NOS. 05-10067, 05-15006 & 05-55354

PANEL MEMBERS: HONORABLE DIARMUID F. O'SCANNLAIN
HONORABLE SIDNEY R. THOMAS
HONORABLE RICHARD C. TALLMAN
DATE OF DECISION: DECEMBER 27, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA DATED MAY 6, 2004 ON COMPREHENSIVE DRUG TESTING, INC. AND QUEST DIAGNOSTICS, INC.

UNITED STATES OF AMERICA,

Defendant-Appellant,

v.

COMPREHENSIVE DRUG TESTING, INC., AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Plaintiffs-Appellees.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Appeal from the United States District Courts for the Northern District of California (No. CR Misc. 04-234 SI); the Central District of California (No. CV 04-2887 FMC (JWJx)); and the District of Nevada (No. CV-S-04-0707 JCM-PAL)

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America has no parent corporation and no publicly held company owns 10% or more of its stock.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

The Chamber of Commerce of the United States of America (the "Chamber") submits this brief as *amicus curiae* in support of Appellees' petition for rehearing and rehearing *en banc*. The parties have consented to the filing of this brief.

I. IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases involving issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in many cases before this Court. *See, e.g., Equal Employment Opportunity Comm'n v. Federal Express Corp.*, No. 06-16864; *Sepulveda v. Wal-Mart Stores, Inc.*, No. 06-56090.

In this case, the panel's decision presents two major concerns for the national business community. The first is that it disrupts a collectively bargained arrangement dealing with the difficult issue of employee drug use in the workplace. The Chamber, of course, does not dispute the government's legitimate interest in conducting a criminal investigation of illegal drug use in the workplace. Indeed, it is the Chamber's understanding that the government's seizure of drug testing records pertaining to the ten Major League Baseball players implicated in

the Bay Area Lab Cooperative ("Balco") investigation is not at issue in this appeal. The issue is the government's seizure of thousands of drug testing records pertaining to every other Major League Baseball player as well as athletes in many other sports, none of whom were identified in the search warrant or implicated in the Balco investigation.

The Major League Baseball Players' Association, the union that represents the players, agreed to player drug tests under a promise of confidentiality and anonymity. Panel Dec. at 19835 (Thomas, J., dissenting). This promise of confidentiality and anonymity was a key term of the deal reached in collective bargaining. As Judge Thomas explained, the sole purpose of the drug tests was "to determine the approximate magnitude of apparent steroid use with the goal of fashioning appropriate policies to address it." *Id* Thus, the drug tests were an evaluative tool, not a tool for punishment of individual players.

By permitting the government to seize all of these drug testing records, even though the search warrant only authorized the seizure of records for ten players, the panel's decision upset the delicate arrangement negotiated by Major League Baseball and the Players' Association. The promise of confidentiality and anonymity has been undermined. As a result, if it is allowed to stand, the panel's decision will jeopardize the ability of employers in many industries to negotiate similar drug testing arrangements in the future. The decision thus will have adverse effects extending far beyond professional sports.

The second concern presented by the panel's decision is even broader, transcending the issue of drug testing altogether. That concern is the potential for

the government to search and seize, without probable cause, vast amounts of electronic information maintained by a business that is not the subject of a criminal investigation. The panel's decision permits such vastly overbroad searches and seizures of electronic data with no guarantee of judicial oversight. Given that electronic records are commonly used by businesses today, the specter of overbroad searches and seizures of electronic data, unsupported by probable cause and unchecked by the involvement of a neutral judicial officer, is deeply troubling to the business community.

II. ARGUMENT

A. The Panel's Decision Will Jeopardize Employers' Ability to Negotiate Drug Testing Arrangements with a Union.

The panel's decision, if allowed to stand, will have a detrimental impact on employers who seek to implement a drug testing program for a union-represented workforce. Under federal labor law, an employer *must* engage in collective bargaining over a drug testing program that will affect employees who are represented by a union. Drug testing is, in the lexicon of labor law, a mandatory subject of bargaining. *See Johnson-Bateman Co.*, 295 NLRB 180 (1989).

Even in industries in which the federal government requires drug testing, employers still *must* engage in collective bargaining over those aspects of a drug testing program that are not addressed by federal regulations. For instance, in *United Food & Commercial Workers v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995), this Court affirmed a labor arbitrator's ruling that an employer's unilateral implementation of a drug testing program, as required by U.S. Department of Transportation ("DOT") regulations, violated a collective

bargaining agreement covering its truck drivers. As this Court held, although the employer was subject to various penalties for failing to implement a drug testing program in accordance with DOT regulations, there was no indication that the regulations "were intended to preempt already existing collective bargaining agreements or to eliminate an employer's duty to bargain under federal labor laws." *Id.* at 174.

