among others. *See* Notes of Bud White (May 7, 1997). According to Olson, the group also discussed whether the Audit Committee or the Board should be involved in the approval process when the payments exceeded a certain amount.

In addition, the notes reflect a discussion about the legality of convivirs. According to White's notes, Thomas reported, "[a Banadex lawyer] indicates convivir is legal." Notes of Bud White (May 7, 1997). The notes also record the question, "who else is funding paramilitary, what is our involvement in paramilitary." *Id.* Although at this point in time, as described more fully below, management in Cincinnati did not understand the connection between the convivirs and the paramilitaries, during this period they became aware of the issues relating to this new stream of payments.[76]

5. David Hills' Investigation Into the Convivir Payments

At or around the time of the May 7 meeting, Thomas asked David Hills to undertake a more thorough inquiry into the convivir payments so that Thomas could better understand them. Hills first consulted [a Banadex lawyer], who told him, like he told Thomas, that convivirs were "well-recognized and legal in Colombia" and that local government officials in Colombia encouraged making payments to convivirs. Hills then requested that [the Banadex lawyer] prepare a written analysis of the payments.

a. *Supporting Documentation from [Banadex Lawyer]*

On May 19, 1997, [the Banadex lawyer] provided Hills with a memorandum summarizing his legal advice concerning several issues, including payments to the

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interview, the SLC believes that Tsacalis's SEC testimony is more likely accurate on this point and that he too participated in this meeting.

76 White failed to cooperate with the SLC's investigation despite its – and the Company's – repeated efforts to obtain his assistance. As a result, the SLC was unable to obtain testimony from the author of these notes, which no doubt would have deepened our understanding of some of their more cryptic portions. The SLC used the notes to refresh the recollections of the witnesses – including Olson, Kistinger, and Thomas – and was therefore able to obtain a coherent account of what happened at this meeting. Nevertheless, we regret White's unexplained decision not to cooperate with this investigation.

guerrilla groups and the fundamentals about convivirs. Thomas and Olson also received copies of this memo. With respect to guerrilla payments, [the Banadex lawyer] stated that one "cannot be punished" for making payments to guerrilla groups, which he termed "montanistas," if one acts "without freedom of consent." With respect to convivirs, [the Banadex lawyer] stated, "The so-called CONVIVIR are cooperatives legally organized, with operating licenses granted by the government, designed to defend private assets" and concluded that "payments made by private persons to CONVIVIR are not against the law." Memorandum from [Banadex lawyer] to David Hills (May 19, 1997).

Around the same time, [the Banadex lawyer] sent Hills a packet of documents containing four Spanish-language letters, dated between March and May 1997, all from the Secretary of the Antioquia government in Colombia. The letters explain that convivirs are legal entities that enhance the security and safety of the community. *See* Compilation of Documents Provided by [Banadex lawyer] to David Hills (1997). Hills said that he likely told Thomas that [the Banadex lawyer] had sent information supporting the legality of convivirs, but did not share it with him, since the letters were in Spanish, and Thomas did not speak Spanish.

According to [the Banadex lawyer], he received the packet of documents that he sent to Hills after a meeting he attended with other banana producers and Alvaro Uribe, who, at the time, was the governor of Antioquia. At this meeting, [the Banadex lawyer] recalled that he voiced Chiquita's concern about the legality of the convivirs and about claims from certain non-governmental organizations ("NGOs") that convivirs had committed human rights abuses. As a result, Governor Uribe instructed the Secretary of Antioquia, Pedro Moreno, to send [the Banadex lawyer] documentation regarding convivirs that had been sent by the government of Antioquia to various NGOs.

b. *August 1997 Hills Memorandum*

In August and September of 1997, the Chiquita Legal Department continued its review of the convivir payments. More than likely, the review of the convivir payments was extended because they were to appear on an FCPA report summary presented to the Audit Committee at a meeting scheduled for September 10, 1997. Because this was the first time the convivir payments would appear on an FCPA report summary, Olson and Thomas likely wanted to prepare for any questions that they would receive.

In August 1997, Hills made a routine trip to Colombia and, during the trip, spoke to both [Banadex Employee #4] and [Banadex Employee #3] concerning the convivir payments. On his return, Hills drafted a memorandum for Thomas, dated August 29, 1997, summarizing the information he had learned. In that memorandum, Hills wrote that he had spoken with [Banadex Employee #4] and [Banadex Employee #3] in

Colombia the previous week and that [Banadex Employee #3] informed him that Banadex was paying $.03 per box to the "Puntepiedra" convivir. Hills also wrote that he learned that convivirs were "pushed by the government as a means of combating guerrilla terrorism" and "[were] not paramilitary groups." Finally, Hills wrote that [a Banadex lawyer] told him that convivirs "operate under full legal protection in Colombia and that our participation is not illegal." Memorandum from David Hills to Robert Thomas (Aug. 29, 1997).

Hills told the SLC that his statement concerning legality was based on [the Banadex lawyer's] view of Colombian law and his own FCPA analysis of the payments in light of the facts he had learned to date. Thomas said that he did not request this memo from Hills, but that he was "happy to get it" because it confirmed what he had been told previously about convivirs. It is unclear whether the memo was provided to anyone else other than Thomas. Olson did not recall receiving the memo.

6. Convivir Payments First Reported to the Audit Committee – September 10, 1997

On September 10, 1997, the Audit Committee, then comprised of Jean Sisco, William Verity and Oliver Waddell, held a regularly scheduled meeting. Steven Warshaw, Olson, Tsacalis, White, Thomas, and representatives from E&Y also attended the meeting. Thomas presented the FCPA report summaries for the first and second quarters of 1997, covering January 1 to June 30, 1997. As noted above, the second quarter summary is the first time that a convivir payment appears in an FCPA summary. The report notes payments in Colombia totaling $29,894 to a "convivir," and describes the payments as a "donation to citizen reconnaissance group made at request of Army." Minutes of Chiquita Audit Comm. Meeting and FCPA Report Summaries (Sept. 10, 1997).

Most of the attendees at the meeting could not recall whether this meeting was the first time the Audit Committee discussed convivir payments. By contrast, Olson was fairly certain that the first time "convivir" appears in an FCPA report would have been the first time these payments were discussed at an Audit Committee meeting, and that it "would be logical" that if Thomas gave an FCPA report at this September 1997 meeting, he would have mentioned convivir payments.

Thomas said that when the Audit Committee was first informed of the convivir payments, the members were "accepting but concerned and a little skeptical." Verity said that he believed that the Audit Committee's initial discussion about convivir payments centered on what convivirs were, and the meaning of the description of the payments in the FCPA report, which called them "donation[s] to citizen reconnaissance group made at request of Army."

Thomas said that he never considered the convivir payments to be FCPA-type payments because they were not payments to government officials, but he recommended to the Audit Committee that they continue to be reported along with actual FCPA payments so that the Company could "keep an eye on them." Verity said that based on the presentation, the Audit Committee understood that these were security payments made to ensure the safety of Chiquita employees, and that they "were legal and legitimate."[77] This was the context in which the payments were presented to the Audit Committee and the description and explanation heard by the Committee consistently until September 2000.

7. March 4-5, 1998 Audit Committee Meeting

The Chiquita Legal Department continued to report to the Audit Committee on the status of the convivir payments as part of its FCPA reporting. On March 4-5, 1998, the Audit Committee held a regularly scheduled meeting, which was attended by Audit Committee members Sisco, Verity, and Waddell, along with Warshaw, Tsacalis, Olson, Thomas, and representatives from E&Y, among others.

At the meeting, Thomas presented the FCPA report summaries for the third and fourth quarters of 1997. On the summaries, the convivir payments were again characterized as a "donation to citizen reconnaissance group made at request of Army." The summaries show convivir payments totaling $18,635 and $83,945 for the third and fourth quarters of 1997, respectively. Minutes of Chiquita Audit Comm. Meeting and FCPA Report Summaries (Mar. 4, 1998). Most witnesses did not recall any specific discussion about convivirs at this meeting, but according to the notes of the meeting taken by Steven Tucker, the Vice President of Internal Audit and secretary of meetings, the convivir was described as an entity that "monitor[s] guerrillas," but that was "not part of [the] army." Notes of Chiquita Audit Comm. Meeting (Mar. 4, 1998).[78] Tucker's notes also reflect the entry: "Jean – Do we ask in a general way about extortion?," but none of the participants recalled a discussion concerning extortion. *Id.* Thus, by the spring of 1998, the Audit Committee and senior management had become substantially informed about the payments to the convivir.

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77 Tsacalis did not recall any discussion of convivir payments at this meeting. As noted above, the SLC was unable to interview Waddell or Sisco, the other members of the Audit Committee during this period.

78 Steven Tucker was Chiquita's Vice President of Internal Audit from approximately 1998 until June 2000.

D. 1998 – The SEC Investigation Begins

1. Background

In conducting the 1997 audit of Banadex (*see supra* Section IV.C.4.), [Chiquita Employee #2], Bud White and [Banadex Employee #1] noticed two unfamiliar payments in the "sensitive payments" ledger totaling approximately $30,000, which were made in September 1996 and March 1997. [Chiquita Employee #2] and White then spoke with Banadex financial managers about the payments, but [Chiquita Employee #2] was not satisfied with the explanation that he received. As a result, [Chiquita Employee #2] asked [Banadex Employee #4] to explain the payments. Ultimately, [Chiquita Employee #2] learned from [Banadex Employee #4] that the payments were a bribe made to customs officials to renew Banadex's port license in Urabá.[79] He reported this finding to Robert Thomas.[80] Following an internal review, the Chiquita Legal Department determined that [Banadex Employee #6], [Banadex Employee #7], and [Banadex Employee #8][81] as well as [a Banadex lawyer], were involved to some degree in making the payments.

At a September 8, 1997 meeting, which was attended by Kistinger, White, Tsacalis, Thomas and Manuel Rodriguez,[82] the decision was made to terminate [Banadex Employee #6] and [Banadex Employee #7] and to discipline [Banadex Employee #8] for their roles in making the payments. It was also decided that [a Banadex lawyer] would be fired, but almost immediately he was re-hired as an outside consultant to Banadex. *See* Notes of Bud White (Sept. 8, 1997). At the September 10, 1997 Audit Committee meeting, described above, Olson informed the Audit Committee about the Company's investigation into the customs payments and the disciplinary actions that it planned to take. *See* Notes of Chiquita Audit Comm. Meeting (Sept. 10, 1997).

After consulting with outside counsel, the Company decided not to disclose the payments to federal regulators. Nonetheless, the bribes became publicly known and the

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79 The customs payments were requested and processed in such a way that they initially appeared to be payments to guerrilla groups. According to [Chiquita Employee #2's] SEC testimony, [Banadex Employee #1] told him that he approved the customs payment because he "was absolutely convinced that it was a payment to the guerrillas. . . ." Transcript of [Chiquita Employee #2] Testimony, In the Matter of Chiquita Brands Int'l, Inc. (2000).

80 In contrast, Thomas said that management in Cincinnati came across the customs payments because they were listed on an FCPA quarterly report. The SLC found no documentary evidence to support Thomas's view.

81 [Biographical and professional information on Banadex Employees #6, 7, and 8]

82 Manuel Rodriguez joined Chiquita in the 1980s as an in-house attorney and continues to work for the Company in that capacity.

focus of a multi-agency federal investigation. On May 3, 1998, the *Cincinnati Enquirer* published the first in a series of articles entitled "Chiquita's SECRETS Revealed," which contained a number of allegations concerning the Company's business practices, including that it had covered up the bribery payments in Colombia. *See* Mike Gallagher and Cameron McWhirter, *Power, Money & Control; Chiquita's Secrets Revealed*, CINCINNATI ENQUIRER, May 3, 1998.[83] These articles prompted the SEC, DOJ, and the U.S. Attorney's Office for the Southern District of New York (the "USAO SDNY") to open investigations into certain allegations contained in the articles. In the end, only the SEC pursued an investigation of the Company, which ultimately focused on books and records concerning the port payments, and not on the payments themselves. *See* Supplemental Thompson Submission.

More relevant to the SLC's investigation, and as described below, the SLC found that, on several occasions during the course of the investigation, both during meetings with government officials and in witness testimony, the Company disclosed the fact that it had made payments to guerrilla groups and the convivir. Although these payments were not the focus of the investigation, they were disclosed and discussed because the customs payments had been drawn from the same accounts that Banadex used to make payments to guerrilla groups.

2. The SEC's Investigation

In late April or early May of 1998, Chiquita received a subpoena from the SEC. At that time, the Company retained Laurence Urgenson of K&E to represent it in connection with the investigation.[84] To understand the facts, K&E interviewed several Chiquita employees and prepared memoranda summarizing the interviews. In addition, at least seven Chiquita employees testified before the SEC, most of them in 1999.

Early in the investigation, on September 18, 1998, K&E lawyers met with representatives of the SEC, DOJ, and the USAO SDNY. The main purpose of the meeting was to provide the government with a chronology of the events relating to the

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[83] Two months later, on June 28, 1998, as part of a settlement with the Company, the *Cincinnati Enquirer* published "An Apology to Chiquita," in which the newspaper acknowledged that Michael Gallagher, the lead reporter for the series, had illegally obtained transcripts of certain of the Company's voice-mails. The *Cincinnati Enquirer* also paid Chiquita $14 million in connection with the settlement. *See An Apology to Chiquita*, CINCINNATI ENQUIRER, June 28, 1998 at A1.

[84] K&E first became involved in the matter when, in or around August 1997, Robert Thomas contacted Urgenson to seek advice regarding the implications of the customs payments under the FCPA. K&E did not provide substantial legal advice on this issue; instead, it discussed potential remedial steps the Company could take. Around the time that the Company retained K&E for assistance in responding to the SEC subpoena, K&E attorneys were also working with the Company in formulating a response to the *Cincinnati Enquirer* articles.

customs payments made by Banadex, but the K&E lawyers also discussed in some detail the guerrilla and convivir payments.

According to a memorandum summarizing the meeting, K&E told the government that [Banadex Employee #3] handled "extortion payments to guerrillas." K&E also said that the Company had "a legal opinion stating that guerrilla payments made to save or protect lives are legal in Colombia under the doctrine of 'justification.'" One of the SEC Enforcement Division attorneys asked how the Company recorded the guerrilla payments, and K&E said that the recording of these payments was "sensitive because BANADEX also pays the army (for security) and paramilitaries, such as the Convivir." K&E described the convivir as "a[n] entity that provides the Army information concerning guerrilla movements" and said that the Company had a "local opinion confirming that payments to Convivir are lawful." Finally, K&E explained, "The payments to guerrilla and anti-guerrilla groups involve sensitive issues. Either group would retaliate against BANADEX for supporting the other." During the meeting, the government requested copies of the 1016s on which the Company recorded the guerrilla payments. K&E Warehouse Presentation (Sept. 18, 1999). In short, K&E described in considerable detail both the guerrilla payments and the convivir payments to federal regulators and prosecutors.

On January 22, 1999, Urgenson and others gave another presentation to SEC and DOJ representatives. The main purpose of this meeting was to provide the government with additional information about the customs payments and documentation regarding the Company's books and records practices. *See* Supplemental Thompson Submission. During the meeting, the Company's payments to guerrilla groups were again discussed. According to a memorandum summarizing the meeting, K&E discussed the amounts paid to guerrillas and the convivir as well as the knowledge of the Company's internal accountants and outside auditors concerning the payments. Urgenson told the government representatives that "you either deal with these groups by paying the guerrillas or else by leaving the country." K&E Presentation on Customs Payment (Jan. 22, 1999). According to the memo, a DOJ lawyer asked what the U.S. Department of State had told Chiquita about making guerrilla payments. Urgenson said that he was not aware of any such contact. *See id.*

The statements made by Chiquita's counsel were confirmed during the SEC testimony of Chiquita employees.

First, several Chiquita employees testified concerning the Company's payments to guerrilla groups. For example, Robert Kistinger testified that: Colombia is "somewhat of a war zone. So we're concerned that now we're being approached and effectively threatened that if we don't go ahead and [make payments to the guerrillas] we're going to put our people at risk, and that we're going to put our assets at risk. . . . We're being extorted." William Tsacalis testified regarding the May 7, 1997 meeting

with management, which addressed "the fact that guerrilla payments were being made, and we had some specific questions with respect to the guerrilla payments, including . . . who was authorized to make payments, are they approved. . . . Olson was going to address the legality question. . . ."

Second, Chiquita employees testified concerning the payments to the convivir. For example, [Chiquita Employee #2] testified that the Colombia personnel "would have told me . . . we're being asked to make a contribution to the Convivir. I would have then asked questions like . . . tell me about the Convivir and who are they. Well, I mean, are these horrible paramilitary? No, they're not. Convivir . . . was founded and pushed by the governor of Antiochia [sic] and it was blessed by legislation in Colombia." Transcript of [Chiquita Employee #2] Testimony, In the Matter of Chiquita Brands Int'l, Inc. (1999). In a colloquy between Urgenson and an SEC staff attorney during Kistinger's testimony, Urgenson described the convivir as "a specific organization which is sanctioned by the government" and "not a paramilitary organization," and also stated that Chiquita had not made payments to paramilitary organizations. Transcript of Kistinger Testimony, In the Matter of Chiquita Brands Int'l, Inc. (2000).

In short, even though the FARC and the ELN were designated as FTOs by the U.S. Department of State on October 8, 1997, and historical payments to these guerrilla groups were discussed during meetings with the SEC, DOJ and the USAO SDNY and in testimony before the SEC, there is no evidence that any government or Chiquita lawyer was aware that payments to the FARC and ELN might be prohibited under U.S. law – and at no point during the SEC investigation did the government state that the guerrilla payments violated U.S. criminal law. *See* Supplemental Thompson Submission. In fact, neither DOJ nor the SEC questioned the legality of the payments to the FARC other than as a potential violation of the FCPA.

After a three-year investigation, the Board approved a settlement with the SEC on September 25, 2001, in which the Company neither admitted nor denied the SEC's allegations. [85] The Company consented to SEC findings that (i) in 1995, a Banadex employee, without the knowledge or consent of any Chiquita employee outside of Colombia, authorized the payment of approximately $30,000 to local customs officials to secure the renewal of a port license and (ii) Banadex did not properly record the payment in its books and records, resulting in a violation of the accounting provisions of the Securities Exchange Act of 1934. The SEC also found that the Company's internal audit staff discovered the payment and that the Company took corrective action after an

[85] The Audit Committee received regular briefings concerning the SEC investigation at meetings held on May 12, 1998; March 10, 2000; September 12-13, 2000; March 7, 2001; May 8, 2001; and September 25, 2001.

internal investigation, including terminating the responsible employees and strengthening internal controls at Banadex. *See* Minutes of Chiquita Board Meeting (Sept. 25, 2001); Chiquita Brands International, Inc., Exchange Act Release No. 44,902 (Oct. 3, 2001).[86]

Robert Olson signed the consent decree on behalf of the Company on October 1, 2001, and the Company paid a civil penalty of $100,000. *See SEC v. Chiquita Brands Int'l, Inc.*, No. 1:01CV02079 (D.D.C. Oct. 3, 2001). The evidence suggests that, at least in part as a response to the adverse publicity caused by the *Cincinnati Enquirer* articles, which in turn triggered the SEC investigation, the Company launched a Corporate Responsibility initiative dedicated to ensuring employees' compliance with certain ethical guidelines, as discussed in more detail below. *See infra* Section IV.G.; *see also* Supplemental Thompson Submission.

In sum, the SLC attached substantial significance to the interactions between the Company and the government during this investigation. The Company fully cooperated with the investigation and disclosed a large quantity of information about the guerrilla payments and convivir payments both in witness testimony and in presentations made to the government. Despite these broad disclosures, no one from the government ever suggested that the payments violated any provision of U.S. law, and no one from the government identified the prohibition of making payments to an organization on the FTO list, which included the FARC and ELN before the investigation began. Accordingly, the SLC found that the Company, its Board, and its officers remained unaware through the duration of the SEC investigation, which was not settled until the fall of 2001, of the potential criminal liability for making payments to entities on the FTO list.

E. <u>Santa Marta Convivir Payments</u>

Until 1999, the Company had been making payments to the convivir in Turbo (first to Punte de Piedra and then to La Tagua del Darién), but not in Santa Marta, where it also had substantial banana growing operations. In 1999, [Banadex Employee #3] was approached by a group of paramilitaries based in Santa Marta and asked to attend a meeting in a hotel.[87] [Banadex Employee #3] advised [Banadex

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86 The SEC Settlement Order noted: "Chiquita had strict policies prohibiting payments of the kind made to the customs officials . . . . After conducting an internal investigation, Chiquita took corrective action, which included terminating the responsible Banadex employees and reinforcing its internal controls with respect to its Colombian operations." Chiquita Brands International, Inc., Exchange Act Release No. 44,902 (Oct. 3, 2001).

87 Other witnesses recalled that the approach was made indirectly, through Irving Bernal, the banana producer who had originally brought [Banadex Employee #4] and [Banadex Employee #1] to meet with Carlos Castaño several years earlier. *See* Memorandum from Robert Thomas to File (Sept. 2000).

Employee #1] and then attended the meeting. [Banadex Employee #3] recalled that many men brandishing AK-47s attended the meeting, and said that he felt "very scared and intimidated. " [Banadex Employee #3] said that during the meeting, the paramilitaries demanded payments from Banadex.

In response, [Banadex Employee #3] sought advice from a friend, who agreed to act as an intermediary in delivering cash payments to the paramilitaries, playing a role similar to that of [Banadex Contract Employee #2] (*see supra* note 40). The intermediary eventually suggested that the Company make the payments through a convivir named Inversiones Manglar, an entity created by the AUC to collect payments. On October 14, 1999, Banadex made its first payment to Inversiones Manglar. *See* KPMG Sensitive Payments Schedule. Thus, as of October 1999, Chiquita was making payments to two convivirs, La Tagua del Darién in Turbo and Inversiones Manglar in Santa Marta.

In November 1999, [Banadex Employee #5] took over for [Banadex Employee #3].[88] Prior to joining Banadex [Banadex Employee #5] was [ ] for 14 years. According to [Banadex Employee #5], in reviewing the documentation relating to Inversiones Manglar, he reached the conclusion that it did not appear to be a legitimate, properly licensed convivir. As a result, [Banadex Employee #5] spoke with "Pedro," a contact whom [Banadex Employee #3] had introduced to him as the "person in charge of the convivir" in Urabá, and told him that Banadex could not pay Inversiones Manglar because it did not appear to be properly licensed.[89] Pedro told [Banadex Employee #5] that the convivir was in the process of obtaining a proper license, and that until it did, Banadex should make the Santa Marta payments through the La Tagua del Darién convivir in Turbo. *See* Memorandum from Robert Thomas to File (Sept. 2000).

On February 28, 2000, Banadex made payments to Inversiones Manglar and La Tagua del Darién, but thereafter, payments were made solely to La Tagua del Darién in Turbo, and a portion of those payments was routed to Santa Marta. *See* KPMG Sensitive Payments Schedule.

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88 [Banadex Employee #3] said that the security concerns associated with his position played a role in his decision to leave the Company.

89 [Both Banadex employees] confirmed that "Pedro" was in fact Raul Hasbún, a commander in the AUC. [Banadex Employee #3] said that he initially did not know that "Pedro" was a member of the AUC, but that over time, he began to suspect that "Pedro" was connected in some way to the AUC. [Banadex Employee #3] said that before he left the Company, he introduced [Banadex Employee #5] to "Pedro," and identified him as the individual responsible for the convivirs. [Banadex Employee #3] said that he did not recall sharing his suspicions about "Pedro's" connection to the AUC with [Banadex Employee #5], and [Banadex Employee #5] recalled only that "Pedro" was introduced as the individual responsible for the convivirs. [Banadex Employee #5] said that he did not initially realize that "Pedro" was a member of the AUC, but, like [Banadex Employee #3], he came to learn that "Pedro" was a member of the AUC.

F. Robert Thomas's Investigation into the Convivir Payments

1. Background

The payments in Santa Marta were picked up by the Company's FCPA reporting process. In early 2000, Robert Thomas noticed a payment to Inversiones Manglar, a group that he did not recognize, on an FCPA report from Colombia. On March 6, 2000, he called [Chiquita Employee #3], and [Banadex Employee #4], to obtain information about the payment. During the call, [Banadex Employee #4] explained that because the Colombian government would not permit the formation of new convivirs, Inversiones Manglar had been formed to perform the same function as a convivir but was incorporated in Santa Marta in such a way as to disguise its true purpose, which was to provide security. *See* Notes of Robert Thomas (Mar. 6, 2000).

Until this conversation, Thomas did not know that convivir payments were being made in Santa Marta (these payments began in October 1999). During the call, Thomas asked whether it was possible for Banadex to stop making the payments at this time, and [Banadex Employee #4] and [Chiquita Employee #3] said that, according to [Banadex Employee #5], the payments were necessary because Banadex needed the security provided by Inversiones Manglar.[90]

Thomas said that this discussion made him suspect that the payments made by Banadex were being routed to paramilitary organizations (indeed, his notes of the call include the notation, "para-military"), but that he did not understand the specifics of the transactions. *See* Notes of Robert Thomas (Mar. 6, 2000). Following the call, Thomas reported to Olson that he had learned certain information that suggested that convivirs were "not as legitimate" as they had originally thought and that "at least some portion" of the money paid to convivirs was being routed to paramilitary organizations. According to Olson, Thomas said that it was "crucial" that the Company ensure that there was a real threat against it and that the payments were necessary to diminish that threat, and suggested sending someone to Colombia to investigate these issues. Olson said that, before Thomas began further work on the issue, he and Thomas agreed that the payments could not continue unless there was a "real threat of physical harm to employees" if the payments were not made.

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90 Thomas said that, during the call, [Banadex Employee #4] and [Chiquita Employee #3] did not explain whether Inversiones Manglar actually was providing security services to Banadex. The SLC is aware of no evidence to suggest that it was.

2. March 10, 2000 Audit Committee Meeting

During a regularly-scheduled Audit Committee meeting on March 10, 2000, which was attended by directors Verity and Waddell,[91] along with Olson, Tsacalis, Thomas, Warren Ligan, Steven Kreps,[92] and representatives from E&Y, the convivir payments were again discussed. Even though the Company continued to make payments to convivirs during this time, the FCPA report summaries for the third and fourth quarters of 1999, which were presented during this meeting, do not reflect any payments to convivirs. However, handwritten notes taken during the meeting by Kreps, who replaced Steven Tucker as Vice President of Internal Audit and Secretary for Audit Committee Meetings, reflect that convivirs were, in fact, discussed: "Payments down 190k. Colombia down (34) convivir; Increased convivir in Q2 (double up) . . . Rate driven by guerilla activity." Notes of Chiquita Audit Comm. Meeting (Mar. 10, 2000).[93] None of the participants questioned by the SLC about this meeting recalled the discussion, and Thomas did not recall mentioning the Inversiones Manglar payment.[94]

E&Y, which continued to attend Audit Committee meetings as the Company transitioned from paying guerrilla groups to paying paramilitary groups, and which

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91 Jean Sisco was ill and did not attend this meeting.

92 Warren Ligan joined Chiquita in 1992 as the Assistant Vice-President of Tax, and became Vice-President of Tax nine months later. He then served as Chiquita's CFO from approximately May 1998 until September 2000. Steven Kreps joined Chiquita in January 1991 as a Senior Audit Supervisor, and seven months later he was promoted to Manager for Global Banana Management Reporting, the position in which he served from mid-1991 until 1996. From 1996 until August 1999, he was the Director of Financial and Operational Controls, and from August 1999 until June 2000, he was Senior Internal Audit Director. In June 2000, Kreps was promoted to Vice President of Internal Audit and remained in this position until August 2006, when he was transferred to Singapore and became the Vice President of Finance for Asia-Pacific Operations. He left Chiquita at the end of 2007.

93 Likewise, the FCPA report summaries for the first and second quarters of 1999, which were presented to the Audit Committee at its September 14-15, 1999 meeting, do not reflect any payments made to convivirs. When the SLC contacted Thomas to ask about the reason the convivir payments were not mentioned in these FCPA reports, he advised, through counsel, that his presentations on the payments were not based on the document he distributed to the Audit Committee but instead based on notes he prepared. He advised that even if the convivir payments were not included in some of the FCPA reports, he would have covered those payments during his oral presentation.

94 Thomas said he recalled an e-mail from [Chiquita Employee #3] stating that the payment to Inversiones Manglar should be excluded from the FCPA report. Thomas surmised that, because a revised report from which this payment was omitted had been presented to the Audit Committee, he would not have discussed the payment with the Audit Committee. *See* E-mail from [Chiquita Employee #3] to Robert Thomas (Mar. 7, 2000).

reviewed the FCPA report summaries generated by the Legal Department on which payments to convivirs were typically recorded, was aware that the Company was making payments to several "militant groups" in Colombia.[95] Like the guerrilla payments, E&Y personnel interviewed by the SLC stated that E&Y did not consider these payments to be either quantitatively or qualitatively material.

3. June 2000 [Banadex Lawyer] Legal Opinion

Following his discussion with Olson after the March 6 call, Thomas began a review of the convivir payments, and spoke with [Chiquita Employee #2], [Chiquita Employee #1], Jorge Solergibert,[96] and David Hills. During these discussions, Thomas became concerned that general descriptions and characterizations of the continuing dangers in Colombia were "not enough" and that he needed to obtain "real facts." Apparently in response to Thomas's concerns, [a Banadex lawyer] was asked to write a memo about issues relating to the payments, although Thomas did not recall who made the request.

In the memo, dated June 17, 2000, [the Banadex lawyer] explained the nature and the history of the guerrilla groups, paramilitaries, and convivirs in Colombia. He concluded that convivirs were legal "securing and monitoring" entities, but that the paramilitary groups requesting payments in Santa Marta were not. In the memo, [the Banadex lawyer] also stated that, like the guerrilla groups, the paramilitaries extorted money from individuals and companies, demanding that they make payments or face the "serious risk of being kidnapped or killed." [The Banadex lawyer] wrote that, as a result, in order to ensure that it was paying a legal entity, the Company should continue to pay the convivir in Urabá, which would then pay the Santa Marta group. *See* Memorandum from [Banadex lawyer] to Robert Thomas (June 17, 2000). [The Banadex lawyer] told the SLC that the thrust of his advice was that Chiquita could not safely operate in Santa Marta unless it made the payments.

The memo to Thomas was shared with Hills, but not Olson. According to Hills, neither he nor Thomas gave the memo much weight. This was based on his belief that the memo had been drafted by [the Banadex lawyer], but signed by [Outside Counsel #2], who Hills thought was "too close to the Company" and "not independent enough."

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95 Like Chiquita management, the E&Y representatives interviewed by the SLC stated that they were unaware of the true nature of the convivirs during this period and knew only that the term "convivir" identified one of the Colombian groups that the Company was paying.

96 Jorge Solergibert joined Chiquita in 1990 as an in-house lawyer and currently serves as Assistant General Counsel.

4. [Chiquita Employee #1's] Trip to Colombia

In an effort to obtain additional information about the convivirs, Thomas asked [Chiquita Employee #1] to meet with Colombian personnel to learn about how the payments were made to the convivirs in Turbo and Santa Marta.[97] According to Olson, he discussed the decision to send [Chiquita Employee #1] to Colombia with Robert Kistinger, who, at the time, was President and COO of the Fresh Group, and Steven Warshaw, who, at the time, was President and COO of the Company.[98] It took several months for [Chiquita Employee #1] to travel to Colombia to gather the information.

According to the Thomas Memo, which Thomas wrote following his discussions with [Chiquita Employee #1], on July 21, 2000, [Chiquita Employee #1] met with [Banadex Employees #5, #2, #4, #9,[99] and #3].[100] *See* Memorandum from Robert Thomas to File (Sept. 2000). During these discussions, according to Thomas's memo, [Chiquita Employee #1] learned how Banadex was first contacted by the convivir, how convivir payments were handled, why the payments remained necessary, and how the payments began in Santa Marta. *See id.* [Chiquita Employee #1] returned to Cincinnati and reported his findings orally to Thomas on August 1, 2000, and Thomas, as discussed above, then summarized those findings in a memo.[101] Thomas told the SLC that his main conclusions from [Chiquita Employee #1's] trip were: (i) that the convivir in Urabá was linked to Carlos Castaño, who was a "very bad guy"; (ii) that payments made in Santa Marta were going to paramilitaries; and (iii) that payments were being routed to Santa Marta through the Urabá convivir.

As noted above, in his memo summarizing [Chiquita Employee #1's] findings, Thomas described the meeting that [Banadex employees] had with Carlos Castaño. Thomas also described the 1999 meeting at which an AUC representative in Santa Marta told [Banadex Employee #3] that "it was time for Banadex to start making payments to Autodefensas." In the memo, Thomas wrote that, at both meetings, there were "unspoken threats" that if payments were not made, the AUC would "attack

97 [Chiquita Employee #1] became ill in the summer of 2008 and passed away on November 25, 2008. As a result, the SLC was unable to interview him.

98 Warshaw said that he has no recollection of Thomas's investigation or [Chiquita Employee #1's] trip to Colombia.

99 [Biographical and professional information on Banadex Employee #9]

100 Curiously, [the Banadex employees] all told the SLC that they had no recollection of meeting with [Chiquita Employee #1].

101 There are two drafts of Thomas's memo, dated August and September 2000. There is no substantive difference between the drafts. The SLC is not aware of any notes [Chiquita Employee #1] took or memos he drafted based on his discussions in Colombia that formed the basis for Thomas's memo.

Banadex's people and property." He also wrote that payments in Urabá were made directly to the convivir La Tagua del Darién and payments intended for Santa Marta were made to the same convivir, which forwarded the payments to Inversiones Manglar. *See* Memorandum from Robert Thomas to File (Sept. 2000).

5. Management's Understanding of the Connection between Convivirs and the AUC

Thomas orally briefed Olson on [Chiquita Employee #1's] findings and then provided him with the memo that he drafted, which Olson received on September 12, 2000. Olson discussed Thomas's findings with Kistinger and Warshaw. Thomas said that he briefed [Chiquita Employee #2], Kistinger, Tsacalis, Hills, and possibly Warshaw on [Chiquita Employee #1's] findings.

However, many of these individuals told the SLC that they were unaware of Thomas's investigation at the time it was conducted and the link that it established between the convivir and the AUC.[102] Warshaw said that he did not recall anyone at the Company "ever" using the word "convivir." He also said, however, "I was perfectly aware that payments were made to prevent inappropriate conclusions to our employees' lives." Kistinger said that, at the time, he was not familiar with the word "convivir," but instead understood that paramilitary groups, which he perceived as having been sanctioned by the Colombian government, had been created to displace the FARC. He did not remember the paramilitary groups initially being called the AUC, but said that "later on" these groups were referred to as the AUC and that they began as the "good guys" and later became the "bad guys."[103]

Based on these facts, the SLC concluded that the Legal Department, and very likely other members of senior Chiquita management in Cincinnati, were aware of the connection between the convivirs and the AUC as of the fall of 2000. Although the discovery of the relationship between the AUC and the convivirs was viewed by Thomas, Olson and others as significant, the Legal Department, with the assistance of

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102 Warshaw, [Chiquita Employee #2], and Tsacalis said that they were unaware of the Thomas inquiry and [Chiquita Employee #1's] trip to Colombia until their SLC interviews. David Hills said that he did not learn about this investigation until he was preparing for his grand jury testimony in 2004 or 2005. Kistinger said that he remembered Thomas's memo, but could not recall when he first saw it.

103 Warren Ligan, who was the Company's CFO from May 1998 to September 2000, said that he did not hear of the AUC during his tenure at Chiquita and that, at the time of his SLC interview, he did not know what this group was. Ligan said that, during his tenure as CFO, he saw the term "convivir" on FCPA payment schedules and understood it to be related to "local security" in Colombia.

outside counsel, concluded that the payments to the AUC (through the convivir) did not violate Colombian law.

6. August 2000 Legal Opinions

After Thomas wrote his memo, he asked Jorge Solergibert, a Company lawyer based in Costa Rica, to provide a "civil law analysis" of the payments under Colombian law. Thomas wanted "to see what such an opinion would look like." Thomas said that it did not occur to him to look into whether the payments violated U.S. law.

In a memorandum dated August 2000, Solergibert used as his factual predicate the summary of facts contained in the Thomas Memo, stating that the Company's contacts with the paramilitaries and the paramilitaries' notoriety "convinced Banadex management that there was no choice but to make payments." He concluded that, under Colombian law, paramilitary groups in both Turbo and Santa Marta were committing extortion against Banadex. *See* Memorandum from Jorge Solergibert to Robert Thomas (Aug. 2000).[104] It does not appear that Thomas shared Solergibert's memorandum with anyone else in the Company.

Around the same time, Thomas and Solergibert requested an opinion regarding the legality of the payments under Colombian law from B&M. In order to facilitate the B&M analysis, Thomas and Solergibert orally provided them with the factual background, and Thomas believes that B&M was provided with his memo. Thomas said that the main question he asked of B&M was whether the conduct Banadex was engaged in was illegal in Colombia.

On August 30, 2000, B&M provided its opinion. The memo stated the factual premise that "the Company" (which it did not identify) had been approached by paramilitary groups and threatened with harm unless payments were made. As did the Solergibert memo, the B&M memo concluded that paramilitary groups had committed extortion against the Company and that employees who failed to report the extortion would not be criminally liable, because reporting the extortion "would have created a present or imminent danger to the Company and its officers." Memorandum from [Outside Counsel #3] and [Outside Counsel #4] to F. Miguel Noyola and Jonathan E. Adams (Aug. 30, 2000).

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104 Solergibert also stated that Banadex managers and employees who knew of the extortion were committing a crime if they did not report the extortion, although he noted the potential for an affirmative defense "akin to the one issued by the Supreme Court in the case of victims of extortive kidnapping," which appears to refer to the defense of necessity. Memorandum from Jorge Solergibert to Robert Thomas (Aug. 2000).

When he received the memo, Olson viewed it as establishing that nothing in the legal analysis had changed with the shift from guerrilla payments to convivir/AUC payments. Accordingly, he concluded that the Company was not violating Colombian law by making payments to convivirs or the AUC.

7. September 12-13, 2000 Audit Committee Meeting

The Audit Committee, then consisting only of directors Verity and Waddell, held a regularly-scheduled meeting on September 12 and 13, 2000. The meeting was also attended by Olson, Tsacalis, Kreps, Fred Runk, Jeffrey Zalla, Thomas, and representatives from E&Y.[105] During the meeting, Thomas presented the FCPA report summaries for the first and second quarters of 2000, which showed payments to the convivir, described as "[g]overnment sponsored citizen reconnaissance group," in the amount of $22,360 and $63,040, respectively. Minutes of Chiquita Audit Comm. Meeting and FCPA Report Summaries (Sept. 12-13, 2000).

In addition, Thomas presented the results of his inquiry into the convivir payments to the Audit Committee. Kreps's handwritten notes of the meeting include the following: "Not a voluntary decision (extortion) – [Chiquita Employee #1] investigated – Baker + McKenzie hired to investigate – conclusion is that we are not violating local laws." The notes also reference Carlos Castaño as the "convivir leader." Notes of Chiquita Audit Comm. Meeting (Sept. 12-13, 2000).[106]

Even though Kreps's notes reflect a discussion that included a specific reference to Castaño at the meeting, participants in the meeting whom the SLC interviewed said that they did not recall the details of Thomas's presentation, or any discussion of the connection between the convivirs and the AUC. Olson recalled Thomas's presentation about his inquiry as well as the legal conclusions from the August 30 B&M memo, but said he did not specifically recall a discussion of Castaño at the meeting. The SLC found no evidence that Thomas's investigation was presented at a full Board meeting.[107]

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105 Jeffrey Zalla began his employment with Chiquita in 1990 as a Supervisor of Treasury Analysis and thereafter held various positions in the Treasury and Finance departments. In 2000, he became Vice President and Corporate Responsibility Officer and, in 2003, Zalla became Treasurer (maintaining his position as Corporate Responsibility Officer). In 2005, he became Senior Vice President and CFO, which are the positions that he holds today.

106 Kreps did not recall anything specific about this meeting and said that he "would have just taken notes from what was said."

107 In addition to directors Verity, Waddell, and Runk, who attended this meeting, the remainder of the Board was comprised of Carl Lindner, Keith Lindner, and Steven Warshaw.

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As to this time period, the SLC reached the following conclusions. ***First,*** by August 2000, senior Chiquita management knew or should have known of the link between the convivir and the AUC. ***Second,*** the Legal Department concluded that Banadex was not criminally liable under Colombian law because it was being extorted and the payments were therefore legally justified. ***Third,*** the Company did no analysis, either internally or through outside counsel, of potential U.S. legal implications of the payments, except under the FCPA. ***Fourth,*** the Legal Department told management and the Audit Committee that the payments to the convivir/AUC were legal under Colombian law. ***Fifth,*** the Company's Legal and Internal Audit Departments adequately monitored the payments.

G. Corporate Responsibility Initiative – 2000

As a result of the negative publicity associated with the *Cincinnati Enquirer* articles and a desire to create a more open and transparent corporate culture, in 2000, Chiquita President Steven Warshaw developed the idea of initiating a broad Corporate Responsibility initiative, which was led by Jeffrey Zalla. At the time, Zalla was promoted to Vice President and Corporate Responsibility Officer.

To aid Zalla in this effort, the Company engaged a consultant to work with him and other members of senior management to develop a set of core values for the Company. After meeting with this consultant to discuss ways in which the Company could "make corporate responsibility a priority," Zalla established a corporate responsibility steering committee, which was comprised of employees from all areas of Chiquita's business. Over a period of several months, Zalla and the steering committee examined comparable companies' values, codes of conduct, and labor standards in order to develop a set of values that the Company would emphasize. This process involved significant time and effort, in large part because the steering committee was committed to establishing core values that both management and non-management employees "could stand behind."

The Corporate Responsibility Initiative was not limited to establishing a set of core values. Zalla also took steps to revise the Company's code of conduct, establish training programs for employees, and conduct a self-assessment of the Company's corporate responsibility efforts in all areas of its business. The initiative culminated in the publication, in the fall of 2001, of Chiquita's Corporate Responsibility Report.[108] *See* Chiquita Brands Int'l, Inc., Corporate Responsibility Report (2000). The Corporate Responsibility Report contains the following statements, among others: (i) "Times have

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108 A draft of the 2000 Corporate Responsibility Report was presented by Zalla at a May 8, 2001 Audit Committee meeting. *See* Minutes of Chiquita Audit. Comm. Meeting (May 8, 2001).

changed. And so has our Company. . . . Three years ago, in the wake of particularly damaging media coverage, we embarked on a disciplined path toward Corporate Responsibility. . . . This was not to be a public relations exercise, but a management discipline. . . ." (Am. Compl. ¶ 79); (ii) "We live by our core values. We communicate in an open, honest and straightforward manner. We conduct business ethically and lawfully." (*Id.* ¶ 80); (iii) "For decades, Chiquita has had a Code of Conduct that dealt with ethical and legal behavior and compliance with Company policies. . . . Our Code of Conduct now embodies standards in the areas of . . . ethical behavior . . . and legal compliance." (*Id.* ¶ 81).

This marked the beginning of the Company's formalized corporate responsibility program. This program remains in place today, and the Company issues a new Corporate Responsibility Report every other year.

H. <u>May 7, 2001 [Outside Law Firm] Legal Opinion</u>

During late 2000 and early 2001, Chiquita continued to make payments to the convivir, but the monitoring of those payments in Cincinnati changed. In December 2000, Robert Thomas, who had been responsible for FCPA reporting since the early 1990s, left Chiquita, in large part because of the Company's mounting financial difficulties. Olson selected David Hills to take over Thomas's FCPA reporting responsibilities.

Before his first FCPA report to the Audit Committee, which was scheduled to hold its next meeting on May 8, 2001, Hills asked [a] Colombian law firm [ ], with which he had a relationship, to prepare a memo on the legality of convivirs. At this point, Hills was unaware of the inquiry conducted by Thomas in the summer of 2000 and had neither received nor read the Thomas Memo. Thus, he was not aware of the clear link between the convivir and the AUC that [Chiquita Employee #1's] July 2000 trip to Colombia and Thomas's September 2000 memo had established. The [legal] memo, dated May 7, 2001, states that convivirs are "expressly authorized under Colombian law" and that payments to such entities are legal, provided that the convivirs have "obtained and maintain appropriate licenses" from the Colombian government and the funds are used for lawful purposes. Memorandum from [Outside Counsel #5] to David Hills (May 7, 2001).

While Hills and Olson agreed in their SLC interviews on the timing of the receipt of the memo, they disagreed as to who commissioned it. Hills said that Olson requested this memo because he wanted an updated opinion on the legality of convivirs under Colombian law prior to Hills' first report on FCPA payments to the Audit Committee. However, Olson did not recall requesting the memo, and was confused about Hills' reasons for obtaining [the law firm's] opinion on this subject. When he received the memo, he recalled "scratching his head" and telling Hills that the

Company was "not relying on this argument anymore," given Thomas's findings during his investigation that the convivirs were linked to the AUC.

I. May 8, 2001 Audit Committee Meeting

The Audit Committee held a regularly-scheduled meeting on May 8, 2001. The Audit Committee was now comprised of Gregory Thomas, Rohit Manocha, and William Verity, who attended the meeting, along with, among others, James Riley (the new CFO), Olson, Tsacalis, Kreps, Zalla, David Hills, and representatives from E&Y. Directors Thomas and Manocha had replaced Jean Sisco and Oliver Waddell on the Audit Committee. *See* Minutes of Chiquita Audit. Comm. Meeting (May 8, 2001).[109]

According to the minutes, the Audit Committee received an update on FCPA compliance and was presented with the summaries of FCPA payments for the third and fourth quarters of 2000, which listed quarterly payments to convivirs in the amount of $76,079 and $94,594, respectively. *See* Minutes of Chiquita Audit Comm. Meeting and FCPA Report Summaries (May 8, 2001). Given that they had only recently joined the Board, this was the first time Audit Committee members Thomas and Manocha received an FCPA briefing from the Legal Department.[110]

While the meeting minutes state that David Hills gave the FCPA report, Hills recalled that Olson briefed the Audit Committee. Both Manocha and Thomas recalled receiving this briefing and being told, consistent with prior FCPA reports to the Audit Committee, that all of the payments listed on the FCPA report summary were legal. Thomas recalled that Hills (and not Olson) gave a "full rundown" of the payments that were reported for FCPA purposes and focused primarily on how the Company had gathered relevant information for each country, rather than the details of the specific entries. Thomas also recalled that he and other members of the Audit Committee had noticed an increase in the total amount of the payments from the previous year and that Hills had pointed out that the increase was due, in part, to security payments made to

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109 This was the second Audit Committee meeting that Gregory Thomas and Rohit Manocha attended. *See* Minutes of Chiquita Audit Comm. Meeting (Mar. 7, 2001); Notes of Chiquita Audit Comm. Meeting (Mar. 7, 2001). Thomas joined the Chiquita Board in November 2000 and was the Chair of the Audit Committee from February 2001 until March 2002. Manocha joined the Chiquita Board in January 2001 and was a member of the Audit Committee from January 2001 until March 2002. James Riley, who also attended the May 8 meeting, was Chiquita's Senior Vice President and Chief Financial Officer from January 2001 until August 2004, and replaced Warren Ligan.

110 Manocha said that he first learned about payments made by Chiquita's overseas divisions at his first Audit Committee meeting, which occurred on March 7, 2001. However, according to the minutes of the March 7 meeting, no FCPA report was given. Thus, Manocha was likely mistaken about the date on which he learned about the payments, and likely learned about these payments at the May 8 Audit Committee meeting.

an organization in Colombia. Manocha said that payments for "security services" were "flagged and highlighted" so that the Audit Committee could consider, and if necessary, discuss them.[111] He said that he did not believe any payments on the FCPA reports were payments to illegal entities.

From the SLC's perspective, Thomas's and Manocha's recollections are consistent with the view of the Legal Department presented in its FCPA reporting to the Audit Committee: all of the payments listed on the reports were proper under the law.

J. Arms and Drug Smuggling

For decades, the violence and turmoil in Colombia – and the climate of fear that caused the country to be such a dangerous place to live and work – were fueled by the pervasiveness of weapons and drugs. The guerrilla groups, paramilitaries, and drug smugglers were well-armed and were continually in need of replacing and adding to their stocks of weapons and ammunition. Because of that continuing need, companies such as Chiquita that owned or had access to shipping facilities were at risk of having those facilities used for smuggling arms and ammunition, as well as drugs.[112]

1. 2001 "Easter" Incident

In the early part of 2001, Chiquita management learned about the first of two incidents in which arms were smuggled by third parties through Banadex's port operations in Colombia. In April of 2001, weapons were smuggled into Colombia through Chiquita's shipping facilities in Urabá. In May 2001, [Banadex Employee #4] called David Hills, and told him that he had recently learned of the incident from [a Banadex employee]. Hills asked [Banadex Employee #4] for more detail, and [Banadex Employee #4] told him that a customs broker "known to be a front for right-wingers" had filed false shipping and import documentation with respect to a shipment of fertilizer, which, in fact, was a shipment of weapons. The broker told Banadex port personnel when the ship would be arriving and that while Banadex employees were not needed to unload the shipment, their "cooperation" was necessary. *See* Memorandum of KPMG Interview of [Chiquita Employee #1] (Nov. 14, 2003); Memorandum of KPMG Interview of [Banadex Employee #9] (Mar. 17, 2003).

[Banadex Employee #5] said that the instructions about the need to cooperate came from "Pedro," or Raul Hasbún. [Banadex Employee #5] said that this confirmed his growing suspicions that there was a direct connection between the convivirs and the

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111 Manocha recalled only broad discussions of security payments, and did not remember discussions specifically focusing on payments in Colombia.

112 *See* Rabasa & Chalk, at 35-37.

AUC.[113] [Banadex Employee #5] said that Chiquita personnel did not actually unload the cargo; instead, "Pedro" and his associates unloaded it. According to [Banadex Employee #5], after the cargo was unloaded, Pedro then called him and demanded that the security camera videotape that had apparently recorded the incident be turned over. After [Banadex Employee #5] provided the tape to Pedro, Pedro destroyed it in [Banadex Employee #5's] presence.

Robert Olson, who was told about this incident (but not about the videotape) by either Hills or Robert Kistinger, asked Hills to investigate the legal implications. Hills again sought the advice of the [outside] law firm of [ ] (as he had in May 2001 with respect to the convivir payments). On July 6, 2001, Hills and [Chiquita Employee #1] met with the [outside] lawyers. The meeting took place in Miami because the Colombian attorneys refused to discuss their legal opinions over the phone or deliver a copy of their opinion in Colombia, as they felt that the subject was "too dangerous" for them to create any evidence of their involvement.

In a July 11, 2001 memo summarizing this meeting, Hills wrote that the [outside] attorneys advised him that while the Company could face civil liability for the criminal acts of its employees, "they believed that pressure on [its] employees [and the Company itself], in terms of personal threats and destruction of property, made this a viable defense to any criminal allegation." Memorandum from David Hills to Robert Olson (July 11, 2001). In addition, the Colombian attorneys advised him that although Chiquita might have a general obligation under Colombian law to report the incident to the authorities, it should refrain from doing so, as this could lead to (i) retaliation from "political extremists" and (ii) the possible targeting of Chiquita by Colombian prosecutors. *Id.*

Hills reported the advice that he received from [the outside law firm] to Olson both orally and by memo. It is unclear from the documents and interviews conducted by the SLC whether Chiquita ever reported this incident to the Colombian authorities, although Olson said that he "considered the matter closed" after receiving Hills' report.

2. November 2001 Otterloo Incident

In the fall of 2001, a second arms smuggling incident occurred at a Banadex port facility in Urabá. In November, a ship called the Otterloo sailed from Nicaragua to the Banadex port. The Colombian authorities subsequently determined that the Otterloo contained guns and ammunition that had been hidden in boxes filled with plastic (or rubber) balls. It was later determined that this arms shipment was delivered to the AUC. Based on the understanding that its shipping facilities had been used, and that

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113 This is the same individual with whom [Banadex Employee #5] spoke in or around late 1999 regarding the demand for payments to the Santa Marta convivir. (*See supra* Section IV.E.).

the Otterloo's illegal cargo had been stored in one of its bonded warehouses, Chiquita conducted an internal investigation into the incident. [Banadex Employee #10] and [Banadex Employee #5][114] conducted this investigation.[115] [A Banadex lawyer] reviewed the investigation findings and concluded that the Chiquita employees who were allegedly involved in the incident were not guilty of wrongdoing. He relayed these findings to the Colombian authorities and Interpol, both of whom had contacted Chiquita about its knowledge of the incident, and with whom the Company was cooperating.

In May 2002, the Foreign Affairs Ministers of Panama, Colombia, and Nicaragua contacted the Organization of American States ("OAS") and asked it to investigate the incident. After a thorough review, the OAS concluded that several Colombian customs officials likely aided the AUC in smuggling the arms shipment into Colombia, but did not conclude that Chiquita was involved in any wrongdoing. *See* The General Secretariat, *Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia*, CP/Doc. 3687/03 (Jan. 29, 2003). Unfortunately, a Chiquita employee was imprisoned for one year in connection with the incident, but was eventually exonerated and released. Aside from this unjustified imprisonment, no other Chiquita employees were charged or criticized by the Colombian authorities in connection with the investigation. Olson, who learned of the incident from [a Chiquita lawyer], believed that he reported it to Steven Warshaw.

3. June 2002 Drug Smuggling Incident

Banadex continued to experience issues with its port in Urabá, as in June 2002, 3,000 kilograms of cocaine were smuggled to Europe aboard a Chiquita vessel. The drugs belonged to a third-party shipper that had purchased cargo space on a Chiquita vessel from Commercial Liner Services, a Chiquita subsidiary that was responsible for coordinating the Company's shipping business.

Before the vessel left Colombia, one of Chiquita's security employees informed [Banadex Employee #10] and [Banadex Employee #5] that he had been threatened and told not to inspect a container belonging to this shipper, and had been given money to ensure his silence. To prevent retaliation against the employee, [Banadex Employee #10] and [Banadex Employee #5] did not contact Colombian authorities to seize the shipment in Colombia. Rather, during a previously scheduled trip with [Banadex Employee #5] to Antwerp, Belgium, the ship's destination, [Banadex Employee #10]

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114 [Biographical and professional information on Banadex Employee #10]

115 [Banadex Employee #10] said that Chiquita did not produce a written report in connection with this investigation.

reported the incident to local authorities, who inspected the ship upon its arrival and seized the smuggled drugs.

[Banadex Employee #5] later arranged a meeting with the AUC, which he believed to be responsible for the shipment, in order to return the money that the security employee had been given. At the meeting, the AUC – which had publicly declared that it was strongly opposed to drug smuggling – denied responsibility for the incident. Following this incident, at [Banadex Employee #10's] recommendation, the Company stopped allowing third parties to purchase cargo space on its vessels. Cyrus Freidheim, Chiquita's CEO at the time, reported this incident to the Board during a conference call shortly after the incident occurred. Moreover, the incident was later the subject of the DOJ investigation, but no charges were brought.

K. FTO Designation – September 10, 2001

On September 10, 2001, the U.S. Department of State announced its designation of the AUC as an FTO. *See* Designation of Foreign Terrorist Organizations, 66 Fed. Reg. 47,054 (Sept. 10, 2001). This represented a seminal change in the legal landscape under which the payments to the convivir were made, as it had now become a felony to knowingly provide "material support or resources" to the AUC.[116]

Shortly after the designation was announced, the *Washington Post*, *Wall Street Journal*, and *Cincinnati Enquirer* published articles in which the designation of the AUC was mentioned. For example, on September 19, 2001, the *Washington Post* published a story that highlighted some of the issues associated with the AUC, a group which, according to the article, many diplomats believed was "destined to become a legitimate

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116 As noted above, 18 U.S.C. § 2339B provides, in part, that "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life." The term "material support or resources" is defined in U.S.C. § 2339A(b)(1) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." Former U.S. Secretary of State Madeline Albright created the first list of designated FTOs in October 1997. At the time, the list was comprised of 30 groups. Since then, the U.S. Secretary of State, in consultation with the Attorney General and Secretary of the Treasury, has periodically reassessed the FTO list, adding or dropping organizations from the list in their discretion. Currently, the FTO list is comprised of 42 organizations, including the FARC, the ELN, and the AUC. *See* U.S. Department of State, 2001 Report on Foreign Terrorist Organizations (Oct. 5, 2001), http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm (last visited February 6, 2009); U.S. Department of State, Foreign Terrorist Organizations, http://www.state.gov/s/ct/rls/fs/37191.htm (last visited February 6, 2009).

party in the country's peace process," despite its history of violence. At the same time, the article made specific mention of the AUC's "massacres" in Urabá, "a region valued for its vast banana orchards and strategic position near the Panamanian border." Scott Wilson, *Paramilitary Army Seeks Political Role in Colombia; AUC Wants Recognition, Vows 'More Civilized' Fight*, WASHINGTON POST, Sept. 19, 2001 at A28.

The *Wall Street Journal* also ran several articles during this period, including on September 24 and 26, 2001, that described the recent FTO designation of groups based in Colombia, including the AUC. *See* Neil King Jr. and Jim VanderHei, *Aftermath of Terror: Allies Hope Antiterror Effort Won't Ignore Local Fights --- Some Question Wisdom of U.S. Focus on Groups with 'Global Reach,'* WALL ST. J., Sept. 26, 2001, at A10; Matt Moffett, *Colombia's Woes Are Highlighted by Attacks on U.S.*, WALL ST. J., Sept. 24, 2001, at A18.

Finally, the *Cincinnati Enquirer*, in an October 17, 2001 article, reported on AUC violence and stated that the group had recently been placed on the FTO list. *See* Kevin G. Hall, *Colombia's Right Turns Violent to Gain Recognition: Group Admits Killing in Marxist Land*, CINCINNATI ENQUIRER, Oct. 17, 2001, at A6.

As described below, even though the State Department publicly announced the FTO designation and there were multiple reports by major local and national media outlets, the SLC has concluded that no one in Chiquita senior management or the Board became aware of the designation until late February 2003, nearly 18 months later. At first blush, this seems improbable, but the SLC did not find any evidence to the contrary. The SLC's finding that no one in Chiquita senior management or on the Board learned of the designation until February 2003 is based on the fact that DOJ, during an investigation that lasted more than three years, failed to develop any such knowledge, as reflected in the record of that investigation and the public documents filed in connection with Chiquita's guilty plea and sentencing in 2007. More importantly, the SLC's own independent review of documents and its extensive witness interviews led to the same conclusion.

The DOJ Grand Jury Investigation. DOJ fully and thoroughly investigated the issue of whether any individual at Chiquita had knowledge of the FTO designation prior to February 2003; it was a principal focus of the investigation of the Company. Ultimately, DOJ found no evidence to establish any such knowledge by either senior management or the Board prior to February 2003. The factual proffer filed by DOJ, which accompanied the Company's guilty plea, states, "On or about September 30, 2002, Individual H" ([Chiquita Employee #1]) accessed the "Colombia—Update page" of an Internet subscription service (of which the Company was a member), which mentioned the U.S. Department of State's decision in 2001 "to include paramilitaries [the AUC] in its annual list of foreign terrorist organization." Def. Factual Proffer, *U.S. v. Chiquita Brands Int'l, Inc.*, No. 07-055 ¶ 28 (D.D.C. Mar. 19, 2007) (*hereinafter* "Factual

Proffer"). It further states that, on or about February 20, 2003, "Individual I" ([Chiquita lawyer]) discovered that the AUC had been designated an FTO. *See id.* ¶ 55.

During its investigation, DOJ was not able to establish that, as a result of accessing the webpage on or about September 30, 2002, [Chiquita Employee #1] actually read about the designation. The SLC learned that during [Chiquita Employee #1's] two interviews with federal prosecutors, which occurred on or around June 2 and June 7, 2004, he stated that he was not aware of the designation until he was informed about it by [the Chiquita lawyer], who, as will be discussed in detail below, discovered the designation on February 20, 2003. [Chiquita Employee #1] gave the same explanation during his grand jury testimony on November 2, 2005.[117] The SLC is not aware of any evidence gathered by DOJ establishing that [Chiquita Employee #1] learned of the designation prior to [the Chiquita lawyer's] February 20 discovery.

The SLC Investigation. The SLC was aware at the outset of its work that DOJ, over the course of its investigation from 2003 through 2006, was unable to establish any pre-February 2003 knowledge of the AUC's FTO designation by management in Cincinnati or the Board. Even so, the SLC independently investigated the issue. The SLC and its counsel reviewed all documents produced to DOJ, and questioned all the witnesses it interviewed who served at the Company during the relevant period as to when they became aware of the FTO designation. Despite its considerable efforts, the SLC found no documentary or testimonial evidence that any member of senior management or the Board knew of the FTO designation before February 20, 2003.

During their SLC interviews, all members of senior management (Warshaw, Kistinger, Riley, Olson, and Tsacalis) and the Board (Carl Lindner, Keith Lindner, Greg Thomas, Manocha, Runk, and Verity) denied learning of the designation at the time it was announced.[118] [Chiquita Employee #1] passed away before he could be interviewed by the SLC; however, as noted above, during his DOJ interviews and

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117 The SLC did not have access to the transcript of [Chiquita Employee #1's] grand jury testimony (or the grand jury testimony of any other witness), but instead had access to a memorandum summarizing [Chiquita Employee #1's] attorney's account of his grand jury appearance.

118 Olson said that he recalled seeking guidance from an outside law firm after September 11, 2001 regarding whether legal changes enacted post-September 11 imposed new legal requirements on the Company. Although there is some support for Olson's claim in the outside law firm's billing records, the lawyer on Olson's staff who dealt with the law firm recalled the request for such guidance being limited to licensing issues. *See* McDermott, Will & Emery LLP Invoice (Jan. 10, 2002).

testimony before the grand jury, he denied knowledge of the FTO designation prior to February 2003.[119]

In Colombia, media outlets carried news of the FTO designation more widely than in the U.S. While certain Banadex employees learned of the designation from the Colombian press, none of these employees understood the implication of the designation with regard to the payments that the Company was making, or recalled talking to anyone in Cincinnati about the designation. [Chiquita Employee #2] said that he became aware of the designation in 2002, when it was widely reported in the Colombian press that the European Union had designated the AUC, but not the FARC, as a terrorist organization, and the press in the same articles reported that the U.S. included both groups on its list of FTOs. [Chiquita Employee #2] said that he did not understand the significance of the U.S. designation, and believed only that it imposed restrictions on the terrorist groups themselves.

Thus, in sum, on the issue of when senior management and the Board first learned of the AUC's FTO designation, the SLC found that the first knowledge of the designation of the AUC as an FTO by the U.S. Department of State at the Company occurred on or about February 20, 2003.

L. The Company's Bankruptcy Reorganization and the New Board

Beginning in the summer of 2001, the Company's financial position was deteriorating substantially, and the prospect of a Chapter 11 bankruptcy filing became increasingly likely. According to the evidence developed by the SLC, there were three reasons for the Company's financial problems during this period: (i) the decline in the Company's earnings in the mid-1990s, related, in part, to the debt it incurred in expanding its ownership of farms and investing substantially in enlarging its fleet of ships; (ii) the substantial destruction of the Company's Honduran division by Hurricane Mitch in 1998 and the decision to rebuild in that location; and (iii) the deteriorating value of the Euro as compared to the dollar, which, because Chiquita's costs were dollar-based, affected its operating cash flow and the ability to refinance its debt.

The Company's financial problems dominated Board discussions during the fall of 2001, and were discussed at three formal meetings from September 25, 2001 to November 27, 2001. Ultimately, the Company, with the assistance of financial and legal advisors, entered into negotiations with its bondholders, and reached a preliminary

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119 The SLC learned that [Chiquita Employee #1's assistant] also had access to Control Risk, the Internet subscription service that, according to the factual proffer, was accessed on or about September 30, 2002. However, as noted above, [Chiquita Employee #1's assistant] passed away in April 2007.

agreement on how to restructure its debt. As a result, on November 27, 2001, the Board approved the filing of a "prepackaged" Chapter 11 bankruptcy petition. Following approximately four months in bankruptcy, on March 19, 2002, the restructured Company emerged from Chapter 11 protection. *See* Minutes of Chiquita Board Meeting (Nov. 9, 2001); Minutes of Chiquita Board Meeting (Nov. 27, 2001); Minutes of Chiquita Board Meeting (Mar. 19, 2002).

As part of its restructuring, Chiquita's bondholders selected five new independent members for the Board – Cyrus Freidheim, who had recently retired as Vice Chairman of Booz Allen Hamilton ("Booz Allen"), the well-known management consulting firm; Robert Fisher, formerly a senior executive at Dole (one of Chiquita's competitors) with substantial experience in the fresh fruit industry; Morten Arntzen, at the time, the CEO of a boutique investment advisory firm specializing in the shipping industry; Jeffrey Benjamin, a partner at Apollo Management, the private equity firm; and Roderick Hills, a lawyer and former high-ranking government official, who, among other things, was the former Chairman of the SEC and counsel to President Gerald Ford.[120] Prior to their first Board meeting on March 19, 2002, the new directors met with members of management and were briefed on several issues, but not on the payments in Colombia.[121]

As one of its first acts, on March 19, 2002, the new Board sought and received the resignation of the Company's CEO, Steven Warshaw, who had also remained on the Board.[122] *See* Minutes of Chiquita Board Meeting (Mar. 19, 2002). It was the Board's view that it was appropriate to replace the CEO that had guided the Company immediately preceding its bankruptcy. In addition, in their introductory meetings, the new directors did not find Warshaw to be sufficiently open and forthcoming in discussing the Company's operations.

At the same time as it removed Warshaw, the Board appointed Cyrus Freidheim as CEO. *See id.* Olson said that in late March or early April of 2002, prior to briefing the Audit Committee about the payments in Colombia, he "fully briefed" Freidheim about the convivirs, the paramilitaries, and the AUC and that, in addition, he "probably" told

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120 Freidheim served as a director until May 2004 and was CEO, Chairman, and Chair of the Executive Committee until January 2004, when Fernando Aguirre became CEO. Arntzen served as a director until May 2008. Stanbrook currently serves as a director and was Chair of the Compensation Committee until approximately November 2008. Hills served as a director and was Chair of the Audit Committee until May 2007 (although he recused himself from Colombia matters in late January 2007). Fisher currently serves as a director.

121 Benjamin said that he did not recall being briefed by Chiquita's management prior to joining the Board.

122 Carl Lindner remained on the Board briefly, until May 2002.

him about the demand for cash payments in Santa Marta (discussed below). He explained to Freidheim that the payments were a "fact of life" in Colombia. According to Olson, Freidheim was "not happy" about this information, but he believed that the Company's course of action was "correct under the circumstances" and that the "most important objective was to protect lives." Olson said that Freidheim "always had questions," but could not recall him asking any specific questions during this briefing.

Freidheim recalled that Olson described the history of the payments and told him that the payments raised no legal issues because the Company was being extorted. Freidheim also recalled that Olson told him that the payments did not violate the FCPA, the one U.S. law that Olson said could apply, because they were not payments to a government entity.

M. The New Audit Committee Learns of the Payments

1. Demand for Cash Payments

During the spring of 2002, Banadex employees received a demand from the AUC that ultimately led the Company to alter the procedures that it had used to make payments to the AUC in Santa Marta. Originally, the Company made all AUC payments (by check) to a convivir in Turbo,[123] which then disbursed a portion of that amount to the Santa Marta group. However, around this time, an AUC representative informed [Banadex Employee #5] that the Santa Marta group was no longer receiving its full share of funds from the Turbo convivir, and demanded that all future payments intended for Santa Marta be made directly and in cash. *See* Memorandum of KPMG Interview of [Banadex Employee #10] (Jan. 30, 2004).

[Banadex Employee #10] informed [Chiquita Employee #2] and [a Chiquita lawyer] about the demand, and they, in turn, informed Olson and Tsacalis. As a result, in March 2002, Tsacalis and [Chiquita Employee #2] designed, and Olson reviewed, a set of procedures for making cash payments to the AUC in Santa Marta. These payments were to be drawn from a "Gastos de Gerente"[124] account used by Banadex's General Manager for travel and entertainment expenses, and would be subject to accounting safeguards that went beyond those that were required for payments by check. *See* Notes of [Chiquita Employee #2] (Mar. 28, 2002). Olson asked [a Chiquita lawyer] to consult with [a Banadex lawyer] to ensure that this procedure was legal and appropriate, and [the Chiquita lawyer] did so.

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123 Documentary evidence shows that the Company made payments to La Tagua del Darién until September 2001, at which point it began making payments to Asociación Papagayo, another convivir in Turbo. Witnesses told the SLC that these two convivirs, and perhaps others in Turbo, eventually merged.

124 Translated literally, "Gastos de Gerente" means "Manager's Expenses."

In May 2002, [Chiquita Employee #2] approved the new procedure. In June, [Banadex Employee #10] began to use funds from the Gastos de Gerente account, into which a portion of his salary had been paid, in order to pay the AUC. His salary was then "grossed up" to compensate for what would otherwise have been a shortfall in his income. *See* KPMG Sensitive Payments Schedule; Supplemental Thompson Submission.

2. The Audit Committee Learns of the Payments and the New Payment Procedures

At an April 23, 2002 meeting of the Audit Committee, which was now comprised of Roderick Hills, Morten Arntzen, and Jeffrey Benjamin, Olson discussed the payments in Colombia for the first time. E&Y was also present at this meeting. While none of the committee members specifically recalled the discussion, it appears that, during the course of Olson's FCPA report, the directors were told about the Santa Marta group's demand for cash payments and the new procedures that would be used to make the payments. *See* Minutes of Chiquita Audit Comm. Meeting (April 23, 2002); Notes of Steven Kreps (April 23, 2002); Factual Proffer ¶ 26.

According to Olson, he advised the committee that the payments to paramilitaries were legal under both the FCPA and Colombian law. Olson also discussed convivirs, and told the directors that the Company originally believed them to be government-sponsored organizations hired to help protect Chiquita personnel against violence in Colombia, but subsequently learned they were being used to support paramilitaries. None of the committee members recalled being particularly alarmed by Olson's report at this meeting. The Audit Committee continued to be apprised of the convivir payments through Olson's regular FCPA reports at Audit Committee meetings going forward.

N. Acquisition of Atlanta AG

One of the first issues the new Board focused on in the spring of 2002 was the Company's interest in Atlanta AG, its largest distributor in Europe, which was based in Germany. Prior to its 2003 acquisition, Chiquita effectively owned substantially all of the economic interest in Atlanta through a five percent limited partnership interest in Scipio, the parent of Atlanta, and loans secured by substantially all of the other limited partnership interests in Scipio. The borrowers had used the proceeds of these loans from Chiquita to purchase their limited partnership interests in Scipio in the late 1980s and early 1990s. Scipio and Atlanta were controlled by an official of Atlanta by virtue of his ownership of the general partnership interest in Scipio. Until mid-2002, Chiquita kept its ownership interest in Atlanta confidential because the Company did not want to damage Atlanta's relationship as a distributor with its other customers, who were also Chiquita's competitors.

Upon joining the Board, Hills became concerned about whether Chiquita had sufficiently disclosed its relationship with Atlanta, which, as an accounting matter, had been blessed by the Company's outside auditors, E&Y. In addition, by 2002, Atlanta had run into financial difficulty, and management became concerned that Chiquita's investment was at risk.

In a series of Board and Audit Committee meetings, from late May 2002 through early September, Chiquita's directors conducted a review of Chiquita's accounting and disclosures regarding its investment in Atlanta and debated whether to acquire Atlanta. As a result of this review, the Board and Audit Committee determined that the accounting was proper, but that Chiquita's interest in Atlanta should be fully disclosed in the footnotes to Chiquita's financial statements, which was done in an SEC filing on August 14, 2002. *See* Minutes of Chiquita Board Meeting (May 23, 2002); Minutes of Chiquita Board Meeting (July 3, 2002); Minutes of Chiquita Board Meeting (Sept. 4, 2002); Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (Aug. 14, 2002).

The Company retained the consulting firm Booz Allen to advise the Board with respect to its options for Atlanta, which included selling its interest in Atlanta, acquiring control of Atlanta, or walking away from its investment in Atlanta. Booz Allen presented its advice to the Board at meetings in July and September. *See* Minutes of Chiquita Board Meeting (July 3, 2002); PowerPoint Presentation, Booz, Allen & Hamilton (July 3, 2002); Minutes of Chiquita Board Meeting (Sept. 4, 2002); PowerPoint Presentation, Booz, Allen & Hamilton (Sept. 4, 2002). Prompted by Hills' concerns regarding the sufficiency of the Company's disclosure and management's concerns about Atlanta's continuing viability, and based on advice from Booz Allen, the Board determined that the Company should acquire control of Atlanta by acquiring all the partnership interests in its parent, Scipio.

At a September 4, 2002 Board meeting, the Board approved Chiquita's acquisition of 100% of the equity in Scipio. *See* Minutes of Chiquita Board Meeting (Sept. 4, 2002). This transaction, completed in March 2003, was accomplished by exchanging Chiquita's loans for the underlying Scipio limited partnership interests and purchasing the Scipio general partnership, at a total cash cost of approximately $1 million. After the sale was complete, Chiquita also paid off Atlanta's $65 million in outstanding debt. *See* Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (Aug. 14, 2002); Chiquita Brands Int'l, Inc., Annual Report (Form 10-K) (Mar. 31, 2003).

O. <u>Discovery of the FTO Designation</u>

In early 2003, about six months after the Company began making cash payments to the AUC in Santa Marta, [Banadex Employee #10] became increasingly uncomfortable with the payment method that grossed up his salary, and his concerns were communicated to management in Cincinnati, including Olson, Riley, Kreps [and a

Chiquita lawyer]. [Banadex Employee #10] felt that internal and government records showing the amounts of money flowing to him, including for salary and the AUC payments, exposed him to increased risk of kidnapping or other harm. *See* Memorandum of KPMG Interview of [Banadex Employee #10] (Jan. 30, 2004).

In response to these concerns, [a Chiquita lawyer], and other personnel in Cincinnati, began exploring various other options for making the payments, including the possibility of bringing cash into Colombia. *See* Notes of [Chiquita lawyer] (Jan. 30 and Feb. 3, 2003). At this time, [the Chiquita lawyer] asked B&M to update and clarify its prior memo regarding extortion payments, which it did. *See* Memorandum from F. Miguel Noyola to [Outside Counsel #3] (Feb. 4, 2003). While reviewing payment options, [the Chiquita lawyer] ran Internet searches for information on paramilitaries in Colombia. Late in the day on February 20, 2003, during one of these searches, [the Chiquita lawyer] came across a reference to the AUC's FTO designation. [The Chiquita lawyer] said he had not previously known about the FTO list generally, much less about the specific designation of the AUC.

The next morning, [the Chiquita lawyer], reported his discovery to Olson, who directed him to contact K&E. As noted above, prior to this conversation, Olson, like [the Chiquita lawyer], had not been aware that the State Department kept a list of designated FTOs, or that the AUC was on such a list. Olson was upset and concerned about the discovery.

Later that same day, [the Chiquita lawyer] spoke with Laurence Urgenson of K&E, who represented Chiquita in the SEC investigation that was settled in October 2001. Although Urgenson was not familiar with either the legal framework of the FTO statute, 18 U.S.C. § 2339B, or the AUC, based on what [the Chiquita lawyer] told him about the statute, Urgenson advised [the Chiquita lawyer] that the Company should presume that it was violating the law by making the payments. *See* Notes of [Chiquita lawyer] (Feb. 21, 2003). Following the call, Urgenson instructed his associate, Audrey Harris, to conduct research to learn more about § 2339B.

On February 25, Harris provided the preliminary results of her research to [the Chiquita lawyer] (Urgenson was traveling at the time). Harris's talking points for the call, which she prepared after consulting Urgenson, state: "Bottom Line: CANNOT MAKE THE PAYMENT."[125] Memorandum from Audrey Harris to File (Feb. 26, 2003); *see also* Notes of [Chiquita lawyer] (Feb. 25, 2003). According to Harris, this was the main point she made to [the Chiquita lawyer] during the call. During this call, [the Chiquita lawyer] and Harris also discussed the relationship between the AUC and

125 Harris told the SLC that she prepared her talking points prior to the call as an outline for her discussion with [the Chiquita lawyer]. The document was then revised after the call to include the substance of their discussion.

convivirs. Harris advised [the Chiquita lawyer] that the Company could not make the payments through convivirs, because the law did not allow the Company to do indirectly what it could not do directly. *See* Memorandum from Audrey Harris to File (Feb. 26, 2003); Notes of [Chiquita lawyer] (Feb. 25, 2003). Harris's talking points were featured prominently in the factual proffer that accompanied Chiquita's guilty plea. *See* Factual Proffer ¶ 56.

Immediately upon being told by [the Chiquita lawyer] that the AUC was on the FTO list, Olson suspended all payments to "paramilitaries." But he did not expressly order that the payments to the convivir stop, because, he said, he failed to recall the connection between the Turbo convivir and the AUC that had been explained to him in the Thomas Memo in September 2000. Because Olson did not specify that the payments to the convivir must stop, local management interpreted his order to suspend payments to paramilitaries as applying only to the direct AUC payments in Santa Marta. Accordingly, only payments to the AUC group in Santa Marta were suspended during this time,[126] and on February 25, the same day as [the Chiquita lawyer's] discussion with Harris, the Company made a $17,541 payment to the convivir Asociacion Papagayo. *See* KPMG Sensitive Payments Schedule.

Another payment was made to Asociacion Papagayo on March 10. *See id*. Olson said that a short time later, as a result of conversations with [Chiquita Employee #1], he was reminded that the convivir payments, or at least some portion of them, were going to the AUC. Olson then expressly suspended payments to the convivir. Thus, two payments were made to the convivir after Olson had learned of the FTO designation.

In the weeks that followed, Chiquita and K&E had frequent, and at times tense, discussions concerning the appropriate response to the FTO discovery. They covered a variety of topics during these discussions, including (i) potential legal defenses, and in particular a duress defense, (ii) exit strategies and business alternatives for the Company to consider in Colombia, (iii) issues relating to the disclosure of the FTO designation to the Board, (iv) how to deal with the issue of whether to continue making the payments, and (v) whether DOJ had a policy for dealing with companies that were being extorted. *See* Notes of Audrey Harris (Apr. 4, 2003); Memorandum from Audrey Harris to File (Mar. 27, 2003); Notes of [Chiquita lawyer] (Mar. 26, 2003); Memorandum from Audrey Harris to File (Mar. 11, 2003).

By all accounts, Olson was extremely concerned about the potential lethal consequences of stopping the payments. He believed, as he had for many years, that

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126 As a result of Olson's directive, [Banadex Employee #5] met with AUC representatives and told them that Banadex was having legal problems and the payments would be delayed as a result. The AUC representatives told [Banadex Employee #5] that Banadex would have to find a way to continue to make the payments.

stopping the payments would put the Company's Colombian employees at risk, and pressed Urgenson on his advice that the Company could not continue to make the payments. Urgenson explained to Olson and [the Chiquita lawyer] that, in his judgment, the Company had two options: (i) stop the payments, or (ii) approach the government and obtain clearance from DOJ to make the payments. *See* Notes of [Chiquita Lawyer] (Feb. 27, 2003); Memorandum from Audrey Harris to File (Mar. 27, 2003); Memorandum from Audrey Harris to File (Mar. 11, 2003).[127] Urgenson, Harris, Olson, and [the Chiquita lawyer] had numerous discussions about the best way to approach the government and disclose the payments, and the Company ultimately decided that, in the first instance, it would approach the DOJ on an anonymous basis. *See* Memorandum from Audrey Harris to File (Mar. 27, 2003); Notes of [Chiquita lawyer] (Mar. 5, 2003).

While these discussions were continuing, approximately three weeks after [the Chiquita lawyer's] discovery, on March 13, Olson, for the first time, briefed Freidheim on the payments and the discovery of the FTO designation. According to Freidheim, he asked Olson what the designation meant for Chiquita, and Olson advised him that the designation meant that "the law would prohibit the payments the Company had been making." Freidheim told Olson that he should inform the Audit Committee of the FTO designation, and Olson told him that he already planned to do so. *See* E-mail from Audrey Harris to Laurence Urgenson (Mar. 13, 2003).

1. Disclosure to the Audit Committee

Approximately five weeks after the FTO designation was discovered, in early April, Olson informed Audit Committee Chair Roderick Hills that the Company had discovered that it had been making payments to an FTO. At the time, Hills incorrectly assumed that the discovery of the FTO designation had been made a very short time before Olson had told him about it, and not more than a month earlier.

Olson explained that he delayed informing Hills about the FTO designation because it was his practice to collect as much information on an issue as he could before presenting the issue to the Audit Committee. Olson explained that he wanted to be prepared to answer questions from the committee and recommend a course of action,

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127 The Amended Complaint alleges that "Chiquita's outside counsel Laurence Urgenson of K&E in Washington, D.C. told the Chiquita Defendants on at least five occasions in February and March of 2003 that Chiquita's payments to the AUC ***were illegal and had to stop***!" Am. Compl. ¶ 9 (emphasis in original). This is not accurate. Rather, as reflected in the contemporaneous documentary evidence and confirmed by Urgenson to the SLC, he advised the Company that it *either* had to stop making the payments *or* approach the DOJ, which the Company did. For example, [a Chiquita lawyer's] notes of a call with Urgenson in late February reflect the following: "LU: Two approaches: 1. Stop conduct, make record of stopping it. 2. Continue, but get ruling from gov't." Notes of [Chiquita lawyer] (Feb. 27, 2003).

rather than just presenting an issue without a solution.[128] Olson said that as long as the Company took steps to ensure that no further payments were made during this time, the Company would not be prejudiced by the delay, and said he thought that he was proceeding in a rational and methodical way that would lead to an appropriate disclosure to the Board. At various times before Olson finally notified Hills and the Audit Committee, Urgenson urged Olson to do so promptly and briefly considered whether, under the Sarbanes-Oxley Act, he might have an independent obligation to do so if Olson did not. *See* Memorandum from Audrey Harris to File (Mar. 27, 2003).

After being briefed by Olson, Hills contacted Audit Committee members Arntzen and Benjamin to brief them on the issue. According to Arntzen and Benjamin, Hills told them that the Company had discovered that payments being made in Colombia were being made to an organization that had been designated as a terrorist organization, and that it was very clear that the payments were illegal and could no longer be made.

2. Anonymous Disclosure to DOJ

On April 2, 2003, Urgenson and Harris met with Michael Taxay, a line prosecutor in the Counter-terrorism Section of DOJ's Criminal Division. *See* Memorandum from Audrey Harris to File (Apr. 2, 2003). When speaking with Olson, Hills had argued against this course of action because he was concerned that contacting DOJ on an anonymous basis – as the Company planned to do – would make it appear that the Company was attempting to avoid disclosure entirely. Hills' view was that the Company was going to make full disclosure in any event, so that nothing was gained by proceeding on an anonymous basis at the outset.

During the April 2 meeting, Urgenson provided Taxay with a brief overview of the Company's situation, without any identifying information about the Company or specifying the country involved. *See id*. In response, Taxay said that DOJ's likely view would be that the payments were, at a minimum, a "technical violation" of § 2339B. *Id*. Taxay also stated, however, that whether DOJ would prosecute was a matter that would have to be discussed with more senior DOJ officials. Urgenson left the meeting with the understanding that DOJ was open to the possibility that there were circumstances under which, pursuant to the exercise of prosecutorial discretion, it would not prosecute a violation of the statute. After the meeting, Taxay called Urgenson to follow up: he said that DOJ would be hesitant to give a company a complete "pass" given the purpose of § 2339B. *See id.;* Notes of Audrey Harris (Apr. 4, 2003).

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[128] Olson told the SLC that his predecessor as General Counsel had been criticized by the Board for raising issues without having answers.

3. Disclosure to the Board

On April 3, 2003, the Audit Committee held a regularly scheduled meeting. Because of the importance of the Colombia issue, the meeting, although nominally an Audit Committee meeting, was attended by the full Board.[129] *See* Minutes of Chiquita Audit Comm. Meeting (Apr. 3, 2003). In addition to the five directors who joined the Board upon the Company's exit from bankruptcy (Morten Arntzen, Jeffrey Benjamin, Cyrus Freidheim, Robert Fisher, and Roderick Hills), the Board now included Durk Jager, the former CEO of Procter & Gamble, Jaime Serra, Chairman of SAI Consulting, a law and economics consulting firm, and Principal of the NAFTA Fund, a private investment fund,[130] and Steven Stanbrook, a senior executive with S.C. Johnson & Son, a consumer goods company.

Olson provided the Board with a briefing of the Colombia situation, focusing on the discovery of the FTO designation and its implications for the Company. Olson's briefing was based on a detailed set of talking points that he had prepared in advance of the meeting. *See* Robert Olson Talking Points (Apr. 3, 2003). During his presentation, Olson addressed various issues relating to the payments and the specific problems created by the discovery of the FTO designation. Olson described the history of the payments, including the reasons why the Company believed they were necessary and appropriate; he told the Board about the Company's legal analysis that established that the payments were not illegal under Colombian law; he advised the Board of the recent discovery of the AUC's FTO designation; he reported on the April 2 meeting with Taxay; and, at least according to his talking points, he told the Board about the current status – that the payments had been delayed while the Company determined the appropriate course of action. *See id*.

The Board members who attended the meeting confirmed that Olson generally covered the various issues raised by the talking points, although their collective recollection was that his presentation was not as detailed as suggested by the talking points. At the conclusion of the presentation, both Olson and Hills recommended that the Company disclose the fact of the payments to DOJ. The Board discussed the issue, and left the meeting with the understanding that the Company would approach DOJ to make a full and voluntary disclosure of the Company's predicament in Colombia and seek guidance on how to proceed.

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129 Olson told the SLC that it was typical for Board members to attend the Audit Committee meetings when, as here, there was a Board meeting on the same day.

130 Serra was also formerly a senior-level Mexican government official. He became Mexico's Undersecretary of Finance in 1986. He was appointed Minister of Trade and Industry in 1988, and held this position until 1994, when he became Minister of Finance, a position he only held briefly due to a financial crisis in Mexico. As Minister of Trade, Serra helped implement the recently-passed North American Free Trade Agreement of 1992.

The evidence is mixed as to what Hills and Olson told the Board regarding whether the payments were continuing. Pursuant to Olson's direction, the payments had stopped, and although his talking points cover that point, it is not clear what he said about it to the Board. Directors had varying recollections on this important point. For example, Arntzen said that Hills clearly stated that Chiquita could not continue to make payments because doing so was illegal; as a result, he assumed that the payments had stopped. Stanbrook said that, while he did not recall a specific discussion regarding whether payments could continue, he similarly assumed that they had stopped because they were illegal.[131] In contrast, given the reason stated for the payments, Benjamin assumed that they were continuing.

4. Continuing Communications Regarding the Payments

Following the April 3 Board meeting, Chiquita executives and K&E continued to discuss how to go about disclosing the matter to the government and what it should do about making further payments. Although the Company's legal posture had changed once the FTO designation had been discovered, conditions on the ground had not. Pressure to resume making the payments continued, with concerns being expressed by Banadex personnel in Colombia that further delays in making the payments posed grave threats to the Company's personnel.

During an April 4 call, Olson told the K&E lawyers about the different aspects of the problem and the pressures that he was feeling. *See* Notes of Audrey Harris (Apr. 4, 2003). Olson told Urgenson and Harris that Hills believed that he could approach the State Department on an anonymous basis to get its reaction to Chiquita's situation, which might be helpful in dealing with DOJ. Olson also said that, as a result of discussions with [Chiquita Employee #1], he had been reminded that the convivir to which the Company had been making payments in Urabá was closely linked to the AUC; as a result, the Company had the same problem in Urabá as it had in Santa Marta – it was making payments to an organization on the FTO list. Finally, Olson discussed the intense pressures he was feeling to approve a payment that personnel in Colombia were advising needed to be made by the end of the following week. *See id*.

Olson and Urgenson discussed whether the Company should make this payment. Olson, by all accounts genuinely and profoundly concerned about the safety

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131 Stanbrook offered somewhat conflicting testimony on this point. In his first SLC interview, Stanbrook said that there was no discussion of whether or not the payments were continuing; rather, "this was left unsaid." In his second interview, Stanbrook said that Olson's discussion of whether Chiquita continued to make payments after its self-disclosure "was very opaque." Stanbrook said that he believed that the payments had stopped, but that this was "just an impression," and he could not point to a specific discussion that led him to think that Chiquita was no longer making payments.

of the Company's employees in Colombia, suggested that various changes in payment procedures might allow the Company to make an additional payment; Urgenson advised that the problem was the payment itself, not the procedures used to make it, and firmly opposed making another payment. *See id*.

Olson told Urgenson and Harris that he, Hills, and Freidheim all believed that the Company should make the payment, even if there was a risk that DOJ would later decide to prosecute the Company.[132] *See id*. However, neither Freidheim nor Hills recalled expressing this view to Olson. Olson recalled expressing the view that he did not believe that making another payment would tip the balance in favor of prosecution, and thought that if it did, the Company would be prepared to defend its decision to make the payment. The call became so heated that Urgenson and Harris recalled that, out of frustration, Olson hung up on them; although Olson acknowledged that he became very upset during the call, he said he did not recall hanging up.

On April 8, 2003, Kistinger, Olson, [the Chiquita lawyer], and [Chiquita Employee #1] met in Cincinnati with [Banadex Employee #5] and [Banadex Employee #10], who had flown up from Colombia to discuss the impact of the FTO designation on Banadex's ability to continue to make the payments. *See* Memorandum from [Banadex Employee #10] to File (Apr. 9, 2003). The purpose of the meeting was for [the Banadex employees] to explain why the payments were necessary, and to confirm the continuing threat to Chiquita employees if payments stopped. According to [Banadex Employee #10's] memo of the meeting, the group discussed (i) the organization of the AUC, (ii) the Company's review of the legality of the payments, (iii) possible alternatives for making the payments, and (iv) issues related to the continuation of the payments. *See id*. Olson reported that he came away from the meeting with the belief that the threat of harm continued to be real and that the payments were necessary.

[Banadex Employee #10] said that he came to the meeting with the pressing need to obtain clear guidance about whether the payments, which had been suspended, could be resumed. He said that at the end of the meeting, he specifically sought that guidance, and that he and [Banadex Employee #5] were told by either Olson or Kistinger that the payments could be continued, which is what his memo of the meeting reports. *See id*. Multiple witnesses said that they believed that [Banadex Employee #10] belatedly produced this memo just prior to his interview with DOJ and not during the

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132 Indeed, Harris's notes of the call state: "BO thinks it will be impossible to clear this before making next payment. His and Rod's opinion is just let them sue us, come after us. This is also CEO's opinion." Notes of Audrey Harris (Apr. 4, 2003). This statement was cited by DOJ in the factual proffer without any context. *See* Factual Proffer ¶ 60. As Olson explained to the SLC, and as discussed above, this note is a truncated version of what was actually a much more nuanced conversation. However, in contrast to Olson, both Urgenson and Harris recalled that Olson said, "let them sue us" on the call.

Company's initial document collection efforts, implying that [Banadex Employee #10] created this memo after the fact to protect himself, and that he falsified the portion of the memo that suggested that Kistinger or Olson approved resuming or continuing the payments at that time.[133] Kistinger and Olson stated unequivocally that they did not authorize continuing the payments at the April 8 meeting, and neither [Banadex Employee #5] nor [the Chiquita lawyer] recalled that they did so. In any event, the payments were not resumed until early May, after the Company met with DOJ, as described below.

P. <u>Disclosure to DOJ</u>

1. April 24, 2003 Meeting with Michael Chertoff

On April 24, representatives from Chiquita met with Assistant Attorney General ("AAG") Michael Chertoff, the head of DOJ's Criminal Division. Hills, who had known Chertoff for approximately 25 years (they had worked together at the same law firm at one time), arranged the meeting to inform DOJ that Chiquita had made payments to the AUC, an FTO, and to seek DOJ's guidance on how to proceed. *See* Memorandum from Audrey Harris to Robert Olson and [Chiquita lawyer] (May 20, 2003).

Hills said that he thought disclosure at the level of AAG Chertoff was appropriate not because of their past relationship but because Chertoff was positioned high enough in the DOJ hierarchy to address the broader policy implications of the Company's predicament in Colombia. Hills, Olson, Urgenson, and Harris attended the meeting on behalf of the Company. In addition to Chertoff, Deputy Assistant Attorney General Alice Fisher, Barry Sabin, Chief of DOJ's Counterterrorism Section, David Nahmias, Counsel to the Assistant Attorney General, and Michael Taxay attended the meeting on behalf of DOJ. *See id*.

The SLC interviewed Olson, Hills, Urgenson, and Harris in detail about the meeting, almost certainly the most significant single event the SLC examined during this investigation, and had access to Harris's detailed memo summarizing it.[134] The recollection of these four witnesses was generally quite consistent, with only relatively

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133 There is no evidence that the payments were resumed until a full month later, and neither Olson nor Kistinger disputed the fact that the resumption of the payments, when it occurred in early May, was fully understood and anticipated.

134 Harris prepared a memo of this meeting from her handwritten notes taken during the meeting, which she then discarded. The memo was not finalized until May 20, 2003, one month after the meeting occurred. Harris's memo erroneously described Nahmias as "an unidentified FBI agent." She later discovered Nahmias's true identity, which she shared during her SLC interview.

minor differences and discrepancies.[135] Providing an overview, Olson described the meeting as having three distinct parts: (i) a beginning, during which DOJ officials reacted in a hostile manner; (ii) a middle, during which Olson and Hills were able to explain Chiquita's situation and DOJ officials appeared to "soften;" and (iii) an end, during which Chertoff acknowledged that the situation was "complicated" and agreed to get back to the Company regarding the policy issues it had raised.

At the outset of the meeting, Hills and Olson explained the history and mechanics of Chiquita's payments to the AUC (including its payments to convivirs). Olson described incidents of paramilitary intimidation and harassment of Banadex employees. *See id*. As Hills and Olson moved through their presentation, they responded to various questions and points made by the government representatives. For example, Nahmias asked what the AUC's reaction would have been if Chiquita had been forced to stop payments immediately because of a criminal prosecution. Hills said that "the AUC would kill the people — someone would get shot." *Id*. Chertoff commented that he did not see Chiquita's case as one of true duress, because the Company had a legal option — to withdraw from Colombia. Hills said that Chiquita was prepared to sell its Colombian operations if "it came to that," but asked that, given the foreign policy implications of a withdrawal of a significant U.S.-based multinational corporation from Colombia, Chertoff first discuss this issue with other agencies of the government concerned with foreign policy and national security matters, including the National Security Council ("NSC"). Hills offered to contact the NSC himself, but Chertoff said, "No, let us take it up to them." *Id*.

With respect to continuing payments, Olson told the DOJ officials that he did not see how the statute could force an American company to stop making the payments when the result of doing so would be that employees would be killed. Chertoff responded that the payments were "a crime" and that he "just wanted Chiquita to be alert to the fact that DOJ would probably not be able to okay the payments going forward." *Id*. Hills responded that if DOJ sought to enforce a "black and white rule" against making payments to the AUC or another FTO in Colombia, the result would be a "mass exodus" of U.S. companies from Colombia. *Id*. Chertoff responded, "You're quite right, this is a much heavier meeting than I thought," and acknowledged that future payments were a "complicated issue." *Id*.

Urgenson suggested that Chiquita could envision assisting the government in "some kind of undercover scenario," although it would obviously have concerns about

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[135] Indeed, initially the SLC felt that it would be important to obtain testimony from the government officials who attended this meeting and sought to do so through the *Touhy* process, as described above. However, the need to speak with the government representatives was substantially reduced once the SLC determined that there was no material dispute about what occurred or was said at the meeting.

the safety of its employees in any such operation. *Id*. Urgenson argued that Chiquita's willingness to cooperate, together with the duress under which payments had been made, should cause DOJ to understand the full complexity of the situation. Urgenson also told the DOJ officials about the legislative testimony of Occidental Petroleum, an oil company operating in Colombia. Urgenson said that Occidental had addressed a similar extortion problem by making payments through its employees and contractors, and Hills suggested that Chiquita could do the same thing. Chertoff interrupted by saying, **"**It's illegal, it's an illegal act.**"** *Id*. Chertoff then "[gave] an indication" that this statement did not mean that DOJ would seek enforcement for historic payments, but added that he "could not say to Chiquita to go ahead and make the payments going forward." *Id*.

At the end of the meeting, Chertoff thanked the Chiquita representatives for coming, and said that he would get back to them. The DOJ officials requested that the Company provide them with the legislative testimony that Urgenson referenced and "anything about the other ways other companies in Colombia work out this type of situation."[136] *Id*. After the meeting, Taxay followed up with K&E regarding this request. Taxay indicated in a later phone call to K&E that he had drafted a memo regarding the meeting and "the issue was now at a policy level above his involvement." *Id*.

2. Reactions to the Chertoff Meeting

The meeting at DOJ – and the interpretation of its meaning by Hills, Olson, and Urgenson – had an enormous influence on the Company's actions in the months that followed, and ultimately became a source of fierce controversy between DOJ and the Company. Olson and Hills were encouraged by the government's reaction to the Company's plight, especially by AAG Chertoff's acknowledgement, implicit in his agreement to speak with the NSC, that the matter raised foreign policy issues, not simply criminal enforcement issues. Olson and Hills were both very pleased, in general, with how the meeting went, and where it ended, with Chertoff seeming to recognize the moral complexity of the situation faced by the Company. In addition, they both felt that the Company had, at a minimum, deferred the day when the decision to leave Colombia had to be made until the Company heard back from DOJ.

Hills recalled that he clearly and firmly said at this meeting that as long as Chiquita was in Colombia, it would have to continue making the payments; he said that it was inconceivable that DOJ did not understand that payments would have to

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136 According to a letter sent the following day from Urgenson to Taxay, in response to DOJ's request for additional information about Occidental, the federal government had, according to news reports, appropriated $93 million to protect Occidental's pipeline. *See* Letter from Larry Urgenson to Michael Taxay (Apr. 25, 2003).

continue. He recalled that Chertoff said that he could not condone the payments, but he would consider exercising prosecutorial discretion in the Company's favor and not charging the Company with violating the statute. Hills said that he did not specifically ask Chertoff whether payments could continue because he knew that DOJ could not explicitly authorize conduct that constituted a crime, and he did not want to ask a question that would back the government into a corner and force it to provide a negative response. Hills stated that Chertoff's parting words were that this was a problem that he needed to discuss outside of DOJ, and that he would get back to Chiquita. *See* Letter from Roderick Hills to Laurence Urgenson, Elliott Leary, and Ronald Goldstock (Jan. 7, 2004).

Olson said that, although Chertoff said that the payments to the AUC were a crime, and that he was not sure that he could authorize payments going forward, he did not take this as a prohibition against future payments. Instead, Olson took it as a soft restatement of the proposition that the government could not explicitly authorize illegal conduct. Olson said that while he did not expect the government to explicitly authorize payments going forward, and acknowledged that the government in fact did not do this, he believed the government understood that, while Chiquita was waiting for an answer, it would have to continue the payments. He believed that the government was, in effect, condoning the payments until they finished reviewing the issue with other agencies in the government.

Urgenson's general view was that the government's reaction was more understanding and sympathetic than it might have been. Urgenson said that both Chertoff and Taxay (i) stated that the Company's conduct was a "technical violation" of § 2339B, (ii) suggested by words and demeanor that enforcement against historic payments was unlikely, but (iii) suggested that toleration of payments going forward was also unlikely. Urgenson also said that Chertoff acknowledged that the situation was "complicated" and implicated policy concerns that should be vetted with other agencies in the government. *See* K&E Talking Points (Sept. 2003).

In Urgenson's view, Chertoff did not foreclose the possibility that Chiquita would be allowed to make payments in the future. Like Hills and Olson, Urgenson left the meeting feeling optimistic that, while the government had not authorized continuing the payments, it had reacted more positively than it might have. Urgenson believed that, in light of how the meeting ended – with Chertoff agreeing to make contact within the government on the policy implications of forcing the Company to leave Colombia – Chiquita would in the very near future have another meeting with the government. The SLC found no evidence that there were any discussions among Olson, Hills, Urgenson, or anyone else in the Company about whether the payments could continue while the Company waited to hear back from the government.

3. Report to the Audit Committee

Olson updated members of the Audit Committee on the meeting with Chertoff during an April 30, 2003 Audit Committee meeting. Audit Committee members Arntzen, Benjamin, Hills, and Stanbrook attended. Freidheim, Riley, Olson, Tsacalis, and Kreps also attended the meeting, along with representatives from E&Y.[137] *See* Minutes of Chiquita Audit Comm. Meeting (Apr. 30, 2003).

Kreps's notes of the meeting reflect that Olson told the directors that his conclusion after the Chertoff meeting was that Chiquita would have "no liability for past conduct." Notes of Audit Comm. Meeting (Apr. 30, 2003). However, Olson later said that he did not say – and did not mean to suggest – that DOJ had provided assurances that there would be no prosecution for the past payments; instead, he believes he said that past payments were a technical violation, but that, based on the statements by the government representatives at the meeting, he felt hopeful that the Company was unlikely to be charged for the past payments and that DOJ was focusing on what to do about the continuing payments. None of the Committee members recalled Olson stating definitively that the Company would not be held liable for past payments, and Hills said that, if Olson had made such a statement, he would have corrected him. However, the Committee members recalled that they had the impression that the Company was handling the situation correctly and that prosecution for past payments was unlikely.

There were significant differences among the Audit Committee members and management personnel who attended the meeting regarding what the Committee was told about whether the payments would resume while the Company waited for a response from the government. Kreps's notes state that the directors were told that, during the Chertoff meeting, there was "no conclusion on continuing the payments."

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137 Then-senior E&Y auditor Christopher Reid said that E&Y first learned that payments to the AUC were illegal under U.S. law at an Audit Committee meeting in April or May 2003. The April 30 meeting, which is the first Audit Committee meeting attended by E&Y at which the illegality of the payments was discussed, is most likely the meeting where E&Y learned that the payments to the AUC were illegal. Once E&Y learned that payments to the AUC were illegal, according to Reid, it considered them to be qualitatively material. The fact that the payments were qualitatively material meant that E&Y was obligated to investigate, among other things, (i) what steps the Company had taken to fix any internal control problems that had allowed it to make illegal payments, (ii) what steps it was generally taking to address the situation, and (iii) the "financial statement ramifications" of any potential fines and penalties that might result from the illegal conduct. Reid said that E&Y believed that the Company was taking adequate steps to review its internal controls and otherwise address the problem, including hiring KPMG to perform a thorough forensic review of its control procedures and disclosing the payments to the DOJ. E&Y did not believe that the payments were material from a financial-reporting perspective, even though they were illegal.

Id. However, Olson did not recall a discussion at this meeting about resuming the payments. Hills said he did recall such a conversation, and said that, while there was no official discussion or decision made at any Board or Audit Committee meeting that specifically authorized the Company to resume payments, the Committee knew, given the security situation, that the payments had to continue and was allowing them to be made. Hills said that he did not view continued payments as a problem at this point because the Company had fully disclosed the facts and the issues to DOJ and was awaiting its response.

Arntzen and Benjamin recalled being told that DOJ had not given Chiquita a final opinion on whether it would be able to continue making payments. As noted above, Benjamin was under the impression that the payments were continuing at this time, but Arntzen said he believed that the payments had stopped. Arntzen did not explain how he believed the payments could be suspended indefinitely given the pressures he had previously been told existed in Colombia to make the payments or risk damage to life and property. Stanbrook did not recall the discussion at the meeting.

In addition, several directors also recalled a discussion at this meeting regarding a possible sale of Banadex. The notes of the meeting reflect that Hills stated: "Worst case get out of Colombia." Notes of Audit Comm. Meeting (Apr. 30, 2003). In some directors' view, because of the size and scope of Chiquita's operations in Colombia, it would be irresponsible to attempt to sell Banadex before the Company had all the facts regarding the payments and before it had heard back from DOJ.

Q. <u>Payments in Colombia Resume</u>

In early May 2003, [Banadex Employee #10] traveled to San Jose, Costa Rica on business. According to a memo to file by [Banadex Employee #10], during an impromptu meeting with [Chiquita Employee #2] on May 5, he and [Chiquita Employee #2] called [a Chiquita lawyer] in Cincinnati to ask what to do about continuing the payments, which had been suspended for close to two months. According to [Banadex Employee #10], [the Chiquita lawyer] told him to resume making the payments. *See* Memorandum from [Banadex Employee #10] to File (May 10, 2003). [Chiquita Employee #2] also recalled this meeting, and said that it was his impression that [Banadex Employee #10] had already been given authorization to make another payment, but wanted confirmation from [the Chiquita lawyer]. The records of the Company reflect that, on May 8, 2003, the payments to the convivir in Turbo and to the AUC in Santa Marta resumed. *See* KPMG Sensitive Payments Schedule.

Notwithstanding the importance of the issue, the SLC was unable to determine who authorized the resumption of the payments. [Banadex Employee #10] said that he assumed that [the Chiquita lawyer] would not have given him that directive without

authorization from Olson, but did not know, in fact, whether Olson had given such authorization. [The Chiquita lawyer] did not recall the conversation with [Chiquita Employee #2] and [Banadex Employee #10], and did not recall ever giving anyone "advice" on whether to stop or continue the payments. [The Chiquita lawyer] confirmed that, if he had given such advice, he would have first consulted his superiors, such as Olson. Olson said that while he did not believe that the Colombian employees would have resumed making payments without authorization, he did not recall authorizing them to do so. Olson said that the payments would not have resumed without authorization from Freidheim, Hills, and probably Kistinger as well.

Freidheim said that he did not recall authorizing the resumption of the payments, was not aware who did so, and was not aware who relayed the word to Colombia that it was permissible to resume the payments. Freidheim said that, at that point, the Audit Committee was directing the Company's actions with respect to the payments. Likewise, Kistinger said that he did not recall authorizing the resumption of the payments, was not aware who did so, and was not aware who relayed the word to Colombia that it was permissible to resume the payments. Hills said he did not specifically authorize the resumption of the payments, assumed that someone in management had done so, but did not know who and never inquired further about who authorized the resumption of the payments; he considered the resumption of the payments as correct and uncontroversial and therefore viewed the process by which the payments were resumed as an administrative detail, not an Audit Committee or Board matter.

In short, based on the interviews of all the key participants, and a review of all relevant documents, the SLC was unable to resolve the important factual issue of who authorized the resumption of the payments.

R. Additional Public Disclosures Regarding Colombia

The Audit Committee met on May 12, 2003 to review the Company's Form 10-Q filing for the first quarter of 2003. Directors Arntzen, Benjamin, Hills, and Freidheim attended. Riley, Olson, Tsacalis, and Kreps also attended, along with representatives from E&Y. *See* Minutes of Chiquita Audit Comm. Meeting (May 12, 2003).

The Audit Committee focused on specific language, which was to be added to the risks and assumptions section of the 10-Q, to more accurately reflect the risks that the Company faced in various parts of the world, including most specifically Colombia. *See id.* To the list of factors previously listed, the Company proposed adding the

following: "the potential impact of political instability and terrorist activities."[138] *Id.* Olson recalled that Peter Atkins at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), Chiquita's disclosure counsel, drafted the proposed language and did not recall any debate or discussion among the Audit Committee members about the proposed language. However, Hills recalled that he continued to be "uncomfortable" with this disclosure because it did not provide "enough information." Hills said that he discussed the language "at great length" with Atkins, and gained comfort that the disclosure was legally sufficient. Neither Benjamin nor Arntzen had a specific recollection of this meeting, but recalled generally that the Company was continuously updating its disclosures as new, material risks arose.

As a result of the meeting, the proposed language was added to the 10-Q, which was filed with the SEC on May 15, 2003. As discussed further below, this language was expanded upon in later disclosures throughout 2003 and 2004.

S. Further Contact with the Government

1. Call from Chertoff

During June, July, and August 2003, the Company had a series of contacts with senior officials at DOJ, each of which gave the Company reason to believe that its situation was being considered at the highest levels of DOJ.

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138 In its entirety, with the new language, the disclosure would read:

> This quarterly report contains certain statements that are "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. These statements are subject to a number of assumptions, risks and uncertainties, many of which are beyond the control of Chiquita, including: the impact of changes in the European Union banana import regime expected to occur in connection with the anticipated enlargement of the E.U. in 2004 and the anticipated conversion to a tariff-only regime in 2006; prices for Chiquita products; availability and costs of products and raw materials; currency exchange rate fluctuations; natural disasters and unusual weather conditions; operating efficiencies; labor relations; the continuing availability of financing; the Company's ability to realize its announced cost-reduction goals; actions of U.S. and foreign governmental bodies including in relation to, *and the potential impact of political instability and terrorist activities on*, the Company where it has international operations; and other market and competitive conditions. The forward-looking statements speak as of the date made and are not guarantees of future performance. Actual results or developments may differ materially from the expectations expressed or implied in the forward-looking statements, and the Company undertakes no obligation to update any such statements.
>
> Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (May 15, 2003) (emphasis added).

In early June 2003, Hills received a phone call from Chertoff, who had been, or was about to be, confirmed to a seat on the U.S. Court of Appeals for the Third Circuit.[139] Chertoff told Hills that he had briefed Deputy Attorney General Larry Thompson, the second-most senior official at DOJ, on Chiquita's situation, and advised Hills to contact Thompson if he felt "uncomfortable" about the status of the matter. Hills said that he asked Chertoff if there was any reason why he should feel uncomfortable, and Chertoff told him that there was not, that Chiquita had "done the right thing," and that DOJ was still consulting and considering the issue. Hills reported the substance of this conversation to Olson and to the Audit Committee. Although there is no written record of this call, Olson and Urgenson recalled hearing about the substance of the conversation from Hills.

According to Hills, a few weeks after this call, he saw Chertoff at a dinner party to celebrate his appointment to the bench. Hills said that Chertoff initiated a conversation with him about Chiquita, and that Chertoff reiterated that he should feel free to speak with Thompson. Hills said that, at the dinner, he also mentioned Chiquita's situation to Attorney General John Ashcroft, who, according to Hills, thanked the Company for its cooperation. Hills told the SLC that he was not sure if Ashcroft was "just being polite or if he really remembered Chiquita's case." Hills said that he reported this to the Board and to Olson as well. Again, although there is no record of this contact, Olson recalls hearing about it from Hills.

2. Call from Alice Fisher

On July 2, 2003, Urgenson called Alice Fisher to check on the status of DOJ's review and spoke to Fisher briefly. Fisher let him know that Larry Thompson had been briefed on the situation; that Chertoff's replacement as head of the Criminal Division, Christopher Wray, would likewise be briefed; and that she would call shortly to set up a meeting to "work this out." Notes of K&E (July 2, 2003); *see also* Notes of Audrey Harris (Aug. 4, 2003). Fisher also indicated that DOJ "intended to cooperate with Chiquita to find a satisfactory solution." Notes of K&E (July 2, 2003). Urgenson described Fisher's tone as friendly and conciliatory. *See* Notes of Audrey Harris (Aug. 4, 2003). According to Urgenson, Fisher never followed up to schedule a meeting.

Urgenson briefed Olson on this call, informing him that DOJ was focused on Wray's confirmation hearing, but had passed the Chiquita file on to Thompson. Olson said his understanding was that the call was "friendly" and consistent with the tone at the end of the Chertoff meeting.[140]

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139 The Senate confirmed Chertoff on June 9, 2003.

140 Hills said he was not informed about this phone call prior to his meeting with Thompson on August 26, 2003, discussed below. Both Urgenson and Olson recall that Urgenson's call to Fisher

By this time, more than two months had passed since the April 24 meeting with Chertoff and the payments were continuing, but no one at the Company was concerned or alarmed because they had made a full voluntary disclosure to the government, and based on their contacts with senior DOJ officials, the Company knew that the matter was still under review by the government and did not believe that the additional payments were creating additional risks for the Company.

3. July 8, 2003 Audit Committee Meeting

The Audit Committee was briefed again on the situation when it met next on July 8, 2003. Audit Committee members Arntzen, Hills, and Stanbrook attended this meeting, as did Riley, Olson, Tsacalis, and Kreps, along with representatives from E&Y. According to the minutes, Olson provided an update on the Colombia situation and presented the FCPA payment summaries for the third and fourth quarters of 2002 and the first quarter of 2003. *See* Minutes of Chiquita Audit Comm. Meeting (July 8, 2003).

Investigation Update. According to Kreps's notes, Olson reported that the DOJ officials that the Company had been in touch with were "in transition," and that the Company was in the process of arranging a meeting with Larry Thompson. *See* Notes of Chiquita Audit Comm. Meeting (July 8, 2003). The Audit Committee raised several questions, including whether (i) there was a chance the AUC would be removed from the FTO list, (ii) the Company should evaluate withdrawing from Colombia, and (iii) the Company's disclosures regarding the investigation were adequate. *See id.* In response, according to Kreps's notes, Olson and Hills reported that (i) there was no possibility the AUC would be removed from the FTO list, (ii) the Company had been approached by C.I. Banacol S.A. ("Banacol"), a Colombia-based banana producer, regarding a sale and the Company was exploring this option, and (iii) the Company had made "opaque" disclosures regarding the situation, a reference to the expansion of the risks section in its most recent 10-Q to include the general reference to political instability and terrorist activities. *See id.*

Withdrawing from Colombia. Audit Committee meeting attendees recalled that directors Stanbrook and Serra raised the idea of exiting Colombia more than once, although they could not recall specifically at which meetings they raised the issue. Arntzen believed that Stanbrook and Serra were very uncomfortable during the period when the Company was waiting to hear back from DOJ, while other directors, such as

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was prompted by discussions that they had with Hills. This is confirmed by K&E billing records and contemporaneous notes from a July 1, 2003 call between Urgenson and Hills. *See* Notes of K&E (July 2, 2003). Urgenson told the SLC that he conveyed the substance of the call to the Company immediately, and the implications of the call were discussed at length on an August 4 conference call with Olson, [a Chiquita lawyer], and attorneys from Skadden. *See* Notes of Audrey Harris (Aug. 4, 2003).

he and Hills, wanted to obtain all the facts, including a response from DOJ, prior to taking action.

"Opaque Disclosures." Neither Olson nor Hills recalled using the word "opaque" to describe the Company's disclosures, and both said that they do not believe they would have used that word. In addition, none of the directors questioned about this meeting recalled the word "opaque," or anything to that effect, being used at this meeting or ever, to describe the Company's disclosures. To the contrary, the directors' general sense was that the Company was trying to be as transparent as possible, and that any "opacity" in the disclosures arose from the Company's concerns about its employees' safety.

FCPA Report. The FCPA Summary of Payments provided to the Audit Committee and reviewed at this meeting lists payments to the "Papagayo Association, a 'convivir'" in the amount of $25,688 for the third quarter of 2002 and $108,125 for the fourth quarter of 2002, periods that pre-dated the Company's discovery of the AUC's FTO designation. FCPA Summary of Payments (Q3 and Q4 2002). The convivir is described as a "government licensed security provider."[141] *Id.* Olson could not recall why the convivir was described this way in the report, and the committee members did not recall a discussion of the convivir payments at this meeting.

T. <u>Initial Banacol Proposal</u>

As the Audit Committee was told at the July 8 meeting, the Company had already begun a dialogue with Banacol about a potential transaction involving Banadex.

1. Initiation of Negotiations

In September 2002, Banacol had approached Chiquita, through director Robert Fisher, to express their interest in acquiring Banadex, but, other than an introductory meeting, the parties did not pursue discussions at that time. During a June 5, 2003 conference call, Kistinger and Olson, for the first time, informed [Chiquita Employee #2] and [Banadex Employee #1] about the DOJ investigation. Kistinger informed [Chiquita Employee #2] that the Company might have to sell Banadex, and asked him to begin assessing potential buyers. *See* Banacol Deal Chronology (May 10, 2004). [Chiquita Employee #2] said that he believed that in April 2003 he had asked Banacol to submit a written proposal to the Company based on Banacol's unsolicited approach in 2002. On June 11, 2003, Banacol sent Chiquita a document entitled "General Negotiation Frame and Issues to be Defined." This was a "conceptual document" outlining issues to be addressed during negotiations for a possible sale of Banadex,

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141 [A Chiquita lawyer] and Kreps were now responsible for compiling this report based on information supplied by the Company's Colombian employees.

rather than a formal proposal. *See* Memorandum from Banacol to Chiquita (June 11, 2003).

2. Concerns Raised by Colombian Employees

According to a memo to file prepared by [Banadex Employee #10], on August 13, 2003, he met with Kistinger, Freidheim, Manuel Rodriquez, and Jorge Solergibert in Panama and discussed the risks associated with any decision to stop the payments to the AUC pending a sale to Banacol. *See* Memorandum from [Banadex Employee #10] to File (Aug. 16, 2003). [Banadex Employee #10] clarified during his SLC interview that this was not an official "meeting," but that it took place "at a bar" following meetings regarding other business. During the conversation, prompted by a question from Kistinger, [Banadex Employee #10] expressed his concern that a sale would not reduce the risk to the people on the ground in Colombia, and that paramilitaries might decide to extort Chiquita while they still had the chance; alternatively, they might "turn around" and extort Banacol for the money Chiquita had not paid. *Id*. [Banadex Employee #10] testified before the grand jury in the DOJ investigation that he said during this conversation that he might be able to delay payments to the AUC during the transition period following the sale of Banadex, but that he did not mean to convey that it was safe to stop making the payments at that time.

[Banadex Employee #10's] memo also stated that Freidheim expressed the view during this informal conversation that it was unlikely that the government would pursue Chiquita for continuing to make the payments. However, Freidheim said he did not recall this conversation or making any such comments. Kistinger recalled that Freidheim was, in general, concerned during this discussion.

According to [Banadex Employee #10's] memo, Rodriguez offered to contact Chris Arcos, a former U.S. ambassador to Honduras who was working in the U.S. Department of Homeland Security, to obtain the views of someone outside DOJ who was familiar with Latin American issues regarding the risk that Chiquita would be "pursued" for making the payments. Freidheim asked Rodriguez to do so as soon as possible. *See id.* According to Kistinger, after the meeting, he and Rodriguez contacted Arcos. However, the SLC found no evidence that Chiquita received any guidance or counsel from Arcos.

3. Initial Proposal From Banacol

On August 23, 2003, Banacol sent Chiquita a detailed, formal proposal for the purchase of Banadex, and the parties spent the next several months negotiating the terms of a potential deal. In its initial proposal, Banacol offered to purchase Banadex's farms for $76 million in total consideration (comprised of $54 million in cash and $21.61 million in preferential discounts on the purchases of Banacol pineapples), and to enter

into an eight-year fruit purchase agreement whereby, following the sale, Banacol would supply Chiquita with bananas at a premium, above-market price. *See* Banacol Proposal (Aug. 23, 2003).

The Company's Banacol "deal team" was comprised of [Chiquita Employee #2], [Banadex Employee #1], John Byerly, Jimmy Medrano, and [a Banadex employee]. *See* E-mail from John Byerly to Robert Kistinger, et al. (Sept. 5, 2003).[142] On September 5, 2003, Byerly circulated an analysis of the deal, prepared by the team, to senior management, including Olson, Kistinger, and Freidheim. *See id.* Kistinger believed that Banacol's proposal was a reasonable and serious first offer. [Chiquita Employee #2], who was not initially an advocate of the sale, said that, at the outset, he thought that Banacol would try to "steal" Banadex, but that his concern "dissipated somewhat" as he came to understand that Banacol was a serious purchaser.

[Chiquita Employee #2] was largely responsible for negotiating the terms of the sale. He discussed the progress of the sale with Kistinger and other members of Chiquita management, but was given a great deal of autonomy. All of the directors interviewed by the SLC stated their belief that the Company vigorously and responsibly negotiated the sale of Banadex. During 2003 and early 2004, the Company did not share with Banacol that its interest in selling Banadex was substantially greater because of the pressure imposed by the Company's discovery of the FTO designation and its disclosure to DOJ. Thus, at the outset, the DOJ investigation did not play a role in the negotiation.

Over time, several key issues needed to be negotiated, including, among many others, (i) the amount of the up-front payment from Banacol to Chiquita, (ii) the contract purchase price for bananas and pineapples,[143] and (iii) several joint venture issues.[144] In particular, the amount of the up-front payment was aggressively negotiated, with Chiquita pushing for a higher up-front payment, and offering in exchange to pay a greater premium price on the bananas to be purchased under the supply contract in the future. Kistinger and Freidheim advocated for a higher up-front payment/high purchase price, believing that this would provide better long-term value to Chiquita. Kistinger believed that a higher up-front payment was highly preferable

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142 John Byerly was a financial analyst in Chiquita's Treasury Department. Jimmy Medrano was a financial analyst in Costa Rica. [Banadex Employee] was the [ ].

143 As part of the deal, Banacol also agreed to supply Chiquita with MD2 pineapples (a new, sweeter variety of pineapple that at the time was relatively scarce) at a discount. This discount added significant value to the deal for Chiquita.

144 The ultimate disposition of these joint ventures was "critical" to the sale price because they collectively produced a significant amount of bananas. Chiquita was ultimately able to resolve joint venture ownership issues to Banacol's satisfaction.

because he thought it unlikely that Banacol would be able to deliver all of the boxes it had promised over the life of the purchase contract due to uncontrollable factors such as weather and labor disruptions; and, as a result, the overall amount paid by Chiquita under the supply contract would be reduced. The terms of the deal would continue to be negotiated over the coming months.

U. Additional Public Disclosure

1. August 4, 2003 Call between Olson, K&E, and Skadden

During the summer of 2003, to raise capital, Chiquita considered a convertible bond offering because of favorable rates on the bond markets. Though quite separate from the issues relating to Colombia, the potential bond offering again raised the issue of what disclosures were necessary and appropriate regarding the situation in Colombia.

On August 4, 2003, Olson, [the Chiquita lawyer], Urgenson, and Harris participated on a conference call with Peter Atkins and David Friedman of Skadden, Chiquita's disclosure counsel, to discuss the potential bond offering. Urgenson said that this was a narrowly focused call to determine whether Chiquita needed to make any new disclosures regarding the DOJ investigation before proceeding with the offering. According to notes of the call, Urgenson told Olson and the Skadden attorneys that (i) he had not heard anything in his discussions with DOJ that would lead him to believe that DOJ intended to prosecute Chiquita, and (ii) that in the event of a prosecution, Chiquita had good, but untested, duress arguments. However, Urgenson cautioned the participants that it would be prudent to get clarity from DOJ before going forward with the bond offering. *See* Notes of [Chiquita lawyer] (Aug. 4, 2003); Notes of Audrey Harris (Aug. 4, 2003). Chiquita ultimately abandoned the bond offering for market reasons.

2. August 12, 2003 Audit Committee Meeting

On August 12, 2003, the Audit Committee met, with members Arntzen, Benjamin, Hills, and Stanbrook attending. Also present were Riley, Olson, Tsacalis, and Kreps, along with representatives from E&Y. The purpose of this meeting was to review proposed revised disclosures for Chiquita's Form 10-Q for the second quarter of 2003, which was to be filed that day. *See* Minutes of Chiquita Audit Comm. Meeting (Aug. 12, 2003). According to Olson, the bond offering and advice from Skadden and Urgenson, as discussed on the August 4 conference call, prompted this discussion.

After repeating the risk factors that since May had included the references to instability and terrorism, the additional draft disclosure language reviewed by the Audit Committee stated: "The Company is currently dealing with one such issue,

which it has brought to the attention of the appropriate U.S. authorities. Management does not currently believe that this matter will have a material effect on the Company." *Id.*[145] According to Kreps's notes, Olson stated: "Added 'currently' to disclosure to inform that this is a 'changing' event." Notes of Chiquita Audit Comm. Meeting (Aug. 12, 2003). Olson said that a more accurate recording of what he said with respect to the disclosure would have been that the situation *could* change, not that it was changing.

According to the notes, Hills said that he "believes this is a proper disclosure." *Id.* Hills said that as the disclosures evolved and grew more specific over time, he felt increasingly comfortable with them. At all times, he felt comfortable that the Company was consulting with well-qualified lawyers who were experienced in the disclosure area. Arntzen, Benjamin, and Stanbrook did not have a specific recollection of this meeting, but generally recalled that the Company's disclosures were discussed.

In addition, Olson also gave another update on the DOJ investigation. He expressed concern about the turnover at DOJ because it impaired the Company's ability to continue its discussion. According to Kreps's notes, Olson noted that the Company needed "more input from DOJ indicating their probable stance." *Id.*

V. <u>Further Communication with the Government</u>

1. Call from Taxay

On August 18, 2003, Michael Taxay of DOJ called Urgenson and told him that he had met with Christopher Wray about the Chiquita matter. Taxay invited Urgenson to participate in what he characterized as "working-level discussions." Notes of [Chiquita lawyer] (Aug. 18, 2003). On this call, Urgenson asked Taxay if he knew the status of the

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145 The full text of the disclosure states:

> The Company has international operations in many foreign countries, including those in Central and South America, the Philippines and the Ivory Coast. These activities are subject to risks inherent in operating in these countries, including government regulation, currency restrictions and other restraints, burdensome taxes, risks of expropriation, threats to employees, political instability and terrorist activities, including extortion, and risks of action by U.S. and foreign governmental entities in relation to the Company. Should such circumstances occur, the Company might need to curtail, cease or alter its activities in a particular region or country. Chiquita's ability to deal with these issues may be affected by applicable U.S. laws. *The Company is currently dealing with one such issue, which it has brought to the attention of the appropriate U.S. authorities. Management does not currently believe that this matter will have a material effect on the Company.*

Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (August 12, 2003) (emphasis added).

meeting that Fisher had promised to arrange on a call a month earlier. Taxay said that although he was unaware of Fisher's July call with Urgenson, Taxay wanted to meet with Urgenson to continue discussions between DOJ and the Company. *See id.*

2. August 26, 2003 Meeting with Larry Thompson

Interested in continuing discussions at higher levels of DOJ on the policy issues the Company had initially raised in April, following the August 12 Audit Committee meeting, Hills contacted DOJ to set up a meeting with Deputy Attorney General Larry Thompson. On August 26, 2003, Hills and Olson met with Thompson and his Chief of Staff, Stuart Levy. The main purpose of the meeting was to confirm that DOJ was continuing to explore the policy issues raised by Chiquita at the April meeting with AAG Chertoff. *See* Roderick Hills Talking Points (Aug. 26, 2003).

Based on his talking points, at the outset of the meeting with Thompson, Hills described the Company's disclosure to Chertoff, including that Chertoff's preliminary view was that "the Department is unlikely to prosecute us for the past; it is possible that Chiquita would be asked to depart the country; and the Department will appreciate our assistance in future investigations." *Id.* Hills said that he might have told Thompson that his understanding was that prosecution for past payments was unlikely in an effort to "smoke him out" to see if he would say that DOJ was, in fact, not considering a case against the Company.[146]

Hills discussed the policy issues raised by Chiquita's situation – specifically, the concern that if Chiquita were forced to leave Colombia, it "would likely cause an exodus from the country of US based companies." *Id.* In response, Thompson told Hills and Olson that DOJ was considering Chiquita's policy arguments, but that DOJ could not simply accept Chiquita's assertions and make a decision on how to dispose of the matter without doing fact-finding of its own. According to the notes taken at the meeting by Olson, Thompson went on to say that the "Criminal Division needs to do its job – need to verify facts." Notes of Robert Olson (Aug. 26, 2003).

Significantly, Thompson then added that Chiquita "did [the] right thing" and was "not [a] subject or target" of a DOJ investigation at the time. *Id.*[147] Given that the

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146 Hills told the SLC that the description of the Chertoff meeting in his talking points was an accurate statement of what he said about that meeting to Thompson. Olson did not recall that Hills described the Chertoff meeting as aggressively as he had described it in his talking points.

147 The United States Attorneys' Manual ("USAM") defines a target as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." The USAM defines a subject of an investigation as "a person whose conduct is within the scope of the grand jury's investigation." USAM, Title 9, Section 11.151. Generally, lawyers representing companies and

Company had previously admitted to violations of law in making payments to the AUC, this was an extraordinarily encouraging statement for the Deputy Attorney General to make. Not surprisingly, Olson said that he came away from this meeting "feeling good" because Thompson had (i) complimented the Company for doing the right thing and voluntarily disclosing the payments, (ii) allayed his concerns about a potential investigation, (iii) said that the matter was "still active at the highest levels" of DOJ, and (iv) said that the Company was, at least at that time, neither a subject nor a target.

Olson and Hills did not recall Thompson specifically asking if the payments were continuing, but both told the SLC that there was no doubt in their minds, based on the timing and context of the meeting, that Thompson knew that they were. Hills and Olson drew comfort from the fact that Thompson did not say either that the payments must stop or that the Company would be prosecuted if the payments continued. The SLC has no basis, one way or the other, to judge the reasonableness of this view.

Urgenson, who originally expected to go to the meeting, said that Olson had told him about the substance of the meeting and that he understood that the "upshot" was that Chiquita learned it was not a subject or a target. Urgenson recalled that he felt "fairly optimistic" after receiving Olson's report of the meeting.

In yet another departure of a senior DOJ official that appeared somewhat sympathetic to Chiquita, Thompson left his position as Deputy Attorney General just a few days after the meeting took place, at the end of August.[148]

3. September 4, 2003 Meeting with Taxay and Beasley

Following their August 18 call, on September 4, 2003, Urgenson and Harris of K&E met with Taxay, Assistant U.S. Attorney ("AUSA") John Beasley of the U.S. Attorney's Office for the District of Columbia, Transnational/Major Crimes Section, and Kevin Currier of the Federal Bureau of Investigation ("FBI"). The purpose of this meeting was to discuss the factual investigation that DOJ planned to conduct, consistent with Larry Thompson's suggestion that DOJ had to engage in fact-finding of its own to test the representations the Company had made to DOJ. *See* Memorandum from K&E to Robert Olson and [a Chiquita lawyer] (Sept. 8, 2003).

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individuals attach great significance to these categories, and being advised that one's client is neither a subject nor a target is the comfort that criminal defense lawyers seek.

148 By the end of August, the three most senior officials with whom the Company had dealt – Thompson, Chertoff, and Fisher – had left DOJ. Chertoff left in June, Fisher left at the end of July, and Thompson left at the end of August. Thompson then served as a senior fellow at the Brookings Institute for a year, where Cyrus Freidheim served as a director, and then joined Pepsico, Inc. as General Counsel.

At the meeting, Taxay told Urgenson that he wanted the facts "soup to nuts," which Urgenson interpreted to mean that DOJ wanted all relevant facts so that it could evaluate Chiquita's duress claims. *Id.* Urgenson understood that the investigation would be a significant effort, and that although DOJ wanted to take the lead on the investigation generally, Chiquita would be an active, rather than a passive, participant.

Prior to the meeting, Urgenson had anticipated that the status of the payments would be discussed at the meeting and asked Olson whether the payments were continuing, and Olson told him that they were.[149] During the meeting, Taxay asked about the payments and Urgenson confirmed that they were continuing. However, Urgenson added that if Taxay gave the Company a directive with respect to the payments, he would relay this directive to his client. Taxay declined to do so. Instead, he merely repeated the guidance provided by Chertoff at the April 24 meeting, that continuing to pay the AUC constituted a violation of the law. Taxay added that, at that time, he could not say that the Company would be able to continue making the payments. *See id*. Urgenson was frustrated with what he viewed as DOJ's refusal to provide Chiquita with any real guidance with respect to continuing the payments, and felt that this was a "key development" to relate to Chiquita. Urgenson said that he left this meeting with the sense that, if Chiquita continued to make payments, it "proceed[ed] at [its] own risk." *Id.* On the other hand, Taxay had specifically declined to tell Urgenson that the payments must stop.

Olson's principal reaction to Urgenson's report of the meeting was concern over the amount of work that would be involved in the DOJ investigation. Olson was comforted, however, by Urgenson's characterization of the DOJ officials as "sympathetic." With respect to continuing the payments, Olson believed that Taxay's statements – parroting what Chertoff had said more than four months earlier but going no further – were designed to preserve DOJ's options. Olson believed that DOJ could, at any time, have told the Company to stop making the payments, but did not do so.

W. <u>September 2003: Retention of K&E and KPMG By the Audit Committee</u>

1. September 8, 2003 Letter from Hills to Freidheim

In a letter dated September 8, 2003, Hills told Freidheim that he had asked Olson to allow the Audit Committee to conduct an investigation into the payments "to provide independent confirmation of the facts." *See* Letter from Roderick Hills to Cyrus

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149 Urgenson said that, before the meeting, Olson had cautioned him not to mention this fact unless Taxay asked about it, but Urgenson planned to disclose the fact that payments were continuing even if Taxay did not ask. In contrast, Olson said that, in a conversation prior to this meeting, he and Urgenson discussed that it would be "useful" at this meeting to "confirm the government's understanding" that payments were continuing.

Freidheim (Sept. 8, 2003). Hills made it clear that the Audit Committee, and not management, should conduct the investigation. Hills explained to the SLC that he wanted the Audit Committee to conduct the investigation because management, apart from Freidheim, was "compromised" by its involvement in making the payments that DOJ was beginning to investigate; by contrast the Audit Committee was independent from management and had no such involvement. Freidheim had no objection to that arrangement.

2. September 17, 2003 Audit Committee Meeting

On September 17, 2003, the Audit Committee held a regularly scheduled meeting with directors Hills, Arntzen, Benjamin, and Stanbrook present, along with Freidheim, Riley, Olson, Tsacalis, Kreps, and representatives from E&Y. According to the minutes, Olson introduced Urgenson to the Audit Committee "and [Olson and Urgenson] gave an update on a situation involving the Company's Colombian subsidiary, Banadex." Minutes of Chiquita Audit Comm. Meeting (Sept. 17, 2003). This was the first Audit Committee meeting attended by Urgenson.

At the meeting, the Audit Committee approved retaining K&E to "represent the Company, under the direction of the Committee," with respect to issues that had arisen in Colombia. *Id.*[150] The Audit Committee met with Urgenson in executive session prior to the meeting to discuss the Committee's concerns, felt most acutely by Hills, that K&E's prior relationship with management, particularly with Olson, might impair its ability to work directly with the Audit Committee. Urgenson said he was "comfortable" that he could independently represent the Company, and believed that the reporting structure established – whereby he represented the Company, but reported to the Audit Committee – was appropriate under circumstances where it was possible that senior members of management might have engaged in improper conduct. Urgenson said he had the sense that the Audit Committee understood the nature and severity of the issues involved, and felt that the group as a whole was well-informed.

Urgenson then reported on his September 4 meeting with DOJ.[151] Kreps's notes of the meeting state: "9/4 meeting at DOJ – counterterrorism division; need to embark

150 Hills signed K&E's engagement letter the same day. The letter described the scope of K&E's representation as follows: "We have agreed to represent Chiquita in connection with the investigation and review of various compliance issues related to Banadex's operations in Colombia. This representation may include conducting an internal investigation at the direction of the Audit Committee and in coordination with Robert Olson, General Counsel; reporting the findings of such investigation to the Audit Committee and Chiquita management; providing confidential legal advice to Chiquita; and representing Chiquita in presentations before various federal agencies." Letter from Laurence Urgenson to Roderick Hills (Sept. 17, 2003).

151 Urgenson explained that his talking points for the meeting were a cheat sheet to be used in the event that he was asked to address certain issues at the meeting, but that he had not been told

on fact-finding mission; will be given credit for cooperation; a policy issue not an investigation." Notes of Chiquita Audit Comm. Meeting (Sept. 17, 2003).[152] Hills reported that Chiquita would cooperate with the government, conduct an investigation, and report its findings to DOJ. *See id.* Urgenson discussed the investigatory steps, including employee interviews and document collection, which the Company would likely have to undertake, though at this point it remained unclear whether DOJ would permit the Company to conduct its own investigation.[153] *See id.*

The Committee then discussed various issues relating to Colombia, including what DOJ had said about the continuing payments. Kreps's notes reflect that Arntzen asked, "Must we cease & desist?" and that Urgenson replied, "DOJ didn't approve – didn't take a strong stand." *Id.* Both Urgenson and Arntzen recalled that the thrust of Arntzen's question was, "Did the *government* say cease and desist," not whether the Company had to stop making payments. Arntzen did not believe that he would have asked if the Company could continue to make the payments, because, in his view, he had been told that the payments were illegal and therefore had stopped.[154] Arntzen explained that he took Urgenson's reply, reflected in the notes, to mean that DOJ could not condone the payments, but that the issue was complicated and it would get back to the Company. He believed that the Company might ultimately be able to resume the payments based upon DOJ's guidance.

Urgenson did not advise the Audit Committee with respect to whether the Company should continue the payments at this meeting – he was not asked about the propriety of continuing the payments and he did not offer his own views. Stanbrook said that during this period the Board was seeking clarity regarding whether DOJ had given the "green light" and that Urgenson did not give clear guidance on this issue; according to Stanbrook, Urgenson "sat on the fence." Stanbrook explained that Urgenson told the Board that the government had not told Chiquita to stop, but had also refused to tell Chiquita that they could continue. Moreover, Stanbrook said that

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ahead of time by Olson to make a presentation. When Urgenson arrived in Cincinnati, Olson took him aside and gave him "general guidance" regarding what was expected of him at the meeting. Urgenson explained that Olson told him that the Audit Committee was well informed, and that Urgenson should briefly present the issues.

152 Urgenson told the SLC that, in his opinion, Kreps frequently failed to accurately report what was said at the meetings. Urgenson also said that he believed that there were many instances where Kreps failed to capture everything being said about an issue. In contrast, Kreps told the SLC that his tendency would have been to err on the side of putting "too much" detail in his notes.

153 Ultimately, the government instructed Chiquita not to conduct an internal investigation. Instead, the government sought information from Chiquita to assist in its investigation. *See* Memorandum from K&E to Robert Olson and [Chiquita lawyer] (Sept. 8, 2003).

154 The differences in recollections among the directors concerning whether the payments had stopped or were continuing is discussed at length above.

Urgenson never told the Board that the payments had to stop. Stanbrook explained that this lack of clarity was one of the reasons that he believed that Chiquita needed to exit Colombia. Freidheim said that Urgenson's report at this meeting further confirmed his view that Chiquita needed to exit Colombia, because it was clear that DOJ was never going to tell Chiquita that it was "okay" to make the payments, and therefore the risks to the Company would not disappear.

At this meeting, given the lack of response from Urgenson or DOJ, Stanbrook also raised the issue of whether it was time for Chiquita to review the economic benefit of doing business in Colombia. *See* Notes of Chiquita Audit Comm. Meeting (Sept. 17, 2003). Stanbrook said that this idea was met with some resistance, particularly from Kistinger, which Stanbrook believed was explained by a desire "to exit in an orderly way and not to conduct a fire sale." Hills pointed out that the payment issue would not automatically disappear if Banadex were sold. In response, Olson said that Chiquita would ensure that a sale would resolve the issue or the Company would not make the sale. *See id.*

3. September 18, 2003 Board Meeting

At the September 18 Board meeting, Kistinger gave a presentation regarding "Chiquita's banana sourcing strategies, including the pros and cons of pursuing potential opportunities to sell owned production and replace it with purchased fruit agreements." Minutes of Chiquita Board Meeting (Sept. 18, 2003). The possible sale of Banadex was discussed, but it was part of a far broader and ongoing series of discussions regarding the merits of owned versus purchased fruit operations. This was a topic that the Board had begun to discuss following the Company's emergence from bankruptcy in March 2002.

4. Engagement of KPMG

In addition to retaining K&E, Hills felt that the Audit Committee needed its own independent team in connection with the investigation. As a result, KPMG began doing forensic accounting work for the Audit Committee in approximately mid-September 2003, even though the firm was not formally engaged until November 14, 2003.

Hills made the initial contact with Elliott Leary, a twenty-year veteran of the FBI and certified public accountant, whom he knew from a Transparency International function. According to Leary, who led the team, KPMG's mission was to act as an independent fact finder and track the history of payments made to the paramilitaries. Urgenson described KPMG's assignment as tracing and mapping the payments, so that the Company would be able to report this information to DOJ in a form that DOJ could rely on and use in its investigation.

KPMG drafted a preliminary work plan based on standard protocols used by KPMG, which included a document review protocol, as well as a list of potential witnesses to be interviewed. *See* KPMG Workplan (undated). As part of its work, KPMG reviewed all of the documents the Company produced to the government that were relevant to the payments, and traveled to Colombia to collect and preserve documents that were maintained locally. Apart from mapping the payments, KPMG viewed its role as supporting K&E and, for the most part, KPMG took its lead from K&E.

X. Document Collection and the Concerns Raised by Colombian Employees

On October 30, 2003, after a lengthy process of drafting and revising, including obtaining approval from DOJ, Olson issued a document retention and collection memorandum to several Chiquita and Banadex employees asking them to preserve and collect documents relating to the Company's payments. The request sought all documents concerning payments made directly to the AUC, through a convivir, any subgroup of a convivir, and payments to the FARC and ELN. *See, e.g.*, Memorandum from Robert Olson to [Chiquita lawyer] (Oct. 30, 2003). Although such a document retention and collection memo is standard protocol in government and internal investigations, Hills took a dim view of the memo and, as is discussed further below, at a meeting with the government on December 1, offered his view that the memo was an invitation for employees to destroy relevant documents. *See* Memorandum from Audrey Harris to Roderick Hills, et al. (Dec. 1, 2003).

The document collection memo sent a ripple of concern through senior Banadex personnel. On November 6, 2003, [the Chiquita lawyer] and Olson spoke with Urgenson about concerns raised by employees in Colombia following their receipt of the document collection memo. *See* Memorandum from Ben Gipson to Laurence Urgenson and Audrey Harris (Nov. 7, 2003); Notes of Audrey Harris (Nov. 6, 2003). During this same call, Olson also mentioned that Freidheim had recently run into Larry Thompson at a Brookings Institute board meeting. *See* Notes of Audrey Harris (Nov. 6, 2003). According to Freidheim, he asked Thompson for his view of Chiquita's situation, and Thompson responded that, in his view, DOJ had "no basis" for prosecuting Chiquita. Thompson also told Freidheim that Chiquita handled the situation exactly as it should have and Thompson saw no fault with Chiquita's actions.[155]

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155 In addition to sharing this information, Thompson also told Freidheim that he understood that the government had failed to live up to its pledge to get back to the Company on the issue it had raised. Freidheim said he was not sure whether Thompson shared both sets of comments in the same discussion or in two separate discussions. Freidheim attended a meeting with Larry Thompson around May 2007 and mentioned Chiquita's then-recent guilty plea. According to

At the request of four of the senior Company employees in Colombia, on November 10, 2003, those employees – [Banadex Employee #10], [Banadex Employee #5], [Banadex Employee #2], and [Banadex Employee #11] – met in Cincinnati with Olson, Kreps, [Chiquita Employee #1], Kistinger, and [the Chiquita lawyer] to discuss their concerns about the DOJ investigation. *See* Memorandum of KPMG Interview of Robert Olson (Nov. 14, 2003). The Colombian employees' main concern was the possibility that their cooperation in an investigation of the AUC would be publicized in Colombia, or that the information provided to DOJ would be provided to the Colombian government, which would put them in danger of retribution by the AUC. They were also concerned about their potential legal liability. For these reasons, the employees were also concerned about certain specific information becoming public: (i) information regarding the Otterloo incident from November 2001, which, at the time, was being investigated by a local Colombian prosecutor; (ii) the June 2002 drug smuggling incident; and (iii) the payments to the customs officials that gave rise to the SEC investigation in the late 1990s. The employees also wanted a commitment from the Company to protect them. *Id.*

Olson and Kistinger took the lead in addressing these concerns. Olson said that the Company was taking every precaution to ensure that DOJ understood that there was real risk to the people in Colombia. Kistinger explained that the Company was in active negotiations with Banacol at the time and that they were hopeful that the situation would soon be resolved. At the end of the meeting, the employees provided a disk containing the information the Company had requested in its October 30 document request.

This meeting did not sit well with Hills, who was angry that the Audit Committee had not been told of the meeting in advance. As a result, Hills instructed KPMG to determine what had happened at the meeting and report its findings to the Audit Committee. On November 14, Elliott Leary and other KPMG representatives traveled to Cincinnati and interviewed Olson, Kreps, [Chiquita Employee #1], Kistinger, and [the Chiquita lawyer] regarding the November 10 meeting. *See, e.g.*, Memorandum of KPMG Interview of Robert Olson (Nov. 14, 2003). Olson recalled that Hills was upset that he had not "taken the opportunity to interrogate" the Colombian employees, but Olson said that he failed to understand why Hills was so upset about the meeting and was unclear about the topics Hills wanted the Colombian employees to be questioned about.

Freidheim, Thompson said that he did not understand how everything had unfolded but that he never thought that Chiquita would be prosecuted.

Y. November 2003 – January 2004: Growing Concerns About the Investigation

By November 2003, the Company and its counsel were no longer communicating with senior DOJ officials. Instead, all of their interactions were at the line prosecutor level and typically concerned the details of Chiquita's cooperation in the ongoing DOJ investigation.

1. Communications with Taxay

On November 17, 2003, Hills called Taxay to ask if he was receiving everything that he needed from the Company. *See* Memorandum from K&E to Roderick Hills (Nov. 19, 2003). Taxay said that he was, and that he felt that things were progressing well. *See id.* Hills also told Taxay that the Audit Committee had retained KPMG to help with the forensic accounting issues relating to the payments, and that KPMG would be assisting with the document collection as well. Taxay raised no objections to this. *See id.* Finally, Hills also informed Taxay about two anonymous whistleblower e-mails that the Company had recently received. *See id.* Among other things, the whistleblower e-mails claimed that certain Chiquita employees were affiliated with terrorist groups and that [Banadex Employee #5] was involved in facilitating arms and drug shipments to the AUC.[156] Hills thought it more appropriate that the communication about the whistleblower e-mails – and the monitoring of the Company's cooperation with DOJ – come from the Audit Committee than from management.

The next day, on November 18, Urgenson and Taxay spoke about Taxay's discussion the previous day with Hills, as well as the status of Chiquita's document collection efforts. Taxay expressed his appreciation for the "huge amount of work" the Company was doing to respond to DOJ's document request, and suggested ways in which he could assist the Company in developing search criteria for additional documents. *See* Memorandum from K&E to Roderick Hills (Nov. 19, 2003). Based on both Hills' and Urgenson's discussions with Taxay, DOJ appeared quite satisfied with the Company's efforts.

2. November 20 and 21, 2003 Board Meeting

During a Board meeting that took place on November 20 and 21, 2003, the Board met with Olson in executive session to discuss matters relating to Colombia. The

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156 DOJ stated it would investigate those allegations and directed the Company not to conduct its own investigation. DOJ never disclosed the outcome of that investigation to the Company, but acknowledged in its Sentencing Memorandum filed with the court that it did not believe that Chiquita was complicit with the AUC. *See* Memorandum of Sentencing, U.S. v. Chiquita Brands Int'l, Inc., No. 07-055 (Sept. 17, 2007).

minutes refer generally to "a situation related to the Company's Colombian operations," and reflect that the Board "agreed that a more extensive review would be undertaken at the December 4 Audit Committee meeting and that all directors would be invited to attend." Minutes of Chiquita Board Meeting (Nov. 20 – 21, 2003). According to Hills, at this meeting, the Board was informed of the recently-received whistleblower e-mails and about the drug and arms incidents, including the Otterloo incident and the June 2002 drug incident, and that the matters would be discussed more fully at the December 4 meeting.

3. December 1, 2003 Meeting between Hills, Harris, and DOJ Officials

On December 1, 2003, Hills and Harris met with Taxay and Beasley to share with DOJ the details of the whistleblower e-mails that the Company received in November and disclosed to Taxay at that time. This meeting went badly according to K&E and strained the Company's relationship with DOJ.

At the meeting, Hills showed Taxay a copy of the whistleblower e-mails and told him that the e-mails "call into question" Hills' belief that the Colombian employees face threats to their safety, presumably because the e-mails alleged that at least some of those employees, most notably [Banadex Employee #5], were affiliated with the AUC. *See* Memorandum from Audrey Harris to Roderick Hills, et al. (Dec. 1, 2003). Hills also told Taxay about the November 10 meeting in Cincinnati with Colombian employees and, according to Harris, made pejorative comments about those employees that suggested doubts about their integrity and of the sincerity of their professed concerns about their safety. Further, Hills expressed the view that the document collection memo that was distributed to Colombian employees was an "invitation for employees to destroy documents." *Id.* Hills and Taxay also discussed the payment process, the status of negotiations to sell Banadex, and the details of the drug and arms incidents that had recently come to Hills' attention. *See id.* According to Harris, this meeting went extremely badly, with Hills gratuitously criticizing the Company and its personnel and sowing doubt about the good faith and integrity of some of its personnel.

Following the meeting, on December 3, 2003, Urgenson and Harris called Taxay, who expressed his discomfort in dealing directly with Hills. *See* Memorandum from Audrey Harris to File (Dec. 3, 2003). In particular, Taxay focused on statements Hills allegedly made to the effect that he did not believe that the Company had violated the law.[157] In addition, Taxay told Urgenson that, in light of Hills' comments casting doubt on aspects of the Company's document collection efforts, Taxay was now concerned that the sale of Banadex was a pretext to hide relevant documents from DOJ. *See id.*

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157 Hills did not recall making such a statement and did not believe that he would have made this statement.

These interactions prompted serious concern over Hills' management of the Company's relationship with the government. As a result, Olson, Freidheim, and Urgenson believed that Hills should not continue to have direct dealings with line prosecutors. Although it was presented to Hills as being more appropriate for him to pursue Chiquita's policy-level arguments at higher levels within DOJ, in fact Olson and Urgenson were concerned that Hills' continued dealings with the line prosecutors would not advance the Company's interests. In addition, Taxay made clear in his discussions with Urgenson that DOJ would not accept the results of an Audit Committee-led investigation; indeed, Taxay said his discussion with Hills made him suspicious that Hills and the Company were trying to slow down DOJ's investigation.[158]

4. December 4, 2003 Audit Committee Meeting

For various reasons, the December 4 Audit Committee meeting was recalled by many of the participants as being of central significance. During the first part of the meeting, which was attended only by Audit Committee members, Olson presented the FCPA payment summaries for the first three quarters of 2003, which included payments to the convivir. *See* Minutes of Chiquita Audit Comm. Meeting (Dec. 4, 2003); Notes of Chiquita Audit Comm. Meeting (Dec. 4, 2004).

The full Board joined the second half of the meeting, as did Kistinger, [Chiquita Employee #1], Urgenson, Leary, and Hammond.[159] Hills, Olson, and Urgenson briefed the Board on the status of the Company's discussions with DOJ. *See* Minutes of Chiquita Audit Comm. Meeting (Dec. 4, 2003). In this report, Urgenson told the Board that no policy decision would be forthcoming from DOJ until it finished verifying the facts. Olson described the November 10, 2003 meeting with Banadex employees, provided additional information about investigations in Colombia into arms and drug smuggling incidents, and explained the specific allegations contained in the whistleblower e-mails. *See* Robert Olson Talking Points (Dec. 4, 2003). Hills described his recent contacts with Taxay and Beasley, stating that DOJ was apparently not satisfied with Chiquita's level of cooperation and arguing that the Company needed to

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[158] Olson prepared talking points at the request of Freidheim for Freidheim to use when discussing the meeting with other directors, but he said that the version of his talking points shown to him during his SLC interview was not the final version. According to Olson, in the final version, the final bullet point, which says that Hills will help at a policy level, was deleted at Freidheim's request, and a bullet point was added describing how Taxay called Urgenson after the meeting to say that DOJ would not accept an Audit Committee investigation in lieu of its own investigation and that he believed Hills was trying to slow down DOJ's investigation. It is unclear if Olson was referring to the December 3 call discussed above, or another call from Taxay.

[159] It does not appear that Kreps took notes of the portion of the meeting where the Board discussed Colombia. *See* Notes of Chiquita Audit Comm. Meeting (Dec. 4, 2004).

address these concerns promptly.[160] Following the update, [Chiquita Employee #1] described in some detail the various attempts by third parties to use the Company's facilities to smuggle drugs and arms that the Company had dealt with over the prior years, described in detail above, and more generally about the continuing security challenges faced by the Company in Colombia.[161] *See* Minutes of Chiquita Audit Comm. Meeting (Dec. 4, 2003).

According to some of the Board members, all of whom had been on the Board eighteen months or less, this was the first time they were learning the full extent of the drug, arms, and security issues in Colombia, and they were very concerned about what they heard. It caused many of them to realize the enormous risks and dangers inherent in continuing to do business in Colombia and caused at least one of the directors, Jaime Serra, who was formerly a senior member of the Mexican government, to advocate strongly for leaving Colombia as soon as possible. Serra said that Chiquita should sell Banadex, that such a sale would create long-term value for shareholders, and that if Chiquita bought bananas from Colombia after the sale, it needed to make sure it would in no way be responsible for payments made to the AUC by the companies from which it purchased bananas. Serra added that the incoming CEO should be informed about the Colombia situation before accepting the job.[162] Most directors recalled Serra's impassioned advocacy, including his statement that he would leave the Board if Banadex was not sold.

The Board discussed in some detail the potential sale of Banadex as a way of eliminating the dangers and difficulties – both legal and operational – it continued to face in Colombia. By the time this meeting concluded, the Board unanimously believed that a sale was Chiquita's best course of action. Olson told the Board that the Company was in the final stages of negotiations with Banacol and addressed some specific questions relating to a sale, including whether the process should be opened up to other bidders, and whether Chiquita should retain an investment bank. *See* Robert Olson Talking Points (Dec. 4, 2003).

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160 This issue became increasingly important to Hills throughout the rest of December; he believed that the Company had relatively little to fear from DOJ as long as it fully cooperated. When he heard concerns from Taxay and Beasley that the Company was not fully and promptly cooperating, he thought this substantially raised the risks of DOJ action against the Company.

161 Christopher Reid of E&Y told the SLC that, shortly after this meeting, he received a memo, drafted by Jim Havel (another E&Y partner) following a conversation with Olson, that discussed arms and drug smuggling incidents in 2001 and 2002, respectively. Reid said that because no Chiquita employee was involved in any wrongdoing, and because he understood the Company had cooperated with the relevant authorities, these incidents were not material from an audit perspective.

162 At this time, the Company was in the final stages of recruiting a new CEO, Fernando Aguirre, who assumed the CEO position on January 12, 2004.

Finally, it is unclear whether the Board discussed the status of the payments. Olson's meeting talking points state: "Stop payments – risk to personnel," (*id.*), but according to participants at the meeting, there was no directive by the Board that the payments should stop.[163] No Board member recalled being asked to make this decision.[164]

In response to questions that arose during the Audit Committee meeting, Kistinger e-mailed the Board later that same day offering to meet with each director individually to review the status of the Banacol deal. Kistinger stated that he did "not want anyone to be in a position to feel as though they were asked to make a decision without knowing all the financial details and strategic implications." E-mails between Audit Committee (Dec. 4, 2003). Serra responded by e-mail that he had already "made up [his] mind on this issue" and asked that Kistinger forward any additional materials he had regarding the proposed deal. *Id.*

5. Additional Disclosure Issues

The security situation highlighted at the December 4 meeting rapidly came into focus. On December 11, 2003, Olson informed Audit Committee members that the financial manager of the Banadex port loading operation had been kidnapped by the FARC. *See* E-mail from Robert Olson to the Board and Senior Management (Dec. 11, 2003). After an e-mail discussion, management determined that the Company would seek permission from DOJ to pay the ransom. The Company informed DOJ of the kidnapping and its intention to pay a ransom payment and DOJ did not object. The payment was made and the employee was released in late January 2004. *See* E-mail from Robert Olson to Laurence Urgenson and Audrey Harris (Jan. 25, 2004).

Hills, concerned about the kidnapping, e-mailed Olson that he was "greatly concerned about our failure to clarify our problems in Colombia, in the Company's disclosures." E-mail from Roderick Hills to Robert Olson (Dec. 11, 2003). Although Hills felt more comfortable with the disclosures that had been made in August than those made in May, the kidnapping apparently rekindled his concern that the disclosure should be even more detailed and specific.

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[163] According to Arntzen, during his first SLC interview, he believed that he first learned that payments were continuing during the December 4, 2003 Audit Committee Meeting. During his second SLC interview, Arntzen could not say definitively when he learned the payments were continuing.

[164] The Board issued no directive on the payments until March 30, 2004, two months after the last payment was made, in January 2004. At that time, the Board directed that the payments should not be resumed. *See* Section IV.AA.9. *infra.*

On December 12, 2003, the Audit Committee met to consider additional disclosures regarding the Colombia situation. The Audit Committee, all of whose members attended the meeting, decided that additional information should be included in a press release reporting on the Company's Investor Day meeting, which was to be held on December 16, 2003. *See* Minutes of Chiquita Audit Comm. Meeting (Dec. 12, 2003); Notes of Chiquita Audit Comm. Meeting (Dec. 12, 2003). The final press release approved by the Audit Committee was far more specific than the previous disclosures – for the first time, Colombia was specifically identified. After reciting the list of risk factors, the release stated: "The company must continually evaluate the risks in these countries, including Colombia, where an unstable environment has made it increasingly difficult to do business." Press Release, Chiquita Brands Int'l, Inc., Chiquita Brands International Presents "Turnaround and Transformation" to Investors and Analysts (Dec. 16, 2003).

Coincidentally, the SEC focused on the Company's disclosures at this time. On December 19, 2003, the SEC sent Freidheim a letter regarding the Company's October disclosure, which had not mentioned Colombia. In the letter, the SEC asked the Company to explain the "one such issue" it mentioned in its "Risks of International Operations" in its 10-Q for the period ending September 30, 2003[165] and advised the Company "to avoid vague references to risks in the future." Letter from the SEC to Cyrus Freidheim (Dec. 19, 2003). By the time the Company received the letter from the SEC, the disclosure had already been made more specific in the December 16 Investor's Day press release.

In late January 2004, Olson, along with representatives from Skadden (on behalf of the Company) and Baker Botts (on behalf of the Audit Committee) met with the SEC to address the agency's concerns and disclose the DOJ investigation.[166] Following this meeting, the SEC withdrew its comment.

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165 The Company's 10-Q for the period ended September 2003 stated, in relevant part: "The Company is currently dealing with one such issue, which it has brought to the attention of the appropriate U.S. authorities. Management does not currently believe that this matter will have a material effect on the Company, although there can be no assurance in this regard." Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2003).

166 Earlier that month, Hills hired the law firm of Baker Botts to work with the Audit Committee regarding the Company's disclosures as an added protection. Hills wanted the SEC to know that the Audit Committee had separate disclosure counsel because he feared that the SEC might think that Peter Atkins of Skadden was no longer independent after working with the Company for so many years. *See* E-mail from David Powers to James Doty, *et al.* (Jan. 5, 2004).

Z. Continuing Concerns About Continuing the Payments and Chiquita's Cooperation

1. Hills' Call with Beasley

At some point after Hills' December 1 meeting with DOJ, but before a Chiquita document production to DOJ on December 8, Hills spoke with AUSA John Beasley (it is unclear who called whom), during which, according to Hills, Beasley complained about the Company's lack of cooperation. *See* E-mail from Roderick Hills to the Audit Comm. (Dec. 22, 2003). Specifically, Beasley complained about (i) the pace of the Company's document production, and (ii) that the Company had indicated, through Olson and Urgenson, that it was no longer interested in participating in an undercover operation. Hills was particularly troubled by Beasley's comments concerning the undercover operation, because, aside from the overall policy issue that the Company had raised, the possibility of an undercover operation provided an alternative basis for the Company to stay in Colombia and continue the payments. According to Hills, he assured Beasley that the Company would still be open to pursuing an undercover operation.

During this conversation, Beasley apparently made a comment regarding the status of the payments. In a January 7, 2004 letter to Leary, Urgenson, and Ronald Goldstock, who, as discussed below, was also retained by the Audit Committee to help remedy DOJ's concerns about Chiquita's cooperation, Hills wrote that Beasley had told him that the payments needed to stop. Specifically, the letter states:

> A few days before documents were provided to Justice, an Assistant U.S. Attorney, John Beasley, who is working with Taxay, told me that the Department is extremely unhappy with Chiquita's attitude, that he did not consider us to be cooperative. He complained about waiting 7 months for documents and threatened a subpoena. He also stated that the payments must stop and noted that other US companies in Columbia have worked out solutions. I asked him for assistance in working out a solution for Chiquita.

Five more payments were made by Chiquita after this conversation.

The SLC was troubled by Hills' description of Beasley's statement in the letter that the payments must stop, because that statement appeared to be the very guidance that the Company had been seeking since the Chertoff meeting in April 2003. As a result, the SLC sought to obtain a detailed understanding of this statement and how the Company reacted, which included re-interviewing all of the key participants on this issue.

Hills explained to the SLC that this portion of the letter, which was drafted by K&E but reviewed, edited, and approved by Hills, was not an accurate description of Beasley's remarks. According to Hills, Beasley did not give a directive that the payments had to stop. Rather, in connection with the discussion about whether the Company would participate in an undercover operation, Beasley made a statement to the effect of: the Company cannot keep making the payments forever. This was not a surprise to Hills, who said that he always knew that, absent participation in an undercover operation, or a favorable policy determination, the payments would have to stop and Chiquita would have to exit Colombia. Hills did not understand anything Beasley said to be a directive, or a meaningful shift in the government's position on the payments.

Olson's recollection of what Hills told him is consistent with Hills' explanation. According to Olson, shortly after the call, Hills reported that Beasley had told him that the Company could not continue making payments indefinitely, and that Chiquita had to find a solution that would allow it to stop the payments. Hills explained to Olson that Beasley's comment was made in the context of his statement that other companies had found ways to stop payments in Colombia and his question as to why Chiquita had not been able to do the same.[167]

The evidence reviewed by the SLC supports Hills' and Olson's claim that the statement in the January 7 letter is not an accurate reflection of what Beasley actually conveyed to Hills. A review of the drafting history of the January 7 letter showed that after Hills completed the initial draft, it was Audrey Harris who added the sentence regarding the Beasley call to the letter. Harris wrote: "During my telephone conversations with Beasley, he indicated that Banadex cannot continue making these payments." Thus, the sentence was added by someone with no direct knowledge of what was said. Harris learned of the Beasley call sometime in late December or early January 2004, several weeks after the call took place. It is unclear how Harris learned about the call, but it is likely that she heard about it second-hand from either Olson or Urgenson. According to Harris, she learned that Hills had reported "some indication" by Beasley that the payments had to stop, or "something to that effect," and the statement she added to the letter was meant to reflect that information. Although she had no first-hand knowledge of the call, Harris assumed that if the sentence was not accurate, Olson, Urgenson, or Hills would correct it.

Indeed, Hills acknowledged reviewing Harris's additions to the letter, and in fact, revising the language Harris added, but could not explain why he did not remove

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167 Due to the discrepancy between the letter and the recollections of Hills and Olson, the SLC directed counsel to re-interview Hills and Olson on this issue in mid-January 2009. In addition to Hills and Olson, SLC Counsel re-interviewed Harris and Audit Committee members Arntzen and Benjamin.

the sentence from the letter. He maintained, however, that Beasley did not give him a directive that the payments needed to stop at that time.

Significantly, following the call, Hills did not report to anyone that Beasley had issued a directive to stop the payments. Rather, Hills called Urgenson and Olson to question them on why they told DOJ that the Company was no longer interested in participating in an undercover operation. Olson and Urgenson explained that they had not told DOJ that the Company would not participate in an undercover operation, but instead expressed concern about the danger to Chiquita's employees that would be involved in any such operation. A few days after learning about the call from Hills, Urgenson called Beasley to discuss the ways in which other companies in Colombia dealt with the payment issue. According to Olson, the message conveyed by Beasley was (i) that the Company needed to start cooperating and (ii) that DOJ was not interested in helping Chiquita solve the payment problem. Beasley did not say anything about the need to stop the payments. Urgenson had several other conversations with the government during the December 2003 time period during which the government could have reiterated a directive to the Company, if there had been such a directive, and did not.

Thus, after reviewing all of the evidence, the SLC concluded that Hills and the Company did not, in fact, receive a directive from the government to stop the payments which it intentionally or recklessly ignored in making the remaining payments through January 2004.

2. Indirect Communications from DOJ

Hills did, however, hear from Joseph Bianco of Debevoise & Plimpton, counsel for [Banadex Employee #5], that DOJ had told him that the Company should stop making the payments in Colombia in late December 2003. Urgenson recalled that the fact that people were hearing that the government wanted the payments to stop was a "new and important development" even though it was somewhat odd for the communication with the Company on this important issue to be indirect. Hills said that he did not recall when he heard that the government had told Bianco the payments must stop, but that he did not recall thinking it was a "definitive" directive. Instead, Hills continued to focus on the resolution of the Company's cooperation issues.

3. Retention of Ronald Goldstock

On December 22, 2003, Hills e-mailed the Audit Committee to express his growing concern about Chiquita's cooperation with DOJ. Hills reported that both Beasley and Taxay believed that Chiquita was not being cooperative. *See* E-mail from

Roderick Hills to the Audit Comm. (Dec. 22, 2003). To address his concerns, as discussed above, Hills proposed retaining Ronald Goldstock, a law professor and the former Director of the New York State Organized Crime Task Force, to assist Leary and Urgenson with the investigation and, more specifically, to ensure that the Company was cooperating with DOJ in a satisfactory way.[169] *See id.* While Hills had information from Beasley and Taxay suggesting that DOJ believed that the Company was not being sufficiently cooperative, Urgenson said he had a very different impression based on his own continuing interactions with the government lawyers.

In response to Hills' proposal to hire Goldstock, Morton Arntzen, who was becoming concerned about the mounting costs associated with the investigation, questioned whether the Audit Committee was trespassing on an area that was properly management's responsibility. In a response featured prominently in the factual proffer, Hills responded bluntly: "Let me say very simply. This is not a management investigation. It is an Audit Committee investigation because we appear to [be] committing a felony." *Id.* Ultimately, Hills explained more fully that he wanted to hire Goldstock to get to the root of the government's complaints about the Company's cooperation. The Audit Committee agreed to retain him.

In late December 2003, Hills contacted Goldstock and explained the situation. Hills told Goldstock that he was very concerned because, based on his discussions with Taxay and Beasley, it was his impression that the government viewed Chiquita as uncooperative. Goldstock said that Hills asked him to provide advice to the Audit Committee regarding the ongoing DOJ investigation and communicate with his DOJ contacts in order to "tell Chiquita's story." Goldstock agreed to come on board.

AA. Winter 2004: Aguirre Becomes CEO, End of Payments, Continued Investigation into Banacol Deal

1. Hills' Continuing Concerns About Cooperation

As discussed at length above, on January 7, 2004, Hills sent a lengthy letter to Urgenson, Leary, and Goldstock in which he set the framework for trying to address the cooperation issue. The letter summarized in detail the path of the investigation and the Company's document production efforts to date, expressed concerns about the progress of the investigation and Chiquita's cooperation, and asked Urgenson, Leary, and

[169] Hills knew Goldstock from the CSIS Hills Program on Governance, which Hills and his wife established to promote corporate integrity, particularly in developing countries. This program had two "boards," an Advisory Board and an Academic Council. Hills asked Goldstock to serve on the Academic Council (at the time, Goldstock was teaching corruption and control at New York University) and to attend one of its meetings, which was being held at Harvard University's Kennedy School of Government. Goldstock said that he attended several other meetings as well.

Goldstock to meet to resolve the issues raised in the letter. Among other things, Hills wrote that AUSA Beasley told him that DOJ was "extremely unhappy with Chiquita's attitude." Letter from Roderick Hills to Laurence Urgenson, Elliott Leary, and Ronald Goldstock (Jan. 7, 2003). Hills requested advice on how to proceed in the DOJ investigation and whether the sale of Banadex would "solve our legal problems with Justice." *Id.* According to Hills, the letter was an attempt to summarize open issues and to educate Goldstock on the chronology of the investigation. Hills thought it was important for the Audit Committee's advisors to be working on a shared set of assumptions and accurate facts.

Urgenson, Harris, Leary, and Goldstock met on January 8, 2004 for several hours to address Hills' concerns. Following the meeting, the group drafted a memo summarizing the conclusions it reached. The memo concluded that DOJ's concerns about the Company's cooperation were largely the product of DOJ's failure to understand fully the Company's genuine concerns about the safety of its employees, and recommended several ways in which the Company could resolve the perceived cooperation issue. *See* Memorandum from K&E, KPMG, and Ronald Goldstock to Roderick Hills (Jan. 13, 2004).

One of the recommendations contained in the memo stated "the payments have to stop, unless they are undertaken as part of an authorized undercover operation." *Id.* In connection with stopping the payments, the memo recommended that the Company work with DOJ on the terms and conditions of a sale of Banadex and/or reiterate the Company's willingness to engage in an undercover operation. *See id.*

Urgenson said that he believed that it was important in this memo to "say directly that the payments have to stop." However, according to Goldstock, the consensus at the meeting was that Chiquita "could not simply stop the payments, because the risk of harm to its employees was too great." Goldstock, who was newest to the situation and had an outsider's perspective, came away from the meeting concluding that: (i) the Company "had a clear duress defense" with respect to its payments to the AUC, (ii) Hills "did the right thing" by disclosing the payments to DOJ, and (iii) while DOJ could not say directly that Chiquita should continue paying the AUC, it nevertheless could not have wanted Chiquita to discontinue the payments and be responsible for the resulting bloodshed. Leary had only a vague recollection of this meeting. Following this meeting, the Company worked to implement the recommendations contained in the memo, including, as discussed below, working with DOJ towards completing the sale of Banadex.

2. Aguirre Joins Chiquita

That same day, at a January 8, 2004 meeting, the Board elected Fernando Aguirre as CEO, effective January 12, 2004. *See* Minutes of Chiquita Board Meeting (Jan. 8,

2004). Freidheim had served as a bridge for the Company following the bankruptcy, and the Board wanted a CEO that could move the Company away from its commodities-based banana production model. Aguirre had been a longtime employee and senior executive with Cincinnati-based Procter & Gamble, and was attractive to the Company because, among other things, he had extensive experience in the consumer goods industry, had substantial experience in Mexico, Central America and South America, and spoke fluent Spanish. Aguirre said that prior to his official start date, he met with Olson and Kistinger, who informed him that the Company had "an issue" in Colombia regarding the sale of its farms, but that Freidheim was managing it. Aguirre further said that after he had started at Chiquita, Olson gave him an overview of the Company's payments to the AUC. Aguirre has stated that he did not fully understand the severity of the Company's situation in Colombia prior to joining Chiquita.[170]

3. January 20, 2004 Meeting with DOJ

On January 20, 2004, Olson, Urgenson, and Harris met with Taxay. *See* Memorandum from Audrey Harris to File (Mar. 27, 2004). The purpose of the meeting was for Chiquita to provide details reading the proposed terms of the sale of Banadex to Banacol to DOJ for the first time. Olson told the government about the history of the negotiations, and specifically, that Banacol had initially approached the Company about a potential sale and that the issue of payments to the AUC had not come up during the course of the negotiations. DOJ was also told that Chiquita would have "no physical presence" in Colombia post-sale. Notes of Audrey Harris (Jan. 20, 2004). Olson explained, however, that Banacol would not make the deal without a post-sale banana-purchase agreement with the Company.

As it had for some time on a periodic basis, the possibility of the Company's participation in an undercover operation was also discussed at this meeting. *See id.* Olson was comforted by this discussion because it indicated to him that DOJ must have known that the payments were still continuing, since the Company could not participate in an undercover investigation if it had already stopped making the payments and was pulling out.[171] Finally, at this meeting, the parties discussed a

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[170] Olson said that he never had a meeting with Kistinger and Aguirre prior to Aguirre joining the Company. Rather, Olson said that he had a meeting with Aguirre (without Kistinger) before Aguirre joined the Company, at which he provided Aguirre with a general overview of the Company's legal issues, including the payments to the AUC. Olson said that his meeting with Aguirre was approximately forty-five minutes long, with twenty to twenty-five minutes devoted to the Colombia situation. He said that Aguirre asked a lot of questions and was "not happy" about the situation.

[171] Hills shared Olson's view that any continuing discussion of an undercover operation meant that DOJ was implicitly acknowledging that the payments were continuing; as Hills told the SLC, discussion of an undercover operation made no sense if the Company had ceased making the payments and was pulling out of Colombia. This is why Hills reacted so negatively when

waiver of privilege with respect to certain legal advice given to the Company through February 20, 2003.[172] *See id.*

4. Final Payment

Four days later, on January 24, 2004, [Banadex Employee #5] initiated the approval process for the final payment to the AUC in Santa Marta. In total, Chiquita made payments of $365,865 to the convivir and the AUC between February 20, 2003, the date on which [the Chiquita lawyer] discovered the FTO designation, and January 24, 2004. *See* KPMG Sensitive Payments Schedule. According to Aguirre, after he learned from Olson and Kistinger that a payment was made in late January, he ordered that no payments be made in the future without his knowledge and approval.[173] No other witnesses recalled that Aguirre issued this directive, or how the payments actually ended. In any event, as discussed below, no further payments were made to the AUC.

5. Banadex Sale Announcement

Around the same time as the last payment was authorized, on January 26, 2004, Chiquita issued a press release that it was negotiating with Banacol regarding the potential sale of its Colombian operations.[174] *See* Press Release, Chiquita Brands Int'l, Inc., Chiquita Confirms Discussions for Potential Sale of Banana Operations in Colombia (Jan. 26, 2004). The release reflected the fact that negotiations had progressed to a point where the Company believed disclosure to be in its best interests. In addition, the issuance of the release was designed to stimulate other potential bidders to

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Beasley told him in early December that Olson and Urgenson had, in effect, said they were not interested in an undercover operation because of the risk to Company employees: to Hills, if the discussion about an undercover operation had ended, this would have eliminated a central part of the Company's rationale for continuing to make the payments.

172 This waiver excluded legal advice concerning "Chiquita's strategy in dealing with any government investigations."

173 As support for this statement, Aguirre pointed to an e-mail, dated January 31, 2004, in which he states that the Company will not do business in any country in which extortion is the "modus operandi," but the e-mail does not order that the payments be stopped. *See* E-mail from Fernando Aguirre to Michael Mitchell, *et al.* (Jan. 31, 2004).

174 The release states:

> Chiquita Brands International, Inc. (NYSE: CQB) today confirmed reports that it is having discussions regarding the potential sale of its banana-producing and port operations in Colombia to Invesmar Ltd., the holding company of C.I. Banacol S.A. C.I. Banacol S.A. is a Colombian-based producer and exporter of bananas. The discussions also involve a potential long-term agreement for Chiquita's purchase of Colombian bananas.

come forward so as to ensure that the Company would get the best deal. However, no additional bidders came forward as a result of the release. According to Kistinger, one of the benefits of issuing the release was that [Banadex Employee #10] and [Banadex Employee #5] were then able to use the pending sale as an excuse to stall the payments to the AUC.

6. February 9, 2004 Audit Committee Meeting

On February 9, 2004, the Audit Committee met to discuss the potential sale of Banadex; they discussed the current terms of the deal, the status of the negotiations, steps in conducting due diligence, and the details of financing the transaction. *See* Minutes of Chiquita Board Meeting (Feb. 9, 2004). At that time, the terms of Banacol's proposal included (i) a $33 million cash payment, (ii) an $8 million pension assumption, (iii) $8 million (NPV) of seller's financing, (iv) $25 million (NPV) in preferential discount for pineapple purchasing, and (v) an eight-year purchasing contract for bananas and pineapples, with a total net value to Chiquita of $37 million. *See* Chiquita PowerPoint Presentation (Feb. 9, 2004). Aguirre expressed strong support for the sale and, while some directors viewed the transaction as potentially risky because Colombia was significant to the Company's operations, the Audit Committee supported the sale.

At the same meeting, the Board received a presentation from Jack Devine, president of the Arkin Group, a security consulting firm, and a former Director of Operations for the Central Intelligence Agency. The Audit Committee retained Devine in January 2004 to perform a comprehensive security review of Chiquita's operations with the goal of assessing both the Company's preparedness for retaliation if it stopped the payments to the AUC and the feasibility of providing effective security for employees after the sale. *See* Minutes of Chiquita Board Meeting (Feb. 9, 2004).

Based on considerable fieldwork by a team of operatives in Colombia, as well as tapping his firm's intelligence and security sources, Devine's presentation largely validated the judgments the Company had been making for many years about the situation in Colombia. Devine told the Audit Committee that if the Company ceased making payments to the AUC, Banadex could expect "an escalating threat situation," beginning with threats and harassment and eventually sabotage and kidnapping. *See* Arkin Group Talking Points (Feb. 9, 2004). Devine criticized the Company's crisis management plans as inadequate to deal with the dimensions of the threat posed by the AUC. Devine told the Board that the Colombian military was aware of the Company's payments to the AUC and tolerated them because the military was unable to provide sufficient protection to the banana growers. Finally, Devine confirmed a key point that the Company had been making internally as well as to DOJ – that other U.S.-based multinational companies were making similar payments. *See id.*

Those who attended the meeting reported to the SLC that they came away from the presentation confirmed in the belief that Colombia was a dangerous place and that Chiquita's employees were in danger by virtue of operating there. Devine's presentation also confirmed to the Board and management what they had been told by Company personnel about the risks they faced. Devine told the SLC that he was asked to give his independent and honest assessment, and no one attempted to influence his views.

7. March 4, 2004 Audit Committee Meeting

By early March, the payments to the AUC had been halted for a little over a month. At a March 4, 2004 meeting, the Audit Committee engaged in an extended discussion regarding whether the Company should make "one last payment to the AUC" before the sale of Banadex. Minutes of Chiquita Audit Comm. Meeting (Mar. 4, 2004). Along with the Audit Committee, Urgenson, Leary, and Goldstock participated in the discussion. Goldstock was the only attendee who advocated that additional payments should be made in order to protect Company employees. *See* Notes of Chiquita Audit Comm. Meeting (Mar. 4, 2004). Goldstock recalled a crisp, coherent debate on the issue, with each director focusing only on the best interests of the Company. In a letter that Goldstock wrote in support of Hills in June 2007, he said that, as he left the meeting with Urgenson and the Audit Committee began its executive session, he:

> stated to [Urgenson] that it was [his] belief that had a video camera been hidden in the conference room where the meeting occurred, anyone viewing it (including the Government) could only come to the conclusion that this was precisely the way an Audit Committee should act when faced with a complicated situation without an obvious solution.

Letter from Ronald Goldstock to Reid Weingarten (June 28, 2007).

While Kreps's notes indicate that Aguirre may have made a statement in support of the payments – "continue payments; preserve life" – Aguirre said that he did not, and no attendees recalled that Aguirre advocated making further payments. *See* Notes of Chiquita Audit Comm. Meeting (Mar. 4, 2004). Rather, several witness have noted that Aguirre simply stated that by making a payment, the Company would preserve the lives and safety of its employees. No decision was made with respect to making a payment at this meeting.

8. March 23, 2004 Meeting with DOJ

Through the middle of March, the Company continued to be in regular contact with the government regarding next steps, policy issues, and the sale of Banadex.[175] Then, on March 23, 2004, representatives of the Company met with David Nahmias, Michael Taxay, John Beasley, and various other government attorneys. The purpose of this meeting was for the Company to notify DOJ of the upcoming sale of Banadex, as per Audit Committee instructions. *See* Memorandum from Audrey Harris to File (Mar. 27, 2004).

At the outset of the meeting, Nahmias, the highest-ranking DOJ official with whom the Company had met since its meeting with then-Deputy Attorney General Larry Thompson seven months earlier, discussed the background of the investigation, including the April 24 Chertoff meeting, which Nahmias had attended. *See id*. Nahmias stated that the government's view of the Chertoff meeting was that, "historically the Department could not 'give a pass,' although they would give credit for the voluntary disclosure; and that they had real concerns about the behavior going forward, but understood the tough position the Company was in, but if [the payments] continued it needed to be under full cooperation with authorities." *Id*. Olson said that Nahmias's account of the Chertoff meeting was different from his own recollection, but he and Urgenson did not take issue with Nahmias's version at this meeting. Rather, they emphasized that the Company wanted to focus on its cooperation going forward.

The discussion then turned to the Company's cooperation to date. Taxay expressed concern about a number of issues, including that he was not given details about the sale of Banadex quickly enough, that the Company was proceeding too slowly in the document collection process, and for various reasons, the government had not yet been able to interview any witnesses. *See id*. In a statement of considerable significance, Nahmias also informed Chiquita that DOJ considered Chiquita and some of its officers and former officers subjects of an investigation, but did not identify which officers. *See id.* According to Olson, the Company's view of DOJ investigation "changed dramatically" as a result of this information.

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175 In connection with the sale, the Board debated by e-mail, at the end of February, whether it needed a fairness opinion to move forward with the sale. On February 24, 2004, Olson e-mailed the Board questioning whether it felt that a fairness opinion was necessary in connection with the transaction with Banacol. Stanbrook was the only director to express interest in obtaining a fairness opinion, but acceded to the other members of the Board, who believed that obtaining such an opinion was unnecessary because (i) it would be unusual to obtain a fairness opinion for the sale of a production division, as opposed to a major business, (ii) the transaction was relatively small, (iii) no other potential buyers had come forward after the sale was made public, and (iv) "the primary motivation for the sale [was] non-financial." Olson shared the view that a fairness opinion was not required, which was expressed in his original e-mail to the Board. *See* E-mail from Robert Olson to the Board (Feb. 24, 2004).

In addition, Nahmias expressed concern that Chiquita might be aiding and abetting payments to the AUC if, pursuant to the sale agreement, it purchased fruit from Banacol and Banacol continued to make the payments. Nahmias also expressed concern about the Company's ability to continue to cooperate if a sale was completed. In short, DOJ refused to "bless the sale" of Banadex and told Chiquita to "proceed at its own risk." *Id.*

9. March 30, 2004 Board Meeting

The discussion at the March 23 meeting with DOJ was shared with the Board at a meeting on March 30, 2004. Urgenson and Olson told the Board that DOJ now considered the Company and certain of its current and former officers subjects of the investigation and that the government had raised potential issues with respect to a sale to Banacol, including potential aiding and abetting issues and concerns relating to access to documents controlled by the Company in Colombia. Urgenson and Olson also told the Board that subpoenas had been issued to the Company and certain executives. Finally, Kistinger reported that the Company had ceased making payments to the AUC. *See* Minutes of Chiquita Board Meeting (Mar. 30, 2004).

The Board members and executives were troubled by this report and recognized that the status quo could not continue. The Board agreed that the Company's cooperation efforts should be accelerated and directed that the payments to the AUC should not resume. The Board did not consider the resolutions that had been prepared for the meeting relating to the Banacol transaction, in part because of DOJ's concerns about the sale. *See id.*[176]

BB. Spring 2004: Subpoenas are Issued and the Sale of Banadex is Approved

1. Retention of K&L Gates

Within days of the March 30 Board meeting, in early April 2004, the Audit Committee retained former U.S. Attorney General Dick Thornburgh of K&L Gates. According to Hills, the hiring of Thornburgh was prompted by the classification of the Company and some of its officers as subjects of the DOJ investigation. To Hills, this meant that that the Audit Committee needed independent counsel. Thornburgh believed that he was retained in part to help focus high-level DOJ officials on the

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[176] By the time of the March 30 meeting, Banacol's proposal to Chiquita: included (i) a $31 million cash payment, (ii) an $8 million pension assumption, (iii) $12 million (NPV) of seller's financing, (iv) a $25 million preferential discount on pineapples, and (v) an eight year purchase contract for bananas and pineapples, with a total net value to Chiquita of $43 million. *See* Chiquita PowerPoint Presentation (Mar. 30, 2004).

matter. Initially, K&E's role remained unchanged, and K&E continued to produce documents to, and communicate with, DOJ on behalf of Chiquita.

2. April 2004 Banacol Meeting

On April 6, 2004, Chiquita representatives traveled to Panama to advise Banacol executives of the DOJ investigation. *See* Banacol Deal Chronology (May 10, 2004). Until then, the Company had mentioned nothing about the investigation, as it was concerned both about the fallout of disclosing the investigation as well as the possibility that Banacol might use the existence of the investigation as leverage to extract additional concessions from the Company. Somewhat to the Company's surprise, Banacol did not use the disclosure to change the terms of the sale, except to require a break-up fee in the event DOJ blocked the sale, and an indemnity.

On the same day as the disclosure to Banacol, KPMG made a presentation to DOJ summarizing its forensic investigation in Colombia. KPMG provided the government with a detailed summary, based on its independent review, of the Company's payments to the convivir and the AUC between 2001 and 2004. *See* Memorandum from Jeffrey Maletta to File (Apr. 6, 2004). Leary told the SLC that the purpose of the presentation was, in part, to demonstrate the extent of the effort Chiquita was making to cooperate and to understand the facts surrounding the payments.

3. DOJ Concerns About Cooperation and the Sale

To help facilitate the sale, on April 26, Thornburgh requested, by letter, a meeting with Assistant Attorney General Wray to discuss the concerns raised by DOJ regarding the proposed transaction. *See* Letter from Dick Thornburgh to Christopher Wray (Apr. 26, 2004). In early May 2004, both Nahmias and Taxay responded to Thornburgh's request by telling him that DOJ had obtained information, apparently from the testimony of a Colombian witness, that the Company was continuing to make payments to the AUC. *See* E-mail from Dick Thornburgh to Roderick Hills, et al. (May 4, 2004).

During a May 4 call with Thornburgh, Nahmias also warned that Chiquita needed to be careful to structure the Banadex transaction in such a way that there would be no basis for suspecting that the Company was somehow arranging surreptitiously to continue making the payments. Nahmias refused to give the Company any more specific guidance on a course of conduct with respect to the sale; it was a warning to be careful without any specific guidance on how to proceed. *See* E-mail from Dick Thornburgh to Roderick Hills, et al. (May 4, 2004). On May 11, in response to the information that Nahmias had said the government had received, Aguirre confirmed in a letter to DOJ that payments to the AUC had stopped. *See* Letter from Fernando Aguirre to Christopher Wray (May 11, 2004).

4. May 7, 2004 Joint Board and Audit Committee Meeting

On May 7, 2004, the Board and Audit Committee met jointly to discuss various aspects of the issues faced by the Company in Colombia. In addition to receiving an update on the Company's most recent communications with DOJ, the Board considered and approved the sale of Banadex. The terms of the deal were: (i) approximately $27 million in cash, (ii) approximately $4 million in notes of 90 days or less, (iii) longer-term notes and deferred payments having a net present value of $12 million, and (iv) the assumption of $8 million pension liability. In addition, the Board authorized the Company to enter into eight-year purchase contracts with Banacol for bananas and pineapples, with a preferential discount on the pineapples. *See* Minutes of Chiquita Board and Audit Comm. Meeting (May 7, 2004).

The Board also approved an indemnification/rescission arrangement and a break-up fee to address the uncertainties created by DOJ's warnings about the transaction and the risk that DOJ might try to block the sale or otherwise make it untenable. *See id.* To address concerns of DOJ regarding continued access to documents, the deal included a provision granting Chiquita control of certain books and records of Banadex, some of which were transferred to the U.S. *See* Banacol Deal Chronology (May 10, 2004).

Further, the Audit Committee, advised by Skadden attorneys Peter Atkins and David Freidman, discussed the Company's disclosures at length. According to Kreps's notes, Freidman advised that the Company would have to balance its need for fuller disclosure (based upon pressure the Company was receiving from DOJ) with the risks such disclosure created for Chiquita's employees in Colombia. *See* Minutes of Chiquita Board and Audit Comm. Meeting (May 7, 2004); Notes of Chiquita Board and Audit Comm. Meeting (May 7, 2004). Indeed, [Chiquita Employee #2] and [Banadex Employee #10] had traveled to Cincinnati to voice security concerns, explaining that the AUC would retaliate against Banadex employees if it became public that those employees were cooperating with DOJ. Accordingly, Kistinger advised the Committee that there were "no clear answers" and that the "risk is big." Notes of Chiquita Board and Audit Comm. Meeting (May 7, 2004). Three days later, on May 10, 2004, the Company issued an earnings release, which disclosed the DOJ investigation, but did not mention the AUC by name. *See* Release, Chiquita Brands Int'l, Inc., Chiquita Reports Net Income of $20 Million, $0.46 EPS, in the First Quarter of 2004 (May 10, 2004).

Finally, according to the minutes from that meeting, Aguirre and Hills proposed that the Company "should consider making a charitable donation that would be used exclusively for bona fide civic projects in the Urabá and Santa Marta regions." Minutes of Chiquita Board Meeting (May 7, 2004). This was considered as a way to potentially soften the blow of the Company's leaving Colombia and to reduce the risk of violence from the guerrillas and the AUC. Indeed, Kreps's notes from the meeting state: "Make

a donation to Pan American Develop Org as an alternative? This may help pacify the guerillas."[177] Notes of Chiquita Board Meeting (May 7, 2004). The Board approved a donation in the amount of $300,000, with the caveats that the Company needed to ensure the funds were used properly and to disclose the contribution to DOJ prior to making it. However, the donation ultimately was not made. *See* Minutes of Chiquita Board Meeting (May 7, 2004).[178]

Following the meeting, in a May 8, 2004 letter to the Board, Aguirre again expressed his support for the Company's exit from Colombia. Aguirre could not specifically recall why he wrote this letter, but told the SLC that he sometimes uses these types of letters to "clarify" issues in his own mind. Aguirre outlined possible next steps for the Company. These included (i) negotiations with Banacol, (ii) communication with the Colombian ambassador to the U.S., and (iii) preparation for making the transaction public. *See* Letter from Fernando Aguirre to the Chiquita Board (May 8, 2004).

5. State Department: No Objection to Prosecution

On May 13, Nahmias called Thornburgh to inform him that the U.S. State Department had no policy objection to the possible prosecution of Chiquita by DOJ. *See* E-mail from Laurence Urgenson to Roderick Hills, et al. (May 13, 2004). Some viewed this call as vindication that DOJ had promised to consult with other branches of the government regarding the policy issues raised by Chiquita's situation. In contrast, Urgenson believed that this call was a signal that Chiquita should stop pushing its policy agenda. In any event, by now, it was clear that DOJ viewed Chiquita in a very different light than it did in the summer of 2003.

6. May 13, 2004 Board Meeting

The same day that Nahmias called Thornburgh, the Board met. Among other things, the Board again considered the sale of Banacol because the sale had been voted on by a bare quorum at the May 7 meeting; given the importance of the transaction and the issues that it raised, the directors thought it was important to make sure that the transaction was considered and approved by the full Board. As such, the resolutions relating to the sale of Banadex were approved again without change. *See* Minutes of Chiquita Board Meeting (May 13, 2004).

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177 The organization being considered was actually the Pan American Development Foundation.

178 The payment was not made because (i) K&E advised the Company against making such a payment, and (ii) after raising the issue with DOJ, DOJ questioned the good faith nature of the payment. *See* E-mail from Roderick Hills to Laurence Urgenson (July 8, 2004).

Olson reported that the closing of the Banacol deal would be "subject to financing and the absence of regulatory action, including action by the Justice Department with respect to the proposed sale." *Id.* He also reported that Hills had sent a letter on behalf of the Audit Committee to DOJ "describing the chronology of discussions with Banacol" in order to demonstrate that the transaction was not in any way designed to facilitate future payments by Banacol to the AUC and that Aguirre had sent a letter to DOJ "reaffirming the 'protection' payments that are a focus of the Department's investigation have stopped." *Id.*

CC. OFAC Presentation and Thompson Memorandum Submission

1. OFAC Presentation

Having lost the State Department as an option, Hills looked for another avenue to approach the government and recommended that the Company contact the Office of Foreign Assets Control ("OFAC") and seek to brief the agency on the Company's situation. Hills thought that this was a prudent step because OFAC had regulatory jurisdiction over the Colombia payments and because he thought OFAC might be a sympathetic audience and exert some influence on DOJ. On June 23, 2004, Urgenson, Hills, Olson, Thornburgh, Leary, Devine, and Harris met with OFAC. *See* Letter from Audrey Harris to OFAC Director Richard Newcomb (June 16, 2004); Memorandum from Jonathan Borrowman to File (June 23, 2004). The Company decided to make Devine's work on assessing the security situation the centerpiece of the presentation to provide a credible and objective justification for the Company's course of conduct in making the payments. Although DOJ lawyers were invited to the meeting, they declined to attend, apparently because they learned that Devine would not agree to disclose all the sources of his information.

The meeting was primarily devoted to Devine's presentation, which focused on a history of violent incidents in Colombia and other information supporting the conclusion that paying paramilitary groups was a necessary condition of doing business in Colombia. *See* Presentation to Office of Foreign Asset Control (June 23, 2004). The Company's representatives who attended the meeting thought that the presentation went extremely well and had a favorable impact on OFAC.

2. Sale of Banadex

On June 28, 2004, after many months of negotiation, Chiquita completed the sale of Banadex to Banacol on substantially similar terms as those authorized by the Board at the May 7 and 13, 2004 Board meetings. Although the primary motivation for the sale was the DOJ investigation, many directors and officers also felt that the sale fit within Chiquita's planned shift from an owned farm to purchased fruit model. In addition,

many also felt that the dangerous environment in Colombia dictated that the Company leave Colombia, separate and apart from the DOJ investigation.

Although some Board members and members of management were more enthusiastic about the sale than others, in the end no one was against it – views ranged from very positive to acceptable under the circumstances. [Chiquita Employee #2], who was primarily responsible for negotiating the terms of the deal, summed up what many said about the deal when he told the SLC that the sale was, under the circumstances, a "remarkably good deal," although not necessarily one he would have endorsed absent the need to leave Colombia. No one interviewed by the SLC believed that Chiquita conducted a "fire sale" of Banadex, citing, among other things, the length of the diligence and negotiations and the ultimate terms of the deal. As discussed further below, the SLC agrees with this conclusion.

3. Request for Thompson Submission

By the end of July, it appeared that a resolution to the DOJ investigation may be in the offing. On July 29, 2004, Beasley told Urgenson that DOJ wanted Chiquita to prepare a "Thompson Memorandum Submission," setting forth Chiquita's arguments as to why DOJ should not prosecute it for violations of § 2339B. *See* E-mail from Laurence Urgenson to Roderick Hills, et al. (July 30, 2004).[179] In the months that followed, there was heated disagreement – principally between Hills and Urgenson – about the role that the Chertoff meeting should play in the Company's submission. *See, e.g.*, E-mail from Roderick Hills to Laurence Urgenson (Aug. 6, 2004); E-mail from Roderick Hills to Robert Olson (Aug. 25, 2004); E-mail from Roderick Hills to Dick Thornburgh, et al. (Sept. 10, 2004); E-mail from Roderick Hills to Laurence Urgenson, et al. (Sept. 22, 2004).

Hills argued that DOJ clearly understood that Chiquita would continue to make payments following the meeting and that the Company had every right to do so until it heard back from the government. *See* E-mail from Roderick Hills to Laurence Urgenson (Aug. 6, 2004). Urgenson thought that it was provocative to make that argument as aggressively as Hills wanted to make it – he thought it placed the government on the defensive and increased the odds that DOJ would react poorly to the Company's

[179] The "Thompson Memorandum" is the name given to a memorandum entitled "Principles of Federal Prosecution of Business Organizations" issued by then-Deputy Attorney General Larry Thompson in January 2003 that established the criteria federal prosecutors are required to use in deciding whether corporate entities should be prosecuted. It is common for companies and individuals under investigation to file a submission with federal prosecutors setting forth why, under the factors set forth in the Thompson Memorandum, DOJ should not bring a prosecution in a particular case. Subsequent to the Thompson Memorandum, a revised version of the memorandum was issued by Deputy Attorney General Paul McNulty in December 2006, and in 2008, a further revised set of standards was incorporated in the USAM.

arguments. In addition, Urgenson felt that this argument might distract DOJ from making a favorable decision based on the overall merits of Chiquita's case. As various drafts of the submission were exchanged between Hills, Urgenson, Olson, and Thornburgh, this issue came to a head at an October 1 meeting with DOJ.

4. October 1, 2004 Meeting with DOJ

On October 1, 2004, Chiquita representatives gave a presentation to DOJ substantially similar to the June 23, 2004 presentation it made at OFAC. During the meeting, Hills raised the subject of the Chertoff meeting and, according to Urgenson, suggested to DOJ that Chertoff had given Chiquita "assurances of non-prosecution." The DOJ representatives, including Beasley and Taxay, had an extremely strong and negative reaction to Hills' statements. Taxay in particular was incensed by Hills' statements and, after the meeting, had several conversations with Urgenson in which he said in very strong terms that it would be counter-productive for Chiquita to make similar arguments in the future. Taxay went so far as to argue that if Hills continued to press his interpretation of the Chertoff meeting, a special prosecutor might need to be appointed to determine whether the former head of the Criminal Division (Chertoff) had authorized continued payments to an FTO. *See* E-mail from Laurence Urgenson to Audrey Harris, et al. (Oct. 1, 2004); E-mail from Laurence Urgenson to Roderick Hills, et al. (Oct. 1, 2004).

Following this meeting, the Company and Urgenson, with Hills only reluctantly going along, reached a consensus that Chiquita should de-emphasize its discussion of the Chertoff meeting in its Thompson Memorandum Submission. On October 4, 2004, after circulating a draft to the Audit Committee for comment, the Company delivered its Thompson Memorandum Submission to DOJ.

DD. <u>Supplemental Thompson Memorandum Submission</u>

Shortly after the submission was delivered, on October 15, 2004, Taxay followed up with Urgenson to request a supplemental Thompson Memorandum Submission focusing on several topics related to the Company's books and records. Specifically, Taxay requested that further information be provided about: (i) payments to guerrillas, (ii) procedures for recording and accounting for guerrilla and paramilitary payments, (iii) SEC testimony concerning guerrilla payments from the 1998 investigation, and (iv) legal advice received by Chiquita related to the payments. *See* E-mail from Michael Taxay to Laurence Urgenson (Oct. 15, 2004). The Company's Supplemental Thompson Memorandum Submission included KPMG's conclusions regarding Chiquita's compliance with its own internal controls. *See* Supplemental Thompson Submission. Based on KPMG's independent review, with respect to the convivir/AUC payments, the Company's submission stated: "Chiquita complied with their internal policies

regarding accounting for sensitive payments with one possible exception that was discovered and corrected in a timely manner." *Id*.

EE. Quiet Period: November 2004 – Summer 2005

Following the delivery of the Company's submissions, the Company had little contact with DOJ for many months. The contacts that took place encouraged the participants in the process to believe that a reasonable, and favorable, disposition was possible. On December 31, 2004, Taxay sent an e-mail to Urgenson suggesting a meeting with DOJ sometime in February 2005 to discuss settling the matter. *See* E-mail from Michael Taxay to Laurence Urgenson (Dec. 31, 2004); E-mail from Laurence Urgenson to Roderick Hills, et al. (Jan. 3, 2005). The meeting never took place as Taxay never contacted Urgenson to set up a meeting.

In mid-March, Taxay left Urgenson a voice-mail stating that he had drafted a settlement proposal that was in the process of being reviewed within the chain of command at the U.S. Attorney's Office for the District of Columbia and DOJ, and that Chiquita would be asked to participate in settlement discussions in the coming weeks. *See* E-mail from Laurence Urgenson to Dick Thornburgh, et al. (Mar. 16, 2005). Urgenson and Olson were encouraged by these developments, but nothing came of the plan. The request never came from DOJ, and, in fact, there was no communication of any kind between DOJ and the Company for more than five months, until early September 2005. The Company never learned what happened to the settlement proposal drafted by Taxay, nor about who in DOJ was responsible for turning the investigation in a new and more aggressive direction starting in September.

FF. Fall 2005: Transition of Chiquita Investigation to AUSA Malis

1. AUSA Jonathan Malis Takes Over

On September 8, 2005, Assistant U.S. Attorney Jonathan Malis of the U.S. Attorney's Office for the District of Columbia contacted Urgenson to notify the Company that he had assumed responsibility for the DOJ investigation, taking over for Taxay and Beasley. *See* Letter from Jonathan Malis to Laurence Urgenson (Sept. 8, 2005). Almost immediately, Malis took a very aggressive tone with the Company, accusing it of failing to cooperate sufficiently with DOJ and demanding that the Company expand its previous waiver of the attorney-client privilege. *See* Letter from Laurence Urgenson to Jonathan Malis (Sept. 28, 2005); Letter from Jonathan Malis to Laurence Urgenson (Oct. 6, 2005). Specifically, Malis suggested that Chiquita would be viewed as "non-cooperative" unless it agreed to expand the privilege waiver to include all communications with counsel dating from February 2003 and extending through the Company's final payment to the AUC in February 2004. Given the amount of energy that Chiquita had invested in cooperation to date, and the risks of being labeled "non-

cooperative," Chiquita agreed to expand the privilege waiver, which now covered the advice given by K&E in February and March 2003.

In October 2005, pursuant to the waiver, the Company produced documents containing the advice of counsel during the course of the investigation, including the February 2003 memo from Harris that states "CANNOT MAKE THE PAYMENT." Memorandum from Audrey Harris to File (Feb. 26, 2003); *see* Letters from Laurence Urgenson to Jonathan Malis (Oct. 14, 2005 and Oct. 21, 2005). These documents became central to the Company's prosecution. Once Malis took over the investigation, and for the next eighteen months, the investigation of the Company became much more aggressive.

2. Directors Subpoenaed

In late October 2005, Malis issued subpoenas for all of the Company's independent directors, except Roderick Hills. In a telephone conversation, Malis informed Jeffrey Maletta of K&L Gates, Thornburgh's partner, that "the definition of subject in the [U.S. Attorneys' Manual] is so broad that any directors who were serving on the Board while the payments were ongoing should be considered subjects [of the DOJ's investigation]." Email from Jeffrey Maletta to Dick Thornburgh, et al. (Oct. 21, 2005). The Company asked K&L Gates to represent the independent directors, and K&L Gates agreed to do so. Between December 2005 and January 2006, all of Chiquita's directors, with the exception of Hills, testified before the Grand Jury.[180] During the testimony from these directors, AUSA Malis focused largely on the payments Chiquita made after the Chertoff meeting. By this point, K&E's role had shifted primarily to producing documents demanded by DOJ, while K&L Gates managed new developments in the DOJ investigation.

3. Olson Retires

In late 2005 and early 2006, Olson disclosed to the Board that the Company still had certain limited ties to Colombia (apart from its banana purchase contract with Banacol), including (i) a banana purchase contract with another farm, whose owner,

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[180] The following witnesses testified before the grand jury in November 2005: (i) [Chiquita Employee #1], (ii) [Banadex Employee #10], (iii) Steven Kreps, (iv) Barbara Howland, and (v) Robert Kistinger. The following witnesses testified in December 2005: (i) Robert Thomas, (ii) [Banadex Employee #4], (iii) Cyrus Freidheim, (iv) [the Chiquita lawyer], (v) Jaime Serra, (vi) Steven Stanbrook, (vii) Morten Arntzen, and (viii) Jeffrey Benjamin. The following witnesses testified in January 2006: (i) Robert Fisher, (ii) Durk Jager, (iii) [Banadex Employee #5], (iv) James Riley, (v) Fernando Aguirre, (vi) [Chiquita Employee #1], and (vii) Jeffrey Zalla. The following witnesses testified in February 2006: (i) [Banadex Employee #5], (ii) [Banadex Employee #4], (iii) [the Chiquita lawyer], (iv) [Chiquita Employee #2], (v) William Tsacalis, (vi) Jorge Solergibert, and (vii) Manuel Rodriguez.

according to 2005 Colombian media reports, had ties to the AUC; and (ii) ownership of two tracts of land. *See* Letter from Jeffrey Maletta to Jonathan Malis (Feb 7, 2006). The disclosure of this information to the Board, which had been told that the Company had no other ties to Colombia other than banana purchase contracts, led the Board, and Aguirre, to lose confidence in Olson. For that reason, among others, including Aguirre's desire to bring in new management, the Board ultimately decided to replace him as General Counsel. James Thompson was hired in April 2006, originally as Chief Compliance Officer, but with an eye towards eventually becoming the General Counsel. After a brief transition period, Thompson replaced Olson as General Counsel as of July 1, 2006.

4. Continuing Investigation

Between February and September 2006, DOJ's investigation plodded steadily along, with K&E producing documents on a rolling basis. In June 2006, Malis called Urgenson and requested that the Company agree to toll the statute of limitations with respect to certain possible charges, which the Company agreed to do without significant debate. Then, in early summer 2006, Maletta spoke with Malis, who expressed frustration with the pace of the Company's document production and, more generally, with the level of the Company's cooperation. Malis then issued several rounds of subpoenas that addressed different subjects relating to document production. From June through September 2006, K&E made weekly productions to the government according to a pre-arranged protocol, and attorneys from K&E and K&L Gates spoke periodically regarding the pace of the production.

GG. Covington & Burling LLP Takes Over For K&E

In late September 2006, Malis requested interviews of Urgenson and Harris, signaling a new and even more aggressive phase of the investigation. In the wake of the broader privilege waiver demanded by the government, DOJ was now seeking testimony from the Company's own lawyers regarding the legal advice they had provided. The request created a conflict of interest for the K&E lawyers because they were now being asked to testify against their own client; this made their continued representation of the Company in dealings and negotiations with DOJ untenable.[181]

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[181] The Rules of Professional Responsibility generally prohibit a lawyer from serving as a witness and advocate in the same matter. *See, e.g.*, ABA Model Rules of Professional Responsibility, Rule 3.7. Although by their terms, many such rules apply specifically to trials, the rule is generally construed to apply more broadly. The lawyers involved in this matter recognized that DOJ's demand to interview Urgenson and Harris meant that they could not continue to deal with the government as advocates for the Company.

Due to this conflict, created by Malis's request, the Company retained Covington, which was already representing Aguirre individually, to represent it in connection with the DOJ investigation. *See* Minutes of Chiquita Board Meeting (Oct. 24, 2006). After Covington became counsel for the Company, K&E's role was limited to responding to subpoenas, gathering documents, and putting together production materials for the government.[182]

HH. Plea Negotiations

Shortly after Covington came on board, the Company and the government began to work in earnest toward a negotiated resolution to the investigation. Over a four month period, with the active involvement of Covington, K&L Gates, management, and the entire Board, Chiquita agreed to plead guilty.

1. The Board Authorizes the Company to Enter into Plea Negotiations

At a November 16, 2006 Board meeting, Eric H. Holder, who was lead counsel for Covington, gave a presentation on the DOJ investigation to the Board based on Covington's discussions with DOJ to date. Based on Holder's presentation, the Board authorized Covington "to continue its discussions with the Department of Justice." Minutes of Chiquita Board Meeting (Nov. 16, 2006). In explaining this authorization, Board members cited the risks and costs associated with a criminal trial as the primary reasons for seeking a disposition of the matter without going to trial.

For example, Jaime Serra recalled that, during Holder's presentation, he estimated that pursuing litigation could cost Chiquita as much as $180 million, including costs of litigation and the size of the potential fine that could be imposed if the case was lost. The Board also discussed the possible reputational damage to the Company of pleading guilty and the ways this could be mitigated. The Board asked Holder what a guilty plea by the Company would mean for individual directors, and he told them it would increase the probability of individual prosecution. The directors engaged in extensive discussions before arriving at the conclusion that the Company should pursue a plea agreement.

Following this meeting, the Company engaged in an extended period of intense negotiations with DOJ, including various offers and counter-offers regarding a plea agreement. The primary issues to be negotiated were: (i) the specific statute to which the Company would agree to plead guilty, (ii) the amount of the fine that would be assessed on the Company, and (iii) whether individual officers or directors would be

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182 Once Covington entered the case, the requests to interview Urgenson and Harris were put on hold for a period of several months while the Company negotiated a disposition with DOJ.

prosecuted. The Company considered (i) and (ii) to be the most critical issues – because either could result in such catastrophic damage to the Company that it could no longer continue as a viable enterprise.

There were two possible statutes that the Company could plead to under federal law. The first, 50 U.S.C. § 1705,[183] prohibits knowingly engaging in transactions with a specially designated global terrorist without obtaining a license from OFAC. The second, 18 U.S.C. § 2339B, prohibits providing material support to a foreign terrorist organization, a much more serious offense. Section 2339B carries with it the implication that the offender is "in bed" with the terrorist organization and supports the goals of that organization. As such, the Company was concerned that a plea under § 2339B could potentially cause devastating global public relations issues, and sought to plead under § 1705.

2. Initial Plea Offer and DOJ Response

On December 5, 2006, Holder sent an initial proposal to Malis. The key aspects of the Company's offer were (i) to plead guilty to two counts of violating § 1705, for the two payments made to the convivir in February and March 2003, (ii) the payment of a fine of $1 million, and (iii) the government would agree to "conclude its investigation into this matter in its entirety," including any investigation into individuals. *See* Letter from Eric Holder to Jonathan Malis (Dec. 5, 2006).

On December 18, 2006, DOJ responded with its first counter-offer. The key elements of DOJ's counter-offer were that the Company would (i) plead guilty to one count of conspiracy to violate § 2339B and one count of conspiracy to violate § 1705, and (ii) pay a $79 million fine. *See* E-mail from Jeffrey Maletta to the Board (Dec. 20, 2006). The Board and management unanimously considered the size of DOJ's proposed fine to be inappropriate, unrealistic, and unaffordable.

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183 At the time of the Company's guilty plea, as amended effective March 9, 2006, § 1705 stated: "**(a)** A civil penalty of not to exceed $10,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this chapter. **(b)** Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both." Pub. L. No. 109-177, Title IV, § 402, 120 Stat. 243. On October 16, 2007, the statute was amended to, among other things, (i) increase the ceiling of the civil penalty to the greater of $250,000 or an amount twice that of the transaction that served as the basis of the violation, and (ii) increase the ceiling of the criminal penalty to $1,000,000. Pub. L. No. 110-96, § 2(a), 121 Stat. 1011.

3. Board Update

On January 5, 2007, the Board met telephonically to receive an update on the progress of Covington's negotiations with DOJ. *See* Minutes of Chiquita Board Meeting (Jan. 5, 2007). During the meeting, the Board discussed the potential prosecution of individuals. In the view of James Thompson, the Company's new General Counsel, which was shared by the Board, the prosecution of individuals was not appropriate and not in the best interests of the Company for a number of reasons, including that (i) the Company would have to pay the substantial legal fees of those individuals, (ii) the Company's reputation would be further damaged, (iii) any director or officer of the Company who was indicted would be unable to perform his or her duties for the Company, and (iv) the Company had just gone through a series of amendments to its credit facilities, which were only possible because of the Company's financial stability and reputation; individual prosecutions could put this access to credit in jeopardy. In addition, Aguirre was extremely concerned with the potential prosecution of Board members because he feared it could create a serious corporate governance problem for the Company if DOJ chose to pursue multiple directors. Based on detailed discussions, the Board authorized the Company to develop and transmit a counter-offer to DOJ.

4. Chiquita Counter-Offer

On January 17, 2007, Holder sent Malis a counter-offer. The key aspects of the Company's offer were to (i) plead guilty to three counts of § 1705 for payments made between October 2001 and April 2003, (ii) pay a $5 million fine, and (iii) agree to cooperate in investigations of individuals for improper conduct occurring prior to the disclosure to the government on April 24, 2003.[184] In addition, the letter also set forth a chronology of relevant contacts and communications between the Company and the government after the April 24, 2003 meeting to address DOJ's concerns about post-disclosure payments and to make the argument that prosecution based on those

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[184] Specifically with respect to cooperation, the letter states:

> Chiquita understands and appreciates the government's policy that corporate plea agreements not be used to shield culpable individuals from criminal liability. Nevertheless, the Company feels strongly that, for the reasons set forth above and in the attached appendix, no liability should attach for payments made following the Company's voluntary disclosure – either to Chiquita or to those officers, directors, or employees involved solely in the continuation of the payments. If, however, the government has reason to believe that individuals appropriately bear responsibility for pre-disclosure conduct or for improper conduct during the course of the government's investigation, Chiquita can agree to the government's request that it cooperate in further the investigation of those individuals. In such circumstances, we would seek additional information concerning the nature and scope of any contemplated cooperation.

payments was inappropriate. *See* Letter from Eric Holder to Jonathan Malis (Jan. 17, 2007).

5. January 22, 2007 Meeting with DOJ

The Company and DOJ met on January 27, 2007 to negotiate in person. At this meeting, which was attended by, among others, Holder, Aguirre, and Thompson, DOJ made clear that its focus was on the post-designation payments, and shared with the Company a draft of its indictment. The draft indictment identified ten individual co-conspirators by job title and letter designation. According to Aguirre and Thompson, the government was "very aggressive" at this meeting and said that it would not accept a plea from the Company without an agreement to cooperate in its continuing investigations of the individuals. In addition, the government asked for additional information regarding (i) "remedial actions" (punishments) taken against Chiquita employees involved in the payments, (ii) the Company's financial condition, and (iii) a description of the Company's compliance programs instituted after the discovery of the AUC's FTO designation.

6. January 26, 2007 Board Meeting – Hills Recuses Himself

Four days later, at a January 26, 2007 Board meeting, Hills voluntarily recused himself from all matters related to Colombia and from his role as Chair of the Audit Committee on these issues. *See* Minutes of Chiquita Board Meeting (Jan. 26, 2007). The Board believed that this was the appropriate course of action, given the growing tension between DOJ's prosecutorial interest in Hills – he was one of the ten individual "conspirators" identified by letter and job title in the draft indictment – and his responsibilities as Chair of the Audit Committee. The Board named Morten Arntzen acting Chair of the Audit Committee with respect to all matters relating to Colombia. Thereafter, Arntzen took the lead in dealing with the plea negotiations on behalf of the Audit Committee.

7. Continuing Negotiations with DOJ

The Company continued to engage in detailed and intense negotiations during the first two weeks of February. At a February 2, 2007 Board meeting, the Board authorized and directed the Company to make another plea offer to DOJ, which authorized its counsel to offer to pay a financial penalty not to exceed $12.5 million. *See* Minutes of Chiquita Board Meeting (Feb. 2, 2007). Four days later, on February 6, Chiquita sent a letter containing a revised plea proposal to DOJ and attached a financial analysis prepared by Jeffrey Zalla, the Company's Chief Financial Officer, which

supported the Company's claims concerning its limited ability to pay a fine.[185] The key aspects of the offer were for the Company to (i) plead to one count of § 1705 for all payments from 2001 through 2004, (ii) pay a $12.5 million fine, and (iii) cooperate in the government's ongoing investigation of the case. *See* Letter from Eric Holder to Jonathan Malis (Feb. 6, 2007) ("Chiquita would agree to cooperate in the government's investigation of this case"). Thus, at this point, Chiquita had completely abandoned its efforts to prevent the prosecution of individuals through the Company's plea.

The government's response, faxed to Covington lawyers on the same date, February 6, noted that the government and Chiquita still remained "far apart" on the amount of the fine and the statute to which the Company would plead guilty, and attached a proposed plea agreement and draft criminal information. The key aspects of the government's counter-offer were that the Company would (i) plead to one count of conspiracy to violate § 2339B and one count of conspiracy to violate § 1705, and (ii) pay a $70 million fine. *See* Letter from Jonathan Malis to Eric Holder (Feb. 6, 2007). The draft information was worded to suggest that the government had no knowledge between April 2003 and January 2004 that the payments were continuing.

On February 7, Holder, Aguirre, Thompson, and Zalla met with Malis and other DOJ representatives for approximately four hours. During the meeting, Zalla reviewed the Company's finances with DOJ in response to the proposed $70 million fine. The discussion was heated at times, with the Company's representatives arguing that they did not have the flexibility to accede to the conditions the government was demanding, and that if the government did not make additional concessions, the Company would have no choice but to take the case to trial. As Aguirre advised the Board via e-mail later that day, the Company "played hardball" on the amount of the fine and "threatened several times that we are prepared to go to trial." E-mail from Fernando Aguirre to the Chiquita Board (Feb. 7, 2007).

On February 8, the Board met telephonically to discuss DOJ's February 6 counterproposal. The Board authorized Zalla to conduct further financial analysis to determine if an increased settlement offer was possible. *See* Minutes of Chiquita Board Meeting (Feb. 8, 2007).

8. The Parties Reach an Agreement

At a Board meeting held on February 15, Zalla provided the analyses requested by the Board regarding the Company's ability to pay a fine greater than $12.5 million. *See* Minutes of Chiquita Board Meeting (Feb. 15, 2007). After reviewing Zalla's findings,

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185 Zalla was asked by Aguirre to prepare two analyses to present to DOJ, including (i) a response to an analysis prepared by DOJ's expert relating to the profits Chiquita allegedly earned from its Colombian operations, and (ii) the impact of various fines on the Company's financial position.

the Board approved a plea offer consisting of (i) a plea to one count of a violation of § 1705, (ii) a maximum $25 million fine, and (iii) continued cooperation in any ongoing investigation. *See* Minutes of Chiquita Board Meeting (Feb. 15, 2007).

The following day, Holder sent a letter to Jeffrey Taylor, the United States Attorney for the District of Columbia, containing the revised offer. The letter raised several issues with the draft criminal information that had been sent on February 6, including that it contained misleading or inaccurate facts, and identified individuals as co-conspirators. The Company also challenged the fairness and appropriateness of the proposed charges and proposed financial penalty and argued that the Company's voluntary disclosure to the government and its extensive cooperation should count more heavily in its favor. Consistent with the authorization granted at the February 15 Board meeting, the Company made a counter-offer, the key aspects of which were that the Company would (i) plead to one count of § 1705 for all payments from 2001 through 2004, and (ii) pay a $25 million fine. *See* Letter from Eric Holder to Jeffrey Taylor (Feb. 16, 2007).

A significant breakthrough in the negotiations occurred four days later. In a letter dated February 20, 2007, Malis, while noting his disagreement with Chiquita's characterization of its cooperation, agreed to the $25 million fine. While there were remaining issues to be negotiated – the statute to which the Company would plead guilty and the factual allegations contained in the charging document – this was the first major concession made by the government. *See* Letter from Jonathan Malis to Eric Holder (Feb. 20, 2007). On Feb. 22, 2007, the Company publicly disclosed in an 8-K filing that it had reserved $25 million for the purpose of paying a criminal fine. *See* Chiquita Brands Int'l, Inc., Current Report (Form 8-K) (Feb. 22, 2007).

Throughout the remainder of February and the beginning of March, the Company and the government continued to exchange proposals, focusing on the language to be contained in the criminal information. The Company fought to keep "collateral issues," such as issues relating to the Company's books and records, out of the information and to prevent the government from identifying individuals by name and position. These were issues of enormous interest and importance to the Board, and there was an extensive exchange of views between Aguirre and the other members of the Board, both by e-mail and conversations – as there had been throughout the plea negotiations – about the remaining issues. *See* Letter from Eric Holder to Jonathan Malis (Feb. 23, 2007).

At a Board meeting on March 9, Holder updated the Board on the Company's discussions with DOJ. Holder reviewed a proposed offer letter he had prepared, which outlined the terms upon which the Company would accept a plea. Those terms included (i) pleading guilty to one count of violating § 1705, and (ii) paying a $25 million fine. The letter also requested that the government make two modifications to

the criminal information and factual proffer: (i) collapse the descriptions of "relevant persons" section, which described each individual's position at the Company, into a single paragraph with a general description of the individuals as "senior executives or employees of Chiquita," and (ii) eliminate additional identifying information regarding Individual B (Hills). *See* Minutes of Chiquita Board Meeting (Mar. 9, 2007); Letter from Eric Holder to Jonathan Malis (Mar. 9, 2007).

The Board members asked a number of questions and had extended discussions about the elements of the plea and the appropriate factors for the Board to consider, including the Board's duties of care and loyalty. At the end of the meeting, the Board directed counsel to offer DOJ a settlement with the terms set forth in the letter. *See* Minutes of Chiquita Board Meeting (Mar. 3, 2007). The same day, DOJ rejected the Company's two requests regarding the identifying information, but otherwise accepted the terms of the Company's offer.

Two days later, on March 11, the Board resolved to enter into the plea agreement with DOJ. The directors engaged in a lengthy discussion regarding the potential ramifications of the proposed agreement for the Company and its stakeholders, as well as available alternatives and their potential ramifications for the Company, but in the end they were satisfied that this was the best course for the Company. *See* Minutes of Chiquita Board Meeting (Mar. 11, 2007).

The Board members who participated in these lengthy, important, and sometimes contentious discussions believed that the Board and management were searching for results that were in the best interests of the Company. That is what the SLC was told repeatedly in its interviews of the officers and directors who participated in this process. Although many directors were concerned that entering into a plea agreement without any resolution on whether charges would be brought against individuals was risky, the Board decided the Company's interests were best served by a settlement that resolved the case against the Company, even if it left open the possibility that individuals would be prosecuted.

All directors were aware, and in fact had been explicitly told, that the plea agreement was conditioned on the Company's continuing cooperation with the DOJ investigation, which they understood to mean that some directors might be required to testify against other directors and former officers of the Company, and that some directors might ultimately be charged. The directors understood that continued cooperation would also entail providing DOJ with documents, witnesses, and other materials it might request to assist DOJ in its continuing investigation of individuals.

On March 17, 2007, four months after the process began and after more than two months of serious negotiations, the Company signed a plea agreement with the government and entered its guilty plea in the U.S. District Court for the District of

Columbia in Washington, D.C. The Company entered a plea of guilty to one count of a violation of § 1705 for payments made from September 2001 through January 2004, agreed to pay a $25 million fine, paid over five years, and agreed to be subject to corporate probation for a period of five years. In addition, the Company agreed to cooperate in the continuing investigation of individual Chiquita officers and directors. The Court provisionally accepted Chiquita's plea the same day, pending the conclusion of the government's investigation of the individuals. *See* Plea Agreement, U.S. v. Chiquita Brands Int'l, Inc., No. 07-055 (Mar. 19, 2007) (Chiquita "agrees to cooperate fully, completely and truthfully with all investigators and attorneys of the government, by truthfully providing all information in your client's possession relating directly or indirectly to all criminal activity and related matters which concern the subject matter of this investigation").

9. Continued Investigation of Individuals

Subsequent to the plea being entered, DOJ continued its investigation of individuals. Among the investigative steps the government took during this period was obtaining the grand jury testimony of Larry Urgenson and requesting additional documents from the company. *See* Letter from Laurence Urgenson to Jonathan Malis (April 19, 2007). The government interviewed Urgenson on six separate occasions prior to his testimony. Urgenson then testified in the grand jury for over four hours. During that time, DOJ requested and received individual memos in support of non-prosecution from five then-current and former officers and directors, which sought to persuade DOJ not to pursue criminal charges against them in connection with the payments to the AUC. In early September, DOJ notified counsel for the individuals that their clients would not be prosecuted. *See* Transcript of Sentencing, U.S. v. Chiquita Brands Int'l, Inc., No. 07-055 (2007).

The Company was sentenced on September 17, 2007, according to the terms set forth in the plea agreement. *See id.*

II. <u>Compensation & Severance</u>

The Amended Complaint alleges that the individual defendants made wrongful and excessive compensation decisions that rewarded officers and directors who had been involved in unlawful activity relating to the payments in Colombia. *See* Am. Compl. ¶ 119. The following section details the severance and compensation decisions taken with respect to senior management and the directors in the period following the Company's discovery of the FTO designation in February 2003.

1. Freidheim's Retirement

Cyrus Freidheim served as CEO from the time the Company emerged from bankruptcy in March 2002 until Fernando Aguirre joined the Company as CEO in mid-January 2004. Freidheim assumed the CEO position on an interim basis after the Board decided not to retain Steven Warshaw. The Board ultimately decided to hire a CEO with substantial operational experience in the food or consumer goods industries.

On March 11, 2003, the Compensation Committee approved a compensation package for Freidheim as interim CEO, which consisted of the following: (i) annual base salary of $700,000 and an increased target bonus opportunity from 170% to 200% of annual salary (under a program that was previously approved by the Compensation Committee);[186] (ii) 30,000 shares of restricted stock and stock options for 150,000 shares; and (iii) continued eligibility for awards of restricted stock under the Company's Long Term Incentive Program ("LTIP"). *See* Minutes of Chiquita Compensation Comm. Meeting (Mar. 11, 2003). This arrangement was memorialized in a letter agreement, dated July 23, 2003, which was signed by Jeffrey Benjamin, then-Chair of the Compensation Committee. *See* Letter from Cyrus Freidheim to Jeffrey Benjamin (July 23, 2003).

Pursuant to the letter agreement, Freidheim was to be paid normal director's fees as non-executive chairman after the election of a new CEO. The arrangement also provided that any stock options and restricted stock grants would vest if Freidheim were to leave the Board at its request, for health reasons, or after January 1, 2004 at the government's request[187] and, should he leave under any of those circumstances, he would forfeit eligibility for unearned LTIP restricted stock awards. *See id*.

In December 2003, Michael Kesner, a consultant from Deloitte Touche Tohmatsu ("Deloitte"), who began advising the Compensation Committee earlier that year, reviewed the terms of Freidheim's compensation in connection with providing recommendations to the Board regarding Aguirre's employment agreement. According to Kesner, Freidheim's compensation was weighted in favor of cash compensation (base salary and bonus) rather than equity compensation due to his age and the fact that he was expected to hold the CEO position for only a short time. According to Kesner, both

186 A target bonus is commonly tied to the attainment of pre-determined performance goals by the Company and, under Chiquita's plan, is calculated by multiplying each senior executive's annual base salary by a factor set by the Compensation Committee.

187 This referred to the possibility that during the DOJ investigation, DOJ might make it clear that Freidheim needed to step aside. At no time during the DOJ investigation did the government request that Freidheim do so.

of these factors made long-term incentive compensation less preferable for Freidheim, despite the fact that this type of compensation typically accounts for the bulk of public company CEO pay packages.

When he retired as Chairman in May 2004, Freidheim received only the previously granted stock options and restricted stock that were due to vest upon his retirement in accordance with the July 23, 2003 agreement. *See* Letter from Cyrus Freidheim to Jeffrey Benjamin (July 23, 2003); Minutes of Chiquita Board Meeting (Mar. 30, 2004).

2. Riley's Severance

Jim Riley served as CFO from January 2001 to August 2004, when he was replaced by Jay Braukman. Freidheim had told Riley that Aguirre planned to bring in a new CFO once he assumed the CEO position. In July 2004, Riley approached Aguirre to discuss his long-term plans, and they made a mutual decision that Riley should leave the Company.

In anticipation of Riley's departure, the Compensation Committee proposed and discussed certain severance arrangements for Riley at its February 9 and March 30, 2004 meetings.[188] At its July 26 and 27, 2004 meeting, the Board discussed and approved certain additional enhancements to the proposed severance package for Riley, consisting of pro rata vesting of his LTIP restricted stock award and a two-year life insurance policy. *See* Minutes of Chiquita Board Meeting (July 26–27, 2004). The directors recalled in general that this award was standard and appropriate. Although he did not consult on Riley's award, upon reviewing the terms at a later date, Kesner found them to be appropriate and not "excessively generous."

3. Salary Increases for Kistinger, Olson, and Zalla

At a February 16, 2005 Compensation Committee meeting, Aguirre recommended annual salary increases for Kistinger ($25,000), Olson ($15,000), and Zalla ($10,000), among others – his direct reports – which the Committee approved. *See* Minutes of Chiquita Compensation Comm. Meeting (Feb. 16, 2005). The directors interviewed by the SLC viewed these decisions as reasonable based on both market compensation rates at Chiquita's peer companies and advice provided by Kesner. At its meeting on July 9, 2007, which was attended by Kesner of Deloitte, the Compensation Committee approved a salary increase in the amount of $30,000 for Jeffrey Zalla. *See* Minutes of Chiquita Compensation Comm. Meeting (July 9, 2007).

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188 In or around mid-2003, the Compensation Committee began to be referred to as the Compensation and Organization Development Committee. For purposes of clarity, this Report will refer to the committee as the Compensation Committee throughout.

4. Braukman's Severance

Jay Braukman replaced Riley as CFO, and served in that position from August 2004 to June 2005. In or around May 2005, Aguirre informed Braukman that he was being terminated from the Company because of his performance and because several shareholders had complained about him to Aguirre. In structuring the terms of Braukman's separation, Aguirre proposed that he would remain at the Company for three additional months – from June until August 2005 – in order to allow him to qualify for severance under the Company's policy.[189] In July 2005, the Compensation Committee ultimately approved an award of a cash payment equal to nine months of salary (one year's salary reduced by three months to reflect Braukman's tenure as CFO), with no bonus. *See* Email from Fernando Aguirre to Chiquita Compensation Comm. (July 28, 2005). Braukman was granted a modest severance award in recognition of the disruption to Braukman's career caused by his brief tenure and his abrupt termination by Chiquita, as well as the fact that he had moved to Cincinnati to take the job.

5. Olson's Retirement

After eleven years as General Counsel, Robert Olson retired as of August 31, 2006. The evidence developed by the SLC shows that Olson retired as part of Aguirre's attempts to bring in new management and after questions were raised about Olson's performance in late 2005. Olson received an individually negotiated retirement agreement, approved by Aguirre after discussion with certain directors, under which he received: (i) a cash benefit of $622,500, (ii) a pro rata bonus of $138,333, (iii) twelve months of office space and services, and (iv) accelerated vesting of stock options, among other things. *See* Retirement Agreement between Chiquita Brands Int'l, Inc. and Robert Olson (Aug. 3, 2006). Although Olson's retirement agreement was not granted pursuant to any existing Company plan, it largely mirrors what the Company offered to departing (rather than retiring) executives of his level of seniority under the Executive Officer Severance Pay Plan (the "Plan").[190] Moreover, because Olson was over age 55

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[189] Although he did not advise the Compensation Committee on Braukman's severance, Kesner informed the SLC that the Company's treatment of Braukman is typical of the practices at many of the companies for which he has served as a compensation consultant. Kesner explained that when it becomes apparent almost immediately that a new senior officer is not a good fit, companies tend to recognize that they have made a hiring mistake, and generally avoid penalizing the employee for that error. Therefore, according to Kesner, even if the employee has served for less than one year, companies commonly grant a standard severance award or fair severance compensation, in recognition of the impact of the mistake on that person's career and as a means of creating a "financial bridge" to that individual's next position.

[190] The Plan was largely drafted by Kesner and Olson in 2005 and became effective as of March 27, 2006. *See* Chiquita Brands Int'l, Inc., Annual Report (Form 10-K), Exhibit 10.37 (Mar. 8, 2007). Kesner advised the Company to adopt a severance plan in order to avoid long and distracting negotiations with individuals over severance awards. According to Kesner, such plans are standard practice among companies in Chiquita's peer group. The Plan, in relevant part, applies

and had served the Company for over ten years, he was eligible to receive accelerated vesting of certain equity awards upon departure.[191]

Directors and senior management recalled discussions about the fairness of Olson's retirement package and the desire to ensure his continued cooperation with the ongoing DOJ investigation, but none believed that the benefits he received had been "sweetened" in exchange for his cooperation. Benjamin noted that, in his experience, the market severance package for someone at Olson's level ranges from one to two years' salary, so Olson's retirement pay – which was one year's salary – was believed to be at the lower end of this range. Stanbrook noted that the Board wanted to treat Olson fairly and in a manner that would allow the Company to benefit from his institutional knowledge and ensure his ongoing cooperation with the DOJ investigation, and that this agreement was designed to do both while not deviating from standard practice at the Company. Fisher said that he believed Olson's award was standard and fair; the Company was wary of granting any severance that went over and above its established practices because doing so would "set a precedent."

6. Aguirre's Salary Increases

As CEO, Fernando Aguirre was granted certain enhancements in his compensation between 2004 and 2008. At its meeting on February 16, 2005, the Compensation Committee approved a $50,000 increase in his salary and a cash bonus of $1,506,960 (which was a reduction of the bonus to which he was otherwise entitled under the annual bonus plan and his employment agreement). *See* Minutes of Chiquita Compensation Comm. Meeting (Feb. 16, 2005).

One year later, at its meeting on February 15, 2006, the Compensation Committee approved an increase in Aguirre's annual salary from $750,000 to $800,000 and a cash bonus of $1,857,275 (which likewise was a reduction of the bonus to which he was otherwise entitled under the annual bonus plan and his employment agreement). *See* Minutes of Chiquita Compensation Comm. Meeting (Feb. 15, 2006).

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to senior executive officers who separate from the Company for reasons other than "for cause" termination or retirement. Under the Plan, participants receive the following severance award: (i) cash benefit equal to the sum of the participant's current annual base salary and annual bonus target, (ii) cash benefit equal to the participant's pro-rata cash bonus for the year of termination, based on the annual bonus target, (iii) continuation of health benefits under normal COBRA rules for 12 months, (iv) accelerated vesting of restricted shares awarded under the Company's LTIP, (v) one additional year of vesting for the purposes of the Company employee stock options and non-LTIP restricted stock, and (vi) outplacement services, provided that the participant begins using those services within 30 days of his separation from service.

[191] Although he did not consult on Olson's agreement, in reviewing it at the SLC's request, Kesner did not find any of the terms to be excessive or inappropriate, including the accelerated vesting provision, which he described as standard practice at many companies.

On or around April 15, 2007, the Compensation Committee discussed and approved via e-mail an increase in Aguirre's compensation whereby (i) his base salary was increased by 13% to $900,000, (ii) he was given a target bonus of 130% of that salary, (iii) he received a restricted stock award of shares worth $1.2 million, and (iv) he received an additional restricted stock grant with a targeted value of $1.6 million. *See* E-mail from Steven Stanbrook to James Thompson, et al. (Apr. 13, 2007); *see also* Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 15, 2008). According to Stanbrook, then-Chair of the Compensation Committee, the increases were granted with the goal of positioning the Company in the 75th percentile of its peer companies in CEO salary, while providing incentives to Aguirre. Stanbrook also believed that Aguirre's compensation reflected the fact that Aguirre had not played any role in the Colombia situation and the resulting DOJ investigation – the seriousness of which he was not fully aware prior to joining the Company – was a significant distraction for him in running the Company. In addition, the increase in compensation was viewed as reasonable because a substantial portion of Aguirre's compensation package consisted of equity awards and the Company's stock price was not particularly strong at the time. See E-mail from Steven Stanbrook to Chiquita Compensation Comm. (Jan. 30, 2007).

Finally, at its February 13, 2008 meeting, the Compensation Committee deferred discussion of Aguirre's compensation, but, according to the meeting minutes, later (on an unspecified date) approved an increase in his annual base salary to $950,000 and a target bonus in the amount of $1,235,000. *See* Minutes of Chiquita Compensation Comm. Meeting (Feb. 13, 2008).

According to Kesner, who advised the Compensation Committee with regard to Aguirre's compensation during this period, the Board handled Aguirre's requests to revisit his salary appropriately, and took additional steps to balance the need to incentivize and retain Aguirre with the need to keep executive compensation within range of the median of Chiquita's peer group, with the goal that Aguirre's compensation not differ materially from standard practice at similarly sized and situated companies.

7. Director Compensation Increases

In addition, during this period, there were increases in directors' compensation. At a regularly scheduled Board meeting on February 15, 2007, the Board adopted a resolution in favor of increasing annual director fees to $80,000 in cash and $80,000 in Company stock. The Board also approved an additional $20,000 for the Chairs of the Audit and Compensation Committees, and an additional $15,000 for the Chair of the Nominating and Governance Committee. Newly elected or appointed directors were also granted a restricted stock award with a fair market value of $160,000. *See* Minutes of Chiquita Board Meeting (Feb. 15, 2007).

This meeting marked the first time that the Company raised its annual fees for directors since 2002.[192] Prior to this increase, director compensation was $50,000 annually, payable half in stock and half in cash, plus a ten-year option to purchase 50,000 shares of Company stock. These increases were made in consultation with Kesner, who informed the Nominating and Governance Committee that the Company's director fees were well below market, after reviewing the Company's peer group, general industry group, and other data.

Several directors said that they became aware that the gap in director compensation could no longer be ignored, as it threatened the Company's ability to attract and retain directors in an already difficult market. The directors who attended the February 15, 2007 meeting recalled a lively discussion of the raise, but did not recall that anyone questioned the appropriateness of the increase or its timing (given the forthcoming guilty plea). Kesner said that although the total compensation of $160,000 per year in combined stock and cash did no more than raise director compensation to market range, he advised the Board that it might want to consider increasing its fees in two equal steps over two years. However, the Board decided to raise its fees at one time.

On the whole, the Board believed that the increases were appropriate and necessary in light of the serious challenges facing the Company, the amount of time and attention the Board had spent on the DOJ investigation, the Company's relatively recent emergence from bankruptcy, and the Company's need to remain competitive with its peer group. Indeed, this decision came immediately after the resignation of director Jeffrey Benjamin, who left the Board on February 6, 2007 because of complications to his other gaming-related business activities caused by the DOJ investigation.

8. Kistinger's Severance

In December of 2007, after approximately twenty-eight years of service to the Company, Robert Kistinger was terminated from employment in connection with an effort led by Aguirre to reduce the Company's overhead costs that included eliminating the position of COO of Chiquita Fresh Group, which Kistinger held. On October 25, 2007, the Board approved a compensation and severance package for Kistinger (whose separation from the Company was to become effective as of December 31, 2007), "consistent with the terms of the Company's Executive Officer Severance Pay Plan." *See* Minutes of Chiquita Board Meeting (Oct. 25, 2007).

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192 *See* Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 15, 2008); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 23, 2007); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 19, 2006); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 18, 2005); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 20, 2004); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 22, 2003).

In addition to an award consistent with the terms set forth in the Plan (including a cash payment equal to one year's salary and a bonus) (*see supra* note 190), Kistinger received (i) the full balance of his employee deferred compensation account, (ii) reimbursement for $10,000 in legal fees, (iii) continued D&O liability insurance coverage, (iv) accelerated vesting of all his shares of unvested restricted stock, (v) three years to exercise all stock options, and (vi) an additional two months to determine whether to use Company provided outplacement services. Like Olson, Kistinger qualified for and received acceleration of certain equity awards due to his age and tenure at the Company.

Several Board members said that Kistinger was extremely dissatisfied with his severance, which was less than what he had requested, but that they viewed it as appropriate under the circumstances. *See* Minutes of Chiquita Board Meeting (Oct. 25, 2007). Kistinger told the SLC that he attempted to negotiate a larger severance package because of his many years of service to the Company and because he ran the most profitable aspect of its business. In the end, Kistinger's severance award was consistent with the terms of the Plan, with the exception of the minor deviations described above.

JJ. <u>Remedial Measures</u>

As part of its investigation, the SLC, under the direction of Audit Committee Chair and SLC member Barker, also examined what, if any, remedial measures and enhancements to the Company's compliance programs the Company implemented in connection with the events described in this report. The SLC found that, following the discovery of the AUC's FTO designation and the DOJ investigation, the Company appropriately focused on the adequacy of its compliance measures. It developed various enhancements to its compliance program that are designed to minimize to the greatest extent possible the chances that the Company will experience a problem of this type ever again. This review is continuing and the SLC will make recommendations to management as to whether any further enhancements are appropriate.

The SLC has summarized below the major enhancements to Chiquita's compliance program that have been implemented over the past several years:

First, in February 2005, at the direction of Chiquita's Audit Committee, the Company created the position of Chief Compliance Officer ("CCO"). The CCO reports directly to the Chair of the Audit Committee and oversees the Company's Compliance and Ethics Program. The Program includes, (i) establishing institutional compliance policies and procedures designed to prevent illegal and unethical conduct, (ii) communicating compliance policies and procedures throughout the Company, (iii)

training for Company employees,[193] and (iv) monitoring, auditing, and enforcing compliance with policies and procedures. In particular, over the last several years, the Company has implemented a broad variety of new or updated mandatory compliance policies, including an International Trade Compliance Policy, a revised FCPA Compliance Manual, an updated Antitrust Policy, and an updated Code of Conduct. The CCO attends all Audit Committee meetings and reports no less than once per year on the status and effectiveness of the Company's compliance programs.

Second, in the fourth quarter of 2005, the Company implemented a comprehensive OFAC screening program. Under this program, the Company's Controller group is responsible for screening all third party suppliers and customers against all OFAC lists of restricted persons and entities, and several additional lists of persons and organizations published by, among other government agencies, the Department of Homeland Security.[194] For this screening program, the Company employs the JPMorgan Chase Vastera software tool, which electronically screens all vendor/customer records and identifies potential matches with persons or organizations that appear on the OFAC and other lists. No non-cash payments can be made by the Company or any of its personnel to a third party until the third party is cleared through this system. If Vastera is unable to resolve a potential match,[195] the Company conducts an investigation to determine whether there is any connection between the third party and the prohibited entity. If there is any doubt as to the third-party's identity, the Company will not allow the payment to be made. All consolidated subsidiaries globally are required to comply with this screening policy, as well as non-controlled affiliates in potentially higher risk geographic areas.

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193 In 2008, in addition to traditional in-person training, Chiquita introduced new online training programs covering FCPA compliance, antitrust, global competition law, and Chiquita's revised Code of Conduct.

194 The Company has reviewed the specific lists it includes in this screening program with OFAC counsel at two separate law firms to ensure they are appropriate. The lists are automatically updated when there is a change made.

195 Vastera identifies both "hard hits" and "soft hits." Where there is a "soft hit" there is no match to a name, but there may be a match to some other identifying information such as an address, birth date, or country. Where there is a "hard hit" there is a match to a name, plus a match to one or more other identifiers.

Third, in 2004, the Company established an external anonymous reporting system (the "Chiquita Helpline") that allows employees to anonymously report potential ethical, legal and compliance issues. Each employee communication is promptly reviewed according to standard procedures, and logged into a central record keeping system, classified by type, and the investigative facts and disposition are recorded. A summary report of all Chiquita Helpline matters is presented to the Audit Committee for review and discussion on a monthly basis.

V. APPLICABLE LAW AND ANALYSIS OF THE CLAIMS

The Amended Complaint alleges, in a single cause of action, that each of the defendants breached their fiduciary duties owed to the Company and, as a result, caused the Company to wrongfully waste corporate assets. *See* Am. Compl. ¶¶ 157–165; 166-169. However, the Amended Complaint contains allegations spanning a nearly 20-year period and includes numerous different types of allegedly wrongful conduct. Thus, for purposes of its investigation and analysis, the SLC divided the plaintiffs' single cause of action into the following distinct claims:[196]

(i) breach of fiduciary duty by causing Chiquita to make payments to the FARC and the ELN from approximately 1989 to 1997, or by failing to be aware of such payments;

(ii) breach of fiduciary duty by causing Chiquita to make payments to the AUC, from approximately 1997 through February 2004, or failing to be aware of those payments;

(iii) breach of fiduciary duty by conducting an alleged "fire sale" of Chiquita's Colombian operations (Banadex), in June 2004 as a result of the pending Department of Justice investigation;

(iv) breach of fiduciary duty and waste of corporate assets by causing Chiquita to enter a guilty plea and pay a $25 million fine in March 2007 in order to protect individual officers and directors from prosecution;

(v) breach of fiduciary duty by causing Chiquita to acquiring Atlanta AG, a German fruit distribution business, in 2003, which allegedly turned out to be an unprofitable transaction, to offset the financial effect of a potential sale of Banadex;

(vi) breach of fiduciary duty by causing Chiquita to make false or misleading statements in its public filings regarding (i) the nature of the payments to the AUC and (ii) Chiquita's efforts to comply with the law in general, or allowing such false statements to be made; and

(vii) breach of fiduciary duty and waste of corporate assets by paying severance to departing executives who allegedly engaged in wrongdoing, failing to pursue claims against executives who allegedly engaged in wrongdoing, and allowing executives who allegedly engaged in

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[196] Counsel for the SLC reviewed these categories with Lead Counsel at a meeting held on October 31, 2008, and Lead Counsel raised no objection at that time or at any time since.

wrongdoing to remain at the Company and to receive excessive compensation.

In addition, while the Amended Complaint fails to apply any particular cause of action to any particular defendant, the SLC has considered the conduct of each defendant individually in making its assessment of each claim. In the section that follows, the SLC discusses and analyzes applicable law to each claim.

A. Summary of Relevant Legal Standards[197]

The SLC has analyzed the relevant legal standards that apply to the actions taken by directors and officers of a New Jersey corporation. These standards governed the SLC's review of the Amended Complaint and the relevant facts developed during the course of its investigation.

1. The Duty of Care

New Jersey law requires that directors and officers "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent people would exercise under similar circumstances in like positions." N.J.S.A. § 14A:6-14. Delaware law, which is substantially more developed, imposes a similar requirement. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005) (directors and officers owe a duty of care to the corporation that requires officers and directors to "'use that amount of care which ordinarily careful and prudent men would use in similar circumstances,'" and "'consider all material information reasonably available in making business decisions'") (citation omitted); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them").

Business Judgment Rule. The business judgment rule arises from the fundamental principle that the business and affairs of a corporation are managed by or under the supervision of, its board of directors. *See In re PSE&G S'holder Litig.*, 801 A.2d 295, 306 (N.J. 2002). The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to directors. *See id.* ("One of the rule's purposes is to promote and protect the full and free exercise of the power of management given to the directors") (citation omitted); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).

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197 As noted above, Chiquita is incorporated in New Jersey, and thus New Jersey law governs the conduct of Chiquita's directors and officers. However, New Jersey courts generally consider the law of Delaware and New York in interpreting New Jersey corporate law.

Courts also apply the business judgment rule to decisions made by corporate officers. *See In re Classica Group*, 2006 WL 2818820, at *7 (Bankr. D.N.J. 2006) ("The business judgment rule applies equally to corporate directors and officers") (applying New Jersey law); *Maul v. Kirkman*, 637 A.2d 928, 937 (N.J. Super. Ct. App. Div. 1994) ("bad judgment, without bad faith, does not ordinarily make officers individually liable"); *Gantler v. Stephens,* C.A. No. 2392 (Del. Jan. 27, 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold").

The rule itself creates "a presumption . . . that disinterested directors act 'on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest.'" *In re PSE&G S'holder Litig.,* 718 A.2d 254, 256 (N.J. Super. Ct. Ch. Div. 1998), *aff'd,* 801 A.2d 295 (N.J. 2002); *see also Temiz v. Temiz*, 2006 WL 163503, at *12 (N.J. Super. Ct. Ch. Div. Jan. 23, 2006) (the business judgment rule "is a rebuttable presumption that good faith decisions based on reasonable business knowledge by directors and officers are not actionable"); *Aronson*, 473 A.2d at 812 (same). This presumption applies when there is no evidence of "fraud, self-dealing, or unconscionable conduct" on the part of the officers or directors. *Maul,* 637 A.2d at 937.

Thus, courts are typically precluded from second-guessing the decisions of corporate officers and directors. *See PSE&G,* 801 A.2d at 306 ("New Jersey courts have long accepted that a decision made by a board pertaining to the manner in which corporate affairs are to be conducted should not be tampered with by the judiciary so long as the decision is one within the power delegated to the directors and there is no showing of bad faith"); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) ("To employ a different rule – one that permitted an 'objective' evaluation of the decision – would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests"). Accordingly, "[w]here a director in fact exercises a good faith effort to be informed and to exercise appropriate judgment, he or she should be deemed to satisfy fully the duty of attention." *Caremark*, 698 A.2d at 968. Indeed, it is well-settled under New Jersey law that, "[B]ad judgment, without bad faith, does not ordinarily make officers individually liable." *Maul,* 637 A.2d at 937 (citation omitted).

In order to overcome the presumption created by the business judgment rule, it must be shown that there was fraud, illegality, a conflict of interest, or gross negligence. *See id*. ("the burden of proof shifts to the defendant . . . upon the showing of self-dealing or other disabling factor"); *Auerbach v. Bennett,* 47 N.Y.2d 619, 631 (N.Y. 1979) ("absent evidence of bad faith or fraud . . . the courts must and properly should respect [director] determinations"). Absent any of these conditions, the decision "will be upheld unless it cannot be 'attributed to any rational business purpose.'" *Disney*, 907 A.2d at 747

(citation omitted); *see also PSE&G*, 718 A.2d at 257 ("Unless they engage in conduct in which no reasonable owner would be likely to engage, the directors should not expect to be monetarily liable").

Gross Negligence. Typically, absent outright fraud, the actions of officers or directors will not subject them to liability for breach of the duty of care unless "gross negligence" is shown. *Classica Group*, 2006 WL 2818820, at *7 ("the business judgment rule is commonly referred to as requiring grossly negligent acts to trigger personal liability, such as directors who 'completely abdicate their duties and fail to exercise any judgment'"); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005) ("Director liability for breaching the duty of care 'is predicated upon concepts of gross negligence'") (internal citation omitted).

With respect to actions of corporate fiduciaries, gross negligence has been defined as "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Disney*, 907 A.2d at 750 (citation omitted); *see also Benihana*, 891 A.2d at 192. To show gross negligence, the facts must suggest a "wide disparity" between the decision-making process employed by the board, and a process that would be rational. *See Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003) ("If gross negligence means something other than negligence, pleading it successfully in a case like this requires the articulation of facts that suggest a *wide* disparity between the process the directors used to ensure the integrity of the company's financial statements and that which would have been rational") (emphasis in original). As a result, "duty of care violations are rarely found." *Disney*, 907 A.2d at 750.

2. The Duty of Loyalty and Good Faith

The duty of loyalty "mandates that the best interest of the corporation and its shareholders take [ ] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (citation omitted). To discharge the duty of loyalty, directors and officers must "not only affirmatively . . . protect the interests of the corporation committed to [their] charge, but also . . . refrain from doing anything that would work injury to the corporation, or . . . deprive it of profit or advantage which [their] skill and ability might properly bring to it . . . in the reasonable and lawful exercise of its powers." *Disney* 907 A.2d at 751 (citation omitted); *see also AYR Composition, Inc. v. Rosenberg*, 619 A.2d 592, 595 (N.J. Super. Ct. App. Div. 1993) ("This duty includes an obligation not to take action which would be adverse to the Corporation's interests").

a. Duty of Oversight

The duty of oversight has been categorized as a subset of the duty of loyalty. While there is no New Jersey case law discussing the issue, the law in Delaware has recently developed in this area and the SLC believes that it is more likely than not that, if confronted with the issue, New Jersey law would impose a duty of oversight similar to the duty that has been found by the Delaware courts to exist under Delaware law. As a result, the SLC has analyzed the claims in the Amended Complaint applying the approach to this issue articulated by the Delaware courts.[198]

To establish a failure of oversight, one must show "either (1) that the directors knew or (2) should have known that violations of law were occurring *and*, in either event, (3) that the directors took *no steps* in a good faith effort to prevent or remedy that situation, *and* (4) that such failure proximately resulted in the losses complained of." *Caremark*, 698 A.2d at 971 (emphasis added); *see also Saito v. McCall*, 2004 WL 3029876, at *6 (Del. Ch. Dec. 20, 2004).

This test can be satisfied by showing either that: (i) "the directors *utterly failed* to implement *any* reporting or information system or controls," or "having implemented such a system or controls, *consciously* failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention" (*Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("*Stone II*") (emphasis added)) or (ii) that the directors "had notice of serious misconduct and simply failed to investigate," *i.e.*, intentionally ignored "red flags" (*Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, at *5 (Del. Ch. Feb. 13, 2006) ("a *Caremark* plaintiff can plead that 'the directors were conscious of the fact that they were not doing their jobs,' and that they ignored 'red flags' indicating misconduct in defiance of their duties") (citations omitted).

The "fail[ure] to exercise oversight" and the "fail[ure] to investigate" claims are "closely related," but distinct. *Shaev*, 2006 WL 391931, at *5. For both claims, however, "imposition of liability requires a showing that the directors *knew* that they were not discharging their fiduciary obligations." *See Stone II*, 911 A.2d at 370 (emphasis added); *Guttman*, 823 A.2d at 506 (Del. Ch. 2003) (liability is premised on "a showing that the directors were conscious of the fact that they were not doing their jobs"); *Brehm v. Eisner*, 906 A.2d 27, 67 (Del. 2006) ("A failure to act in good faith may be shown . . . where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties").

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198 According to one commentator, under New Jersey law, "it is not clear whether a gross inattention to duty could be characterized not only as a breach of the duty of care but also as a breach of the duty of loyalty." 2-12 NJ Corporations and Other Business Entities § 12.08 (2007).

In either case, such conduct by a director constitutes a failure to discharge his/her fiduciary duties in good faith, and, therefore, violates the duty of loyalty (not the duty of care). *See Stone II*, 911 A.2d at 370 ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith"); *Guttman*, 823 A.2d at 505 (the "standard for liability for failures of oversight . . . requires a showing that the directors breached their duty of loyalty by failing to attend to their duties in good faith") (citation omitted). Indeed, a lack of good faith is a "necessary condition to liability" with respect to a failure to exercise adequate oversight and "a failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)." *Stone II*, 911 A.2d at 369 (citation omitted).

Accordingly, directors alleged to have violated their duty of oversight do not receive the protection of the business judgment rule, as there is no "business judgment" to which the courts can defer. *See, e.g.*, *Rattner v. Bidzos*, 2003 WL 22284323, at *8 (Del. Ch. Oct. 7, 2003); *Fagin v. Gilmartin*, 2007 WL 2176482 at *7 (N.J. Supr. Ct. Ch. Div. Jul. 19, 2007) ("It is well established, however, that mere inaction by the Board does not constitute a decision which is subject to business judgment analysis"). However, liability under this theory is extremely rare, and courts have noted that an oversight claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967; *see also Rattner*, 2003 WL 22284323, at *12 ("a claim for failure to exercise proper oversight is one of, if not the, most difficult theories upon which to prevail").

(i) *Duty to Monitor*

The duty of oversight does not require directors to possess detailed information about all operational aspects of a business. *See Caremark*, 698 A.2d at 971. Rather, directors must "attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards." *Id*. at 970. However, "only a *sustained or systematic failure* of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability." *Id*. at 971 (emphasis added); *see Stone II*, 911 A.2d at 369 (affirming the standard for oversight liability articulated in *Caremark*).

There is no formula prescribing the steps directors must take to ensure that a company has in place reasonable information and reporting systems. Delaware courts, however, have provided some guidance as to the types of controls that, if implemented,

satisfy the Board's duty of oversight. For example, a duly-constituted audit committee that meets regularly, and the retention of an independent audit firm, establish the types of reporting systems that a Board can implement to satisfy its duty of oversight. *See Shaev*, 2006 WL 391931, at *5 (a failure of oversight can be shown by demonstrating that a board "entirely lacked an audit committee or other important supervisory structures, or that a formally constituted audit committee failed to meet"); *Ash v. McCall*, 2000 WL 1370341, at *15 n.57 (Del. Ch. Sept. 15, 2000) ("the existence of an audit committee, together with [the] retention of Arthur Anderson as . . . outside auditor to conduct annual audits of the Company's financial reporting, is some evidence that a monitoring and compliance system was in place").

Whether the reporting systems actually worked is not the test. Indeed, in a recent decision, the Delaware Supreme Court explicitly rejected an attempt to "equate a bad outcome with bad faith" in the oversight context. *Stone II*, 911 A.2d at 373. In that case, certain employees of AmSouth Bancorp failed to file Suspicious Activity Reports ("SARs"), as required under federal law, in connection with a customer's establishment of custodial accounts that were then used by the customer in a criminal scheme. *Id*. at 365. AmSouth ultimately became the subject of a federal criminal investigation because of the failure of its employees to file SARs. *See id*. at 365-66.

To resolve the criminal investigation, AmSouth entered into a deferred prosecution agreement in which it admitted that "at least one" employee knowingly failed to file SARs in a timely manner, and agreed to pay a $50 million fine. *See id.* In addition, the Federal Reserve Board and Alabama Banking Department issued orders requiring AmSouth to, among other things, engage an independent consultant to review its compliance programs and make recommendations "for new policies and procedures to be implemented by the Bank." *Id*. at 366.

The plaintiffs brought a derivative claim against the AmSouth Board alleging solely that the directors "had utterly failed to implement any [sort of statutorily required monitoring,] reporting or information [] controls" that would have enabled them to learn of "problems requiring their attention." *Id.* at 370. The Delaware Supreme Court affirmed the Court of Chancery's dismissal for failure to make a demand on the AmSouth Board, as there were no particularized facts that "created reason to doubt whether the directors had acted in good faith in exercising their oversight responsibilities." *Id.* at 373. Based on findings made by AmSouth's independent consultant (which were incorporated into the complaint), the Supreme Court concluded that "the Board received and approved relevant policies and procedures, delegated to certain employees and departments the responsibility for filing SARs and monitoring compliance, and exercised oversight by relying on periodic reports from them." *Id.*

The Supreme Court added that "the directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both." *Id.; see also Shaev,* 2006 WL 391931, at *5 ("one thing that is emphatically not a *Caremark* claim is the bald allegation that directors bear liability where a concededly well-constituted oversight mechanism, having received no specific indications of misconduct, failed to discover fraud").

Thus, a claim that a board must have violated its duty of oversight simply because criminal conduct occurred lacks merit. *See Shaev,* 2006 WL 391931, at *5 (rejecting a claim that "only a board violating its fiduciary duties could possibly have remained ignorant" of alleged accounting improprieties); *Stone v. Ritter*, 2006 WL 302558, at *2 (Del. Ch. Jan. 26, 2006) ("*Stone I*"), *aff'd*, 911 A.2d 362 (Del. 2006) ("Neither party disputes that the lack of internal controls resulted in a huge fine – $50 million, alleged to be the largest ever of its kind. The fact of those losses, however, is not alone enough").

As the applicable law has been summarized, "[i]n the absence of red flags, good faith in the context of oversight must be measured by the directors' actions 'to assure a reasonable information and reporting system exists' and not by second-guessing after the occurrence of employee conduct that results in an unintended adverse outcome." *Stone II*, 911 A.2d at 373 (citation omitted).

(ii) *Duty to Investigate*

For a "failure to investigate" claim to succeed, there must be "specific red-or even yellow-flags" that put the directors on notice of potential misconduct. *Guttman,* 823 A.2d at 507. As the Delaware courts have observed, such flags "are only useful when they are either waved in one's face or displayed so that they are visible to the careful observer." *In re Citigroup Inc. S'holders Litig.,* 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003); *see also Guttman,* 823 A.2d at 507 ("the complaint does not plead a single fact suggesting specific red or even yellow flags were waved at the outside directors"); *Rattner,* 2003 WL 22284323, at *13 (same).

Thus, "absent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company's behalf." *Caremark*, 698 A.2d at 969 (citation omitted). Further, once a red flag is "waved," for the Board to be liable, the Board must *willfully* and *intentionally* ignore that flag. *See Stone I*, 2006 WL 302558, at *2.

For example, in the AmSouth case, described at length above, the Delaware Supreme Court defined "red flags" as "facts showing that the board *was aware* that

AmSouth's internal controls were inadequate, [and] that these inadequacies would result in illegal activity." *Stone II*, 911 A.2d at 370 (emphasis added). In that case, the Court of Chancery found that:

> Plaintiffs' complaint is devoid of the particularized allegations of fact needed to tie the defendants to any of the alleged wrongdoing. Plaintiffs fail to point to any facts either showing how the [criminal] scheme, or any other problems at AmSouth, waved a 'red flag' in the face of the board. Nor do plaintiffs point to facts suggesting a conscious decision to take no action in response to red flags. Without these well-pled allegations, there is no possibility the defendants faced a substantial likelihood of liability.

Stone I, 2006 WL 302558, at *2. Thus, in the absence of specific facts showing that a red flag was waved "in the face" of the directors, and evidence of a conscious decision to ignore those facts, directors will not be found liable for a breach of their duty of oversight. *Id.*

The District Court's decision in *In re Veeco Instruments Inc. Sec. Litig.*, 434 F. Supp. 2d 267, 277-78 (S.D.N.Y. 2006) provides an example of what constitutes a "red flag." In that case, an employee reported to management that Veeco had violated federal export laws. *Id.* The company then conducted an internal audit, and found several violations of law. *See id*. at 278. The initial report of the employee, and the results of the Company's audit, were reported to the board. Because Veeco derived seventy percent (70%) of its revenue from export sales, and a single violation of federal export laws could have led to the suspension of its export privileges, "the reported violations threatened to jeopardize the future viability of Veeco." *Id.* Seven months later, the same employee reported another set of export law violations.

The plaintiffs, while failing to plead specific facts regarding the Board's response to the first reported violation, claimed that, in light of the second reported infraction, "the Audit Committee permitted additional violations to occur, either by completely disregarding the first report, or by establishing procedures that were wholly inadequate and ineffective and that failed to protect the Company from potentially enormous liability." *Id.* In denying the Board's motion to dismiss, the Court held that "[t]his is not a case where the directors had no grounds for suspicion or were blamelessly unaware of the conduct leading to the corporate liability." *Id.* (quotations omitted). The Court added that "[t]his is precisely the type of case the Delaware Chancery Court was contemplating when it recently held, 'A claim that an audit committee or board had notice of serious misconduct and simply failed to investigate, for example, would survive a motion to dismiss, even if the committee or board was well constituted and otherwise functioning.'" *Id*. (citations omitted); *see also, e.g., In re Abbott Laboratories*

Deriv. Litig., 325 F.3d 795, 809 (7th Cir. 2003) (the plaintiffs sufficiently alleged the existence of "red flags" spanning a six-year period in the face of which the directors' knowing violation of law and failure to take remedial action constituted a "sustained and systematic failure . . . to exercise oversight").

With these standards in mind, the SLC evaluated the facts it learned through the course of its investigation. The SLC's analysis and conclusions are detailed below.

B. Breach of Duty in Connection with Payments to the FARC and the ELN From Approximately 1989 to 1997

The plaintiffs allege that the defendants breached their fiduciary duties by causing Chiquita to make payments to the FARC and the ELN from approximately 1989 to 1997, or failing to be aware of the payments. *See* Am. Compl. ¶ 100. Based on their dates of employment, and the facts developed during the SLC's investigation, this claim applies to the following defendants: (i) *management*: Robert Kistinger, Warren Ligan, Carl Lindner Jr., Keith Lindner, Robert Olson, William Tsacalis, Steven Warshaw, and Jeffrey Zalla; (ii) *directors*: Fred Runk, William Verity, and Oliver Waddell. In support of this claim, the plaintiffs allege:

> From around 1989 through 1997, Chiquita had improperly paid bribes to two violent, left-wing terrorist organizations in Colombia, i.e., the FARC and ELN. In 1989, FARC controlled the areas where Chiquita's [subsidiary], Banadex, had its commercial banana-producing operations, including Uraba. From 1989 through at least 1997, Chiquita made numerous and substantial secret payments to FARC, and also provided FARC with weapons, ammunition and other supplies through its transportation contractors.

Am. Compl. ¶ 100.

Accordingly, the SLC investigated and analyzed: (i) whether the management defendants breached their duties of care or loyalty by causing – or allowing – Chiquita to make payments to guerrilla groups in Colombia starting in 1989 and continuing until approximately 1997; and (ii) whether the director defendants breached their duty of loyalty (by failing to provide oversight) by failing to have adequate information and reporting systems in place to ensure compliance with relevant law. For the reasons discussed below, the SLC will seek to dismiss this claim.

1. Payments to Guerrilla Groups

a. Legal Standard

As discussed above, New Jersey law mandates that directors and officers "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent people would exercise under similar circumstances in like positions." N.J.S.A. § 14A:6-14; *see also Aronson*, 473 A.2d at 812 ("directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them"); *see Classica Group*, 2006 WL 2818820, at *7 (business judgment rule covers officers). Further, the business judgment rule creates "a presumption . . . that disinterested directors act 'on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest.'" *PSE&G*, 718 A.2d at 256 (citation omitted).

Accordingly, the decision to make the payments to guerrilla groups will be protected by the business judgment rule unless it can be shown that the defendants acted with fraud, illegality, a conflict of interest, or with gross negligence. Absent any of these conditions, the decision "will be upheld unless it cannot be 'attributed to any rational business purpose.'" *Disney*, 907 A.2d at 747 (citation omitted); *see also Maul*, 637 A.2d at 937 ("bad judgment without bad faith, does not ordinarily make officers individually liable").

2. Analysis

a. Management Defendants: Kistinger, Ligan, C. Lindner, K. Lindner, Olson, Tsacalis, Warshaw, and Zalla

Decision to Make the Payments. The SLC found that the initial decision to authorize the payments to the guerrilla groups was made on an informed basis, in good faith and in the honest belief that it was in the Company's best interest.[199]

First, when Banadex received the initial demand for payment of $10,000 from the FARC, in approximately 1989, the demand was promptly communicated to senior management in Cincinnati, where Chiquita's headquarters are located. Senior management had several discussions about how to respond to the demand, and instructed [a Banadex employee] to travel to Cincinnati to provide additional information and further discuss the issue. A meeting was then held with, among others, then-head of Latin American operations and defendant Robert Kistinger, Dennis Doyle (then-head of Banana Operations), and Charles Morgan (then-General Counsel).

199 Robert Kistinger was the only management defendant involved in the decision to make the initial payment to the FARC.

It was not until this meeting, which included the Company's General Counsel, that authorization to make the payment was given.

Second, the SLC has determined that the decision to make the payment was made based on a reasonable and good faith belief that the Company's employees and operations were in serious and real danger and that failure to make the payment would have increased the likelihood of harm. At the time of the first demand for payment, Banadex and Chiquita personnel were already well aware of the widespread violence committed by guerrilla groups such as the FARC and the ELN. The SLC credited Kistinger's explanation that senior management understood the payments to be extortion payments, and that they were made to protect employees from being killed and infrastructure from being destroyed.

The SLC found no evidence that this process of deciding to make the initial payment was tainted by fraud, self-dealing, or a conflict of interest. To the contrary, the SLC concluded that the process employed to make the decision was reasonable and rational given the amount at issue ($10,000) and the potential consequences for refusing to make the payment. Thus, Chiquita management did not act with "reckless indifference to or a deliberate disregard of the whole body of stockholders" and their actions were not "without the bounds of reason." *Disney*, 907 A.2d at 750 (citation omitted). Finally, the SLC found that the decision to make the payment was supported by a rational business purpose – protecting the Company's employees and property. As such, the SLC concludes that this decision is protected by the business judgment rule.

Continuing Payments. The SLC has determined that the management defendants reasonably and in good faith continued to believe that the payments were necessary in order to safeguard the welfare of its employees and to protect its property, and that the payments were legal under local law. As a result, the SLC concludes that the management defendants did not breach their fiduciary duties in allowing the payments to continue.

Management's Knowledge. The SLC concludes that, based on the totality of the evidence, each senior member of Chiquita management knew at some point of the payments to the guerrilla groups. While Carl Lindner (CEO), Keith Lindner (COO), and Steven Warshaw (CAO and CFO) told the SLC that they do not recall learning of the payments, the SLC believes that the evidence supports the conclusion that they had knowledge of the payments made by Banadex at some point after the first demand was made in 1989. In addition, as noted above, Robert Kistinger was aware of the payments, having been involved in the decision to make the initial payment. William Tsacalis (Controller) was aware of the guerrilla payments at some point during this period. Likewise, Robert Olson was aware of the payments, having learned about them when he joined Chiquita as General Counsel in 1995.

By contrast, even though they were employed by Chiquita during this period, the SLC found no evidence that Warren Ligan or Jeffrey Zalla were aware of the payments, and nothing about their positions suggests that they should have been. Through May of 1998, Ligan worked in Chiquita's Tax Department, where he held the positions of Assistant Vice President of Tax and then Vice President of Tax. Through 2000, Zalla held various positions in the Treasury and Finance Departments, including Supervisor of Treasury Analysis. Based on the genuine security concerns that limited knowledge of the payments to a select group of executives, the SLC does not believe that Ligan or Zalla knew – or should have known – about the guerrilla payments in their roles at the Company. Accordingly, the SLC concludes that there is no basis to assert a claim for breach of fiduciary duty against Ligan or Zalla for their conduct during this period.

A different analysis applies to the remaining members of management who knew, or should have known, of the payments – C. Lindner, K. Lindner, Warshaw, Kistinger, Tsacalis, and Olson.

Payments Were Necessary. Around the time of the first demand for payment and continuing throughout this period, senior management in Cincinnati maintained the reasonable and good faith belief that the payments were necessary to avoid harm to the Company's employees and infrastructure. Management engaged Control Risks, a leading U.K.-based consulting firm, to assess the security situation in Colombia and to advise the Company on how to deal with what it correctly anticipated to be continuing demands for payments. Control Risks advised that the Company had no meaningful choice but to continue to make the payments.

Senior management was aware that the situation in Colombia remained violent throughout the 1990s and that its employees and infrastructure remained at risk. For example, in 1990 or 1991, Banadex's first Security Director was kidnapped by a group believed to be the ELN. Senior management was also aware of additional kidnappings of and armed attacks against Banadex employees, including the ambush of [Banadex Employees #1 and #3] by guerrilla groups in the mid-1990s. Finally, there was widespread knowledge at Chiquita headquarters in Cincinnati of a 1995 incident in which approximately twenty-five passengers traveling on a bus, consisting mostly of Chiquita farm employees, were killed in an attack that was believed to have been carried out by the FARC.

At the same time as these violent acts were being committed, the evidence was overwhelming that the Colombian government could not protect Banadex and its employees. For example, in early 1995, a senior Colombian General wrote an in-house lawyer for Banadex advising the Company that the Army had knowledge of a threat against certain Banadex facilities and that the Army, while "capable of supporting the normal development of [the Company's] banana operations," recommends that the

Company "make a greater commitment to increase and improve [its] own security." This was well-known to senior executives such as [Chiquita Employee #2] and Kistinger, who were in close touch with Warshaw and Keith Lindner.

Indeed, in mid-1997, as the Company was winding down its payments to the guerrilla groups and began paying the convivir, senior Chiquita management remained concerned about the threat to employees. Their concern is reflected in a discussion that took place at the May 7, 1997 management meeting in Cincinnati (attended by White, Olson, Kistinger, Thomas and, most likely, Tsacalis). As recorded in the meeting notes: "Need to keep this very confidential – people can get killed" and "security is an issue."

Accounting Procedures and Monitoring. The Company also had adequate accounting policies and procedures to record the guerrilla payments. The Company employed its normal accounting procedures for guerrilla payments, but made adjustments to accommodate for security concerns relating to the payments. For the most part, the guerrilla payments were recorded as "sensitive payments," consistent with Company policy. This description of the payments on Banadex's books allowed appropriate review by internal auditors from Cincinnati. Indeed, audits of Banadex's internal controls, such as the one in 1995 led by [Chiquita Employee #3], then an Audit Manager, showed that "sensitive payments" were properly recorded on Banadex's books and records.

Payments Were Not Illegal Under Local and U.S. Law. On a periodic basis, the Chiquita Legal Department took steps to confirm the legality of the payments under Colombian law. As described below, these legal opinions, obtained from in-house and outside Colombian counsel, monitored the development of Colombian law and uniformly concluded that the payments were legally justified under Colombian law:

- *June 10, 1994 [Banadex lawyer] memo*: [A Banadex lawyer's] memo stated that Colombian Law 40 of 1993 concerning kidnapping ransom and extortion payments had recently been held to be "unconstitutional" by the Constitutional Court of Colombia. It concluded that a person making kidnapping ransom or extortion payments "acts in a State of Necessity and, therefore, cannot be penalized."

- *February 3, 1997 [Banadex lawyer] memo*: [A Banadex lawyer's] memo, titled "Crime of Extorsion and Kidnapping in Colombia" [sic], updated and expanded on his June 10, 1994 memo. As with his earlier memo, this memo stated that, "no punishment will be applied" when one makes ransom and extortion payments "in a state of necessity."

- *September 9, 1997 B&M memo*: B&M's memo, titled "Payments to Guerrilla Groups," which the Legal Department received in order to confirm [the

> Banadex lawyer's] conclusions, concluded that payments to guerrilla groups are not illegal if made to "defend the life and freedom of individuals."

The Legal and Internal Audit Departments also monitored the payments on a periodic basis. Under the Company's FCPA compliance program, all employees of a certain salary grade were required, on a quarterly basis, to complete a form detailing any payments that might potentially be covered by the FCPA. The forms submitted by individuals contained both payments to government officials and "sensitive" payments, or payments that the Company treated as confidential, regardless of whether they were covered by the FCPA. The FCPA compliance program was administered by both the Legal and Internal Audit Departments. During this period, Robert Thomas, a senior in-house lawyer, and Bud White, the Vice President of Internal Audit, analyzed employees' FCPA reports and compiled them in a comprehensive FCPA report summary, organized by country and division.

These FCPA reports were first shared with the General Counsel and then presented to the Audit Committee, initially on a quarterly basis, but later (at some point prior to 1995) on a semi-annual basis. The guerrilla payments were reported to Cincinnati in connection with FCPA reporting, although they were not included in the report summaries presented to the Audit Committee, because, according to Thomas, they were not payments to government officials. Thus, in connection with the Company's FCPA reporting program, both the Legal and Internal Audit Departments were aware of the payments.

Further, the guerrilla payments made by Banadex were not prohibited as a matter of U.S. law for at least the first eight years (1989-1997) during which the payments were made.[200] The applicable legal framework changed on October 8, 1997, when the U.S. Department of State designated the FARC and the ELN as FTOs, and therefore knowingly making the payments became illegal under U.S. law.[201] The SLC was unable to determine with precision when the Company stopped making the guerrilla payments. While certain documentary and testimonial evidence suggests that the Company made the payments to the guerrilla groups until approximately mid-1997 or, according to at least one witness, until 1999, KPMG, which conducted an extensive forensic review in connection with the DOJ investigation, concluded that there is no evidence that the Company made payments to the FARC or ELN after the October 1997 designation (other than a 2004 kidnapping ransom payment, which the Company

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[200] As described above, Robert Thomas determined that the guerrilla payments did not violate the FCPA because they were not being made to government officials.

[201] In the Amended Complaint, the plaintiffs do not make any reference to the FARC's FTO designation.

disclosed to DOJ in advance of making the payment).[202] In short, the SLC has determined that the evidence supports the conclusion that the payments to the guerrilla groups were not prohibited during this period under Colombian or U.S. law. In any event, there is no evidence that Chiquita management had knowledge of the FARC's FTO designation at any point during this period.

The SLC also considered the fact that payments to the guerrillas were known to the SEC, DOJ, and USAO SDNY, but that the government took no action. As described above, during the SEC's investigation into Chiquita's books and records arising out of the payments made by Banadex employees to customs officials in Colombia in connection with the renewal of a port license, the government was advised by K&E (on more than one occasion) and by numerous witnesses in sworn testimony that Banadex made payments to guerrilla groups. At no time did government representatives say anything to suggest that the payments violated U.S. law, other than as a potential violation of the FCPA, and no enforcement action was ever taken with respect to the payments. Likewise, at no time did K&E, which was aware of the guerrilla payments, advise the Company that they raised any potential legal issues under U.S. law.

Conclusion. Because there was no fraud, illegality, or conflict of interest, and because the decision to continue the payments did not amount to gross negligence, the management defendants did not breach their duty by allowing the payments to continue from approximately 1989 to 1997. This conclusion is based on: (i) the defendants' reasonable and good faith belief that the payments were necessary to prevent harm to Company employees and infrastructure; (ii) the adequate monitoring of the payments by the Legal and Internal Audit Departments; (iii) the legal opinions received that uniformly concluded that the payments were not illegal under Colombian law; (iv) the absence of any reason for the Legal Department to believe that the payments were illegal under U.S. law; and (v) the fact that federal prosecutors and regulators were aware of the payments but took no action. Further, the SLC found that allowing the payments to continue was supported by a rational business purpose – protecting the Company's employees and property.

Though the SLC finds that the evidence does not support a claim for breach of duty, this is not to say that the course of conduct pursued by the Company during this period is without fault. The SLC believes that it would have been prudent, at some point during this period when the security situation remained violent and unstable, with continuing risks posed to the Company and its employees, for management to have seriously considered withdrawing from Colombia. Indeed, as noted above, the

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202 As stated above, the SLC determined that KPMG conducted a thorough and independent forensic analysis of the payments and that, therefore, it relied on the KPMG Sensitive Payments Schedule as evidence of payments made after January 1, 1997.

SLC raised questions as to why, during this period, there appeared to be no serious discussion within the Company about the possibility of selling its farms in Colombia and purchasing fruit rather than making extortion payments. Even so, the SLC recognizes that whether or not it would have made the same decisions as management about staying in Colombia for as long as it did is legally irrelevant. The SLC has concluded that the implicit decision to remain in Colombia, which required the Company to continue making the payments, was reasonable under the circumstances and made in good faith, and that the members of the Company's management did not breach their fiduciary duty under the applicable legal standards.

b. *Directors: Runk, Verity and Waddell*

The SLC next considered the claims for breach of duty against the director defendants during this period. There are only two non-management, independent directors from that period named as defendants in the Amended Complaint, William Verity and Oliver Waddell, both of whom served on the Audit Committee from approximately May 1994 to March 2002. However, Waddell suffers from a debilitating mental illness, which rendered him incapable of being interviewed by the SLC.[203] In addition, defendant Fred Runk was also a director from 1984 to March 2002, having previously served as the Company's CFO during the 1980s.[204]

As discussed above, there is conflicting evidence regarding whether the directors were aware of the guerrilla payments. While the guerrilla payments were not listed on the FCPA report summaries that were regularly presented to the Audit Committee, Verity said that he recalled that the Company made "security" payments in Colombia, but could not independently recall during which years the Company made payments to guerrilla groups. Olson said that, around the time that he joined the Company as General Counsel in 1995, he was led to believe that the Audit Committee had been informed of the payments and that he also believed that guerrilla payments were discussed with the Audit Committee prior to 1997. Likewise, Kistinger said that Jean Sisco, the Chair of the Audit Committee until 2000, was aware of the guerrilla payments. While this provides some evidence that the Audit Committee was aware of the guerrilla payments, the SLC found no evidence that the full Board (which included defendant director Fred Runk) was aware of these payments. Thus, while the evidence of knowledge is mixed, there is no evidence to suggest that directors Runk, Verity or

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[203] The Chair of the Audit Committee during this period, Jean Sisco, was also unavailable to the SLC, as she passed away in early 2000.

[204] Fred Runk was Chiquita's CFO from 1984 to 1989 and served as a director from 1984 until March 2002. The SLC assessed Runk's conduct as a director, given that, when the relevant events occurred in this period starting in 1989, he was no longer an officer of the Company. As discussed above, regardless of whether Runk was technically an independent director or a management director, there is no evidence that he was aware of the guerrilla payments.

Waddell played any role in approving the guerrilla payments. Accordingly, the SLC considered whether Runk, Verity and Waddell breached their duty of loyalty by failing to provide appropriate oversight.

3. Oversight During the Period From 1989 to 1997

a. Legal Standards

As discussed above, to establish a failure of oversight, one must show "either (1) that the directors knew or (2) should have known that *violations of law were occurring* and, in either event, (3) that the directors took *no steps* in a good faith effort to prevent or remedy that situation, *and* (4) that such failure proximately resulted in the losses complained of." *Caremark*, 698 A.2d at 971 (emphasis added); *see also Saito*, 2004 WL 3029876, at *6. This test can be satisfied by showing either that: (i) "the directors *utterly failed* to implement *any* reporting or information system or controls" or "having implemented such a system or controls, *consciously* failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention" (*Stone II*, 911 A.2d at 370 (emphasis added)); or (ii) that the directors "had notice of serious misconduct and simply failed to investigate," *i.e.*, intentionally ignored "red flags" (*Shaev*, 2006 WL 391931, at *5).

Again, the duty of oversight does not require directors to possess detailed information about all operational aspects of a business. *See Caremark*, 698 A.2d at 971. Rather, directors must "attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards." *Id*. at 970. However, "only a *sustained or systematic failure* of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971 (emphasis added).

b. Analysis

No Violation of Law. Here, as an initial matter, there was no violation of law. Because a violation of law is a necessary precondition of liability and did not occur, the SLC concludes that any claim for breach of the duty of loyalty fails as a matter of law. *See Canadian Commercial Workers v. Alden*, 2006 WL 456786, at *6 (Del. Ch. Feb. 22, 2006) (noting that, among other things, a claim for breach of the duty of oversight must allege facts showing "that the directors knew or [ ] should have known that violations of law were occurring"); *see also Beam v. Stewart*, 833 A.2d 961, 976 (Del. Ch. 2003) (noting that one of the "key elements" for an oversight claim is that "the directors knew or should have known that a violation of the law was occurring").

As discussed above, the Company received multiple legal opinions that the payments were not illegal under Colombian law and, until October 8, 1997, the payments were not illegal under U.S. law. Regardless of whether the payments to the guerrilla groups were made after October 8, 1997, and the SLC found no substantial evidence that they were made after that date, there is no evidence that anyone at the Company was aware of the designation of the FARC and ELN as FTOs until many years later. As a result, it is unclear whether the knowledge element required under 18 U.S.C. § 2339B and the willfulness element required for criminal liability under 50 U.S.C. § 1705 would be satisfied. In support of the absence of illegality, the Company has never been charged with any violation of § 2339B or § 1705 arising from its payments to guerrilla groups (even though the payments were disclosed during the SEC investigation that began in 1998), and the statutes of limitations under § 2339B (eight years) and § 1705 (five years) would bar any such claims.

Adequate Oversight. Even if there was evidence of a violation of law, the SLC has concluded that there was no sustained or systemic failure of the Board to exercise oversight. To the contrary, at all times, the Company had a fully-functioning Audit Committee; a robust FCPA compliance and reporting program, which included reporting on non-FCPA "sensitive" payments; a major accounting firm, E&Y, serving as outside auditor, which was aware of the "sensitive" payments and considered them to be immaterial; and a fully functioning Internal Audit Department, which reported to the Audit Committee on a periodic basis.

First, between 1990 and 1997, the Audit Committee met an average of four times per year. According to the witnesses interviewed by the SLC, the Audit Committee members were generally regarded as knowledgeable and informed, and many witnesses specifically mentioned the energy, diligence, and persistence of the Audit Committee Chair, Jean Sisco. These facts suggest that the Audit Committee was functioning fully and properly during this period.

Second, during this period, the Company had a robust FCPA compliance program that was jointly administered by the Legal and Internal Audit Departments. Under this program, "sensitive" payments, including guerrilla payments, were reported to Cincinnati. The FCPA report summaries were then presented to the Audit Committee, initially on a quarterly basis, but later on a semi-annual basis. These report summaries, however, did not include guerrilla payments. This was based on the Legal Department's view that they were not FCPA payments, because they were not made to government officials.

Nonetheless, the mere fact that the Audit Committee was not informed about the guerrilla payments in connection with the presentation of FCPA report summaries does not render the reporting system inadequate, particularly since the payments were not against the law. *See Stone II*, 911 A.2d at 373 (rejecting the plaintiffs' "hindsight"

allegation that reporting system was inadequate given that it failed to prevent employees from violating criminal laws). In the SLC's view, the Audit Committee appropriately received and relied on FCPA report summaries, and properly delegated to the Legal and Internal Audit Departments the tasks of analyzing and summarizing employees' reports regarding potential FCPA payments. The SLC found that this was an appropriate and reasonable oversight mechanism.

Third, Chiquita engaged E&Y, which provided independent auditing services throughout this period. E&Y was aware of the "sensitive" payments made by Banadex and determined that they were not material to the Company.

Fourth, the Company had a functioning and active Internal Audit Department which reported to the Audit Committee on a periodic basis. Among other things, in 1995, the Internal Audit Department conducted an audit of Banadex in which it concluded that the guerrilla payments were being properly recorded in Banadex's books and records.

In sum, based on this evidence, the SLC concludes that the directors simply did not "utterly fail" to implement any reporting or information system or controls and there was no sustained or systemic failure to exercise oversight. *See Stone II*, 911 A.2d at 370, 372; *See Ash*, 2000 WL 1370341, at *15 n.57 ("the existence of an audit committee, together with [the] retention of Arthur Anderson as . . . outside auditor to conduct annual audits of the Company's financial reporting, is some evidence that a monitoring and compliance system was in place").

Possible Red Flags. The SLC also considered whether there were any "red flags" that would have put the directors on notice of potential misconduct during the period of the guerrilla payments. There are no such red flags alleged in the Amended Complaint, and the SLC likewise found none. *See Stone I*, 2006 WL 302558, at *2 (rejecting the plaintiffs' contention that "red flags" were waved in the face of the board but ignored in the absence of any such allegations).

Conclusion. For these reasons, the SLC has determined that this claim lacks merit because there was no violation of law during this period and the director defendants – Runk, Verity, and Waddell – engaged in legally adequate oversight.

4. Additional Legal Considerations

Separate from the factual and legal merits of the claim itself, several other considerations create substantial uncertainty as to the viability of this claim and raise serious questions whether the costs of pursuing any such claim outweigh any potential benefit. These considerations, detailed below, further support the SLC's decision, in the exercise of its business judgment, to seek dismissal of this claim.

a. <u>No Harm</u>

The SLC's decision to seek dismissal is supported by the fact that, to date, the Company has not suffered any harm as a result of the guerrilla payments. The payments were never the basis for any governmental sanctions and played no role in the Company's March 2007 guilty plea. *See*, *e.g.*, *DeGregorio v. American Bd. of Internal Medicine*, 844 F. Supp 186, 188 (D.N.J. 1994) ("A claim for breach of fiduciary duty is a tort. Damages must be alleged and cannot be inferred. On this ground alone [a] claim [that does not allege damages] must fail*"); see also Sery v. Fed. Bus. Ctrs. Inc.*, 2008 WL 1776551, at *7 (D.N.J. April 16, 2008) (dismissing breach of fiduciary duty claims against defendant trustees because "it is uncontroverted that Plaintiffs have not suffered any damages arising out of the [conduct on which their fiduciary breach was premised]").

The SLC is aware of the ATA/ATS lawsuits pending before the Court, and is therefore aware that those suits seek to impose liability on the Company, in part, based on payments to guerrilla groups made during this period. However, it is established law that the mere possibility of future harm does not constitute legally cognizable injury, as required to support a breach of fiduciary duty claim. *See Stroud v. Milliken Enters, Inc.*, 552 A.2d 476, 480-81 (Del. 1989) ("Courts in this country generally, and in Delaware in particular, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate. Courts decline to render hypothetical opinions . . . [on] the definition of rights which are only future or contingent"); *Saito*, 2004 WL 3029876, at *5 (finding that breach of fiduciary duty claim "[had] not yet matured to a point where judicial action [was] appropriate, and fail[ed] to allege any harm for which this Court at present could hold the [ ] directors accountable"). Thus, if this claim were to be brought, the defendants would raise the defense of lack of harm, rendering the success of any such claim highly uncertain.

b. <u>Bankruptcy Release</u>

The bankruptcy release contained in Chiquita's Plan of Reorganization (the "Plan"), effective as of March 19, 2002, constitutes another defense by which the claim relating to the guerrilla payments could be defeated. That release, contained in an Order of the Bankruptcy Court, provides, in relevant part:

> On and after the Effective Date, except as otherwise specifically provided in the Plan, for good and valuable consideration, the *D&O Releasees . . . are released by Debtor [Chiquita] and Reorganized Debtor from any and all Claims* (as defined in section 101(5) of the Bankruptcy Code), obligations, rights, suits, damages, causes of action, remedies and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law,

> equity or otherwise, that the Debtor or its subsidiaries would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or Equity Interest or other Person or Entity (including any derivative shareholder claims or actions that could be asserted), *based in whole or in part upon any act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date*, except in the case of the D&O Releasees, for claims or liabilities (i) in respect of any loan, advance or similar payment by the Debtor or its subsidiaries to any such Person, or (ii) in respect of any contractual obligation owed by such Person to the Debtor or its subsidiaries. No portion of the limited releases by the Debtor in any way impairs (other than as provided in Article X of the Plan) any Cause of Action or Claim of any person or entity against Debtor or any other party not specifically released the Plan.

(*See* Confirmation Order) (emphasis added).

In the Plan, "D&O Releasees" are defined as "*all officers, directors, employees*, attorneys, financial advisors, accountants, investment bankers, agents and representatives *of Debtor* and its subsidiaries, in each case in their capacity as such." *See* Plan Article I.B.31 (emphasis added). Thus, the release, granted by Chiquita, covers all of the defendants, as they were officers and directors of Chiquita at the time of the conduct in question. Further, the release is applicable as of the "Effective Date," which was March 19, 2002. Therefore, unless an exception applies, by operation of (i) the substantive provisions of the release, (ii) the definition of D&O Releasees, and (iii) the Effective Date, the release operates to insulate all of the defendants from liability to the Company for acts or omissions that occurred *on or before* March 19, 2002.

The release, however, is subject to an exception.[205] According to the terms of the Plan (but not the Order), the release does not apply to:

> claims or liabilities . . . (b) in respect of any act or omission of such Person, Entity or Professional that is determined in a Final Order not to have been taken in good faith and in a manner believed to be in or not opposed to the best interests of Debtor, including its subsidiaries. . . .

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205 The two exceptions expressly contained in the terms of release, which carve out claims based on loans or other contractual obligations owed to Chiquita, do not apply here for obvious reasons.

Plan, Article X.B (the "Bad Faith Exception") (emphasis added).[206]

In substance, by incorporating concepts of good faith, the Bad Faith Exception mirrors the standard under New Jersey law for permissive indemnification of corporate agents. Under New Jersey's indemnification statute, in suits brought by a corporation (or on its behalf), a corporation is permitted to:

> indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of the corporation to procure a judgment in its favor which involves the corporate agent by reason of his being or having been such corporate agent, *if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation*.

N.J.S.A. § 14A:3-5(3) (emphasis added). However, New Jersey law prohibits corporations from indemnifying a corporate agent where, among other reasons, "a judgment or other final adjudication adverse to the corporate agent establishes that his acts or omissions . . . (b) were not in good faith or involved a knowing violation of law. . . ." N.J.S.A. § 14A:3-5(8).

While the law in New Jersey regarding the obligation of fiduciaries to act in "good faith" is not well developed, courts have described "bad faith" in the context of indemnity as "consist[ing] of a 'showing of facts and circumstances . . . so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.'" *U.S. v. Princeton Gamma-Tech*, 1992 WL 349630, at *1, *6 (D.N.J. 1992) (quotations omitted).

Delaware's indemnity statute, 8 Del. C. § 145, is similar to that of New Jersey and is therefore instructive in this matter. *See Vergopia v. Shaker*, 922 A.2d 1238, 1245 n.7 (N.J. 2007) (noting that New Jersey's indemnification statute was modeled on and is similar to Delaware's law). In a series of opinions issued by the Delaware courts in litigation arising from the compensation awarded to the Walt Disney Company's former President Michael Ovitz, those courts commented extensively on the duty of directors and officers to act in good faith. The Delaware Court of Chancery stated as follows: "I am of the opinion that the concept of *intentional dereliction of duty,* a *conscious disregard for one's responsibilities,* is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith." *Disney,* 907 A.2d at 755

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206 The Bad Faith Exception is not included in the Confirmation Order. However, based on the terms of the release and the Confirmation Order's incorporation of the Plan, the SLC believes that the Bad Faith Exception as contained in the Plan nonetheless operates to limit the release.

(emphasis in original); *see also Nagy v. Bistricer,* 770 A.2d 43, 48 n.2 (Del. Ch. 2000) (The "utility [of the good faith requirement] may rest in its constant reminder . . . that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest").

In affirming the Court of Chancery's decision in the *Disney* litigation, the Delaware Supreme Court set forth three categories of conduct that could fall within the definition of "not in good faith" for purposes of exculpation and indemnity:

(a) "The first category involves so-called 'subjective bad faith,' that is, fiduciary conduct motivated by an actual intent to do harm."

(b) "The second category of conduct, which is at the opposite end of the spectrum, involves lack of due care — that is, fiduciary action taken solely by reason of gross negligence and without any malevolent intent."[207]

(c) The third category is where "the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."

Brehm, 906 A.2d at 63-67. These "categories" are intended to assess actions, which, while not necessarily intended to confer a personal benefit on the actor, are taken with something other than the best interests of the corporation in mind.

Thus, in order to overcome the bankruptcy release, the SLC would have to show that the defendants engaged in some form of gross negligence or other intentional bad faith conduct. Because the SLC has concluded that the defendants did not engage in this conduct in making, continuing, or overseeing the payments to the guerrilla groups from 1989 to 1997, the bankruptcy release provides additional support to the SLC's conclusion that it should seek dismissal of the claims regarding these payments.[208]

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207 As noted above, the Delaware Court defined "gross negligence" as "reckless indifference to or deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Disney*, 907 A.2d at 750.

208 The SLC also considered whether it could seek relief from the order containing the bankruptcy release under applicable law. Under certain limited circumstances, the Bankruptcy Code gives courts the authority to revoke or modify a confirmation order or plan of reorganization. *See* 11 U.S.C. § 1127(b) (2008) ("[a] proponent of a plan and a reorganized debtor may modify the plan after confirmation" so long as they seek such modification "before substantial consummation of the plan"); *see also* 11 U.S.C. § 1144 ("on request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation . . . the court may revoke such order if and

c. *Chiquita's Exculpatory Clause and New Jersey* *Business Corporation Act Section 14A:2-7(3)*

The SLC also considered the effect of the exculpatory provision contained in the Company's Certificate of Incorporation ("Certificate"), which bars the Company from recovering money damages from its officers and directors for breaches of the duty of care. In accord with N.J.S.A. § 14A:3-5(3) (described above), Chiquita's Charter provides that, to the extent permitted by New Jersey law:

> an officer or director of the Corporation shall not be liable to the Corporation or its shareholders for damages for breach of any duty, except that nothing contained herein shall relieve an officer or a director from liability for breach of a duty based upon an act or omission (a) in breach of such person's duty of loyalty to the Corporation or its shareholders, (b) not in good faith or involving a knowing violation of law, or (c) resulting in receipt by such person of an improper personal benefit. As used in this subsection, an act or omission in breach of a person's duty of loyalty means an act or omission which that person knows or believes to be contrary to the best interests of the corporation or its shareholders in connection with a matter in which he has a material conflict of interest.

Certificate, Article Nine, §1(b); *see also Kanter v. Barella,* 489 F.3d 170, 182 n.15 (3d Cir. 2007) ("New Jersey allows a corporation to include an exculpatory provision for its directors and officers in its charter"). Exculpatory provisions are treated as an affirmative defense and, where only a duty of care claim is made, bars that claim as a matter of law. *See Malpiede v. Townson*, 780 A.2d 1075, 1101 (Del. 2001) (affirming dismissal of due care claim based on exculpatory provision).

However, under Chiquita's Certificate and New Jersey law, the exculpatory provision does not apply where a final judgment establishes that the agent (i) breached his or her duty of loyalty, (ii) acted not in good faith or in knowing violation of the law, or (iii) received an improper personal benefit. *See First Fid. Bankcorporation vs. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 1990 WL 165937, at *15 (E.D. Pa. Oct. 25, 1990) (stating that because "the Derivative Complaint alleges breach of loyalty, knowing

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only if such order was procured by fraud"). However, after reviewing case law interpreting these provisions, the SLC concluded that it is highly unlikely that the law would support the revocation or modification of Chiquita's confirmation order or plan of reorganization almost seven years after they were entered and approved by the bankruptcy court.

violation of law and personal profit, . . . New Jersey law . . . explicitly precludes [the company] from exempting the defendant officers and directors from liability").

In short, the exculpatory clause bars on its face any claim for breach of the duty of care in making the payments to guerrilla groups from 1989 to 1997. While any claim based on a failure to provide proper oversight would not be covered by the exculpatory clause, since it is a violation of the duty of loyalty, the SLC has concluded that there is no such viable claim and that none of the other exceptions to exculpation apply. Accordingly, Chiquita's exculpatory clause provides additional support for the SLC's decision to seek dismissal of these claims.

d. *Indemnification and Advancement of Legal Fees*

As yet another layer of protection for its officers and directors, Chiquita's Certificate also provides indemnification to the officer and director defendants to the fullest extent permitted by New Jersey law:

> Each person who was or is made a party, or is threatened to be made a party to, or is otherwise involved (including as a witness) in any pending, threatened, or completed (by judgment, settlement or otherwise) Proceeding by reason of his or her being or having been an Indemnitee shall be indemnified and held harmless by the Corporation to the fullest extent not prohibited by the New Jersey Business Corporation Act . . . from and against any and all Liabilities incurred or suffered in connection with any such Proceeding.

Certificate, Article Nine, §1(c). Chiquita's indemnity provision is in accord with New Jersey law, which, with respect to suits brought by a corporation (or on its behalf), permits corporations to:

> indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of the corporation to procure a judgment in its favor which involves the corporate agent by reason of his being or having been such corporate agent, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.

N.J.S.A. § 14A:3-5(3).[209]

Chiquita's Certificate further provides, in relevant part, that the right to indemnification "shall include the right to be paid by the Corporation the Expenses incurred in connection with any Proceeding in advance of the final disposition of such Proceeding. . . ." Certificate, Article Nine §1(d)(3). Thus, if the SLC brought a claim, the Company may be required to advance the defendants' fees and expenses in connection with defending that claim. These fees and expenses are, of course, in addition to any fees and expenses incurred by the Company in pursuing the claim. Because the Company may have to advance legal fees to any defendant against whom the SLC brings a claim, and potentially indemnify that person even if the claim is successful on the merits (which is highly unlikely), the SLC believes that these provisions provide additional support for its decision to seek dismissal of this claim.

e. *Statute of Limitations*

Finally, the SLC has considered the applicable statute of limitations and related issues in assessing the merits of these claims. New Jersey law provides a six-year statute of limitations for a breach of fiduciary duty claim. *See* N.J. Stat. § 2A:14-1 (2008) ("Every action at law for . . . for any tortious injury to real or personal property . . . shall be commenced within 6 years next after the cause of any such action shall have accrued."); *see also Fleming Cos. v. Thriftway Medford Lakes*, 913 F. Supp. 837, 846 (D.N.J. 1995) ("A claim for breach of fiduciary duty, which has a six year statute of limitations, commences to run at the point the plaintiff has actual or constructive knowledge of the breach") (citation omitted).

In this multi-district litigation, the earliest derivative complaint was filed on behalf of Chiquita on October 12, 2007, in an action styled *City of Philadelphia Public Employees Retirement Sys. v. Aguirre, et al.*, Case No. 1:07-cv-851 (S.D. Ohio). Thus, any claim that accrued before October 12, 2001 is presumptively time-barred under the six-year limitations period unless preserved by some equitable tolling doctrine. *See, e.g.*, *Grunwald v. Bronkesh*, 621 A.2d 459, 467 (N.J. 1993) (because the discovery rule did not apply, breach of duty claim arising from alleged legal malpractice was barred by six-year statute of limitations).

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[209] Chiquita's indemnification provision contains certain exceptions. Chiquita's Certificate, consistent with N.J.S.A. § 14A:3-5(8), provides, "[N]o indemnification shall be made to or on behalf of such person if a final, non-appealable judgment or adjudication adverse to such person establishes that such person's acts or omissions (a) were a breach of his duty of loyalty to the Corporation or its shareholders, (b) were not in good faith or involved a knowing violation of law, or (c) resulted in such person's receipt of an improper personal benefit." As discussed above with regard to Chiquita's exculpatory clause, the SLC has concluded that the defendants did not engage in any form of gross negligence or intentional conduct and, therefore, these exceptions would not apply.

The SLC explored possible tolling doctrines that may affect the application of the statute of limitations. In connection with its statute of limitations analysis, the SLC sought and received a memorandum from Lead Counsel, which set forth the plaintiffs' assessment of the applicable limitations period and related tolling doctrines, which the SLC considered in reaching its conclusions. Among the doctrines that the SLC analyzed was the discovery rule, which New Jersey courts apply "[u]nder special circumstances and in the interest of justice . . . to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." *Id.* at 463. However, it appears that New Jersey courts have not applied (or even considered) the discovery rule in a derivative suit or in connection with a claim for breach of corporate fiduciary duty. Thus, there is no New Jersey case law directly on point.[210]

Based on the factual record, the SLC also considered the possibility that the plaintiffs were on "inquiry notice" of the guerrilla payments as of October 3, 2001, the date on which the settlement of the SEC investigation into the Company's books and records was publicly announced. Although the SEC settlement only discussed the customs payments in Colombia, an argument can be made that a reasonable investor should have inquired further about the Company's Colombian operations at that time. If inquiry notice was triggered on October 3, 2001, the filing of the first derivative complaint on October 12, 2007 was untimely under the six-year statute of limitations.[211]

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210 However, Delaware law recognizes the discovery rule as a basis to toll claims alleging breach of fiduciary duty. *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6, *9 (Del. Ch. July 17, 1998) (discovery rule applied to bar claims for breach of the duties of care, loyalty, and candor brought by the owners of interests in various real estate limited partnerships against those partnerships' general partners and financial advisors because the plaintiffs knew or should have known of the facts giving rise to their injury); *Albert v. Alex Brown Mgmt. Servs.*, 2005 WL 1594085, at *19-20 (Del. Ch. June 29, 2005) (noting that "[u]nder the so-called 'discovery rule,' the statute of limitations is tolled where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of," but finding that exchange-fund investor the plaintiffs knew or should have known of facts supporting their claim that the fund manager defendants had breached their fiduciary duties).

211 In addition, well before 2001, the U.S. press published articles focusing on the extortion of U.S. businesses operating in Colombia. For example, one *New York Times* article published in 1998 noted: "Foreign businesses are particularly vulnerable to kidnappings and extortion and kickback demands from the rebels . . . To discourage kidnappings, they employ Colombian executives and use local contractors. They hire such multinational security services as Control Risks Group . . . to tailor security packages for their executives . . . Mr. Lara of Control Risks said, . . . 'So many have a policy of subcontracting to Colombian firms, and Colombians feel, especially operating in rural areas, that they've got to pay to keep themselves safe.'" Diana Jean Schemo, *International Business: Risking Life, Limb and Capital; U.S. Companies Operate in Colombia, but Very Carefully*, N.Y. TIMES, Nov. 6, 1998, at C1. This provides further support an argument that plaintiffs were on inquiry notice of the Company's payments in Colombia before October 12, 2001 and, therefore, the complaint that was filed on October 12, 2007 was untimely.

Because of the uncertainty concerning the possible application of the discovery rule under New Jersey law, and the potential issue of whether the plaintiffs were on inquiry notice as of the announcement of the SEC settlement, there is, at the very least, a non-frivolous argument that any claim arising from the guerrilla payments is barred by the statute of limitations. This provides yet another basis of support for the SLC's decision to seek dismissal of the claims.

* * *

Accordingly, with respect to this period, the SLC has concluded, in the exercise of its business judgment, to seek dismissal of this claim. In exercising that judgment, the SLC took account of the following factors. ***First***, as discussed at length above, this decision is based on the fact that the SLC found no breach of duty on the part of any defendant. ***Second,*** as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are the lack of cognizable harm, the bankruptcy release, Chiquita's exculpatory clause, Chiquita's potential advancement and indemnity obligations, and the statute of limitations. ***Third,*** as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

C. Breach of Duty in Connection with Payments to the AUC From Approximately 1997 Through February 2003

The SLC next considered whether the payments made to the convivir and the AUC, which began in approximately 1997 and continued through February 2003, support a claim that the defendants breached their duties to the Company. In support of this claim, the plaintiffs allege that:

> After having previously made improper and *ultra vires* bribery payments to the ELN and FARC for several years, from 1997 through February 2004, Chiquita, through its Colombian subsidiary, Banadex, made improper or illegal and *ultra vires* payments to a violent, right-wing terrorist organization in Colombia, the AUC . . . Defendants caused or permitted Chiquita to make payments to the AUC, directly or indirectly, nearly every month from 1997 through February 2004, making over 100 payments totaling over $1.7 million.

Am. Compl. ¶ 100. In analyzing this claim, the SLC evaluated the payments in two distinct time periods because, in the SLC's view, each period presented distinct legal issues. ***First***, the SLC examined the payments made between mid-1997 and the designation of the AUC as an FTO on September 10, 2001. ***Second***, the SLC examined the payments made from September 11, 2001 until February 20, 2003, when the FTO designation was discovered by a member of Chiquita's Legal Department in Cincinnati.

1. Payments From 1997 Through September 10, 2001

Based on their dates of employment, and the facts developed during the SLC's investigation, this claim applies to the following defendants: (i) *management*: Robert Kistinger, Warren Ligan, Carl Lindner, Jr., Keith Lindner, Robert Olson, James Riley, William Tsacalis, Steven Warshaw, and Jeffrey Zalla, and (ii) *directors*: Rohit Manocha, Fred Runk, Gregory Thomas, William Verity, and Oliver Waddell. Accordingly, the SLC investigated and analyzed (i) whether the management defendants breached their duties of care or loyalty by causing, or allowing, Chiquita to make payments to the convivir and/or the AUC initially from approximately 1997 through September 10, 2001; and (ii) whether the director defendants breached their duty of oversight (loyalty) by failing to have adequate information and reporting systems in place to ensure compliance with relevant law. For the reasons discussed below, the SLC will seek to dismiss this claim.

a. *Management Defendants: Kistinger, Ligan, C. Lindner, K. Lindner, Olson, Riley, Tsacalis, Warshaw and Zalla*

As set forth above, the payments to the convivir and/or to the AUC are protected by the business judgment rule unless the defendants acted with fraud, illegality, a conflict of interest, gross negligence, or the lack of a rational business purpose. *See Maul,* 637 A.2d at 937; *see also Auerbach,* 47 N.Y.2d at 631. As an initial matter, the SLC has found no evidence of, and the plaintiffs do not allege any, fraudulent conduct, illegality or self-dealing on the part of the defendants in connection with the payments made prior to the FTO designation. Thus, the SLC examined whether the payments to the convivir and/or the AUC were the result of gross negligence or lacked a rational business purpose.

Initial Payments to the Convivir. As described above, the payments to the convivirs began without specific knowledge or approval by any of the management defendants. Instead, both Chiquita's Internal Audit and Legal Departments became aware of the convivir payments in approximately April or May of 1997 in connection with the Company's routine accounting and legal oversight functions. Once they learned about the payments, personnel from Internal Audit and the Legal Departments took reasonable and appropriate steps to better understand the nature of the convivirs and the legal implications of the payments.

First, after becoming aware of the payments, members of senior Chiquita management met on May 7, 1997 to discuss the payments, among other reasons. At that meeting, Robert Thomas and Bud White, along with defendants Robert Olson, Robert Kistinger, and likely William Tsacalis, had a detailed discussion regarding the payments to convivirs (and guerrilla groups) and the appropriate reporting system for these payments. In addition, they discussed the preliminary conclusion of [a Banadex lawyer] that the convivir payments were legal under Colombian law.

Second, following the May 7 meeting, David Hills was directed to conduct a further inquiry into the payments to the convivirs, and reported his conclusion that they did not violate Colombian law to Thomas and Olson. During the course of his inquiry, Hills reviewed background documents concerning convivirs that he received from [a Banadex lawyer], which had been provided to [the Banadex lawyer] by the Secretary of the Antioquia government in Colombia, and which stated that convivirs were legal entities that provided legitimate security services. Hills also traveled to Colombia and discussed the payments with Banadex personnel. In a memo dated August 29, 1997, Hills reported his findings that convivirs were legal entities (and not paramilitary groups) and that the Company's payments were not illegal under Colombian law.

Third, Olson and Thomas reported the convivir payments to the Audit Committee as part of their regular FCPA reporting process. The Chiquita lawyers told the Audit Committee that the convivir payments did not violate Colombian law or the FCPA and were, therefore, lawful.

Fourth, Chiquita's Legal and Internal Audit Departments continued to monitor the convivir payments in connection with the Company's FCPA reporting practices.

Based on these facts, the SLC believes that Chiquita management acted reasonably and appropriately in allowing the payments to the convivirs to continue.[212] Likewise, once this initial review was complete, management monitored the payments on a regular basis. On a quarterly basis, the convivir payments were reviewed by the Legal and Internal Audit Departments as part of the Company's FCPA reporting practices and, on a periodic basis, reported to the Audit Committee.

In reaching this conclusion, the SLC found no evidence that Chiquita management was told of the 1996 or 1997 Castaño meeting, which, by some accounts, linked the convivir to the AUC. Thus, the SLC found that, until the summer of 2000, the management defendants, all of whom were located in Cincinnati, were not aware of the connection between the convivir and the AUC, and believed that the payments were being made to legitimate, government-sponsored, security organizations, which is a

212 The SLC found no evidence that management defendants Ligan, Riley and Zalla participated in the approval of payments.

rational business purpose. This belief was reasonable given the information initially shared with management at the May 7 meeting, the results of David Hills' continued factual inquiry, and the opinions of in-house legal counsel.

As further evidence of good faith, the SLC also considered the fact that the Company provided information about the convivir payments to the SEC, DOJ, and the USAO SDNY. As described above, during the SEC's investigation concerning the customs payments, K&E met with government representatives and, as part of its discussions, described the fact that Banadex had been making payments to convivirs. K&E told the federal authorities that the convivir was "a[n] entity that provides the Army information concerning guerilla movements" and that the Company had a "local opinion confirming that payments to Convivir are lawful." None of the government representatives indicated that the payments were an issue under U.S. law. Likewise, at no time did K&E advise the Company that the convivir payments raised any potential issues under U.S. law.

Discovery of the Convivir-AUC Connection. The SLC believes that the legal considerations are somewhat different once the Legal Department became aware of the connection between the convivir and the AUC in July 2000. In early 2000, during his routine review of FCPA reports, Robert Thomas noticed a payment to Inversiones Manglar, an entity based in Santa Marta whose name he did not recognize. Thomas made inquiries to [Chiquita Employee #3] and [Banadex Employee #4]] who explained to him that since the Colombian government would not permit the formation of new convivirs, Inversiones Manglar was formed to function like a convivir in Santa Marta, but was actually providing security.

Until he spoke with [Chiquita Employee #3] and [Banadex Employee #4], Thomas did not know that convivir payments, which had begun in October 1999, were being made in Santa Marta. [Chiquita Employee #3] and [Banadex Employee #4] also told Thomas that, according to [Banadex Employee #5], Banadex could not stop making the payments, as it needed the security provided by Inversiones Manglar. The information Thomas learned on the call made him suspicious that the payments were being routed to the paramilitary organizations and that further review was necessary. After bringing this to the attention of Robert Olson, Thomas began a review of the convivir payments.

In the initial stages of his review, Thomas received a memo from [a Banadex lawyer] concerning the legality of the payments to the convivirs. The memo, dated June 17, 2000, concluded that paramilitaries extorted individuals and companies, threatening them with harm in order to extract payments, and that the Company should pay convivirs, which were legal security entities, in order to ensure the security of the Company and its employees. Thomas also directed [Chiquita Employee #1] to travel to Colombia to interview Banadex employees about the payments. [Chiquita Employee

#1] reported his findings orally to Thomas, who summarized them in a memo to file. The Thomas Memo stated that (i) the Urabá convivir was linked to Carlos Castaño, a very dangerous figure who was affiliated with the AUC, (ii) the Santa Marta payments were being routed to paramilitaries, and (iii) the payments were being funneled to Santa Marta through the Urabá convivir. Members of senior management in Cincinnati were briefed on [Chiquita Employee #1's] findings: Thomas briefed (and also provided his memo to) Olson, who, in turn, informed Kistinger and Warshaw.

Thomas then sought legal opinions from Jorge Solergibert and B&M concerning the payments. Based on the facts outlined in the Thomas memo, Solergibert and B&M concluded that the Company had been extorted to make payments to paramilitary organizations, and the Company had no meaningful choice but to make the payments and, therefore, would not be subject to liability under Colombian law for the payments to the convivir.

At the conclusion of his review, Thomas reported his findings to the Audit Committee at the September 12-13, 2000 meeting. Although individuals interviewed by the SLC did not recall Thomas's report of his findings, the notes of the meeting reflect Thomas's report that the Company was being extorted and Castaño was described as the "convivir leader." In addition, Thomas reported that outside counsel had confirmed that the payments did not violate Colombian law and were legal in the context of the FCPA.

Conclusion. Because there was no fraud, illegality, or conflict of interest, and because the decision to continue the payments did not amount to gross negligence, the management defendants did not breach their duty by allowing the payments to continue from approximately 1997 to September 2001.

This conclusion is based on (i) the Legal Department's monitoring and detection of the different forms of payments (both initially in 1997 and in early 2000), (ii) the steps taken to gather information about the payments, including Hills' review in 1997 and Thomas's inquiry in 2000, (iii) the legal opinions received from in-house and outside counsel, which uniformly confirmed that the payments were not illegal under Colombia law, (iv) the consistent monitoring of the payments by the Legal and Internal Audit Departments, and (v) management's periodic reporting about the payments to the Audit Committee.

The SLC has concluded that these facts demonstrate that the management defendants employed a rational process designed to ensure that they acted on an informed and adequate basis with regard to allowing the payments to the convivirs and the AUC to continue. S*ee Albert v. Alex Brown Mgmt. Serv., Inc.*, 2005 WL 2130607, at * 4 (Del. Ch. Aug. 26, 2005) ("Gross negligence . . . involves a devil-may-care attitude or indifference to duty amounting to recklessness") (citation omitted). With respect to the

convivir payments, this conclusion is reinforced by the fact that federal authorities and K&E were aware of these payments, but did not raise any issues about their legality.

Finally, the payments had a rational business purpose – senior management was told that they were necessary payments to prevent serious harm to the Company personnel and property, both before and after the Thomas inquiry. For those reasons and others outlined below, the SLC will seek dismissal of this claim.

b. *Director Defendants: Manocha, Runk, G. Thomas, Verity and Waddell*

The SLC next considered the claims against the directors arising from both types of payments made during this period. During the period from mid-1997 until mid-2000, during which the Company was paying the convivir, the non-management members of the Board were defendants Fred Runk, William Verity, and Oliver Waddell. After the completion of Thomas's review of the convivir payments in the summer of 2000, the non-management members of the Board were Runk, Waddell, Gregory Thomas (who joined the Board in November 2000), and Rohit Manocha (who joined the Board in January 2001). Manocha, Thomas, and Waddell served on the Audit Committee.

The SLC found that the director defendants were aware of the convivir and AUC payments during this period. The evidence that supports this finding includes the regular FCPA reports presented by the Legal Department at Audit Committee meetings, which included convivir payments starting in September 1997. In addition, the results of Thomas's review of the convivir payments were reported to the Audit Committee in September 2000. Because it found that the defendants were aware of the payments, the SLC considered whether these defendants breached their duty of loyalty by failing to provide appropriate oversight.

As discussed above, to establish a failure of oversight, one must show that the directors knew that violations of law were occurring *and* that the directors took *no steps* in a good faith effort to remedy that situation. *See Caremark,* 698 A.2d at 971; *Saito,* 2004 WL 3029876, at *6. As an initial matter, as discussed above, there was no violation of law. The payments made to the convivir and the AUC before September 10, 2001 were not prohibited under Colombian or U.S. law. This is what the directors were repeatedly told by the Chiquita Legal Department. Because a necessary precondition to liability does not exist, this claim fails as a matter of law. *See Canadian Commercial Workers*, 2006 WL 456786, at *6; *Beam*, 833 A.2d at 976.

Even if there had been a violation of law of which the directors were unaware, the SLC has concluded that there was no sustained or systemic failure of the directors to exercise oversight. To the contrary, at all times, the Company had a properly

functioning Audit Committee that met regularly; a robust FCPA compliance and reporting program, which included reporting on non-FCPA "sensitive" payments; a major accounting firm, E&Y, serving as outside auditor, which was aware of the payments and considered them to be immaterial; and a fully functioning Internal Audit Department, which reported to the Audit Committee on a periodic basis.

Initial Convivir Payments. As noted above, Chiquita had a duly-constituted Audit Committee, which met at regular intervals throughout the year. In 1997, the Audit Committee met 5 times; in 1998, it met 5 times; in 1999, it met 4 times; and in 2000, it met 4 times.

Beginning with its meeting on September 10, 1997, and continuing thereafter, the Audit Committee received updates regarding the convivir payments in connection with the Legal Department's FCPA reporting. Notes of the meetings reflect that the Audit Committee engaged in discussion and asked questions about the payments at these and other meetings, including changes in the payment amounts and reasons for those changes. At all times, Olson and Thomas presented these payments as legal.

AUC Payments Post-Thomas Review. The Audit Committee continued to function appropriately during the period following Thomas's review in mid-2000. The Audit Committee received updates about the payments at meetings on September 12-13, 2000 and May 8, 2001.[213] At the September 12-13, 2000 meeting, Thomas presented the findings from his review of the payments, which had recently been shared with management. As discussed above, according to notes of the meeting, Thomas reported that the Company was being extorted and Carlos Castaño was described as the "convivir leader." It is at least likely, given these contemporaneous notes of the meeting, that the Audit Committee was informed about the link between the convivirs and the AUC and the fact that the Company's payments to the convivirs were being routed to the paramilitaries. However, at the same time, the Audit Committee was informed that, according to outside counsel B&M, the Company was not violating Colombian law in making the payments. Thus, these facts support the SLC's conclusion that the directors engaged in legally adequate oversight, and the SLC found no "red flags" that should have put the Board on notice of any misconduct.[214]

On May 8, 2001, the Legal Department provided another update to the Audit Committee, which was now comprised of Manocha, Gregory Thomas, and Verity. At

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[213] Indeed, in the Amended Complaint, the plaintiffs acknowledge that the payments to the convivir/AUC were regularly reported to Chiquita's Audit Committee, "the agent of the full Board," during this period. *See* Am. Compl. ¶ 107; *see also Stone II,* 911 A.2d at 370.

[214] The Amended Complaint identifies no such red flags. *See Stone I*, 2006 WL 302558 at *2 (rejecting the plaintiffs' contention that "red flags" existed in the absence of any such allegations).

this meeting, the Legal Department again presented information about the convivir payments in connection with David Hills' FCPA report, which was the first such report received by Manocha and Gregory Thomas. Again, these new directors, like the prior members of the Audit Committee, were told that the payments were legal.

Finally, throughout this period, E&Y continued to provide independent auditing services and its representatives regularly attended Audit Committee meetings. E&Y was generally aware of both the convivir and AUC payments made by Banadex and considered them to be immaterial. Likewise, the Internal Audit Department monitored the "sensitive" payments, including the convivir/AUC payments, in accordance with its normal procedures. This is yet further evidence that the directors had an appropriate monitoring system in place. *See Ash,* 2000 WL 1370341, at *15 n.57.

Conclusion. For these reasons, the SLC has determined that this claim lacks merit because there was no violation of law during this period and the director defendants – Manocha, Runk, G. Thomas, Verity and Waddell – engaged in legally adequate oversight.

2. Payments From September 11, 2001 Through February 20, 2003

The SLC next reviewed and analyzed the period from September 11, 2001, when the AUC was designated an FTO, to February 20, 2003, when the designation was discovered by one of Chiquita's in-house lawyers. The plaintiffs allege that, during this period, the defendants "continued to pay the AUC after the United States designated the AUC as an FTO on September 10, 2001, and as a Specially Designated Global Terrorist on October 30, 2001." Am. Compl. ¶ 110. Based on their dates of employment, and the facts developed by the SLC, this claim applies to the following defendants: (i) *management:* Robert Fisher,[215] Cyrus Freidheim, Robert Kistinger, Carl Lindner, Jr., Keith Lindner, Robert Olson, James Riley, William Tsacalis, Steven Warshaw, and Jeffrey Zalla; and (ii) *directors*: (a) Rohit Manocha, Fred Runk, Gregory Thomas, William Verity, and Oliver Waddell (the "Pre-Bankruptcy Board"), and (b) Morten Arntzen, Jeffrey Benjamin, Robert Fisher, Roderick Hills, Durk Jager, Jaime Serra, and Steven Stanbrook (the "Post-Bankruptcy Board").

Accordingly, the SLC investigated and analyzed whether the defendants (i) breached their duties of care or loyalty by causing, or allowing, Chiquita to make payments to the AUC; and (ii) breached their duty of oversight (loyalty) by failing to

[215] Robert Fisher joined the Board in March 2002 and also served as COO from March 2002 to October 2002. He continued to serve as a director after he left the COO position. The SLC analyzed Fisher's conduct as a manager from March to October 2002 and as a director after that time.

have adequate information and reporting systems in place to ensure compliance with relevant U.S. law. For the reasons discussed below, the SLC will seek to dismiss this claim.

a. *Management Defendants: Fisher, Freidheim, Kistinger, C. Lindner, K. Lindner, Olson, Riley, Tsacalis, Warshaw and Zalla*

The SLC found that the management defendants, both before and after the Company's bankruptcy, were not aware that the payments to the convivir and/or the AUC were prohibited under U.S. law during this period. To begin with, the SLC attached substantial significance to the fact that during an investigation that lasted more than three years, DOJ failed to develop evidence of such knowledge before February 20, 2003. More importantly, the SLC's own review of the documentary evidence and witness interviews found no such evidence. In the absence of such evidence (or other fraud or conflict of interest, of which there is none), the SLC considered whether the management defendants were grossly negligent in continuing to make the payments after the FTO designation or whether the payments lacked a rational business purpose.

No Knowledge of the FTO Designation. The DOJ investigation focused heavily on the issue of when Company executives or employees learned of the AUC's FTO designation. DOJ found evidence to suggest that, on September 30, 2002, [Chiquita Employee #1] accessed a webpage through an Internet service to which the Company subscribed that mentioned the FTO designation. However, DOJ was not able to establish that [Chiquita Employee #1] actually knew of the FTO designation at any time before [a Chiquita lawyer] learned of it on February 20, 2003. Nor did DOJ find that anyone at the Company was aware of the FTO designation prior to February 20, 2003.

In conducting its own thorough investigation of this issue, the SLC found no evidence of any such knowledge on the part of any of the defendants, or indeed of any senior Company personnel in Cincinnati. The SLC reviewed all documents produced to DOJ and questioned numerous witnesses on this issue and, despite reports about the designation in the national and local media, was unable to find any evidence that any individual at the Company – including any of the management defendants – knew about the FTO designation at or around the time it occurred (or at any time before February 20, 2003). While certain Banadex employees learned of the designation around the time it was made, because it was widely reported in the Colombian media, they did not understand the implication of the designation with regard to the payments, and they did not recall talking to anyone in Cincinnati about it. Thus, the SLC, like DOJ, concluded that none of the management defendants, who were all senior members of Chiquita management, were aware of the FTO designation prior to [the Chiquita lawyer's] discovery on February 20, 2003.

No Gross Negligence. The SLC found that senior management was not grossly negligent in failing to learn of the AUC designation. Senior management reasonably and in good faith relied on the Legal Department to keep the Company aware of material legal developments. *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) (court considered the "the extended discussion between the Board and [counsel] before approval" of preferred share rights plan in determining that Board was not grossly negligent).

First, the Legal Department was generally well thought of by senior management. In fact, in his SLC interview, Robert Kistinger, who was employed by the Company for almost thirty years, described General Counsel Robert Olson as "probably the smartest business attorney I ever worked with." This favorable view of Olson was reported by numerous witnesses interviewed by the SLC.

Second, by all outward indications, the Legal Department was adequately informed about and appropriately managed the situation in Colombia. At various points, it considered and reported on the legality of the payments to the guerrillas, the convivir and the AUC. For example, in early 2000, Olson was informed at the outset about Thomas's concerns that the convivir payments were being routed to the paramilitaries and about his plans to review them. Even before Thomas did further work on the issue, Olson and Thomas agreed that the payments could not continue unless there was a "real threat of physical harm to employees" if the payments were not made. Olson discussed [Chiquita Employee #1's] trip to Colombia with senior management. Olson was informed of Thomas's findings from his review of the payments in early September and told Kistinger and Warshaw. The Legal Department consulted with outside counsel as appropriate and reported its findings.

Third, senior management was, on a periodic basis, generally informed of the legal issues relating to the payments during this period. For example, the September 12-13, 2000 Audit Committee meeting, at which the Legal Department reported on the results of the Thomas inquiry, including the opinion from B&M, was attended by Tsacalis and Zalla. Kistinger recalled learning of the results. Shortly after the Company's emergence from bankruptcy in March 2002, Chiquita's new CEO, Cyrus Freidheim, was fully briefed by Olson about the payments. Olson briefed Freidheim on the Colombia payments, including information about the convivirs, the paramilitaries, and the AUC. Olson told Freidheim that the payments were legal.

In addition, senior management knew that the payments were tracked as part of the FCPA process. As noted above, members of senior management attended Audit Committee meetings during which the Legal Department reported on the legality of the payments and the monitoring of the payments. For example, at a September 25, 2001 Board meeting attended by Carl Lindner, Keith Lindner, Steven Warshaw, James Riley and William Tsacalis, Olson sought and received the Board's approval to enter into the

SEC settlement regarding Colombia port payments. In that settlement, the SEC credited the Company's response, which included identifying the issue and taking appropriate corrective action. Moreover, Riley, Warshaw, and Tsacalis attended the March 7, 2002 Audit Committee meeting, at which the Legal Department reported on the convivir payments in connection with its FCPA report presentation.

There were further discussions of the convivir/AUC payments and their legality after the new Board was seated in March 2002. On April 23, 2002, the Legal Department reported to the newly-appointed Audit Committee about the Colombia payments, at a meeting attended by Freidheim, Riley, and Tsacalis. According to notes of that meeting and Olson's recollection, Olson reported that (i) convivirs were sponsored by the Colombian government, but that they had started to be used to support paramilitaries in Santa Marta, (ii) the Company was making cash payments in Santa Marta directly to the AUC "or an organization that might be the AUC," and (iii) the Company had implemented new procedures to make the cash payments. At the October 4, 2002 Audit Committee meeting, the Legal Department presented an FCPA report that listed convivir payments; the meeting was attended by Freidheim, Riley and Tsacalis. At no time during this period did the Legal Department report that the payments were illegal.

Conclusion. Because there was no fraud, illegality, or conflict of interest, and because the decision to continue the payments did not amount to gross negligence, the management defendants did not breach their duty by allowing the payments to continue from approximately September 2001, after the AUC was designated as an FTO, through February 2003.

This conclusion is based on the fact that senior management (i) appropriately and in good faith relied on the Legal Department to keep the Company current with material developments in the law; (ii) reasonably believed that the Legal Department, led by Robert Olson, was competent and capable; (iii) was aware of material developments in Colombia, such as the results of the Thomas inquiry; and (iv) was also aware that the Legal Department tracked the payments through its FCPA reporting. At all times, the Legal Department reported that the payments were legal. For these reasons, the SLC found that the management defendants did not act with gross negligence in allowing the payments to continue after the AUC was designated as an FTO.

Finally, the SLC found that the payments to the AUC during this time did not lack a rational business purpose. Throughout this period, members of senior management had a reasonable basis for their good faith belief that the payments were necessary to protect Company employees and infrastructure. For example, Kistinger said that, around the time of the demand for cash payments by the AUC in Santa Marta in 2002, Company executives and personnel continued to have security concerns and "were constantly in fear." He explained that, "even when [the AUC] are getting paid,

there are incidents, but they are just more isolated." This conclusion is supported by ample evidence.

However, the SLC found that its conclusions about senior management in general did not fully apply to Robert Olson, the Company's General Counsel. Other members of senior management justifiably relied on the advice and guidance of counsel, but the Legal Department, led by Olson, failed to establish mechanisms to monitor developments, such as the existence of the FTO list, and failed to establish a system for bringing material information, including government designations and news accounts, to the attention of management. Although this type of criticism may suggest little more than the exercise of hindsight, the SLC found that the events of September 11, 2001 should have put Olson on notice that more needed to be done to determine whether the various steps taken by the U.S. government to fight terrorism had any impact on the Company's legal exposure, especially on the exposure created by its overseas operations. If such systems had been designed and properly implemented, Olson may have learned of the AUC's designation as an FTO at an earlier point and minimized the harm suffered by the Company.[216]

Nevertheless, while the SLC believes that Olson could have done more to protect the Company, the SLC has determined that Olson's conduct in this regard did not breach his duty of care to the Company.

First, the SLC found that 18 U.S.C. § 2339B, the FTO statute that prohibited payments to the AUC as of September 10, 2001, was, in fact, little-known and obscure, even to experienced practitioners. Larry Urgenson of K&E, while knowledgeable of the Company's payments to the guerrilla groups, was not aware of § 2339B at the time that the FARC and the ELN were designated as FTOs or at any point during the three-year SEC investigation. The relative obscurity of the statute and its criminal sanctions is further reflected by the fact that prior to April 2003, DOJ had not brought a case under the statute against a U.S. company. *See* Memorandum from Audrey Harris to File (Mar. 11, 2003). Olson also knew that the Company had discussed its payments to the FARC at length with attorneys at the SEC, DOJ and USAO SDNY, who were involved in the SEC investigation, yet the government never raised any questions about the applicability of U.S. law in general or the FTO statute in particular.

Second, Olson's Legal Department was comprised of senior lawyers who oversaw the affairs of the Colombia division. This included [a Chiquita lawyer], who was based in Cincinnati and was fluent in Spanish, and Jorge Solergibert, who was

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216 The SLC found that Olson requested some limited legal guidance on whether post-9/11 legal and regulatory developments affected the Company's activities. However, this request for post-9/11 legal guidance does not adequately address the SLC's concerns about putting appropriate systems in place.

based in Costa Rica. Like Olson, these Chiquita attorneys were unaware of the FTO designation prior to February 20, 2003, when it was discovered by [a Chiquita lawyer].

Third, despite the significance of Olson's failure to have a system in place by which to monitor developments in U.S. law relating to the Company's overseas operations, the SLC found that Olson, on the whole, diligently worked to ensure that the Company had compliance systems. Olson oversaw the Company's comprehensive FCPA compliance program, which ensured that the Company was in compliance with applicable law and that the Audit Committee was apprised of facilitating payments made by the Company. The Company subscribed to the Control Risks security website, which provided updates on Colombia and was monitored by Chiquita employees. Control Risks, on or before September 30, 2002, reported on the AUC's FTO designation, but there is no evidence that anyone at the Company saw the report at the time. Therefore, while the SLC believes that, in hindsight, the compliance programs implemented and overseen by Olson should have been broadened, such systems existed and Olson, in good faith, believed that they were sufficient.

Fourth, the SLC found that although it would have been prudent for Olson and the Legal Department to have undertaken a review of the Company's worldwide operations after the events of September 11, 2001, Olson's failure to do so did not display reckless indifference or gross negligence because the focus of the September 11 attacks, and the remedial steps taken by the U.S. government, focused on Middle Eastern-based extremism and terrorist threats emanating from that part of the world, not on paramilitary groups operating in Colombia, which posed no known risk of attacks on the U.S.

Fifth, the SLC found that, during this period, Olson and the Legal Department were substantially focused on other issues relating to the welfare of the Company. Most fundamentally, Olson in particular spent much time and energy focusing on the myriad legal issues related to the Company's impending bankruptcy. In the early fall of 2001, the Company was preparing to file for bankruptcy, which it ultimately did on November 28, 2001. The amount of time and energy spent by Olson on issues related to the bankruptcy is suggested by evidence that Olson made three separate presentations to the Board on issues relating to the bankruptcy in the month of November 2001 alone.

While the SLC did not find that Olson's involvement in other matters excuses his failure to make sure that he had taken necessary steps to protect the Company with respect to the payments in Colombia, the SLC found that, when taken together with the other considerations described above, they simply do not support a finding that his conduct was sufficiently egregious to constitute a violation of his duty of care. Accordingly, for the above reasons, the SLC has concluded that Olson did not breach his duty of care by allowing the payments to continue during this period.

b. *Director Defendants: Pre-Bankruptcy Board (Manocha, Runk, Thomas, Verity, Waddell); and Post-Bankruptcy Board (Arntzen, Benjamin, Fisher, Freidheim, Hills, Jager, Serra, Stanbrook)*

Prior to March 19, 2002, the date the Company emerged from bankruptcy, the non-management members of the Board were Rohit Manocha, Fred Runk, Gregory Thomas, William Verity and Oliver Waddell. After the Company emerged from bankruptcy on March 19, 2002, the non-management members of the Board were Morten Arntzen, Jeffrey Benjamin, Robert Fisher, Cyrus Freidheim, and Roderick Hills. Durk Jager and Steven Stanbrook joined the Board in December 2002 and Jaime Serra joined the Board in January 2003.

The Pre-Bankruptcy Board. As described above, the SLC concluded that the Pre-Bankruptcy Board engaged in legally adequate oversight for the period through September 10, 2001. That conclusion is no different for the approximately six-month period that extended from the time of the FTO designation until the Board was discharged on March 19, 2002. During this period, as with the earlier period, the Board continued to have a fully-functioning Audit Committee, continued to have a robust FCPA compliance and reporting program, continued to be audited by E&Y, and continued to receive periodic updates from the Internal Audit Department. In addition, even though the Board and management were primarily occupied by the Company's serious financial difficulties and bankruptcy, on March 7, 2002, less than two weeks before these directors left the Board, the Audit Committee received a final FCPA update. At all times, the directors continued to be advised by the Legal Department that the payments identified as part of the Company's FCPA reporting were legal.

The Post-Bankruptcy Board. The Post-Bankruptcy Board also engaged in legally adequate oversight for the period from March 19, 2002 through April 3, 2003, when it was first informed of the FTO designation (as discussed below). The new Board immediately selected a new Audit Committee, chaired by Roderick Hills, the former Chairman of the SEC, and including Morten Arntzen and Jeffrey Benjamin. This new Audit Committee met eight times during 2002, and twice in 2003 prior to April 3. During its second meeting, on April 23, 2002, the Audit Committee received a briefing on the Colombia payments by Olson, which included a discussion about the implementation of new procedures to make the cash payments that had recently been demanded by the AUC in Santa Marta. The new Audit Committee, like the old one, was told by Olson that the payments were legal. The Company continued to be audited by E&Y. Internal Audit continued to provide periodic updates. In short, the SLC found that the new Audit Committee was active and engaged, and provided legally sufficient oversight.

Possible "Red Flags." The SLC also considered whether the director defendants ignored any "red flags" during this period. As discussed above, the SLC considered

whether the events of September 11, 2001 and its impact on the political, social and legal climate in the U.S., constituted a "red flag" that put the Pre-Bankruptcy Board on notice of enhanced risks of liability because Chiquita conducted business in difficult operating environments around the world. While the SLC believes that it would have been prudent for Chiquita to have conducted a review of its international operations after September 11, 2001, the SLC found no legal requirement to do so. *See Graham v. Allis-Chalmers Manuf. Co.*, 188 A.2d 125, 130 (Del. 1963) ("absent cause for suspicion there is no duty upon directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists"). Nor, given that the events of September 11 concerned terrorism originating from the Middle East, did the events of that date put the directors on notice that additional steps needed to be taken to protect the Company in Colombia.

Finally, the SLC considered whether the coverage of the AUC's FTO designation in U.S. national and local media in the fall of 2001 constituted a "red flag." As noted above, the SLC has already concluded that senior management was not grossly negligent for failing to discover the FTO decision, so the SLC cannot and does not conclude that the Board acted with conscious disregard, which requires a higher level of culpability, in failing to see or understand the newspaper accounts.

In any event, the SLC has found only one decision in which press reports were determined to have been a potential "red flag" to a board of directors. In that case, the court found that the press reports standing alone were not a "red flag," but only became one when "taken as a whole" with other facts. *McCall v. Scott*, 239 F.3d 808, 819-20 (6th Cir. 2001) (applying Delaware law).[217] Therefore, the SLC found that the articles that addressed the FTO designation of the AUC published in, among others, the *Wall Street Journal*, *Washington Post* and *Cincinnati Enquirer*, without any additional information suggesting problems or issues relating to the payments, did not constitute "red flags," as that concept has been developed in the law. The plaintiffs have asserted no "red flags," and the SLC has found none. *See Stone I*, 2006 WL 302558, at *2.

Conclusion. For these reasons, the SLC has determined that this claim lacks merit since both the Pre- and Post-Bankruptcy Boards engaged in legally adequate oversight.

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217 The other relevant facts in that case included (i) alleged internal audit reports of fraud, (ii) the director defendants' alleged personal knowledge of improper practices, (iii) a pending *qui tam* action in which particularized allegations of fraud were alleged, and (iv) an investigation by the federal government. *See McCall*, 239 F.3d at 819-2.

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Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim with respect to this period. In exercising that judgment, the SLC took account of the following factors. ***First***, as discussed at length above, this decision is based on the fact that the SLC found no breach of duty on the part of any defendant. ***Second,*** as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are the lack of cognizable harm (through September 10, 2001), the bankruptcy release (which covers claims prior to March 19, 2002), Chiquita's exculpatory clause, Chiquita's advancement and indemnity obligations, and the statute of limitations (which may bar claims arising prior to October 12, 2001). ***Third,*** as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

D. Breach of Duty in Connection with Payments to the AUC After Discovery of the FTO Designation in February 2003 Through January 2004

As set forth in detail above, on February 20, 2003, [a Chiquita lawyer] discovered that the AUC had been designated as an FTO by the U.S. Department of State. After retaining K&E and working to understand the factual and legal situation, Olson advised the Board of the situation at an April 3, 2003 Audit Committee meeting (which was attended by the full Board). At the direction of Audit Committee Chair Roderick Hills, Chiquita disclosed the payments to senior DOJ officials, including then-Assistant Attorney General Michael Chertoff. Shortly thereafter, the payments resumed as the Company waited for a response from DOJ that would address the issues it had raised. The SLC has concluded that, at some point following the Chertoff meeting, each member of senior management and the Board (other than Fernando Aguirre, who did not have advance knowledge of the single payment made after he became CEO) knew, or should have known, that the payments were being made.

The plaintiffs allege that the defendants breached their fiduciary duties by causing and/or allowing the Company to continue to make payments to the AUC after the discovery of the FTO designation in February 2003. *See* Am. Compl. ¶ 111-117. In support of this claim, the Amended Complaint alleges that the defendants willfully and knowingly caused the Company to violate the law, which ultimately resulted in the guilty plea and accompanying $25 million fine. *See* Am. Compl. ¶ 118. Based on their dates of employment, this claim applies to the following defendants: (i) *management*: Fernando Aguirre, Cyrus Freidheim, Robert Kistinger, Robert Olson, James Riley,

William Tsacalis, and Jeffrey Zalla; (ii) *directors*: Morten Arntzen, Jeffrey Benjamin, Robert Fisher, Roderick Hills, Durk Jager, Jamie Serra, and Steven Stanbrook.

1. Legal Standard

In the absence of the FTO designation, the decision to make the payments, as analyzed above, would, under appropriate circumstances, be protected by the business judgment rule. However, where a knowing violation of the law exists, the business judgment analysis no longer applies, and director liability may be premised on a breach of the duty of loyalty. That is because the requirement of "legal fidelity" is a "subsidiary element of the fundamental duty of loyalty." *Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1051 n.2 (Del. Ch.1996); *see also Stone II*, 911 A.2d at 370; *Disney*, 907 A.2d at 754, n.447; *Ryan v. Gifford*, 918 A.2d 341, 358 (Del. Ch. 2007) (holding that "intentional violation of a shareholder approved stock option plan, coupled with fraudulent disclosures regarding the directors' purported compliance with that plan, constitute conduct that is disloyal to the corporation and is therefore an act in bad faith"). This principle has been applied under Delaware and New York law, and the SLC believes that, if confronted with the issue, New Jersey courts would adopt it as well.

Several decisions illustrate how the duty of loyalty is implicated where a knowing violation of the law is alleged. For example, in *Desimone v. Barrows*, 924 A.2d 908, 934-35 (Del. Ch. 2007), a plaintiff shareholder brought a derivative action against directors and officers arising from alleged backdating of stock options. The Delaware Court of Chancery ultimately dismissed the complaint for failure to make a demand because the plaintiff failed to plead facts showing that the directors faced a substantial threat of liability with respect to the alleged wrongdoing. *See id*. at 946. However, in the course of reaching its decision, the court examined the legal ramifications of a director's knowing violation of law. The Court stated that:

> [B]y consciously causing the corporation to violate the law, a director would be disloyal to the corporation and could be forced to answer for the harm he has caused. Although directors have wide authority to take lawful action on behalf of the corporation, they have no authority knowingly to cause the corporation to become a rogue, exposing the corporation to penalties from criminal and civil regulators. Delaware corporate law has long been clear on this rather obvious notion; namely, that it is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully. The knowing use of illegal means to pursue profit for the corporation is director misconduct.

Id. at 934-35; *see also Brehm,* 906 A.2d at 67 ("A failure to act in good faith may be shown . . . where [a] fiduciary acts with intent to violate applicable positive law"); *Francis v. United Jersey Bank*, 432 A.2d 814, 823 (N.J. 1981) ("Upon discovery of an illegal course of action, a director has a duty to object and, if the corporation does not correct the conduct, to resign").

The decision in *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs, Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004), also illustrates this principle. In that case, a minority member of a limited liability company ("LLC") brought a breach of fiduciary duty action against the LLC, other LLC members, and LLC managers related to a bribery scandal. *Id.* at 129-30. The plaintiff alleged that certain of the LLC's managers and officers paid $2 million in bribes to Brazilian officials to obtain telecommunications permits. *Id*. at 134. These allegedly illegal payments later became public, resulting in adverse publicity and a DOJ investigation of the LLC for violations of the FCPA. *Id*. at 134-135.

The plaintiff alleged that the defendants either participated in, or had knowledge of, the bribery and failed to disclose it in management reports that were "reviewed, adopted and approved" by LLC management. *Id*. In denying the defendants' motion to dismiss certain of the claims, the Court of Chancery held that the plaintiffs had successfully stated a common law fraud claim against the managers who knew of the bribery and made misleading statements to conceal it. *Id*. at 130-31. The Court stated that a "fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity." *Id*. at 131-32.

Finally, a case applying New York law provides further insight into the circumstances under which directors may breach the duty of loyalty by knowingly violating the law. In *Roth v. Robertson*, 118 N.Y.S. 351, 352 (N.Y. Sup. Ct., Erie County 1909), a shareholder brought an action to compel an officer of the company to reimburse the Company funds that had been paid to a third party in an illegal transaction. The company operated an amusement park and a substantial portion of its profits was derived from business conducted on Sundays. *Id*. However, at that time, operation of the amusement park on Sundays was in violation of New York law. *Id*. After a third party threatened to take steps to prevent the company from operating on Sundays unless it was paid off, the manager of the amusement park paid $800 in "hush money" in the belief that the payment was being made in the best interests of the corporation. *Id.* at 352.

In rejecting this argument, the Court found that the payment was an illegal expenditure because it was made to buy silence about the corporation's violation of the law, and thus constituted an *ultra vires*, or unauthorized, transaction. *See id*. at 352-53. The Court further stated that directors and officers of a corporation who engage in an

unauthorized transaction that causes a loss to the corporation "must be held jointly and severally liable for such damages." *Id.* In the end, the Court held that the corporation was entitled to recovery from the officer even if the plaintiff shareholder had originally approved of the payment, because, as a matter of public policy, the court could not condone the illegal expenditure. *See id.*; *see also Miller v. AT&T*, 507 F.2d 759, 762 (3d Cir.1974) (applying New York law) ("[If the] plaintiffs' complaint alleged only failure to pursue a corporate claim, application of the sound business judgment rule would support the district court's ruling that a shareholder could not attack the directors' decision. . . . Where, however, the decision not to collect a debt owed the corporation is itself alleged to have been an illegal act, different rules apply") (citations omitted).

While this line of authority is clear, the SLC has concluded that it is unclear how this law would be applied to the facts developed during the SLC's investigation, which are entirely different from the underlying facts in these decided cases. Several important features distinguish the facts developed by the SLC during its investigation from these decided cases. ***First***, these cases address decisions to violate the law motivated solely by profit (*i.e.*, paying a bribe to enable the amusement park to remain open) or personal gain (*i.e.*, backdating stock options), and do not address the primary motivation the SLC found existed here, which was to protect the lives of employees. While it is clear that operating in Colombia had continuing financial benefits for the Company, it is also clear that the Board was prepared to abandon Colombia if it could not operate there legally, as it ultimately did. ***Second***, in none of the cases discussed above did the defendants disclose the violations to, and seek guidance from, relevant governmental authorities prior to committing the acts at issue, or as soon as the illegality of the acts became known. ***Third***, these cases do not address a situation where, based on the guidance provided by the relevant governmental authorities, the defendants, advised by competent in-house and outside counsel, held the reasonable good faith belief that the Company would not be prosecuted for its actions. ***Fourth,*** because the SLC saw, first hand, how deeply the defendants were concerned with the safety of their Colombian employees, the SLC believes that any case it brought would not be sympathetic to a trier of fact.[218]

Based on these facts, it is not at all clear whether the defendants' conduct here would constitute a violation of the duty of loyalty. Because the legal merit of this claim

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218 Commentators have acknowledged potential exceptions to corporations' obligations to comply with the law, for example, "under the concept of necessity in extraordinary situations where compliance would inflict substantial harm on third parties, and noncompliance would not." THE AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(1) (1994 & Supp. 2008); *see* Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 33 (2006) (noting a potential exception to a corporation's obligation to obey the law "where the norm of obedience to law is conventionally deemed inapplicable or counterbalanced by another norm, such as necessity").

is uncertain, because the SLC believes the defendants acted in good faith in continuing to make the payments to the AUC after discovery of the FTO designation, and because, as discussed further below, other considerations counsel against pursuing litigation, the SLC has concluded, in the exercise of its business judgment, that the claim should be dismissed.

2. Analysis

a. *Outside Directors: Arntzen, Benjamin, Fisher, Jager, Serra, and Stanbrook*[219]

Although interviews and document review did not allow the SLC to pinpoint exactly when each non-management director learned that the payments had resumed after the April 24 Chertoff meeting, at some point, each of the directors learned that the payments were continuing. Indeed, given that the Board was told repeatedly about the need for the payments, and the risks that would be created if the payments were not made, the SLC believes that the only reasonable conclusion to be drawn by the Board at the time was that the payments would continue. Accordingly, the SLC found that each of the directors caused, or allowed, the Company to make payments knowing that those payments were in violation of federal law.

However, in causing or allowing the payments to be made, the SLC has concluded that the directors acted in good faith and to advance the best interests of the Company. Substantial evidence developed by the SLC supports this conclusion.

Decision to Disclose Payments to DOJ. At the April 3, 2003 Audit Committee meeting, attended by all directors, at which the designation was first disclosed to the full Board, Olson advised that, among other things, (i) the Company believed the payments were necessary to protect the lives of Chiquita employees, and (ii) the payments had been delayed while the Company determined the appropriate course of action. The Board, at the recommendation of Olson and Hills, directed the Company to disclose the fact of the Company's payments to DOJ. At this point in time, the Audit Committee, led by Hills, who, among other things, was formerly Chairman of the SEC, took control of the process. The SLC found that (i) the decision to disclose was an appropriate, reasonable, and responsible course of action, and (ii) that the members of the Board appropriately and reasonably, given Hills' background and experience, relied on him to take the lead on behalf of the Board and the Audit Committee.

At the April 30, 2003 Audit Committee meeting, Hills and Olson reported on the Chertoff meeting. While recollections vary, the message conveyed to the Audit

219 The SLC's analysis of Hills' conduct, as Chair of the Audit Committee, is discussed separately below.

Committee was that criminal liability for past payments was unlikely, and that the government had, in effect, deferred a final answer on the question of continuing payments pending consultations with other agencies in the federal government. Based on the presentations provided by Olson and Hills, the Audit Committee reasonably believed that DOJ had agreed to consider the Company's situation, speak with other governmental agencies, and get back to the Company.

In the SLC's view, it would have been prudent for the Audit Committee members to affirmatively address the issue of whether the payments should continue at this time, but there is no evidence that this occurred. To the contrary, the Audit Committee was not asked to, and did not, make a determination regarding continuing the payments at this time, or at any time until March 2004. Because the continuation of the payments was not presented as a decision to be made, and because no information was presented on the status of the payments, the Audit Committee members had conflicting views regarding whether the payments were in fact continuing. Arntzen and Stanbrook assumed that the Company was continuing to delay the payments, although it is not clear on what basis they believed the payments could be delayed indefinitely; by contrast, Benjamin and Hills believed the payments were continuing. Despite this range of views, the SLC found that the directors believed in good faith that the Company, at the direction of Hills and Olson, was handling the situation appropriately.

Continued Monitoring. The Audit Committee continued to receive regular updates on relevant developments. The Audit Committee met on May 12, July 8, and August 12.[220] At one or more of those meetings, the Audit Committee (i) received updates on the status of the investigation from Hills and Olson, including the fact that the Company was actively pursuing further discussions with DOJ officials (including having repeated contact with senior DOJ officials), (ii) discussed the adequacy of the Company's disclosures regarding Colombia, and (iii) discussed the possible sale of Banadex. The SLC found that, early in the process, several directors determined that the wisest and soundest course was for the Company to cease its operations in Colombia, and also found that by early July 2003, that possibility began to be actively explored. Accordingly, the SLC found that the Audit Committee continued to monitor and control the Company's response to the situation in an appropriate fashion.

Reliance on Experts. The Audit Committee sought advice and assistance from numerous outside professionals, including outside counsel, forensic accountants, and consultants. At the September 17, 2003 Audit Committee meeting, the Audit

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220 The Audit Committee also met on May 22, 2003, July 29, 2003, and August 8, 2003. While the directors told the SLC that Colombia was discussed, at least informally, at every meeting, there is no record in the minutes or the notes of a formal discussion of the Colombia issue at these meetings.

Committee authorized the Company to retain K&E, and required that K&E report directly to it (K&E had been working for the Company on the matter since late February). At this meeting, Larry Urgenson of K&E reported that DOJ intended to conduct an investigation to confirm the facts presented by the Company regarding the payments. With respect to continuing the payments, Urgenson advised the Audit Committee that DOJ had not told the Company to stop making the payments, but also had not condoned the payments. The Audit Committee discussed the implications of the investigation and directed the Company to cooperate fully with the authorities. In addition, Hills reported on his recent meeting with Deputy Attorney General Larry Thompson, including Thompson's assurances that the Company was neither a subject nor a target of the investigation. Shortly after this meeting, the Audit Committee engaged KPMG, with a team led by a former FBI agent, to conduct a forensic analysis.

Reliance on Continued Communication with DOJ. The directors relied on the fact that the Company had not received guidance from the government with respect to continuing payments since the April 24 meeting. On September 4, 2003, K&E met with DOJ, and Urgenson confirmed that the payments were continuing. He specifically asked Taxay for a directive from DOJ with respect to the payments, and Taxay did not provide one, nor did anyone from DOJ communicate such a directive to Chiquita subsequent to the meeting. Urgenson communicated this to the Audit Committee at its September 17 meeting.

Efforts to Exit Colombia. The Board as a whole continued to remain informed about the status of the investigation, including at its next meeting on November 20 and 21, 2003, and at an Audit Committee meeting, attended by all directors, on December 4, 2003. At the December 4 Audit Committee meeting, a portion of which was attended by the full Board as well as by Urgenson and KPMG representatives, the Board received a report from [Chiquita Employee #1] who, among other things, described the range of security issues the Company faced in Colombia. At the same meeting, Olson discussed issues relating to the situation in Colombia and the DOJ investigation, including pursuing the sale of Banadex. At this meeting, it was the consensus of the Board that, having not heard back from DOJ, the Company should cease its operations in Colombia.

Continued Cooperation Efforts. While there is evidence suggesting that Hills learned in early December 2003 that DOJ had communicated, both directly and indirectly, the message that the payments should stop, there is no evidence that Hills communicated that message to the remainder of the Board at that time. However, Hills did communicate to the Audit Committee by e-mail that (i) DOJ was dissatisfied with the Company's cooperation to date, and, in explaining why the Audit Committee rather than management needed to be in charge of the matter, that (ii) the Company "appeared to be committing a felony." Hills then recommended the retention of an

outside consultant, Ronald Goldstock, with expertise in dealing with terrorist and violent organizations,[221] to assist KPMG and K&E with the investigation. After discussion of the issue, the Audit Committee agreed to retain Goldstock to address some of the problems that had emerged in dealing with DOJ. Accordingly, by the end of 2003, the Audit Committee had K&E, KPMG, and Goldstock advising it with respect to the Colombia matter and had a basis for believing that Hills was closely monitoring the situation and responding appropriately to information he was receiving.[222]

The End of the Payments. The Company made its last payment to the AUC on January 24, 2004. On January 26, 2004, the Company publicly announced that it was pursuing a sale of Banadex. Ultimately, on March 30, 2004, after considering whether a final payment should be made as it left Colombia, the Board directed that no further payments be made to the AUC. In total, Chiquita made 23 payments totaling $365,865 to the AUC from the late February 2003 discovery of the FTO designation through late January 2004.

Conclusion. The SLC could not conclude that the non-management director defendants breached their duty of loyalty to the Company by allowing the payments to continue from approximately February 2003 to January 2004.

This conclusion is based on the fact that the non-management directors (i) were informed with respect to the Colombia issue, having discussed it at a minimum of nine meetings (and probably more), (ii) relied, in good faith, on Roderick Hills, as Chair of the Audit Committee, to direct the Audit Committee's response to DOJ investigation, (iii) received and relied upon advice from outside counsel and outside consultants, (iv) believed, in good faith, that the Company was acting appropriately under the circumstances, including to protect the lives of the Company's employees, (v) did not believe that they were placing the Company in further jeopardy by continuing the payments while they waited for a response from DOJ, and (vi) moved promptly to leave Colombia, while protecting the Company's interests, once it became apparent that it would not receive a meaningful response from DOJ.

However, the SLC was troubled that the Audit Committee members, including Roderick Hills, did not take additional steps to ensure that they were kept fully and contemporaneously informed about the status of the continuing payments throughout this period. Indeed, despite the fact that the Audit Committee met frequently and received significant amounts of information through multiple formal and informal

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221 Goldstock is the former Director of New York State Organized Crime Task Force, and has at various times been a Professor at Cornell, Columbia, and NYU law schools.

222 As discussed below, the directors were also advised by the law firms of Skadden and Baker Botts with respect to the Company's disclosures regarding Colombia.

briefings, about Colombia and many other issues, the Audit Committee did not receive briefings regarding what was arguably the most important issue – whether and how the Company was continuing to make the payments (since each additional payment was a violation of federal law).

Even so, because of the efforts the outside directors made to be informed and to direct the Company's response, the SLC found that they acted in good faith and with the best interests of the Company in mind. The SLC had no factual basis for finding that the outside directors acted with disregard for the law or simply to enhance the Company's profitability. In the end, as discussed further below, the SLC found that the Company and the Audit Committee placed too much faith for too long in the possibility of obtaining a favorable answer from DOJ, and allowed the payments to continue rather than more swiftly focusing on the urgency of leaving Colombia. But the fact that, in retrospect, the Audit Committee relied too heavily on the comfort provided by senior DOJ officials does not diminish the good faith that characterized the actions pursued by the Audit Committee.

b. Roderick Hills

While the SLC's analysis of Hills' conduct in many respects tracks the analysis of the other outside directors, Hills played a far larger role in the Company's response to DOJ investigation and therefore warrants separate analysis. In many respects, Hills provided exemplary service as an outside director. He took charge of the situation in Colombia, which he had no role in creating, and provided active and thoughtful direction of the Company's response. Even though the SLC was troubled by some of the actions that he took or failed to take on the Company's behalf, the SLC found that Hills at all times acted in good faith with the best interests of the Company in mind.

Continuing Payments. Hills provided several compelling reasons why he allowed the payments to continue following the discovery of the FTO designation and full disclosure to DOJ.

First, based on what he had been told by management, Hills held the good faith belief that Banadex employees would be harmed if the payments were not made.

Second, at the April 24 meeting, Assistant Attorney General Chertoff stated that the making of payments was illegal, but, very significantly, he also acknowledged that the issue of future payments was "complicated," which was exactly the message that Hills and the other representatives of the Company sought to communicate. Although neither Hills nor Olson explicitly asked whether Chiquita could continue to make the payments, Chertoff did not explicitly state that the Company should stop. Finally, Hills told Chertoff that Chiquita was prepared to sell its Colombian operations, but asked that Chertoff first discuss with the NSC the issue of whether the Company's forced and

hasty departure from Colombia might cause other companies to consider doing the same thing. Hills offered to contact the NSC himself, but Chertoff stated that DOJ would do so. As a result of this meeting, and the way it ended, Hills (and Olson) believed in good faith that based on the Company's presentation DOJ understood that the payments would continue while Chiquita waited for further guidance from DOJ. That guidance was expected to come soon after the meeting.

Third, in June 2003, Hills spoke to Chertoff, who told him that Deputy Attorney General Thompson had been briefed on the issue. This suggested to Hills that DOJ was continuing to consider the issues raised at the April meeting.

Fourth, in late August, Hills took the initiative to set up a meeting with Deputy Attorney General Thompson, who assured him that the Company had done the right thing in disclosing the payments, and the Company was neither a subject nor a target of the DOJ investigation.

Fifth, at the September 4, 2003 meeting with DOJ, Urgenson specifically informed DOJ that the payments were continuing, and invited DOJ to give the Company a directive to stop the payments, which DOJ declined to do, simply repeating the phrases used by Chertoff at the April meeting without further elaboration.

Sixth, beginning in June 2003, the Company began the process of exploring the sale of Banadex.

Finally, K&E, which had strongly counseled the Company to stop the payments before the April 24 meeting, did not repeat the advice in the months that immediately followed it.

Based on this evidence, Hills believed in good faith that the Company was not exposing itself to additional risk by continuing the payments after the April 24 meeting, but rather was acting to protect the lives of the Company's employees and its property. While the SLC questioned whether Hills placed too much faith in the assurances he received from government officials regarding Chiquita's status, it nonetheless found Hills' reliance on all the facts and circumstances to be reasonable and in good faith. Further, the SLC found that Hills was not primarily motivated to increase or maintain Chiquita's profitability and found no evidence that his actions were motivated by potential personal gain.

Hills' Management of DOJ Investigation. The SLC also considered that Hills was actively involved in coordinating the Company's cooperation with DOJ's investigation. He took that responsibility seriously and devoted much time and effort to it. Among other things, Hills caused the Audit Committee to retain KPMG to assist with the investigation and act as an independent fact finder. He also contacted DOJ

officials directly to ensure that DOJ was satisfied with the Company's cooperation, and met with DOJ officials to discuss Chiquita's cooperation and disclose the whistleblower e-mails received by the Company in November 2003.

However, the SLC was sufficiently concerned by a sequence of events involving Hills' actions in December 2003 and early January 2004, that it directed counsel to conduct additional interviews of, among others, Hills and Olson, on the issue of whether DOJ had issued a stop-payments directive to Hills.

For many months after the April 24 meeting, the Company had continued to seek guidance from DOJ as to whether it could continue making the payments; in the meantime, the Company had continued to make them in the good faith belief that a response was forthcoming.

By the end of December 2003, Hills had been informed, directly by AUSA John Beasley in a telephone conversation, and indirectly through outside counsel for a Banadex employee, that DOJ wanted Chiquita to stop making the payments. Although the message may not have been conveyed as clearly or directly as it could have been, in the SLC's view, this statement from the government signaled a shift in DOJ's view of the situation and the guidance it was giving the Company. Yet, Hills failed to inform the Audit Committee about either of the messages that suggested that DOJ wanted the payments to stop and did nothing to gather additional information on the status of the payments. The SLC concluded that Hills failed to attach sufficient significance to these communications and should have, at a minimum, sought clarification from DOJ on the issue of continuing the payments.

Despite the concerns raised by the events of December and early January, the SLC found that Hills' actions were still taken in good faith during this period. Hills was focused primarily on the Company's cooperation with DOJ, and viewed the comment from AUSA Beasley about stopping the payments, which Hills did not even recall with any clarity when questioned about it, as collateral to the focus of their discussion, which was centered on DOJ's criticism of the Company's cooperation. In any event, Hills did not take the statement as a directive to stop the payments but instead as stating the obvious point that the payments could not continue indefinitely. As a direct result of his concerns about the cooperation issue, Hills hired Goldstock as an outside advisor to the Company, and directed K&E, KPMG, and Goldstock to determine how to address this perception. In addition, there is substantial evidence that, by December, the Board, including Hills, was looking carefully at Chiquita's withdrawal from Colombia through the sale of Banadex to Banacol. Finally, the SLC could not identify any additional harm to the Company caused by the five additional payments made in December 2003 and January 2004, after the statements to Hills about stopping the payments: the Company's guilty plea encompassed all payments made after the discovery of the FTO designation.

Conclusion. The SLC could not conclude that Hills breached his duty of loyalty to the Company by allowing the payments to continue from approximately February 2003 to January 2004. This conclusion is based on the fact that Hills (i) believed that the payments were necessary to protect the Company's employees and property; (ii) believed, in good faith, that the Company could continue to make the payments while DOJ considered the issue, (iii) directed the Company's response to the DOJ investigation and kept substantially informed about it, and (iv) sought and received guidance from K&E, KPMG, and Goldstock, none of whom advised Hills that the Company should stop making the payments prior to January 2004.

c. *Robert Olson*

While the SLC found problems with certain aspects of Olson's performance during this period, for the reasons discussed below, it could not conclude that Olson breached his duty of loyalty to the Company.

Initial Response. The SLC found that, upon learning of the designation from [a Chiquita lawyer], Olson instructed [the Chiquita lawyer] to consult outside counsel, Larry Urgenson at K&E. Urgenson advised the Company that, among other things, the Company had to either stop making the payments or seek guidance from the government.

As a result, Olson immediately suspended payments being made directly to the AUC in Santa Marta, pending the Company's review of the situation. Olson did not, however, explicitly order that payments to the convivir be suspended, because, as he told the SLC, he forgot the connection between the Turbo convivir and the AUC he had learned about more than two years earlier. As a result, Banadex made two payments to the convivir, one in February and one in March 2003, before Olson recalled the convivir/AUC relationship. As soon as Olson was reminded about the relationship, he suspended those payments as well.

The SLC was troubled by the fact that Olson allowed these two payments to be made. In the SLC's view, Olson should have been more thorough about ensuring that all payments to the AUC, whether directly or indirectly through the convivir, were suspended pending disclosure to DOJ. He should have spoken with the Company's personnel in Cincinnati and Colombia who were knowledgeable about the payments to make sure that the Company was reacting fully and appropriately to the discovery that the AUC was on the FTO list; the fact that he did not do so unnecessarily delayed the suspension of the second stream of payments. However, the SLC viewed this as an honest mistake because Olson immediately suspended the direct payments; there is no reason to have suspended one stream of payments but not the other; and he suspended the convivir payments immediately upon realizing his error. In response to the SLC's criticism, Olson said he was distracted during this time period by various other

pressing issues, including negotiating the sale of Chiquita's processed food group, completing the acquisition of Atlanta, and drafting the Company's proxy statement. The SLC found that although this provided an explanation for his lack of focus on the payment issue, it did not excuse it.

In addition to the brief delay in shutting off the second payment stream, the SLC was also troubled by Olson's failure to inform the Audit Committee about the designation for almost five weeks. Olson attributed the delay to a number of factors, including his desire to be fully informed prior to raising the issue with the Audit Committee; the fact that his predecessor had been criticized for presenting issues to the Board without having solutions; and that he hired experienced outside counsel and was working through the issues with counsel. Whatever his overall views and experiences, the SLC concluded that an issue of the magnitude of the AUC's FTO designation should have been brought to the Audit Committee earlier.

At the April 3 Audit Committee meeting, Olson, like Hills, advocated that the Company should approach DOJ regarding the payments, and the Audit Committee agreed. The record is clear that, at this time, Olson was becoming increasingly unsettled about the safety of Chiquita's employees in Colombia. Indeed, the factual proffer cites to a statement attributed to Olson on April 4, the day after the April 3 Audit Committee meeting: "BO thinks it will be impossible to clear this before making next payment. His and Rod's opinion is just let them sue us, come after us. This is also CEO's opinion." DOJ used this statement to suggest that the Company was determined to make the payments no matter what DOJ's views on the issue ultimately turned out to be.

However, the SLC credited Olson's explanation that this statement, which he claimed was recorded in a somewhat misleading way, did not show lack of concern for the illegality of the payments – or a disregard for DOJ's authority – but instead reflected his determination to protect the safety and well-being of the Company's employees. If that meant an increased risk that DOJ would pursue the Company, Olson believed that this might be an unavoidable cost of protecting the Company's personnel. Olson knew that the Company was going to self-disclose to DOJ and did not believe that one further payment would substantially affect DOJ's response one way or the other.

The SLC fully appreciates the pressure that Olson was under at that time to balance the risks of continuing to violate the criminal law against the welfare of the Company's personnel. The SLC did not find that Olson displayed a cavalier attitude towards continuing the payments; he took the issue extremely seriously, as reflected in the heated discussion that occurred on this April 4 call when he hung up on Urgenson, and in numerous other conversations.

***The Payments Resume**.* Like Hills, Olson provided several reasons why he allowed the payments to continue following the Chertoff meeting, including Chertoff's assurance that DOJ would get back to Chiquita, Deputy Attorney General Thompson's encouraging statements at the August 26 meeting, DOJ's failure to give a directive to the Company at the September 4 meeting, and the Company's efforts to sell Banadex. Above all else, the SLC found that Olson held the sincere belief that Banadex employees would be physically harmed if the payments stopped. Faced with this dilemma, and for the reasons enumerated above, Olson chose to allow the Company to continue to make the payments.

***Conclusion**.* For these reasons, the SLC could not conclude that Olson breached his duty of loyalty to the Company by allowing the payments to continue from approximately February 2003 to January 2004. The SLC believes that Olson made two errors in judgment – failing to stop the convivir payments immediately after learning of the FTO designation, thereby allowing additional payments to be made, and waiting five weeks to bring the issue to the attention of the Audit Committee. However, the SLC also concluded that Olson, like Hills, believed, in good faith, that the payments were necessary to protect the Company's employees and that the Company could continue to make the payments while DOJ considered the issue. In addition, Olson sought and received guidance from K&E, KPMG, and Goldstock, none of whom advised Olson that the Company should stop making the payments after the Chertoff meeting but prior to January 2004.

d. *Management: Aguirre, Freidheim, Kistinger, Riley, Tsacalis, Zalla*

***Freidheim**.* The SLC found that Cyrus Freidheim, who was CEO through most of this period, reasonably and appropriately relied upon the Audit Committee to direct the Company's response to the DOJ investigation. Freidheim learned of the issue from Olson in mid-March, and he directed Olson to disclose the issue to the Audit Committee. At the April 3 Audit Committee meeting, and from that point forward, the Audit Committee took control of the issue. Indeed, Hills wrote to Freidheim in September 2003 and expressly stated that he had asked Olson to allow the Audit Committee to conduct an investigation of the payments "to provide independent confirmation of the facts." Freidheim continued to receive regular updates at Board meetings, and through informal discussions with Hills and Olson. The SLC found Freidheim's reliance on the Audit Committee, and Hills in particular, to be reasonable and appropriate under the circumstances given Hills' extensive governmental experience, and active role in overseeing the situation, including his regular contact with DOJ officials, outside counsel, and Olson.

Kistinger. Robert Kistinger, President and COO, had a minimal role in making the decision about the payments and in determining the Company's position in its

dealings with DOJ. Kistinger was the senior management official most knowledgeable about the Company's operations in Colombia and the history of the payments. He was involved in high-level discussions among senior management about continuing the payments after the discovery of the designation, including the April and August 2003 discussions documented by [Banadex Employee #10] but he did not have the authority to unilaterally authorize the payments to resume. Indeed, the record reflects that Kistinger deferred to Olson and the Audit Committee on this issue because of its legal implications.

Riley, Tsacalis, & Zalla. James Riley, CFO, and William Tsacalis, Controller, had no role in the decision-making process with respect to continuing payments. While both Riley and Tsacalis knew of the designation shortly after it was discovered, neither was significantly involved in the regular discussions about continuing the payments that followed. Both Riley and Tsacalis received regular updates at Board and Audit Committee meetings regarding the Colombia matter, but were not involved in advising the Board on the matter.

Jeffrey Zalla, VP and Corporate Responsibility Officer during this time, was not informed of the discovery of the FTO designation until the late spring or summer of 2003, and was not involved in the initial decision to continue making the payments. There is no evidence that, once made aware of the designation, Zalla played any role in the Company's decision-making process with respect to the payments. Zalla did not have regular access to the Board during this time, and thus had limited ability to affect the Company's decision on whether to continue the payments.

Aguirre. Aguirre joined the Company as CEO on January 12, 2004, replacing Freidheim. Only one payment – the January 24 payment – was made during his tenure, and he learned about it only after the fact. Aguirre recalled directing that no further payments be made without his authorization, though other key participants in the process do not recall any such directive from Aguirre; in any event, no such payments were made thereafter.

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim with respect to this period. In exercising that judgment, the SLC took account of the following factors.

First, as discussed at length above, this decision is based on the fact that the SLC could not conclude that a breach of the duty of loyalty by any defendant occurred. The SLC found that those who were directly involved in the decision-making process, principally Olson and Hills, acted in good faith and in the honest belief that their actions were in the best interests of the Company, and consulted outside counsel and

outside consultants to ensure the Company acted appropriately in dealing with the many challenges it faced with respect to the situation in Colombia.

The Board, as a whole, also acted in good faith in relying upon Olson and Hills to direct the Company's response. Members of senior management – Freidheim, Kistinger, Riley, Tsacalis, and Zalla – also acted in good faith in relying upon Olson and Hills. Given the role of the Audit Committee, none of these individuals was responsible for, or had the authority to make, the decision to continue the payments during this time. After Aguirre became CEO, there was only one additional payment and he had no knowledge of the payment before it was made.[223]

Second, as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

E. Analysis of Olson's Performance as General Counsel

As described at length above, the SLC looked critically at individual judgments made by Olson at various points during the events investigated by the SLC. In addition to evaluating Olson's individual judgments and decisions relating to the issues under investigation, the SLC concluded that it was appropriate to consider whether, taking Olson's performance as General Counsel as a whole, Olson breached his duty of care to the Company, even though the Amended Complaint does not allege such a claim. *See Disney*, 907 A.2d at 749 (directors and officers owe a duty of care to the corporation that requires officers and directors to "use that amount of care which ordinarily careful and prudent men would use in similar circumstances" and "consider all material information reasonably available in making business decisions") (internal quotes and citation omitted).

As discussed above, the SLC identified several instances when it believed that Olson could have taken additional steps to protect the Company, including:

- Olson did not install a system to ensure that the Company was in compliance with laws affecting countries in which the Company did business, and specifically anti-terrorism laws, particularly after September 11, 2001.
- Olson did not shut off the payment stream to the convivir in February 2003, despite having suspended all payments to "paramilitaries."

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223 As is set forth at length above, because the defendants acted on an informed basis, without fraud, conflict of interest, or gross negligence, and for a rational business purpose, the SLC also could not find that they breached their duty of care during this period.

- Olson delayed five weeks in informing the Audit Committee of the discovery of the FTO designation in February 2003.
- Olson did not make clear to the Board (i) that the payments had resumed after the Chertoff meeting, and (ii) the risk to the Company in continuing the payments.

Taken individually, the SLC found that none of these issues rose to the level of a breach of duty. Similarly, the SLC concluded that Olson's performance, while in certain respects deficient, did not fall below the standard of care, and thus, it is not in the Company's best interests to pursue a claim against him.

In considering Olson's performance, the SLC considered several factors, including, among other things, (i) whether Olson acted in good faith, (ii) the advice Olson received from outside counsel and Roderick Hills, and (iii) whether the Company's actions would have been affected if Olson made different decisions or behaved differently.

First, the SLC found that Olson at all times chose courses of action that he, rightly or wrongly, believed to be in the best interests of the Company. There is no evidence to suggest that Olson was motivated by anything other than the Company's best interests at any time, and certainly nothing to suggest that he was motivated by his own personal interests. The SLC found no evidence that Olson acted in bad faith or intended to cause harm to the Company.

Second, Olson sought and received advice from outside counsel when appropriate. Throughout the period the Company made payments to guerrilla and paramilitary groups, the Legal Department in Cincinnati, at Olson's direction, obtained legal opinions from local counsel, both in-house and outside law firms, regarding the legality of the payments under local law.[224] Upon discovering the FTO designation, Olson immediately sought Larry Urgenson's counsel. Accordingly, the SLC found that Olson in good faith sought the advice of experts to ensure Chiquita acted appropriately.

Third, the SLC found that, even if Olson had made different decisions or acted differently at various points, this would not have changed the outcome or materially affected the decisions made by either the Company or the government. For example, with respect to the two payments the Company mistakenly made to the convivir in February and March 2003, the impact of that mistake was significantly diminished by

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224 Several of those opinions were obtained as a result of the two investigations Chiquita's Legal Department conducted regarding the payments – David Hills' investigation into the convivir payments in 1997 and Robert Thomas's investigation into the convivir-AUC link in 2000.

the fact that the Company resumed making payments to the convivir and AUC in May 2003. Thus, no additional harm resulted from those payments.

As to the delay in advising the Audit Committee of the FTO designation, the SLC concluded that it was unlikely that the Board would have acted any differently had it been informed of the issue in February 2003 rather than April 2003. Further, the SLC found that although Olson should have more closely monitored the payments and made sure that the Board knew that the payments had resumed in May 2003, by that time Hills had assumed responsibility for dealing with the investigation and DOJ; in any event, once it became clear to the Board that the payments had continued, the Board had no objection. Accordingly, the SLC found that the deficiencies in Olson's actions identified by the SLC were not so significant that they would have changed the course of conduct the Company chose to engage in, nor is there any evidence that they would have affected the government's decision to charge the Company.

The SLC found, though, that a more significant failing that might, in fact, have changed the course of events was the failure of Olson to put in place a more comprehensive system for ensuring Chiquita's compliance with all U.S. laws affecting the Company's worldwide activities and operations. If such a system had been implemented, the Company may have discovered the FTO designation shortly after it was made and quite possibly avoided much if not all of the harm that ultimately occurred.

However, as noted above, the SLC found that Olson, on the whole, diligently worked to ensure that the Company had compliance systems in place. While the SLC believes that, in retrospect, the compliance programs implemented and overseen by Olson were too narrow, such systems existed and Olson, in good faith, believed that they were sufficient. It took the discovery of the FTO designation to demonstrate that they were not.

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded that it will not assert a claim for breach of the duty of care against Olson. In exercising that judgment, the SLC took account of the following factors. ***First***, the SLC concluded that Olson at all times believed that he was acting in the Company's best interests, had reasonable and rational justifications for the choices he made, and that his conduct was not so deficient as to support a legal claim against him for breach of duty. ***Second***, as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

F. Allegations Concerning Drugs and Arms Smuggling

In the Amended Complaint, the plaintiffs allege that the defendants caused or allowed the Company to "provid[e] or facilitate[e] the provision of arms and other weapons to the AUC. In particular, Chiquita is the subject of civil litigation that alleges, among other things, that the Company facilitated the illegal transport of arms shipments and narcotics to the AUC through use of its boats and port facilities located in Turbo, Col[o]mbia." Am. Compl. ¶ 1. In support of this claim, plaintiffs point to (i) statements made by Carlos Castanõ that the AUC smuggled 13,000 rifles into Colombia, even though the statements do not mention Banadex, and (ii) an incident in 2001 in which 3,000 AK-47s were smuggled through Banadex's shipping facility in Turbo, an incident that was later investigated by the OAS. *See* Am. Compl. ¶¶ 1, 7, 122. However, the plaintiffs do not directly plead any facts suggesting that the defendants "provided or facilitated" arms and drug smuggling – they simply incorporate the allegations made in the ATA/ATS cases pending before this Court – and these allegations are only tangentially related to the issue of the payments. Nonetheless, the SLC examined this issue.

As an initial matter, the SLC found no evidence that any of the defendants – either senior Chiquita management or the Board – authorized, allowed, or otherwise condoned the use of Banadex's shipping facilities for smuggling by the AUC. Likewise, the SLC found no factual support for the allegation that Banadex provided the FARC with "weapons, ammunition, and other supplies through its transportation contractors." Am. Compl. ¶ 100. Indeed, to investigate this issue, counsel for the SLC contacted all six lead counsel for the plaintiffs in the ATA/ATS cases, whose allegations are referred to in the Amended Complaint, and requested that they share with the SLC any evidence they had gathered to support their claims that Chiquita was involved in arms or drug smuggling; the SLC received no such evidence.

Rather, as described above (*see* Section IV.J.), the SLC identified three specific incidents of smuggling by third parties that occurred at Banadex's shipping facility in Turbo, including (i) the April 2001 "Easter" incident, (ii) the November 2001 "Otterloo" incident, and (iii) a June 2002 drug smuggling incident. As discussed below, the SLC concluded that, in each instance, the event was reported internally, appropriately investigated, and, if determined necessary, remedial steps were taken.[225]

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[225] This was consistent with senior management's response to the discovery of the improper port payments in 1997; upon identifying the issue, it promptly investigated and disciplined the employees who engaged in wrongdoing. *See* Section IV.D.1.; Chiquita Brands International, Inc., Exchange Act Release No. 44,902 (Oct. 3, 2001) ("Chiquita had strict policies prohibiting payments of the kind made to the customs officials. . . . After conducting an internal investigation, Chiquita took corrective action, which included terminating the responsible

The Easter Incident. In the spring of 2001, the Chiquita Legal Department was advised by the Banadex Legal Department that false shipping documents had been used to smuggle weapons through its shipping facilities. Olson was promptly informed, and directed in-house counsel David Hills to investigate the Company's legal obligations in light of what had occurred. Hills hired a Colombian law firm to provide advice regarding Chiquita's obligations, and, after meeting with the Colombian lawyers in Miami, was advised not to report the incident to Colombian authorities because of the risk of retaliation. Indeed, the attorneys from the Colombian law firm refused to discuss their opinions over the phone or to deliver a copy of their written opinion in Colombia due to the danger that these activities posed, and would only meet in person in the U.S. to discuss the matter.

The Otterloo Incident. Later that year, Banadex management learned that its shipping facilities had again been used for smuggling arms. Senior Banadex management then conducted an investigation that found no evidence of wrongdoing by Company employees, and those findings were relayed to the Colombian and international authorities, with whom the Company was cooperating (and who had contacted Chiquita about the incident). As referenced in the Amended Complaint, the OAS also conducted an investigation into this incident, and concluded that several Colombian customs officials likely aided the AUC in smuggling the arms shipment into Colombia, but did not mention Chiquita in its report, or otherwise signal that the Company had any involvement in the incident. Nonetheless, a Banadex employee was wrongfully detained by Colombian authorities for a year in connection with the event.

June Drug Smuggling Incident. In June 2002, a substantial quantity of cocaine was smuggled aboard a Chiquita vessel by a third party that had purchased cargo space on the vessel. To prevent retaliation, senior Banadex management did not alert Colombian authorities, but instead, during a previously scheduled trip to Belgium, the ship's destination, [Banadex Employee #10] reported details of the drug shipment to local Belgian authorities, who then seized the smuggled drugs. Following this incident, the Company stopped allowing third parties to purchase cargo space on its vessels and the SLC learned of no subsequent smuggling incidents involving drugs or arms. The SLC was further advised that Banadex management established a lengthy and constructive relationship with the U.S. Drug Enforcement Administration ("DEA"), which resulted in substantial information being exchanged between the Company and DEA.

These incidents suggest the following to the SLC. ***First***, given the political, social, and security environment in Colombia, they were not unprecedented or unusual.

Banadex employees and reinforcing its internal controls with respect to its Colombian operations").

Second, there is no evidence that Chiquita employees were involved in the smuggling. ***Third***, no member of senior Banadex management, Chiquita management, or the Board had prior knowledge of or involvement in any of the incidents. ***Fourth***, management took steps in response to each incident that it believed were reasonable under the circumstances, including, with regard to the June 2002 drug smuggling incident, informing the Board promptly about what had occurred. ***Fifth***, the Company collaborated and cooperated with the DEA on various matters relating to narcotics enforcement efforts, a relationship that would not have existed if the Company was involved in drug smuggling. Accordingly, the SLC found that the Company's response to these incidents does not suggest that the defendants "completely abdicate[d] their duties and fail[ed] to exercise any judgment." *Classica Group*, 2006 WL 2818820 at *7.

G. Breach of Duty in Connection with Conducting an Alleged "Fire Sale" of Chiquita's Colombian Operations

The plaintiffs allege that the defendants breached their fiduciary duties by conducting a "fire sale" of the Company's Colombian operations, Banadex, in June 2004. Am. Compl. ¶ 127. Based on their dates of employment, and the facts developed during the SLC's investigation, this claim applies to the following defendants: (i) *management*: Fernando Aguirre, Robert Kistinger, Robert Olson, James Riley, William Tsacalis, and Jeffrey Zalla; (ii) *directors*: Morten Arntzen, Jeffrey Benjamin, Robert Fisher, Cyrus Freidheim, Roderick Hills, Durk Jager, Jamie Serra, and Steven Stanbrook. Specifically, the Amended Complaint alleges:

> In 2004, due to the problems created in its Colombia operations due to the illegal activities the Chiquita Defendants had caused Chiquita to engage in there, and hoping to avoid extradition of Chiquita insiders to Colombia for their criminal conduct, the Chiquita Defendants caused Chiquita to sell Chiquita's Colombian banana-producing operations. Due to these circumstances, this was, in essence, a "fire sale" – even though those Colombian operations had been Chiquita's most profitable operations.

Am. Compl. ¶ 127.[226] For the reasons discussed below, the SLC has concluded that this claim should be dismissed.

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226 The SLC has noted that the plaintiffs' claims appear to be at odds with each other. On the one hand, the plaintiffs allege that the Company should not have made the payments (*see* Am. Compl. ¶ 110), and on the other hand, the plaintiffs allege that the Company should not have sold Banadex because it was its most profitable banana producing operation (*see* Am. Compl. ¶ 17). The plaintiffs cannot have it both ways. As set forth at length above, the choice was between continuing to make the payments, or leaving Colombia. Continuing to do business in Colombia

As discussed above, the decision to sell Banadex to Banacol will be protected by the business judgment rule unless it can be shown that the defendants acted with fraud, illegality, a conflict of interest, or gross negligence. Absent any of these conditions, the decision "will be upheld unless it cannot be 'attributed to any rational business purpose.'" *Disney*, 907 A.2d at 747; *see also PSE&G,* 718 A.2d at 257 ("Unless they engage in conduct in which no reasonable owner would be likely to engage, the directors should not expect to be monetarily liable").

1. The SLC Found No Evidence of Fraud, Illegality, or Conflict of Interest

The SLC has found no evidence to suggest that the decision to authorize the sale of Banadex was tainted by fraud, illegality, or a conflict of interest.

The only potential conflict raised in the Amended Complaint is the allegation that the defendants authorized the sale in order to avoid extradition of Chiquita insiders to Colombia for their criminal conduct. *See* Am. Compl. ¶ 129. This allegation is not supported by any facts in the Amended Complaint. The SLC found no evidence, documentary or testimonial, to support this allegation.

To the contrary, the evidence overwhelmingly supports the conclusion that the defendants authorized the sale of Banadex based on several considerations, including, the DOJ investigation and Chiquita's inability to obtain guidance from DOJ that would permit it to continue to do business in Colombia lawfully, which was their primary motivation. The SLC has found no evidence to suggest that the defendants ever discussed the issue of extradition in connection with the sale of Banadex, nor is there any evidence that Colombian authorities were considering, or that the defendants knew Colombian authorities were considering, extradition of Chiquita executives in connection with the payments. Indeed, the possibility of extradition was first publicly reported following the guilty plea in March 2007, nearly three years after the sale had been completed. *See, e.g.,* Simon Romero, *Colombia May Extradite Chiquita Officials*, N.Y. TIMES, Mar. 19, 2007, at A1; Malia Rulon and Cliff Peale, *Chiquita Enters Guilty Plea*, CINCINNATI ENQUIRER, Mar. 20, 2007, at 7A.[227]

Therefore, the business judgment rule protects the defendants from liability for their decision to authorize the sale unless that decision was (i) the result of gross negligence, or (ii) the decision wholly lacked a rational business purpose.

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without making the payments was not an available option. Accordingly, the Company chose to stop making the payments and exit Colombia.

[227] Given these findings regarding the motivations for the sale, the SLC concluded that there was no support for a claim for a breach of the duty of loyalty in connection with the sale of Banadex.

2. The SLC Found No Evidence of Gross Negligence

The SLC has concluded that the facts surrounding the Board's decision to authorize the sale of Banadex fail to support a finding of gross negligence. *See Disney*, 907 A.2d at 750 (citation omitted) (defining gross negligence as "reckless indifference to or deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason"); *Guttman,* 823 A.2d at 507 n.39 (to show gross negligence, there must be facts suggesting a "wide disparity" between the decision-making process employed by the board, and a process that would be rational).

The SLC found that the sale process was rational and orderly and reflected a sustained effort to produce the best value for Chiquita's shareholders under the circumstances. Indeed, for most of the negotiations, which went on for almost a year, Banacol was not aware of the DOJ investigation; thus, it did not have a material impact on the sale process. The SLC found the key events relevant to the sale of Banadex to be the following:

First, the idea of selling Banadex did not arise as a result of the government investigation. One of the first acts the new Board took in 2002 was to engage Booz Allen to perform an analysis of the Company's entire operations and evaluate what changes, if any, should be made, including the sale of some or all of the Company. In addition, the Board began a broad strategic review of the benefits of owning farms, which was its dominant strategy in Colombia, versus purchasing fruit. This review included a discussion of divesting farms not only in Colombia, but throughout Central America. It was consistent with the views of a number of the Board members regarding the most promising business model for the Company.

Second, Banacol raised the idea of a sale with Chiquita, not the other way around. In late 2002, Banacol approached Chiquita, on an unsolicited basis, through director Robert Fisher, to discuss a sale of Banadex. CEO Cyrus Freidheim met with Banacol representatives, but was not interested in pursuing a transaction at that time.

Third, once the DOJ investigation began, certain of Chiquita's outside directors were in favor of immediately exploring a sale, while others believed that, having begun the dialogue with DOJ, the Company should wait to hear its response. The Board decided to do both, and, in June 2003, Chiquita initiated negotiations with Banacol. [Chiquita Employee #2] with decades of experience in Central and South America, was put in charge of the negotiations. By mid-June, Chiquita had received from Banacol a framework for discussing a potential transaction.

Fourth, through the summer and into the fall of 2003, Chiquita engaged in negotiations for a deal. On August 23, 2003, Chiquita received an initial proposal from Banacol. Banacol offered to purchase Banadex's farms for $76 million (comprised of $54

million cash and $21.6 million from a preferential discount on a very desirable type of pineapple). The offer also provided for the parties to enter into an eight-year purchase contract for bananas and pineapples. Reactions were initially mixed, but overall the proposal was considered reasonable and workable. A team, headed by [Chiquita Employee #2], was assembled to analyze the deal and pursue negotiations, which continued for several months.

Fifth, at a November 20, 2003 Board meeting, the Board received another presentation regarding owned versus purchased fruit models. The Board also received an update on the status of negotiations with Banacol. At the time, the deal consisted of a $54 million cash payment, $25 million (NPV) in preferential discount on pineapples, and an eight-year purchasing contract for bananas and pineapples, with an above-market price for bananas (NPV $42 million) and a preferential discount for pineapples (NPV $25 million).

Sixth, at a December 4, 2003 Audit Committee meeting, Olson reported that the Company was nearing a deal with Banacol. Jaime Serra made an impassioned speech in favor of departing Colombia and going forward with the transaction. The Committee members pushed for the Company to close the deal, and questioned whether the Company needed to open the process up to other bidders.

Seventh, on January 26, 2004, Chiquita issued a press release announcing the potential sale of Banadex. This served as market check to determine whether any additional bidders were interested in Banadex. No additional bidders came forward.

Eighth, in February and March, the Board received several updates on the status of the negotiations:

- At a February 9, 2004 Audit Committee meeting, Kistinger presented the latest deal terms and the status of the due diligence and negotiations, and Fernando Aguirre advised the Audit Committee that he believed the Company should go forward with the deal. At that time, the terms of Banacol's proposal included (i) a $33 million cash payment, (ii) an $8 million pension liability assumption, (iii) $8 million (NPV) of seller's financing, (iv) $25 million (NPV) in preferential discount for pineapple purchasing, and (v) an eight-year purchasing contract for bananas and pineapples.

- At a March 4, 2004 Audit Committee Meeting, the directors received another report on the status of the Banacol sale.

- At a March 30, 2004 Board Meeting, the Board received an update on negotiations with Banacol, learned that DOJ had concerns with respect to

> the sale, and decided to postpone approval of the transaction in light of those concerns. At this point, Banacol's proposal to Chiquita included (i) a $31 million cash payment, (ii) an $8 million pension assumption, (iii) $12 million (NPV) of seller's financing, (iv) a $25 million preferential discount on pineapples, and (v) an eight-year purchase contract for bananas and pineapples.

Ninth, it was not until early April that Banacol became aware of the DOJ investigation. The principal terms of the deal were not modified as a result of this disclosure, but Banacol insisted on the inclusion of a break-up fee and a rescission provision in the event DOJ prevented the sale from closing.

Tenth, nearly a year after negotiations had begun, in May 2004, the Board authorized the sale of Banadex to Banacol. At a May 7, 2004 Joint Board and Audit Committee Meeting, Olson reported to the Board that the deal with Banacol was almost final. The Board authorized the addition of a rescission provision, including a break-up fee, in light of Banacol's concerns about the DOJ investigation. The Board further authorized the Company to enter into a definitive agreement with Banacol on the terms presented.

The Board authorized the Company to sell Banacol for the following consideration, (i) approximately $27 million in cash, (ii) approximately $4 million in notes of ninety days or less, (iii) longer-term notes and deferred payments having a net present value of $12 million, and (iv) the assumption of an $8 million pension liability. In addition, the Board authorized the Company to enter into eight-year purchase contracts with Banacol for bananas and pineapples, with a preferential discount on the pineapples. However, several directors were absent from this meeting, and the Board determined that the transaction should be reexamined at the following meeting. At a May 13, 2004 Board Meeting, the full Board reaffirmed its authorization of the transaction. The deal was signed on June 10, 2004 and closed on June 28, 2004.

Thus, as a result of its investigation, the SLC found, among other things, that Banacol approached Chiquita about a sale before the DOJ investigation had begun, the Company negotiated with Banacol for nearly a year, trying to obtain the best terms possible, the Board received regular updates on the status of the negotiations, Banacol was not aware of the DOJ investigation during the majority of the negotiations, and the deal was subject to a market-check through the January press release. Further, the SLC was told by every witness it interviewed on the issue, including members of management and the Board who were originally opposed to or unenthusiastic about the deal, that, overall, management and the Board believed in good faith that Chiquita had obtained the best possible value for Banadex. Finally, while there is no question that the defendants were motivated to sell Banadex as a result of the DOJ investigation, the SLC found that the sale was also driven by a broader shift in the Company's strategy

from owned farms to purchased fruit, and a desire to leave Colombia's dangerous environment, regardless of whether the payments could continue.

The SLC has concluded that these facts do not suggest gross negligence on the part of the defendants, but rather, demonstrate that they used a rational process designed to ensure that the Board acted on an informed and adequate basis in making its decision. The SLC found that the directors did not act with "reckless indifference to or a deliberate disregard of the whole body of stockholders." *Disney*, 907 A.2d at 750; *see also Albert*, 2005 WL 2130607, at * 4 ("Gross negligence . . . involves a devil-may-care attitude or indifference to duty amounting to recklessness") (citation omitted); *Smith v. Van Gorkom*, 488 A.2d 858, 874-75 (Del. 1985) (finding breach of fiduciary duty where Board authorized sale of company after a twenty-minute presentation and two-hour deliberation, without any supporting documentation, prior notice, or input from counsel or management); *Hollinger, Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 388 (Del. Ch. 2004) (finding that Board did not breach its duty of care in connection with the sale of a wholly owned subsidiary due to a "mountain of evidence that refutes the proposition that the CRC acted in a grotesquely deficient way").

3. The Decision to Sell Was Supported by a Rational Business Purpose

Moreover, the decision to sell Banadex was supported by a rational business purpose. As stated above, the SLC found that the sale of Banadex was motivated by the DOJ investigation, Chiquita's desire to move from an owned farm to a purchased fruit business model, and the dangerous conditions in Colombia. The SLC concluded that each of these reasons serves an appropriately rational business purpose. Thus, the SLC concludes that, based on the entire factual record, the "board has acted in a deliberate and knowledgeable way," and therefore deserves the protection of the business judgment rule. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989).[228]

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim. In exercising that judgment, the SLC considered the following factors.

First, as discussed above, this decision is based on the fact that the SLC found no breach of duty on the part of any of the defendants. The SLC has concluded that the Board was fully informed about the decision prior to authorizing the sale, and that the

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228 Because the decision was made by the Board and not management, there is no basis for a claim against the management defendants.

decision-making process employed by the Board on the whole was reasonable and appropriate. Moreover, the SLC found that the decision to sell Banadex was based on valid, objective business considerations and that there is no evidence that the defendants were motivated by self-interest or otherwise acted in bad faith in connection with the sale. ***Second,*** as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are Chiquita's exculpatory clause and Chiquita's advancement and indemnity obligations. ***Third,*** as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

H. Breach of Duty in Connection with the Guilty Plea

The plaintiffs also allege that the defendants breached their fiduciary duties by causing the Company to enter into the plea agreement in March 2007, pursuant to which the Company agreed to pay a $25 million fine. Based on their dates of employment and the facts developed by the SLC's investigation, this claim applies to the following defendants: (i) *management*: Fernando Aguirre, Robert Kistinger, William Tsacalis, and Jeffrey Zalla; (ii) *directors*: Morten Arntzen, Robert Fisher, Clare Hasler, Roderick Hills, Durk Jager, Jamie Serra, and Steven Stanbrook.[229]

Specifically, the Amended Complaint alleges:

> Not only did the Chiquita Defendants engage in illegal and/or improper conduct for their own economic benefit while in control of Chiquita, but when the DOJ threatened a criminal prosecution against them and Chiquita, the Chiquita Defendants further breached their fiduciary duties and continued to protect themselves and aggrandize their own interests at the expense – and to the damage – of Chiquita. The Chiquita Defendants did this by causing Chiquita to plead guilty and pay a huge fine ***in return for a promise from the government not to prosecute the Chiquita executives involved in the illegal conduct – even though the government's Sentencing Memorandum specifically identified 10 present and former officers of Chiquita as being actively involved in the illegal payments. This action***

[229] As noted above, SLC member Hasler recused herself from deliberations and decision-making with respect to this claim.

> ***protected those executives and the Chiquita Defendants, while damaging the Company*** . . .
>
> When the DOJ threatened the Chiquita Defendants and Chiquita with criminal prosecution, the Chiquita Defendants abused their continuing control of Chiquita by causing it to plead guilty and pay a huge fine in return for a promise from the government not to prosecute the Chiquita executives involved in the illegal conduct, thus damaging the Company to protect themselves and their allies and friends.

Am. Compl. ¶¶ 16, 119 (emphasis in original). For the reasons discussed below, the SLC has concluded that this claim should be dismissed.

Like the decision to authorize the sale of Banadex, the decision to authorize the Company to enter into the guilty plea will be protected by the business judgment rule unless there is evidence the defendants acted with fraud, illegality, a conflict of interest, gross negligence, or lack of a rational business purpose.

1. The SLC Found No Evidence of Fraud, Illegality, or Conflict of Interest

The SLC has found no evidence that the decision to authorize the guilty plea was tainted by fraud, illegality, or a conflict of interest. As noted above, the plaintiffs allege that the defendants caused Chiquita to plead guilty in exchange for a promise from DOJ not to prosecute individual Chiquita officers and directors. The SLC examined this issue and found that while the Board initially sought to avoid the prosecution of individual officers and directors, its motivation for doing so was not self-interest. Rather, the Board believed that such prosecutions would be harmful to the Company because: the Company would have to pay the substantial legal fees for the continued investigation and possible prosecution of those individuals, the Company's reputation would be damaged further as a result of ongoing legal proceedings against any of the individuals, the indicted individuals would be unable to perform their duties for the Company, and individual prosecutions could put certain of the Company's credit facilities in jeopardy.

Indeed, as a general matter, the SLC found that, contrary to the allegations in the Amended Complaint, the defendants sought to protect the best interests of the Company in negotiating the guilty plea and ultimately sacrificed the interests of the individual officers and directors in order to reach a satisfactory settlement with DOJ. In fact, the allegations in the Amended Complaint are directly contrary to the terms of the plea agreement, which specifically required the Company to cooperate in any

continuing investigation of the individuals. *See* Letter from Jeffrey A. Taylor to Eric H. Holder, Jr., (Mar. 6, 2007) (Chiquita "agrees to cooperate fully, completely and truthfully with all investigators and attorneys of the government, by truthfully providing all information in your client's possession relating directly or indirectly to all criminal activity and related matters which concern the subject matter of this investigation").

Consistent with that agreement, following the Company's guilty plea, DOJ continued its investigation of individuals for several months. As part of that investigation, the Company made Larry Urgenson and Audrey Harris of K&E available to DOJ, and DOJ required Urgenson to undergo multiple interviews and testify before the grand jury. Ultimately, five of the Company's then-current and former officers and directors submitted memoranda in opposition to prosecution in an effort to dissuade DOJ from bringing charges against them. Thus, the SLC found that, regardless of any alleged improper motives, the Board did not in fact enter into a deal that protected individual officers and directors – it entered into a plea agreement that provided absolutely no protection for any of the individuals.

Specifically, in reviewing the facts and circumstances surrounding the decision to enter into the plea agreement, the SLC found that:

First, the Board authorized counsel to enter into plea negotiations at a November 16, 2006 Board meeting. As support for this decision, directors cited the risk and cost associated with a criminal trial. For example, director Jaime Serra recalled that Eric Holder of Covington, who by then had taken over from Larry Urgenson as the principal point of contact with DOJ, gave a presentation to the Board in which he put Chiquita's odds of winning a criminal trial at 50%, and estimated that pursuing litigation could cost Chiquita as much as $180 million, including costs of litigation and the size of the potential fine that could be imposed if it lost at trial.

Second, the Company then engaged in a period of substantial back and forth with DOJ regarding a plea agreement. The primary issues to be negotiated were the statute under which the Company would plead,[230] the amount of the fine, and the prosecution of individuals. It was clear from the discussions that although the statute

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[230] As discussed above, the Company sought to enter a plea pursuant to 50 U.S.C § 1705 (knowingly Engaging in Transactions with a Specially-Designated Global Terrorist without a license), while DOJ demanded that Chiquita plead under 18 U.S.C. § 2339B (providing material support to an FTO), a much more serious offense. Section 2339B carried with it the implication that the offender (in this case the Company) was an active and knowing supporter of the terrorist organization and advanced its objectives. Understandably, the Company was concerned that a plea under § 2339B could cause serious global public relations issues, as well as expose the Company to devastating collateral consequences.

under which the Company pled guilty and the size of the fine were considered deal-breakers by the Board because either could potentially put the Company out of business, the Company understood that it might not be able to ensure the non-prosecution of individuals and accepted that as something that might need to be sacrificed.

Third, formal plea negotiations began in early December. On December 5, 2006, the Company submitted its initial plea offer to DOJ. The Company offered to (i) plead to one count under § 1705 (knowingly Engaging in Transactions with a Specially Designated Global Terrorist without a license), and (ii) pay a $1 million fine, while the government would agree to end its investigation, including any investigation of individuals. On December 18, DOJ rejected that proposal and countered with a demand that the Company (i) plead guilty to two counts under § 2339B (knowingly providing material support to an FTO), (ii) pay a $79 million fine, and (iii) continue to cooperate with DOJ's investigation of individuals.

Fourth, negotiations continued into January 2007. At a January 5, 2007 Board meeting, the Board authorized the Company to make a revised offer to DOJ, which was made on January 17. The key aspects of the Company's offer were to (i) plead guilty to three counts of § 1705 for payments made between October 2001 and April 2003, (ii) pay a $5 million fine, and (iii) to agree to cooperate in investigations for "pre-disclosure conduct or improper conduct during the course of the government's investigation." DOJ did not counter this offer. Instead, after receiving an update on the investigation at a February 2 Board meeting, the Board authorized and directed the Company to offer a plea agreement which included, among other things, a financial penalty not to exceed $12.5 million. In the interim, Roderick Hills voluntarily recused himself from all matters related to Colombia and from his role as Chair of the Audit Committee on these issues, as a result of specific DOJ interest in Hills as an individual.

Fifth, during February, the parties moved closer to a deal, and the Company dropped its demand that DOJ end its investigation into individual officers and directors:

- On February 6, the Company submitted a revised offer to DOJ, in which it offered to (i) plead guilty to one count of § 1705 for payments made from 2001 through 2004, (ii) pay a $12.5 million fine, and (iii) agree to cooperate in the continuing investigation of individuals. On the same day, DOJ responded that the parties were still "far apart" and proposed that the Company (i) plead to one count of conspiracy to violate § 2339B and one count of conspiracy to violate § 1705, and (ii) pay a $70 million fine.

- At a February 8 Board meeting, the Board discussed DOJ's latest offer and authorized Zalla to conduct a financial analysis to determine if the Company could pay a fine greater than $12.5 million.
- At a February 15 Board meeting, Zalla provided the analyses requested by the Board. The Board then discussed and approved a plea offer to consist of (i) a plea to one count of a violation of § 1705, (ii) a $25 million fine, and (iii) continued cooperation in any ongoing investigation. The proposal was made to DOJ the next day.
- On February 20, DOJ agreed to a $25 million fine.

Sixth, as the negotiations neared completion, the Company, at the insistence of the Audit Committee, held firm on the issue of which statute it would plead guilty to, and, in early March, DOJ agreed to accept a plea to a violation of § 1705. At a March 11, 2007 Board meeting, the Board authorized the Company to enter into the plea agreement, which included pleading to (i) one count of violating § 1705, (ii) a $25 million fine, paid over five years, and (iii) an agreement to cooperate in DOJ's investigation of individuals. On March 17, 2007, the Company entered into the plea agreement.

Seventh, during the summer of 2007, DOJ continued to investigate the conduct of officers and directors of the Company, and five individuals made submissions to DOJ setting forth the reasons why DOJ should not prosecute them. Shortly before the sentencing hearing on September 17, 2007, AUSA Jonathan Malis informed Covington that DOJ would not prosecute any individuals in connection with its investigation.

Based on the fact that the government did not make any assurances with respect to the prosecution of individuals, and, in fact, insisted on the Company's cooperation in the continued investigation of individuals as part of its plea agreement, the SLC found that the facts do not support a claim that the decision making process employed by the Board in authorizing the Company to enter into the plea agreement was tainted by a conflict of interest. [231]

2. The SLC Found No Evidence of Gross Negligence

Based on the facts described above, the SLC has concluded that the Board's decision to enter into the guilty plea does not "suggest a *wide* disparity between the process the directors used . . . and that which would have been rational," amounting to gross negligence. *Guttman,* 823 A.2d at 507 n.39 (emphasis in original). Instead, these

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231 Given these findings, the SLC concluded that there was no support for a claim for a breach of the duty of loyalty in connection with the guilty plea.

facts demonstrate that the Board used a rational process designed to ensure that it acted on an informed and adequate basis in making its decision. The SLC found that, over a five-month period, the Board (i) met repeatedly to consider and analyze offers and counter offers, (ii) engaged in numerous offline conversations, and (iii) were advised by experienced counsel, including the current U.S. Attorney General Eric Holder and former U.S. Attorney General Dick Thornburgh. Ultimately, the Board was able to reduce the amount of the fine from $70 million to $25 million, paid over five years, and plead to a lesser statutory offense.

3. The Decision to Enter Into the Plea Agreement Was Supported by a Rational Business Purpose

Because the Company had made payments to an FTO in violation of a federal statute, and DOJ had advised counsel of its intent to prosecute the Company, the Company's only choice was to enter into a plea agreement or proceed with indictment and a criminal trial. As described above, the SLC found that the defendants determined to enter into plea negotiations based primarily upon the consequences of losing at trial, as described by Holder, including extended negative publicity and the potential for a crippling and potentially catastrophic criminal fine. The SLC concluded that this reason constitutes a rational business purpose.

4. Reliance on Expert Advice

The SLC also concludes that the director defendants are also protected by NJBCL § 14A:6-14(2), which relieves directors from liability if they relied in good faith upon experts who have been selected with reasonable care by or on behalf of the corporation. *See also Francis,* 432 A.2d at 822-23 ("Generally, directors are immune from liability if" their reliance is in "good faith"); *Casey v. Brennan*, 780 A.2d 553, 576 (N.J. Super. Ct. App. Div. 2001) (affirming dismissal of breach of fiduciary duty claims against directors who relied on a banking advisory group regarding valuation and disclosure issues).

Here, the Board and the Audit Committee were each advised by experienced and qualified lawyers from Covington and K&L Gates with respect to the plea negotiations. Indeed, outside counsel was present, and advised the Board regarding the negotiations, during at least eight Board meetings between November 2006, when plea negotiations began, and March 2007, when the Board authorized the Company to enter into the plea. The SLC credited the testimony of the director defendants interviewed by the SLC, who cited the advice of Holder and Thornburgh regarding the risks of going to trial as the basis for their decision to pursue the plea. At no point in time did any outside counsel advise the Company not to enter into the plea agreement.

Further, the SLC found no facts to rebut the presumption that the directors' reliance on outside counsel was reasonable and in good faith. To the contrary, the SLC

found that the directors actually and reasonably relied in good faith on the advice of counsel in making their decision, and that the directors reasonably believed that counsel were qualified based upon their counsels' reputations and the presentations made by the attorneys themselves.

Finally, as noted above, the decision to authorize the Company to enter into the plea agreement was not so unconscionable as to be considered wasteful or fraudulent, which would render the Board's reliance on counsel's advice unreasonable. To the contrary, as evidenced by the months of discussions among counsel and the Board regarding the benefits and potential risks of entering into the plea deal, the decision required the Board to weigh multiple factors, including the substantial benefits a plea agreement would provide to the Company, which included avoiding a criminal fine that was potentially in the hundreds of millions of dollars, avoiding a conviction under a statute that they were advised would have potentially ruinous public relations consequences, and avoiding the significant distraction to management that would have resulted from a criminal trial.

Accordingly, the SLC has concluded that the defendants are entitled to the protection of NJBCL § 14A:6-14(2).

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim. In exercising that judgment, the SLC considered the following factors. ***First***, as discussed above, this decision is based on the fact that the SLC found no breach of duty on the part of any of the defendants. The SLC concluded that the Board was fully informed about the decision prior to authorizing the plea, and that the decision-making process employed by the Board on the whole was reasonable and appropriate. Moreover, the SLC found that the decision to enter into the plea agreement was based on valid, objective business considerations and that there is no evidence that the defendants were motivated by self-interest or otherwise acted in bad faith in connection with the plea.[232] In addition, the SLC found that, in authorizing the plea, the directors reasonably and in good faith relied upon experienced counsel.

Further, with respect to Kistinger, Tsacalis, and Zalla, the SLC found that these individuals did not have the authority to authorize the Company to enter into the plea

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[232] On January 26, 2007, once DOJ had named Hills as a co-conspirator in DOJ's draft indictment, and thereby made clear that he was a subject of continuing prosecutive interest, Hills recused himself from all discussions and decisions relating to the DOJ investigation and thus did not participate in the decision to authorize the Company to enter the guilty plea. In addition to the reasons provided above for the other director-defendants, this further supports the dismissal of the claim as to Hills.

agreement. Indeed, Kistinger and Tsacalis did not advise the Board with respect to any aspect of the decision to enter into the guilty plea. While Zalla performed certain financial analyses for the Board regarding the Company's ability to pay varying levels of fines in connection with a plea, he did not participate in, and was not present for, the Board's deliberations on this issue. Finally, with respect to Aguirre, the SLC found that he devoted a substantial amount of time and attention to a matter of critical importance to the Company, and at all times acted in good faith and on an informed basis. These reasons, in addition to the reasons set forth above, provide additional support for the SLC's decision to seek dismissal of this claim as against these individuals.

Second, as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are Chiquita's exculpatory clause and Chiquita's advancement and indemnity obligations.

Third, as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

I. Breach of Duty in Connection with the Acquisition of Atlanta AG

The plaintiffs allege that the defendants breached their fiduciary duties by acquiring Atlanta AG in March 2003, which allegedly turned out to be an unprofitable transaction, to offset a potential sale of the Company's Colombian business. *See* Am. Compl. ¶¶ 129-134. Based on their dates of employment, and the facts developed by the SLC's investigation, this claim applies to the following defendants: (i) *management*: Cyrus Freidheim, Robert Kistinger, Robert Olson, James Riley, William Tsacalis, and Jeffrey Zalla; (ii) *directors*: Morten Arntzen, Jeffrey Benjamin, Robert Fisher, Roderick Hills, Durk Jager, and Jaime Serra.

Specifically, the Amended Complaint alleges that,

> By 2002, Chiquita's insiders knew that they would have to cause Chiquita to sell off its Colombian banana operations due to the longstanding illegal conduct they had caused or permitted there, in part to try to avoid the extradition of several Chiquita insiders to Colombia for their criminal conduct . . . to try to make up for the lost revenues and profits Chiquita would soon suffer, the Chiquita Defendants in haste, and without adequate research, investigation, evaluation or due diligence, acquired a German fruit

> distribution business, known as Atlanta AG, at a grossly excessive price. Because of the excessive price the Chiquita Defendants caused Chiquita to pay for Atlanta in this hastily arranged acquisition, almost $43 million dollars in goodwill went onto Chiquita's balance sheet.

Am. Compl. ¶ 129. For the reasons discussed below, the SLC has concluded that this claim should be dismissed.

1. The SLC Found No Evidence of Fraud, Illegality, or Conflict of Interest

Like the decision to authorize the guilty plea, the decision to authorize the Company's acquisition of Atlanta will be protected by the business judgment rule unless there is evidence the defendants acted with fraud, illegality, a conflict of interest, gross negligence, or lack of a rational business purpose.

The SLC has found no evidence that the decision to authorize the acquisition of Atlanta was tainted by fraud, illegality, or a conflict of interest. The plaintiffs allege that the defendants acted with a conflict of interest in authorizing the acquisition, because the acquisition was motivated by their desire to compensate for losses from the anticipated sale of Banadex. However, the SLC examined this issue and found no evidence to support this claim. Instead, the SLC found that the Company was interested in acquiring Atlanta for two primary reasons, namely: (i) Roderick Hills' concern about formalizing the Company's interest in Atlanta in order to eliminate potential disclosure and antitrust issues created by the structure of the loan agreements between the entities and (ii) a desire to turn around Atlanta's failing business given the importance of Atlanta's distribution services to Chiquita.

More fundamentally, the SLC found no evidence, either in testimony or documents, linking the acquisition to the situation in Colombia. To the contrary, even though the deal was not completed until March 2003, the Board authorized the acquisition of Atlanta in September 2002, nearly six months before the Board was alerted to the FTO designation. Therefore, the business judgment rule protects the defendants from liability for their decision to acquire Atlanta unless that decision was (i) the result of gross negligence, or (ii) it lacked a rational business purpose.[233]

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[233] Given these findings, the SLC concluded that there was no support for a claim for a breach of the duty of loyalty in connection with the acquisition of Atlanta.

2. The SLC Found No Evidence of Gross Negligence

As stated above, gross negligence has been defined as "reckless indifference to or deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Disney*, 907 A.2d at 750 (citation omitted). Here, the plaintiffs allege that the Board authorized the acquisition "in haste, and without adequate research, investigation, evaluation or due diligence," amounting to gross negligence. Am. Compl. ¶ 129. The SLC found no evidence to support this allegation. To the contrary, and as discussed above, the SLC found that:

- Dating back to the late 1980s/early 1990s, the Company essentially owned substantially all of the economic interest in Atlanta (its largest European distributor), principally through a series of loans made to enable other entities to buy all of the limited partnership interests in Atlanta's parent company. While Chiquita did not control Atlanta, substantially all of the partnership interests in Atlanta's parent were pledged to secure Chiquita's loans. This arrangement, which was disclosed to E&Y, was recorded as an investment on Chiquita's books, but Atlanta's results were not consolidated in Chiquita's financial statements.

- Shortly after the new Board was seated in March 2002, it focused on how the Company's interest in Atlanta, its largest distributor in Europe (based in Germany), was reflected on the Company's financial statements.

- At the May 23-24, 2002 Board meeting, Kistinger, Riley, and Olson made presentations focused on the possible acquisition of Atlanta and the Board discussed the issue.

- At the July 3, 2002 Board meeting, Kistinger, Riley, and Olson again discussed the Company's potential acquisition of Atlanta. Booz Allen, which the Company had engaged to perform a review of the Company's options with respect to Atlanta, gave an update presentation on the due diligence relating to Atlanta. The presentation identified three options to the Board, (i) acquire Atlanta, (ii) sell Chiquita's interest in Atlanta, or (iii) walk away from Atlanta.

- At the September 4, 2002 Board meeting, the Board received another presentation from Booz Allen and decided to acquire 100% of the equity in Scipio, the parent company of Atlanta.

Thus, over the course of six months, the Board received at multiple formal presentations from management regarding Atlanta, and sought and received advice from Booz Allen. The acquisition was not "hastily arranged," as alleged by the

plaintiffs, but was the product of a process that was designed to ensure that the Company took steps to ensure that its interests in Atlanta were protected. Based on these facts, the SLC concluded that the defendants were adequately informed regarding the acquisition of Atlanta and the acquisition was not the product of gross negligence, but was instead a valid exercise of their business judgment.

3. The Decision to Acquire Atlanta was Supported by a Rational Business Purpose

As described above, the SLC found that the acquisition of Atlanta arose out of a desire to (i) restructure Chiquita's relationship with Atlanta on its financial statements, and (ii) protect Chiquita's investment in Atlanta. The SLC concluded that both of these reasons constitute a rational business purpose.

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim. In exercising that judgment, the SLC considered the following factors. ***First***, as discussed above, this decision is based on the fact that the SLC found no breach of duty on the part of any of the defendants. The SLC, in reviewing the facts and circumstances of this decision, has concluded that the Board was adequately informed prior to authorizing the acquisition, and that the decision-making process employed by the Board on the whole was reasonable and appropriate. The SLC also found that the decision to acquire Atlanta was based on valid, objective business considerations and that there is no evidence that the defendants were motivated by self-interest or otherwise acted in bad faith in connection with the acquisition, as the acquisition had nothing whatsoever to do with the situation in Colombia.

Second, as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are Chiquita's exculpatory clause and Chiquita's advancement and indemnity obligations.

Third, as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

J. Breach of Duty For Causing or Allowing Chiquita to Make False Statements in its Public Filings

Plaintiffs next allege that the defendants breached their fiduciary duties by causing, or allowing, the Company to make false and misleading statements from 1997 through 2005 in various annual reports, corporate responsibility reports, and other public filings. *See* Am. Compl. ¶¶ 69-99. Plaintiffs also allege that the Company's financial statements from 1997 through 2005 were false and misleading by "failing to disclose the Chiquita Defendants' improper, wasteful and *ultra vires* payments (and the continuation thereof after DOJ found out about them), as well as the huge contingent liabilities those payments exposed Chiquita to, including large criminal or civil penalties and the diminution of the value of Chiquita's Colombian operations." Am. Compl. ¶ 99. Because the designation of the AUC as an FTO on September 10, 2001 is a seminal event for the purposes of analyzing these claims, the SLC divided its analysis of the Company's public statements into two periods – first, from 1997 through 2000, and second, from 2001 through 2005.

1. Legal Standards

As discussed above, New Jersey law mandates that directors and officers "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent people would exercise under similar circumstances in like positions." N.J.S.A. § 14A:6-14. In the disclosure context, courts have held that "directors that knowingly disseminate false information that results in a corporate injury [ ] violate their fiduciary duty." *Malone v. Brincat*, 722 A.2d 5, 9-10 (Del. 1998); *see also Metro Commc'n Corp.*, 854 A.2d at 130; *In re Triarc Cos. Class & Deriv. Litig.*, 791 A.2d 872, 877 n.14 (Del. Ch. 2001) (a "*knowing* dissemination of materially false information in regular public filings and reports may result in finding of breach of fiduciary duty by corporate directors") (emphasis added).[234]

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[234] As an initial matter, the Amended Complaint alleges that, by making false and misleading statements, the defendants "violated their duty of candor by lying to Chiquita's public shareholders." Am. Compl. ¶ 100(c). However, under Delaware law, the term "duty of candor" is often conflated with the term "duty to disclose," and "represents nothing more than the well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992) (emphasis added). A duty of candor claim is thus inapplicable here because the challenged disclosures were not made in connection with a request for shareholder action, such as a proxy statement. For those reasons, the SLC analyzed the disclosure claims within the legal framework for breach of the duty of loyalty, which requires intentional conduct. While the SLC has found no cases arising under New Jersey law that permit a breach of fiduciary duty claim for improper disclosure where no corporate action is sought, the SLC has nonetheless considered the claim as if it would be recognized by a New Jersey court.

Liability may occur in this context because:

> [t]he shareholder constituents of a [ ] corporation are entitled to rely upon their elected directors to discharge their fiduciary duties at all times. Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty . . . . Inaccurate information in these contexts may be the result of violation of the fiduciary duties of care, loyalty or good faith.

Malone, 722 A.2d at 10-11 (affirming dismissal of claim alleging that directors caused the company to disseminate false information regarding the company's financial performance). A breach of duty in this context may be also premised on the intentional omission of material information from a communication with shareholders. *See Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 389 (Del. Ch. 1999) ("one who pleads that directors deliberately omitted information from a communication [ ] under circumstances that suggest an intent to mislead the stockholders has set forth a violation of the fiduciary duty of loyalty").

For liability to attach, any alleged misstatement or omission must be material. In this context, materiality is defined as information that "a reasonably prudent [ ] stockholder [ ] would have found . . . to be important to its consideration of its rights . . . and that the communicating director or directors could not have reasonably concluded otherwise." *Jackson*, 741 A.2d at 389. Finally, reliance, causation, and damages must also be shown. *See Metro Commc'n Corp.*, 854 A.2d at 158 n.89 (internal citations omitted).

In the disclosure context, courts recognize that directors and officers must be granted wide latitude in corporate decision-making, including decisions about when and how much information to disclose. As a result, the law imposes an exacting standard for breach of fiduciary duty claims based on disclosures: "Because fiduciaries of business entities must take risks and make difficult decisions about what is material to disclose, they are exposed to liability for breach of fiduciary duty *only if their breach of the duty of care is extreme*." *Metro Commc'n Corp.*, 854 A.2d at 157 (plaintiffs stated breach of fiduciary duty claim where management reports stated that the company was securing necessary government permits, but failed to disclose that they were obtained through bribery known to defendants) (emphasis added).

2. Analysis

a. _1997 – 2000 Annual Reports_[235]

The SLC first considered the allegations that statements issued by Chiquita in its annual reports from 1997 to 2000 were false and misleading because they erroneously gave the appearance that the Company was operating in an ethical and legal manner. The following statements from Chiquita's 1997 annual report, issued on March 31, 1998, among others, are cited in the Amended Complaint:

- "We firmly believe in the strength of the Chiquita brand and remain committed to achieving the Company's full earnings potential. . . . We continue to make measurable progress toward objectives which further the realization of Chiquita's earnings capacity." Am. Compl. ¶ 72.

- "Chiquita's corporate values balance good citizenship and social responsibility with profitable business growth. . . . The Company has a strong commitment to ethical [and] social . . . standards. . . ." *Id.* ¶ 72.

- "Consumers worldwide are concerned about . . . social issues. They expect companies to fulfill their responsibilities of global citizenship . . . Chiquita welcomes the interest in ethical standards and pledges to continue improving . . . social conditions where the Company operates." *Id.* ¶ 72.

The Amended Complaint further alleges that the "Statement of Management Responsibility" contained in the Company's 1997 annual report was similarly misleading:

> The Company's system of internal accounting controls, which is supported by formal and financial administrative policies, is designed to provide reasonable assurance that the financial records are reliable for preparation of financial statements and that assets are safeguarded against losses from unauthorized use or disposition. Management reviews, modifies and improves these systems and controls as changes occur in business conditions and operations. The Company's worldwide internal audit function reviews the

235 Plaintiffs' claim as it relates to the Company's 1997 to 2000 annual reports applies to the following defendants: Kistinger, C. Lindner, K. Lindner, Olson, Riley, Tsacalis, Warshaw and Zalla (Management), and Manocha, Runk, Verity, Thomas and Waddell (Directors).

> adequacy and effectiveness of controls and compliance with policies.

Id. ¶ 73. Plaintiffs also allege that the financial statements contained in the 1997 annual report were false and misleading because they did not disclose the existence of illegal and improper payments and failed to "make provision for" the monetary fines and penalties that "would inevitably result from those payments." *Id.* ¶ 71.

The Amended Complaint alleges that Chiquita's annual reports for the years 1998 (issued on March 31, 1999), 1999 (issued on March 28, 2000), and 2000 (issued on April 2, 2001) contained the same false and misleading statement of management responsibility and that the Company's financial statements were similarly misleading. *Id.* ¶¶ 77, 78.

Further, the Amended Complaint alleges that the Company made misleading statements regarding the risks associated with its Central and South American operations. The Company's statement was:

> Chiquita's earnings are heavily dependent upon products grown and purchased in Central and South America. These activities, a significant factor in the economies of the countries where Chiquita produces bananas and related products, are subject to the risks that are inherent in operating in such foreign countries, including government regulation, currency restrictions and other restraints, risk of expropriation and burdensome taxes.

Id. ¶ 74. This statement was published in the 1997, 1998, 1999, and 2000 annual reports. *Id.* ¶¶ 75-77. Plaintiffs allege that it was false and misleading because it did not disclose the "existence and nature of the Colombia payments." *Id.* ¶ 70.

Finally, plaintiffs allege that the following statements in the Company's 1998 annual report were false and misleading:

- "Chiquita is a responsible corporate citizen to a broad community of our customers, consumers, employees and neighbors." *Id.* ¶ 75.

- "Chiquita Brands International's 1998 operating results reflect continuing progress. . . . Higher banana farm productivity has contributed significantly to recent cost improvements." *Id.* ¶ 76.

Applying these standards, the SLC concluded that, during the period from 1997 to 2000, there was no evidence that the defendants knowingly made false statements in

the Company's public filings. The SLC also found that the defendants employed a rational process by which they attempted, in good faith, to make legally adequate disclosures.

First, the SLC concluded that none of the statements challenged in the Amended Complaint from 1997 to 2000 were, in fact, false or misleading. As discussed above, with respect to the guerrilla payments, senior management had been repeatedly told by the Legal Department that they did not violate Colombian law or the FCPA. Moreover, the SLC found no compelling probative evidence that the Company made payments to guerrilla groups after October 8, 1997, the date on which the FARC and the ELN were designated as FTOs. Further, the evidence shows that the SEC and federal prosecutors were aware of the guerrilla payments during the SEC investigation of the Company from 1998 to 2001 and did not raise any issues concerning the Company's disclosures relating to the payments, about which they had learned a great deal during the investigation, or any other disclosure-related issue.

Moreover, the SLC found no evidence to support the allegation that the financial statements contained in the Company's annual reports failed to "make provision for" the monetary fines and penalties that "would inevitably result from those payments." Am. Compl. ¶ 71. Simply put, the Company has never incurred a monetary penalty relating to the guerrilla payments, so the defendants could not have failed to account for them. Nor is there any allegation, or evidence, that the payments were not properly recorded as an expense in the Company's books and records.

Similarly, prior to the AUC's designation as an FTO on September 10, 2001, payments to the convivir and the AUC were not prohibited under U.S. or Colombian law. During this period, as during the FARC period, senior management and the Board were repeatedly assured by the Legal Department that the payments were legal, the Company has never been penalized for convivir or AUC payments occurring before September 10, 2001, and the defendants did not fail to properly account for those payments or fail to properly record them. Accordingly, because the payments to the FARC and the AUC were not unlawful during this period, the SLC has concluded that the Company's public filings were not false or misleading.

Second, the SLC found no evidence that the defendants knew or believed that any of the Company's public statements during this period were false or misleading. There is no evidence to suggest that any of the defendants intentionally made false statements with regard to the "existence or nature" of the guerrilla payments. *See* Am. Compl. ¶ 70. To the contrary, the Legal Department viewed the payments as legal, and senior management had the same understanding. Similarly, the SLC found no evidence that the annual reports from 1998 to 2000 contained any intentionally false or misleading statements with regard to the payments to the convivir or the AUC. As with the guerrilla payments, the Legal Department concluded that the payments to the

convivir and the AUC were legal, and communicated that view to senior management and the Board, which therefore had the same understanding.

Third, neither the guerrilla payments nor the payments to the convivir and/or the AUC were material, and therefore did not need to be disclosed. The SLC found no evidence that the total amount of guerrilla payments ever exceeded approximately $200,000 per year. Similarly, the SLC found no evidence that the total amount of payments to the convivir and/or the AUC ever exceeded approximately $300,000 per year. E&Y, the Company's long-standing external auditor, concluded that Banadex's "sensitive payments," which included guerrilla payments, were not quantitatively material and later reached the same conclusion as to the convivir and/or the AUC payments. Given that the payments were legal during this period, the SLC believes that they were not qualitatively material either.

Fourth, the evidence developed by the SLC shows that the Company relied on competent advisors with regard to its disclosures. In-house counsel, including but not limited to Olson, who had significant disclosure law experience, advised the Company in connection with its disclosures. Where necessary, outside disclosure counsel at Taft Stettinius & Hollister LLP was consulted. Moreover, the Company's disclosures were reviewed regularly by the directors at Audit Committee meetings.[236] Based on these facts, the SLC concluded that the defendants reasonably and in good faith believed that the Company's disclosures were adequate and appropriate and that the defendants actually, and in good faith, relied on the advice of counsel in discharging their duties.

Conclusion. As discussed above, the SLC found that (i) the Company did not make false or misleading statements in its public filings because the payments were not illegal under Colombian or U.S. law during this period; (ii) therefore, the defendants did not knowingly cause the Company to make false or misleading public statements about the legality of the Company's behavior; (iii) the payments were neither quantitatively nor qualitatively material during this period, and therefore there was no affirmative obligation to disclose them; and (iv) the defendants reasonably, and in good faith, reviewed the disclosures and relied on the advice of counsel in issuing its public filings. For all these reasons, the SLC has determined that there was no breach of fiduciary duty with respect to the Company's disclosures for the period 1997 to 2000.

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236 For example, during this period, the Audit Committee reviewed and approved the draft consolidated financial statements, which allegedly failed to account for the liabilities to occur from these payments, at meetings held on March 4, 1998, March 15, 1999, March 10, 2000, and March 7, 2001.

b. *2001 – 2005 Disclosures and Corporate Responsibility Reports*[237]

The SLC next considered whether the Company's disclosures for the years 2001 to 2005 and corporate responsibility reports, issued after the AUC's FTO designation, were false or misleading, as alleged in the Amended Complaint.

(i) *Corporate Responsibility Reports*

The Plaintiffs allege that the Company made false and misleading statements in its corporate responsibility reports. Am. Compl. ¶¶ 79-81, 84-85. As discussed above, in 2000, under the direction of Jeffrey Zalla, the Company launched its Corporate Responsibility Initiative, which included, among other things, the preparation and publication of corporate responsibility reports. The Amended Complaint alleges that these reports contained false and misleading statements with regard to the Company's "series of controls, committees and procedures that ensured compliance with these core values." *Id.* ¶ 81. For example, the following excerpts, among others, from the 2000 corporate responsibility report, which was issued on September 24, 2001, are alleged to be false and misleading:

- "Times have changed. And so has our Company. . . . Three years ago, in the wake of particularly damaging media coverage, we embarked on a disciplined path toward Corporate Responsibility . . . . This was not to be a public relations exercise, but a management discipline. . . ." *Id.* ¶ 79.

- "We live by our core values. We communicate in an open, honest and straightforward manner. We conduct business ethically and lawfully." *Id.* ¶ 80.

- "For decades, Chiquita has had a Code of Conduct that dealt with ethical and legal behavior and compliance with Company policies . . . . Our Code of Conduct now embodies standards in the areas of . . . ethical behavior . . . and legal compliance." *Id.* ¶ 81.

The Amended Complaint alleges that the Company's 2001 corporate responsibility report, which was issued on November 14, 2002, contained the same false and misleading statements that were contained in the 2000 corporate responsibility report. *Id.* ¶ 83.

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237 Plaintiffs' claim as it relates to the Company's 2001 to 2005 disclosures and corporate responsibility reports applies to the following defendants: Aguirre, Freidheim, Kistinger, Olson, Riley, Tsacalis and Zalla (Management), and Arntzen, Benjamin, Fisher, Hills, Jager, Serra and Stanbrook (Directors).

Analysis. The SLC found no evidence to suggest that the defendants knowingly caused the Company to make any false statements in the 2000 and 2001 corporate responsibility reports, which were both issued after the FTO designation, but before it was discovered. The Plaintiffs may question whether it was ethical and socially responsible to make payments to groups such as the FARC and the AUC, but the SLC has found that the payments were made in the reasonable and good faith belief that they were both legal and necessary to prevent serious harm to the Company's employees and infrastructure. The SLC found that these statements were not false and therefore by definition were not intentionally false.

(ii) *Annual Reports and Other Disclosures*

2001 Annual Report. Plaintiffs allege that the Company's 2001 annual report, issued on March 20, 2002, contained the same false and misleading statements of management responsibility and risks associated with its Central and South American operations as the prior annual reports, as described above, and that the Company's financial statements were similarly false and misleading. *See* Am. Compl. ¶ 83.

Analysis. When the Company issued its 2001 annual report on March 20, 2002, none of its officers or directors (or any Company employees) were aware of the AUC's designation as an FTO on September 10, 2001. The SLC concluded, therefore, that none of the defendants knowingly caused the Company to make any false or misleading statements in that filing.

2002 Annual Report. Plaintiffs also allege that the following passage from a letter to shareholders contained in the Company's 2002 annual report (which contained the same statements of risks and management responsibility as the 1997 annual report), issued on March 31, 2003, was false and misleading:

> Our corporate responsibility reports also continue to earn recognition for their honesty, transparency and clear performance measurement. . . . We are committed to managing Chiquita to the highest standards of integrity and propriety in all of our affairs, from our farms to our boardroom. Our achievements are a great source of pride among our employees.

Id. ¶ 84.

Analysis. When the Company issued its 2002 annual report on March 31, 2003, and made the statement alleged to be false – "[w]e are committed to managing Chiquita to the highest levels of integrity and propriety" – only Robert Olson and Cyrus Freidheim, and perhaps Robert Kistinger, were aware of the AUC's FTO designation

that had been discovered in February by [a Chiquita lawyer]; that fact had not yet been shared with the Board. Therefore, they are the only defendants who were even theoretically capable of making a statement that was *knowingly* false and misleading. However, the SLC does not believe that the statement was rendered false by the mere fact of the FTO designation – since, after all, the payments were not made in knowing violation of the law – and therefore found no evidence that Olson and Freidheim knowingly caused the Company to issue a false statement in that report. In the same way, Chiquita's professed commitment to "the highest levels of integrity and propriety" was not rendered false by its failure to discover the FTO violation.

Nor was the statement of management responsibility quoted above knowingly false. Nothing about the FTO designation, or the failure to disclose it, affected the fact that the Company's internal accounting controls were "designed to provide reasonable assurance that the financial records are reliable." Finally, the statement of risk was not false merely because it omitted any reference to the payments – after all, it said, "products grown and purchased in . . . South America" were "subject to the risks that are inherent in operating in such foreign countries." To the extent that the list of specifically identified risk factors did not explicitly identify the payments, the SLC concluded that the payments were nonetheless covered by the general statement quoted above.

2003 Disclosures. Plaintiffs further allege that the Company's 2003 annual report, issued on March 11, 2004, and other public filings issued in that year were false and misleading. Am. Compl. ¶¶ 87-92. ***First***, Plaintiffs allege that a letter from Fernando Aguirre and Cyrus Freidheim, published in the 2003 annual report, was false and misleading because it suggested that the Company was dedicated to high ethical standards and reassured shareholders of Chiquita's compliance with certain laws, controls and procedures.[238] ***Second***, the 2003 annual report contained the same statements of management responsibility and risks that are contained in the Company's annual reports from 1997 to 2001, which Plaintiffs allege are false and misleading. *Id.* ¶ 90. ***Third***, Plaintiffs challenge the Company's 2003 annual report for failure to disclose "illegal bribery payments or arms-providing activities relating to the AUC or Chiquita's other illicit and/or illegal activities or the tremendous risks they posed with regard to legal violations. . . ." *Id.* ¶ 92. ***Fourth***, Plaintiffs allege that the following language in the 2003 annual report was inadequate because it failed to specifically identify (i) Chiquita's payments to the AUC and (ii) Chiquita's violation of U.S. law in making the payments:

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[238] The Amended Complaint alleges that the Annual Report stated: "2003 was an excellent year for Chiquita. . . . The turnaround of Chiquita is well underway. . . . We are very pleased with Chiquita's achievements in 2003." *Id.* ¶ 87.

> The Company has international operations in many foreign countries, including those in Central and South America, the Philippines and La Côte d'Ivoire. The Company must continually evaluate the risks in these countries, including Colombia, where an unstable environment has made it increasingly difficult to do business. The Company's activities are subject to risks inherent in operating in these countries, including government regulation, currency restrictions and other restraints, burdensome taxes, risks of expropriation, threats to employees, political instability and terrorist activities, including extortion, and risks of action by U.S. and foreign governmental entities in relation to the Company. Should such circumstances occur, the Company might need to curtail, cease or alter its activities in a particular region or country. *Chiquita's ability to deal with these issues may be affected by applicable U.S. laws. The Company is currently dealing with one such issue, which it has brought to the attention of the appropriate U.S. authorities who are reviewing the matter. Management currently believes that the matter can be resolved in a manner that is not material to the Company, although there can be no assurance in this regard.*

Id. ¶ 92 (emphasis in original).

Plaintiffs also cite to a Q&A section of the 2003 annual report, which they allege was false and misleading, including the following statement by Aguirre, among others:

> I am impressed by Chiquita's Core Values and the company's accomplishments in corporate responsibility. . . .

Id. ¶ 88.

Analysis. By the time that Chiquita issued its 2003 annual report, on March 11, 2004, it had been more than a year since the FTO designation had been discovered. During this period, the Company repeatedly and in good faith updated its disclosures. For example, the Company added new language to the risk factors section of the financial statements, which specifically referred, for the first time, to "the potential impact of political instability and terrorist activities." This new language was adopted after a discussion at the May 12, 2003 Audit Committee meeting, during which Olson, according to notes taken at the meeting, commented on the new language: "reference to terrorist activities is new [and] intended to highlight risks."

The disclosures reflecting the Company's activities in Colombia were further supplemented in August 2003 when the Company filed its quarterly report for the second quarter. In the section on "Risks of International Operations" after the warning language about "the potential impact of political instability and terrorist activities," the following new language was added:

> The Company is currently dealing with one such issue, which it has brought to the attention of the appropriate U.S. authorities. Management does not currently believe that this matter will have a material effect on the Company.[239]

This language was added after the issue was considered during the August 12, 2003 Audit Committee meeting.

Four months later, the Company again supplemented its disclosures and issued a press release, on December 16, 2003, specifically identifying Colombia as follows: "The company must continually evaluate the risks in these countries, including Colombia, where an unstable environment has made it increasingly difficult to do business." Press Release, Chiquita Brands Int'l, Inc., Chiquita Brands International Presents "Turnaround and Transformation" to Investors and Analysts (Dec. 16, 2003). That expanded disclosure followed a December 12 Audit Committee meeting during which the issue was discussed. One week after the December 16 press release was issued, the SEC requested that the Company explain the statement made in its "Risks of International Operations" section of the Form 10-Q filing for the period ending September 30, 2003 – that the Company was "currently dealing with one such issue" – and advised the Company "to avoid vague references to risks in the future." Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2003). In January 2004, the Company and its counsel met with the SEC to explain its third quarter disclosure, which had already been made more specific in its December 16, 2003 press release. After meeting with the Company and counsel, the SEC withdrew its comment.

After many months of increasingly more specific and detailed disclosures about its situation in Colombia, ending with the December 16 press release, the Company issued its 2003 annual report on March 11, 2004. Plaintiffs allege that the following

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239 The Company's third quarter Form 10-Q contained nearly identical language except for the last line, which read, "Management does not currently believe that this matter will have a material effect on the Company, *although there can be no assurance in this regard*." Chiquita Brands Int'l, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2003) (emphasis added). The Company's 2003 annual report, as excerpted above, also contained nearly identical language, but the corresponding paragraph in that filing ended with, "*Management currently believes that the matter can be resolved in a manner that is not material to the Company*, although there can be no assurance in this regard." Chiquita Brands Int'l, Inc., Annual Report (Form 10-K) (Mar. 31, 2003) (emphasis added).

statements, among others, were false and misleading: (i) a letter from Freidheim and Aguirre stating that the Company "accomplished new milestones in corporate responsibility"; (ii) a statement of management responsibility noting that "[t]he Company's system of internal accounting controls . . . was designed to provide reasonable assurance that the financial records are reliable"; (iii) a statement of risk that, among other things, noted that the Company's Central and South American operations were subject to "political instability and terrorist activities, including extortion, and risks of action by U.S. and foreign governmental entities in relation to the Company" and that "[t]he Company is currently dealing with one such issue"; and (iv) a "Q&A" in which Aguirre stated that he was "impressed by Chiquita's Core Values and the company's accomplishments in corporate responsibility." Am. Compl. ¶¶ 87-92. Plaintiffs also allege that the 2003 annual report failed to disclose alleged bribery payments, the payments to the AUC, "arms-providing activities" related to the AUC, and the "tremendous risks they posed with regard to legal violations." Am. Compl. ¶ 92.

The SLC found that none of these statements was false or misleading, or contained material omissions. ***First***, the SLC found that the Company was in fact committed to its corporate responsibility goals and worked to accomplish those goals; there is no better proof of that commitment than its prompt and voluntary disclosure of those payments to DOJ in April 2003. ***Second,*** no Chiquita employee knowingly made "illegal bribery payments" and no Chiquita employee was involved in "arms-providing activities" during this time period. ***Third,*** the Company clearly and adequately disclosed that it operated in areas, such as Colombia, in which it was subject to risks such as "threats to employees" and "political instability and terrorist activities, including extortion." *See* Am. Compl. ¶ 92. ***Fourth***, the SEC's withdrawal of its comment letter seeking clarification as to the Company's disclosure in its third quarter Form 10-Q filing that it was "currently dealing with one such issue," conveyed its tacit approval of the disclosure, which the Company then appropriately included in its 2003 annual report and supplemented with a specific reference to Colombia. Finally, the defendants, actually and in good faith, relied on the Company's disclosure counsel, Skadden and Baker Botts, in drafting Chiquita's disclosures, which they believed to be both adequate and appropriate.

2004 and 2005 Disclosures. Plaintiffs also allege that the Company's disclosures in 2004 and 2005 contained false and misleading statements. The Amended Complaint alleges that a May 10, 2004 press release, which disclosed the DOJ investigation, contained the false and misleading statement that the Company's "sole" reason for making the payments was to protect employees' lives. *Id.* ¶ 93. This statement is repeated in the Company's 2004 and 2005 Annual Reports, issued on March 16, 2005 and March 1, 2006, respectively. *Id.* ¶¶ 94, 97. Plaintiffs also allege that, in its 2004 annual report, the Company falsely described the DOJ investigation as set forth in its

May 2004 press release, when it stated, "[t]he Company intends to continue its cooperation with this investigation, but it cannot predict the outcome or any possible adverse effect on the Company, which could include the imposition of fines." Am. Compl. ¶ 94.

The Amended Complaint also alleges that the Company's 2005 annual report, issued on March 1, 2006, contains a false and misleading description of the DOJ investigation, by stating, among other things:

> In March 2004, the Justice Department advised that, as part of its criminal investigation, it will be evaluating the role and conduct of the company and some of its officers in the matter. In September-October 2005, the company was advised that the investigation is continuing and that the conduct of the company and some of its officers and directors remains within the scope of the investigation.

Am. Compl. ¶ 97.

In addition, the Plaintiffs allege that the corporate responsibility statement in the 2005 annual report failed to disclose "continuing illegal bribery payments or arms-providing activities relating to the AUC or Chiquita's other illicit and/or illegal activities or the tremendous risks they posed with regard to legal violations in the United States and Colombia and the viability and value of Chiquita's Colombian operations." *Id.* ¶¶ 94-96, 98.

Analysis of May 10, 2004 Press Release. It was not until a meeting on March 23, 2004 with DOJ attorneys that the Company learned that the DOJ's view of the Company had materially changed. At that meeting, among other things, David Nahmias said that the DOJ considered Chiquita and some of its officers and former officers subjects of the investigation, but did not identify which officers. Shortly thereafter, on May 10, 2004, the Company issued a press release that disclosed the DOJ investigation and stated, in part, that "[t]he Company's sole reason for submitting to these payment demands has been to protect its employees from the risks to their safety if payments were not made." Press Release, Chiquita Brands Int'l, Inc., Chiquita Reports Net Income of $20 Million, $0.46 EPS, in the First Quarter of 2004 (May 10, 2004).[240]

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[240] Plaintiffs do not allege that the existence of the investigation should have been disclosed earlier, and until the Company became a subject of the DOJ's investigation, it was not required to be disclosed under Item 103 of regulation S-K (17. C.F.R. § 229.103) ("Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. . . . *Include similar information as to any such proceedings known to be contemplated by*

Plaintiffs allege that the word "sole" renders this statement false and misleading, because the defendants made the payments in order to "control labor conditions in Colombia and to boost [their] bonuses." *See* Am. Compl. ¶ 94. However, the SLC found that this statement was not false or misleading because the evidence shows that concern for the safety of the Company's employees was, at a minimum, the defendants' predominant reason for making the payments to the AUC, and had nothing to do with labor conditions or bonuses. The SLC found that any difference between "sole" and "predominant" is simply not material in this context. In the absence of extortion and the credible threat of AUC violence, the payments would not have been made.[241] The statement was made in good faith and was not knowingly false, and was reviewed and approved by Skadden and Baker Botts.

Analysis of 2004 and 2005 Annual Reports. In its 2004 annual report, issued on March 16, 2005, the Company reprinted the language from its May 2004 press release concerning the DOJ investigation, including the uncertainty regarding the resolution of that investigation. In its 2005 annual report, issued on March 1, 2006, the Company described the DOJ investigation, including the developments with regard to the investigation of individual officers and directors. The SLC found no evidence to suggest that these statements were false or misleading. Instead, the evidence shows that the Company's statements were consistent with the unfolding events during this period. Finally, the SLC concluded that Plaintiffs' allegation that the defendants wrongfully failed to disclose information regarding, among other things, the Company's "continuing illegal bribery payments or arms-providing activities relating to the AUC" in the 2005 annual report (Am. Compl. ¶ 98) lacks merit for multiple reasons, including the fact that the SLC is aware of no such incidents in this time period.

Conclusion. Based on the foregoing, (i) the SLC found no evidence that the Company made false or misleading statements in its disclosures and public filings or (ii) that the defendants knowingly caused the Company to do so; and (iii) the defendants reasonably, and in good faith, relied on the advice of counsel in making its disclosures and public filings. For all these reasons, the SLC has determined that there was no breach of fiduciary duty with respect to the Company's disclosures for the period 2001 to 2005.

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governmental authorities") (emphasis added). *See United States v. Crop Growers Corp.*, 954 F. Supp. 335, 347 (D.D.C. 1997) (holding that Item 103 does not require disclosure of uncharged illegal conduct); *In re Browning-Ferris S'holders Deriv. Litig.*, 830 F. Supp. 361, 369 (S.D. Tex. 1993) (holding that a company need not disclose the fact that a nominee director had received a criminal "target" letter), *aff'd mem.*, 20 F.3d 465 (5th Cir. 1994).

241 For the reasons stated above, the SLC concluded that this statement was not false or misleading as contained in the Company's 2004 and 2005 Annual Reports, issued on March 16, 2005 and March 1, 2006, respectively. *See id.* ¶¶ 94, 97.

3. Additional Legal Considerations

The SLC also found no evidence – and the Plaintiffs allege none – that the Company suffered any independent harm as a result of its allegedly false and misleading disclosures regarding the payments it made from 1997 to January 2004. Indeed, the only alleged harm to the Company in this regard, and the only harm implicated by the Amended Complaint, stemmed from the Company's payments to the AUC after its designation as an FTO on September 10, 2001. As discussed at length above, the SLC has concluded that it should not pursue claims based on the underlying conduct involving the payments; it reaches the same conclusion as to the disclosures stemming from that conduct, which caused no additional harm to the Company.

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim. In exercising that judgment, the SLC took account of the following factors. ***First,*** as discussed at length above, this decision is based on the fact that the SLC found no breach of duty on the part of any defendant. ***Second,*** as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are the lack of independent harm, the bankruptcy release (which covers any disclosure made prior to March 19, 2002), Chiquita's exculpatory clause, Chiquita's advancement and indemnity obligations, and the statute of limitations (which, absent the application of a tolling doctrine, may bar claims arising from disclosures made prior to October 12, 2001). ***Third,*** as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis of whether to bring litigation.

K. Breach of Duty in Connection with Compensation and Severance Decisions

Finally, the SLC considered plaintiffs' claim relating to the compensation and severance paid to Chiquita's officers and directors. This claim is tangential to the main issue investigated by the SLC – whether the payments to the FARC and AUC were a breach of duty. In general, plaintiffs allege that all the compensation decisions that were made after the FTO designation was discovered on February 20, 2003 were wrongful and excessive because all of the defendants engaged in wrongdoing. *See* Am. Compl. ¶ 69. However, in this Report, the SLC has concluded that the defendants acted in good faith and with the best interests of the Company in mind. Thus, in reviewing these compensation decisions, which, in the SLC's view, were made in the normal

course of the Company's business, the SLC sought to determine whether they were a proper exercise of business judgment.[242]

In the Amended Complaint, the plaintiffs:

- claim that the defendants breached their duties by "abus[ing] their control of Chiquita for their own personal gain, aggrandizement and protection." (Am. Compl. ¶ 160(e));
- claim that the defendants committed corporate waste by "award[ing] themselves and their allies excessively lucrative compensation and payments which have no reasonable basis, but instead are designed only to enrich themselves." (*Id.* ¶ 168);
- claim that the defendants wrongfully "have continued to employ key wrongdoers in important corporate positions, have paid off other employees with generous severance packages and 'confidentiality' agreements and promises not to pursue them civilly for their involvement in the activities which resulted in the criminal plea of Chiquita." (*Id.* ¶ 119; *see also id.* ¶ 16);
- claim that the defendants wrongfully "decided to *increase* executive pay following the Company's March 2007 plea agreement, despite Chiquita's losses and massive exposure to criminal and civil liability." (*Id.* ¶ 141(d)) (emphasis in original); and
- request that Jeffrey Zalla and Robert Kistinger be terminated from employment, along with "any other current member of Chiquita's management found to have been actively involved in the wrongdoing," and that the Company seek and obtain an accounting for all improperly

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242 As noted above, while the Amended Complaint names SLC member Barker as a defendant (*see* Am. Compl. ¶ 28), it contains no specific allegations against him. Nevertheless, since he was included as a defendant, the SLC sought to determine what potential wrongdoing he could possibly have committed. The only allegation that could conceivably apply to Barker, although not specifically pleaded, is his involvement in the decision to grant a severance award to Robert Kistinger at a Board meeting on October 25, 2007 (his first Board meeting as Chiquita director), at which the Board considered and approved the award. Although Barker believes he could fairly and appropriately judge this issue, out of an abundance of caution, he recused himself from the SLC's deliberation and decision-making with respect to the Kistinger severance. Likewise, given the allegations against SLC member Hasler relating to decisions about compensation and severance in which she participated as a member of the Compensation Committee (*see, e.g.*, *id.* ¶¶ 141(d), 151), Hasler, although she too believes that she could fairly and appropriately judge this claim, recused herself from the SLC's deliberation and decision-making with respect to this claim in its entirety.

paid salaries, bonuses, and stock awards and disgorgement of "all directors' fees and other compensation or reimbursement paid to any of the Chiquita directors named as defendants." Am. Compl. Prayer for Relief (D-E).

However, with one exception, the Amended Complaint does not provide any specific instances in which executives or directors are alleged to have received wrongful compensation or severance or have been wrongfully permitted to continue their employment with the Company. For clarity of presentation, the SLC has focused its analysis of this claim solely on decisions made after the discovery of the FTO designation because previously all compensation and severance decisions were made without knowledge of any potential wrongdoing.

1. Legal Standards

Compensation decisions are governed by traditional notions of business judgment. In fact, "Courts have long recognized that the business judgment rule's presumption of good faith and regularity carries particular force when the challenged decision concerns employee compensation." *Jannett v. Gilmartin*, 2006 WL 2195819, at *7 (N.J. Super. Ct. Law Div. July 21, 2006); *see also Eliasberg v. Standard Oil Co.*, 92 A.2d 862, 867 (N.J. Super. Ct. Ch. Div. 1953) ("Directors have the discretionary power to employ, fix compensation and generally to use legitimate ends and means to retain employees or induce them to continue in the corporation's service, and in such matters the honest exercise of business judgment is controlling") (citation omitted).

In the widely reported *Disney* case, the Delaware Supreme Court addressed the issue of breach of fiduciary duty and corporate waste in the compensation context. According to the complaint, Disney's board "committed waste [by permitting a] lucrative severance payout to [its then-president], Michael Ovitz, under the no-fault termination provision of his employment contract, when it allegedly could have contested that issue in an attempt to avoid paying out the severance. *See Brehm v. Eisner*, 746 A.2d 244, 265 (Del. 2000).

In rejecting this claim, the Court of Chancery found that the plaintiffs had failed to "allege with particularity facts tending to show that *no reasonable business person* would have made the decision that the . . . Board made under these circumstances." *Id.* at 266 (emphasis added). Despite expressing concerns about "lavish executive compensation," the Delaware Supreme Court upheld the dismissal and held that compensation decisions are left to the business judgment of directors, and though we may have "aspirations that boards of directors . . . live up to the highest standards of good corporate practices," failure to do so is not grounds for liability under Delaware law. *Id.* at 249.

Accordingly, compensation decisions made on an independent and informed basis are entitled to the protection of the business judgment rule and will not be second-guessed by courts. *See Prod. Res. Group L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 799 (Del. Ch. 2004) ("Informed decisions regarding employee compensation by independent boards are usually entitled to business judgment rule protection"); *Litt v. Wycoff*, 2003 WL 1794724, at *6 (Del. Ch. Mar. 28, 2003) ("employee compensation decisions made by a fully informed, disinterested, and independent board of directors are usually entitled to the protection of the business judgment rule"). Thus, the compensation decisions at issue here will be protected by the business judgment rule unless there is evidence of fraud, illegality, a conflict of interest, or gross negligence. In the absence of such facts, those decisions will be upheld unless it can be shown "that *no reasonable business person* would have made" them. *Brehm*, 746 A.2d at 266 (emphasis added). A review of the Chiquita Board's pertinent compensation decisions follows.

2. Analysis

Cyrus Freidheim. On March 19, 2002, upon the Company's emergence from bankruptcy, Cyrus Freidheim became CEO on the understanding that the Company would be seeking a permanent CEO in the near future. Pursuant to a July 23, 2003 letter agreement, which was signed by Jeffrey Benjamin, then-Chair of the Compensation Committee, Freidheim was granted certain compensation as "interim-CEO" to be followed by normal director's fees as non-executive chairman after the election of a new CEO. This agreement reflected an arrangement that was approved by the Compensation Committee at its March 11, 2003 meeting, including (i) salary at his then-current level of $700,000, (ii) an increased target bonus opportunity under a program that was previously approved by the Compensation Committee, and (iii) certain stock options and restricted stock units. Fernando Aguirre replaced Freidheim as CEO in mid-January 2004, and Freidheim retired as Chairman in May 2004. Upon his retirement, Freidheim's previously granted stock options and restricted stock units vested pursuant to the July 23, 2003 letter agreement.

The SLC found that the decision to enter into the July 23, 2003 agreement was not unreasonable. It was approved by the Compensation Committee on March 11, before the FTO designation was known to Freidheim or disclosed to the Board. It granted Freidheim no new benefits upon his retirement, allowing only the vesting of previously awarded stock and options. Moreover, the SLC found no evidence that Freidheim was involved in any wrongdoing related to the payments; they began long before he joined the Company and he deferred to the Audit Committee's management of the investigation after the FTO designation was disclosed. Thus, the SLC found no basis to conclude that the approval of these retirement benefits was a breach of duty.

James Riley. Riley served as the Company's CFO from January 2001 to August 2004. Soon after Aguirre became CEO, discussions began about replacing Riley as CFO.

Ultimately, in August 2004, Riley left the Company after he and Aguirre made the mutual decision that he should do so. Upon his departure from the Company, Riley was awarded a severance package with certain Board-approved enhancements, including pro rata vesting of his long term incentive plan restricted stock award and a two-year life insurance policy.

The SLC found that the decision to grant Riley this severance award was not unreasonable. This severance arrangement was initially considered by the Compensation Committee at its February 9 and March 30, 2004 meetings. This arrangement was then discussed and approved by the full Board at its July 26 and 27, 2004 meeting. The SLC found no evidence that Riley played any role in the Colombia payments either before or after the discovery of the FTO designation, or was involved in any wrongdoing, such that a severance award recognizing his service to the Company was improper. Thus, the SLC found no basis to conclude that the approval of this severance award was a breach of duty.

Jay Braukman. Braukman replaced Riley as CFO, and served in that position from August 2004 to June 2005. At that time, Braukman was notified that the decision had been made to terminate his employment based on his performance, but he was allowed to remain at the Company until August 2005. Braukman received nine months of severance pay, which corresponded to his nine-month tenure as CFO.

The SLC found that the decision to grant Braukman this severance award was not unreasonable. The Compensation Committee members had multiple discussions regarding Braukman's severance and, ultimately, discussed and approved it via e-mail on July 28, 2005. The SLC found no evidence that Braukman played any role in the DOJ investigation during the nine months he was employed with the Company. Instead, the SLC found evidence to suggest that Braukman was granted a modest severance award in recognition of the disruption to his career caused by his brief tenure and his abrupt termination by Chiquita, as well as the fact that he had moved to Cincinnati to take the job. Thus, the SLC found no basis to conclude that the approval of this severance award was a breach of duty.

Robert Olson. After eleven years as General Counsel for the Company, Robert Olson retired in August 2006. The evidence developed by the SLC shows that Olson retired for two reasons – as part of Aguirre's attempts to bring in new management and after questions were raised about his performance in late 2005. Olson received an individually negotiated retirement award, which was approved by Aguirre after discussion with certain directors, and was memorialized in a retirement agreement dated August 31, 2006. Under this agreement, Olson received: (i) a cash benefit of $622,500, (ii) a pro rata bonus of $138,333, (iii) twelve months of office space and services, and (iv) accelerated vesting of stock options, among other things. Although not technically conforming to the Company's Executive Officer Severance Pay Plan (the

"Plan"), which applies to severance but not retirement, the evidence shows that the Plan provided a framework for Olson's retirement agreement.

The SLC found that the decision to enter into this retirement agreement was not unreasonable. Reasonable business purposes supported Olson's retirement agreement, including that (i) it was largely consistent with the terms of the Plan and Company policy, and recognized his extended service to the Company, (ii) it allowed for continued access to Olson's substantial institutional knowledge resulting from that service; and (iii) it helped secure Olson's ongoing cooperation with the DOJ investigation even after his departure from the Company, a valid consideration given that the DOJ investigation was still ongoing. Moreover, Olson's retirement agreement did not contain any release of the Company's rights to pursue possible claims against him in the event that it became appropriate to do so. In any event, the SLC has now investigated those claims and cannot conclude that Olson breached his duties to the Company. Thus, the SLC found no basis to conclude that the approval of this retirement agreement was a breach of duty.

Robert Kistinger. After approximately twenty-eight years of service to the Company, Robert Kistinger was terminated from employment, effective December 31, 2007, in connection with an effort led by Aguirre to reduce the Company's overhead costs, including by eliminating the position of COO of Chiquita Fresh Group, which Kistinger held. Kistinger received a severance package that was largely consistent with, and deviated only slightly from, the terms of the Plan in effect at the time.

Under his severance agreement, Kistinger received, among other things, (i) a cash benefit of $1,092,500 (equal to the sum of his then-current annual base salary and then-current annual bonus target); (ii) a pro rata bonus for 2007 in amount of $517,500; (iii) continuation of medical benefits under COBRA for twelve months; (iv) accelerated vesting of all 69,478 of his shares of unvested restricted stock; (v) three years from the date of separation in which to exercise stock options for the 450,000 shares granted under the Company's stock plan, all of which had already vested; (vi) reimbursement for $10,000 in legal fees; (vii) continued D&O insurance coverage; and (viii) the full amount of his deferred contribution account, payable pursuant to the terms of the Company's capital accumulation plan. The evidence shows that the Board refused to enhance the monetary component of the severance award despite Kistinger's requests given his lengthy tenure at the Company. Kistinger's severance was discussed and approved at an October 25, 2007 Board meeting.

The SLC found that the decision to grant Kistinger this severance award was not unreasonable. The SLC found no evidence that Kistinger was involved in any wrongdoing with regard to the payments in Colombia, which might raise questions about the propriety of his severance award, and which otherwise recognized his long-

tenured service to the Company. Accordingly, the SLC found no basis to conclude that the approval of this severance award was a breach of duty.

Aguirre's Salary Increases. The SLC next considered the decisions to approve certain enhancements to Aguirre's compensation – salary increases and additional stock option awards – in 2005, 2006, 2007, and 2008. As noted above, Aguirre joined the Company on January 12, 2004, and was not aware of the only payment to the AUC that occurred during his tenure until after it was made.

The SLC found that the decision to grant Aguirre these salary enhancements was not unreasonable. The SLC found evidence that Aguirre's compensation was set to provide appropriate performance incentives to serve as CEO and to reflect the substantial efforts required of him to deal with the significant legal issues created by the DOJ investigation that were not fully anticipated at the time of his hiring. In addition, by granting these increases, the Compensation Committee maintained Aguirre's compensation in the 75th percentile of peer companies, which the Compensation Committee concluded was an appropriate benchmark.

This decision was reached with the advice of Michael Kesner, a consultant from Deloitte, who was engaged by the Compensation Committee. All of these increases and awards were discussed and approved by the Compensation Committee at meetings or during discussions, which were held on February 16, 2005, February 15, 2006, April 15, 2007, and February 13, 2008. Finally, as noted above, the SLC found no evidence that Aguirre was involved in any wrongdoing with regard to the payments; instead, he helped guide the Company through a perilous period in its history and helped avoid a potentially catastrophic outcome of the DOJ investigation. Accordingly, the SLC found no basis to conclude that the approval of Aguirre's compensation enhancements was a breach of duty.

Other Salary Increases. Finally, the SLC considered certain salary increases recommended by Aguirre for Kistinger ($25,000), Olson ($15,000), and Zalla ($10,000) (among others) – his direct reports – which were approved by the Compensation Committee at its February 16, 2005 meeting and that related to 2005, along with a salary increase for Zalla in the amount of $30,000 that was approved by the Compensation Committee at its July 9, 2007 meeting. The SLC also considered increases in director compensation, including, among other things, an annual director fee of $80,000 and shares of common stock having an aggregate fair market value of $80,000, which were approved by the Board at its February 15, 2007 meeting.[243]

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[243] The plaintiffs allege that the increases in the amount of director compensation were granted at a February 17, 2007 Board meeting, *see* Am. Compl. ¶ 27. Documents reviewed by the SLC show

The SLC found that the decision to grant these modest salary increases to the Company's most senior executives and its directors was not unreasonable. Raises of $10,000 to $30,000 were made in the ordinary course of business to senior corporate officers. The Board had not increased the cash component of its own compensation since 2002 and believed it was necessary to attract and retain qualified directors because of the Company's issues with DOJ and the time being devoted to Board service by the directors. *See* Proxy Statement (Form Def 14-A) of Chiquita Brands International Inc. (Apr. 23, 2007).[244] Indeed, director Jeffrey Benjamin had recently resigned from the Board because of complications to his other gaming-related business activities caused by the DOJ investigation. Moreover, all of these increases were approved with the advice of Michael Kesner from Deloitte, the Compensation Committee's consultant. Thus, the SLC found no basis to conclude that the approval of these compensation awards was a breach of duty.

Conclusion. The SLC found no evidence to suggest that the defendants' decisions to authorize compensation enhancements, severance pay, or retirement awards, as described above, were tainted by fraud, illegality, or a conflict of interest, or were grossly negligent. The SLC also found that each determination was made at a Board or Compensation Committee meeting (sometimes with the advice of an outside consultant), or following internal discussions, and that none of the awards were unreasonable. Accordingly, the SLC found that none of these decisions was a breach of duty.

* * *

Retention of Executives and Failure to Pursue Claims. In view of its decision that it could not conclude that members of management breached their duties with respect to the payments in Colombia, the SLC concludes that the Board did not breach its duties in retaining those officers who the plaintiffs allege were involved in wrongdoing. *See* Am. Compl. ¶ 119; *Eliasberg*, 92 A.2d 862 at 867 ("Directors have the discretionary power to employ, fix compensation and generally to use legitimate ends and means to retain employees or induce them to continue in the corporation's service, and in such matters the honest exercise of business judgment is controlling") (citations omitted); *see also National Cash Register v. Riner*, 424 A.2d 669, 673 (Del. Super. Ct. 1980) ("An employe[r]

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that it occurred on February 15. *See* Proxy Statement (Form Def 14-A) of Chiquita Brands Int'l, Inc. (Apr. 23, 2007).

244 While there were no increases in director fees from 2002 to 2007, the record shows that there were changes in the structure of the equity component of director compensation. *See* Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 23, 2007); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 19, 2006); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 18, 2005); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 20, 2004); Chiquita Brands Int'l Inc., Proxy Statement (Form Def 14-A) (Apr. 22, 2003).

is entitled to exercise his sound business judgment, and may fire even an adequate employee, if the reason is to hire a new employee . . . as long as it is not a pretext for discrimination").

Moreover, the SLC found that the defendants did not breach their duties in failing to pursue claims against the Company's former and current officers and directors: the SLC has now considered and rejected those very claims following its investigation. The SLC found no evidence whatsoever of any "promises not to pursue [the defendants] civilly for their involvement in the activities which resulted in the criminal plea of Chiquita." Am. Compl. ¶ 119. Indeed, as noted above, Olson's retirement agreement does not contain a release from liability from the Company. Likewise, none of the defendants have asserted a promise by the Company not to pursue claims as an impediment to the SLC's investigation.

Finally, the SLC found that the plaintiffs' request in the Amended Complaint for the dismissal of Jeffrey Zalla likewise lacks merit (*see* Am. Compl. Prayer for Relief (D)); Zalla played no role whatsoever in the payments and only became CFO in May 2005. The SLC found no evidence that Zalla, as Corporate Responsibility Officer from 2000 to May 2005, had any knowledge of, let alone authority over, the payments. He played no role in the DOJ investigation after the FTO designation was discovered, except to perform some financial analyses regarding the Company's ability to pay a fine. None of the other members of senior management in Cincinnati who are alleged to have been actively involved in the wrongdoing (*see* Am. Compl. ¶ 18) related to the payments remain employed by the Company.[245]

* * *

Accordingly, in the exercise of its business judgment, the SLC has concluded to seek dismissal of this claim. In exercising that judgment, the SLC took account of the following factors. ***First,*** as discussed at length above, this decision is based on the fact that the SLC found no breach of duty on the part of any defendant. ***Second,*** as is also discussed at length above, the SLC found that various considerations create, at a minimum, substantial uncertainty as to whether a viable claim exists and therefore raise serious questions whether bringing such a claim is in the best interests of the Company. These considerations are Chiquita's exculpatory clause and advancement and indemnity obligations. ***Third,*** as discussed below (*see* Business Judgment Considerations), the SLC took into account additional factors apart from the legal and

245 The plaintiffs also seek the termination of Robert Kistinger who, as discussed above, is no longer employed by the Company. The SLC saw no basis to examine the retirement of William Tsacalis, the corporate controller, who retired from the Company on January 1, 2008 after twenty-eight years of service; he had little, if any, role in the payments in Colombia and no role in the DOJ investigation.

factual merits of the claims that are relevant to the analysis of whether to bring litigation.

L. <u>Business Judgment Considerations</u>

As noted above, in making its determinations as to what course of action is in the best interests of Chiquita and its shareholders, the SLC also took into account additional factors apart from the legal and factual merits of the claims that are relevant to the analysis.

Lack of Bad Faith. The fact that there was no evidence that any defendant, at any time, acted in bad faith or was motivated by self-interest weighed heavily in the SLC's deliberations. While the SLC believes that, at times, the defendants made mistakes, some more significant than others, those mistakes were made in the belief that the actions being taken were in the best interests of the Company and were to protect the lives of the Company's employees.

Reputational Harm. The SLC concluded that the reputational harm associated with prolonging what has already been six continuous years of investigation and litigation, with continued emphasis on the Company's actions in Colombia, would inflict substantial further damage on the Company. Rather than pursuing these claims, which the SLC found to be at best questionable and to have significant factual and legal flaws, the SLC concluded that the Company's interests are better served by moving forward with efforts to restore its image as a leading seller of bananas, tropical fruit, and other value-added produce.

Cost. The SLC concluded that the costs that will be incurred in connection with these claims, including legal fees for the Company to pursue the claims effectively and for counsel for the individual defendants – for whom, under its charter and New Jersey law, the Company may be required to advance fees – outweigh any potential recovery that may be obtained in the future, especially given the weaknesses of the claims.

Remedial Steps and Deterrence. As discussed above, the SLC found that management and the Board appropriately focused on the adequacy of the Company's compliance measures and remedial actions implemented following this episode. As a result, the SLC believes that an event of this nature is unlikely to recur, and therefore, the deterrent effect of bringing a claim against former officers and directors, whom the SLC concluded acted in good faith, is outweighed by the negative impact such claims would have on the Company's current management. Moreover, the SLC, in a project led by Mr. Barker, who also serves as the Chair of the Board's Audit Committee, is in the process of reviewing the improvements to the Company's compliance program that have already been made to determine whether any further enhancements are necessary, and will make recommendations to management as the SLC concludes are appropriate.

Distraction to Management. The SLC strongly considered the fact that, in its view, continuing with this litigation would serve to further divert management from its core mission, which is to increase shareholder value by expanding the profits of the business.

Accordingly, the SLC, in the exercise of its business judgment, taking all of these factors into account, is now seeking by motion filed February 25, 2009 to dismiss the Amended Complaint in its entirety.

VI. CONCLUSION

The SLC's nine-month investigation into the plaintiffs' allegations was wide-ranging, independent, and exhaustive. At all times, the SLC was guided by the mandate it was given by the Company's Board – "to consider and determine whether or not the prosecution of the claims asserted in the Derivative Litigation . . . is in the best interests of the Company and its shareholders." The SLC believes that it has fulfilled this mandate, and that the conclusions it has reached truly serve the best interests of Chiquita and its shareholders.

To this end, the SLC is seeking to dismiss all claims as against all defendants, and has determined that:

- neither management nor the director defendants breached their fiduciary duties to Chiquita by making, or allowing payments to be made, to guerrilla and paramilitary groups from 1989 to September 10, 2001;
- neither management nor the director defendants breached their fiduciary duties to Chiquita by making, or allowing payments to be made, to the AUC from September 10, 2001 (when the AUC was designated an FTO) to February 20, 2003 (when the Company discovered that designation);
- the SLC could not conclude that management or the director defendants breached their fiduciary duties to Chiquita by making, or allowing payments to be made, to the AUC from February 21, 2003 (after the discovery of the designation) to January 2004 (when the last such payment was made); and
- neither management nor the director defendants breached their fiduciary duties to Chiquita in connection with (i) any incident related to drug or arms smuggling, (ii) the sale of Banadex, (iii) the decision to enter into the guilty plea, (iv) the acquisition of Atlanta AG, (v) the Company's public disclosures regarding Colombia and the DOJ investigation, or (vi) the compensation and severance awards it granted to certain individual defendants or decisions to retain those individuals.

Because the reasons underlying these determinations are discussed above at great length, it is unnecessary to reiterate them here. However, the SLC thinks that one point in particular bears repeating: that, at the conclusion of its investigation, the SLC found absolutely no evidence to suggest that either the Company's initial decision to make payments in Colombia, or its continued payments (even once they were in knowing violation of the law), were influenced by any motivation other than the sincere and abiding belief that these actions were necessary to protect the lives of its employees

and the integrity of its infrastructure. To the contrary, the SLC determined that Chiquita's Board and management, faced with an untenable situation, struggled to act in the best interests of the Company, and to do the right thing. In the SLC's judgment, pursuing litigation will only prolong the Company's entanglement in matters that have absorbed, distracted, and damaged it for close to six years. For the reasons stated in this Report, the SLC believes that dismissing the Amended Complaint is plainly in the best interests of the Company and its shareholders.

Respectfully Submitted,

Special Litigation Committee
Board of Directors
Chiquita Brands International, Inc.

Howard W. Barker, Jr.
William H. Camp
Dr. Clare M. Hasler

Fried, Frank, Harris, Shriver & Jacobson LLP

Michael R. Bromwich
David B. Hennes
William G. McGuinness

Rachel L. Braunstein
Dianna W. Lamb

Elizabeth L. Fasse
Zachary R. Hall
Katherine A. Raimondo
Laura Israel Sinrod

February 25, 2009

EXHIBIT "B"

CHIQUITA BRANDS INTERNATIONAL, INC.

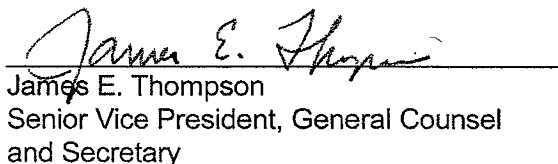
CERTIFICATE OF SECRETARY

The undersigned, being the duly elected and qualified Senior Vice President, General Counsel and Secretary of Chiquita Brands International, Inc., a New Jersey corporation (the "Corporation"), hereby certifies as follows:

> Attached as Exhibit A is a true, correct and complete copy of resolutions adopted by the Board of Directors of the Corporation on April 3, 2008, and these resolutions have not been rescinded or modified and are in full force and effect.

IN WITNESS WHEREOF, I have executed this Certificate and affixed the corporate seal as of the 14th day of May, 2008.

CHIQUITA BRANDS INTERNATIONAL, INC.



James E. Thompson
Senior Vice President, General Counsel
and Secretary

EXHIBIT A

CHIQUITA BRANDS INTERNATIONAL, INC.

RESOLUTION OF THE BOARD OF DIRECTORS FORMING SPECIAL LITIGATION COMMITTEE

WHEREAS, the Company, as nominal defendant, certain of its former and present officers and directors, individually, and Ernst & Young LLP have been sued in various derivative lawsuits, including *Service Employees International Union v. Hills et al.*, No. A07-11383 (Ohio Common Pleas Ct. Hamilton County), *Hawaii Annuity Trust Fund for Operating Engineers v. Hills et al.*, No. C-379-07 (N.J. Super. Ct. Ch. Div. Bergen County), and those actions centralized in the multidistrict litigation proceeding captioned *In re: Chiquita Brands International, Inc., Alien Tort Statute and Shareholders Derivative Litigation*, No. 08-1916 (S.D. Fl.) (together, with any additional related derivative lawsuits that may be filed in the future, the "Derivative Litigation"); and

WHEREAS, having considered the claims asserted in the Derivative Litigation, the Board of Directors of the Company has determined that it would be desirable and in the best interests of the Company and its shareholders to form a special committee of the Board in response to the Derivative Litigation;

NOW THEREFORE, BE IT RESOLVED, that pursuant to Article II, Section 2.5 of the Company's Bylaws and Section 14A:6-9 of the New Jersey Business Corporation Act, the Board of Directors hereby creates a Special Litigation Committee (the "SLC");

FURTHER RESOLVED, that the SLC shall initially consist of Howard W. Barker, Jr., Clare M. Hasler, and William H. Camp;

FURTHER RESOLVED, that the SLC shall investigate, review, and analyze the facts, allegations, and circumstances that are the subject of the Derivative Litigation, as well as any additional facts, allegations, and circumstances that may be at issue in any related inquiry, investigation, or proceeding;

FURTHER RESOLVED, that the SLC shall have the full and exclusive authority to consider and determine whether or not the prosecution of the claims asserted in the Derivative Litigation or any other claims related to the facts, allegations, and circumstances of the Derivative Litigation is in the best interests of the Company and its shareholders, and what action the Company should take with respect thereto, including what action the Company should take with respect to the Derivative Litigation and any related inquiry, investigation, or proceeding;

FURTHER RESOLVED, that the determinations made by the SLC shall be final, shall not be subject to review by the Board of Directors and shall in all respects be binding upon the Corporation; and

FURTHER RESOLVED, that the SLC is hereby authorized and directed to continue in existence until such time as the SLC shall recommend its dissolution to the Board of Directors;

FURTHER RESOLVED, that the SLC may retain such outside counsel and other advisors, at the Company's expense, as the SLC may deem necessary or appropriate to perform its duties hereunder;

FURTHER RESOLVED, that the directors, officers, employees, public accountants, and advisors of the Company are, and each individually is, hereby authorized and directed to assist the SLC and to provide it with any and all documents and other information that the SLC deems necessary to carry out the duties set forth in the foregoing resolution;

FURTHER RESOLVED, that the officers of the Company are authorized to take all such actions and to perform any and all acts (including execution, filing and delivery of any and all instruments and documents) that they deem necessary and appropriate to effectuate the purpose and intent of the foregoing resolution; and

FURTHER RESOLVED, that all actions heretofore taken by any officer, employee, agent, or director of the Company in connection with the foregoing be, and hereby are, ratified and approved in all respects.

EXHIBIT "C"

DEF 14A 1 ddef14a.htm DEFINITIVE PROXY STATEMENT

Table of Contents

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14A

Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934
(Amendment No. __)

Filed by the Registrant ☒ Filed by a Party other than the Registrant ☐

Check the appropriate box:

☐ Preliminary Proxy Statement
☐ **Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**
☒ Definitive Proxy Statement
☐ Definitive Additional Materials
☐ Soliciting Material Pursuant to §240.14a-12

CHIQUITA BRANDS INTERNATIONAL
(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

☒ No fee required.
☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11.

(1) Title of each class of securities to which transaction applies:

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(2) Aggregate number of securities to which transaction applies:

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(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

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(4) Proposed maximum aggregate value of transaction:

Table of Contents

INFORMATION ABOUT THE BOARD OF DIRECTORS AND ITS COMMITTEES

Board Governance, Meetings, and Attendance at Meetings

The Board of Directors has adopted Board governance standards and policies, which together with the charters of the Board committees, provide the framework for corporate governance at Chiquita. The company also has a Code of Conduct that applies to all employees, including executive officers, as well as to directors to the extent relevant to their service as directors. Chiquita's Board of Directors currently has four standing committees: Audit, Compensation & Organization Development, Food Innovation, Safety & Technology and Nominating & Governance. The Executive Committee of the Board, which existed for many years but had not been used since 2000, was eliminated in May 2007. The Board could reestablish the committee in the future should it identify a need to do so. Each current committee is comprised solely of directors who are "independent" as defined by New York Stock Exchange ("NYSE") rules, and the Board has adopted a charter for each. The Board governance policies, Code of Conduct, and committee charters are available on the company's website at www.chiquita.com by clicking on "Investors" and "Governance." You may request a copy of any of these documents to be mailed to you as described on page 57 of this proxy statement. Any amendments to, or waivers from, the Code of Conduct that apply to the company's principal executive and financial officers will be posted on the company's website. At the date of this proxy statement, no such waivers have been requested or granted.

NYSE rules require a majority of the board of directors of a listed company to be "independent." The Board has determined that the following directors are "independent" as defined by the NYSE: Mr. Arntzen, Mr. Barker, Mr. Camp, Mr. Fisher, Dr. Hasler, Mr. Jager, Mr. Serra and Mr. Stanbrook. This determination was based on categorical standards adopted by the Board that are consistent with the definition of "independent" contained in the NYSE rules. These standards are available on the company's website at www.chiquita.com by clicking on "Investors" and "Governance."

Jeffrey D. Benjamin served as an independent director of the Board and as a member of the Audit and Compensation & Organizational Development Committees until his resignation on February 6, 2007, and Roderick M. Hills served as an independent director and as a member of the Audit Committee until his retirement on May 24, 2007. Mr. Barker was appointed as a director and member of the Audit Committee on September 21, 2007. Mr. Camp was appointed a director on April 3, 2008. Both of them were determined to be independent on the dates of their appointments. Mr. Arntzen will retire from service on the Board and its committees on May 22, 2008 immediately prior to the Annual Meeting.

Under the Board's governance standards and policies, directors are expected to attend all scheduled Board and committee meetings. During 2007, the Board of Directors held 14 meetings and took action by unanimous written consent two times. Each director who served on the Board of Directors in 2007 being nominated for re-election attended at least 75% of the meetings of the Board and of each committee on which he or she served.

The company's non-management directors, all of whom are also independent directors, generally meet in conjunction with each regularly scheduled Board meeting in a separate "executive session." The Chair of the Nominating & Governance Committee, currently Mr. Jager, presides at all of these sessions.

Directors are also expected to attend the Annual Meeting of Shareholders. Last year, all of the directors then serving on the Board attended the Annual Meeting.