Thus, employers cannot implement a drug testing program for union-represented employees without first negotiating with the union. Assurances of confidentiality may be, and often are, essential to reaching agreement with the union, as in this case. If, however, the employer's ability to make that key promise is undercut by the potential for overbroad searches and seizures by the government, the union justifiably may be unwilling to rely on the employer's promise. As one of the district court judges observed in this case, "I can't imagine there's going to be any voluntary agreement to do this kind of testing" in the future. Decision of Judge Illston, quoted in Panel Dec. at 19850 (Thomas, J., dissenting).

The issue here is not whether the government may conduct criminal investigations regarding illegal drug use. Nor is it whether the government, in the course of such investigations, may seek information from innocent third parties by subpoena or even by search warrant. The issue is whether the government should have the right to seize and retain drug testing records where that seizure is (a) not supported by probable cause; (b) not authorized by a neutral judicial officer; and (c) wholly outside the scope of the government's investigation. The Chamber submits that the panel majority in this case, in permitting such an overbroad

seizure, failed to consider the adverse effect its decision can be expected to have on the collective bargaining process and future voluntary drug testing in the workplace.[2] Therefore, the Chamber urges the Court to grant Appellees' petition for rehearing.

B. The Panel's Decision Sets a Troubling Standard for Searches and Seizures of Electronic Data.

In addition to the Chamber's concern about the effect of the panel's decision on collective bargaining over the issue of drug testing, the Chamber objects to the panel majority's authorization of sweeping searches and seizures of electronic information that is allegedly "intermingled" with certain information specified in a search warrant. The majority declared that drug testing records for the ten players named in the warrant were "intermingled" with records for all other Major League Baseball players and many other athletes, simply because the records were stored in the same computer directory. Panel Dec. at 19818. But, as Judge Thomas noted, this directory was divided into a number of clearly named sub-directories and files that "were not connected with Major League Baseball player drug testing at all." *Id.* at 19872 (Thomas, J., dissenting). Thus, "it was clear to the investigating officers that they were seizing a sizable amount of data that was not responsive to the warrant." *Id*

The notion that data is "intermingled," and therefore may be seized by the government, simply because it resides on the same database or computer as the

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[2] The majority opinion barely mentions the collective bargaining agreement that gave rise to the drug tests at issue in this case, acknowledging the agreement only in a footnote. Panel Dec. at 19792 n.8.

information sought in a search warrant is troubling to the Chamber and the more than three million businesses it represents. Under the panel majority's definition of "intermingled," the government's ability to seize electronic information is virtually limitless. As Judge Thomas aptly noted, "[a]ll of the files in one directory on one computer in today's world could very well constitute the equivalent of all the files in an entire office in yesterday's paper era." *Id.* at 19872 n.9.

Given that businesses today typically rely on computers to store information, the standard set by the Court in this case will have a wide impact, reaching far beyond drug testing companies and professional sports leagues. Many businesses, such as banks, telephone companies, and internet service providers, possess electronic information that is routinely sought by the government in criminal investigations, even though these businesses are not suspected of any wrongdoing. Normally, according to the government's own procedural guidelines, the government obtains information from such innocent third parties only by subpoena, not by search warrant. Under the panel's majority decision, however, the government is given a perverse incentive to depart from its own voluntary rules and to proceed by search warrant even against business entities not suspected of wrongdoing. By proceeding in this way, the government would obtain for itself the right to seize banking, telephone, or e-mail records not only for those persons under investigation, but also for anyone else whose records just happened to reside on the same computer or database.

Furthermore, under the standard established by the panel majority, thousands of innocent persons whose information is seized in this way would have no notice

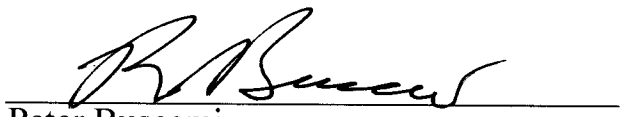
of the seizure unless the business informed them after the fact. And even then, the government would be under no obligation to return the information unless the individual or the business incurred the expense of hiring a lawyer to undertake the necessary legal proceedings. Panel Dec. at 19834 ("Under the majority's holding, a magistrate would be required to review the seized data for probable cause after seizure only if an aggrieved party made a motion." (Thomas, J., dissenting)).

The Chamber objects to this standard. To begin with, the definition of "intermingled" should be limited so that, even when a search warrant is used, the government is authorized to seize only those data that truly cannot be separated from the subject data described with specificity in the search warrant. *See United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982) ("[T]he wholesale *seizure* for later detailed examination of records not described in a warrant is significantly more intrusive, and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'"). The Chamber also believes that the government should have an affirmative obligation to seal and submit the ostensibly "intermingled" data to a magistrate for review, with the goal of separating and returning the irrelevant data. *Id.* at 596 ("The essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate."). The onus should not be placed on innocent businesses or their customers to seek judicial review after the fact.

III. CONCLUSION

For all of these reasons, the Chamber urges the Court to grant Appellees' petition for rehearing and rehearing *en banc*.

Respectfully submitted,



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Dated: February 20, 2007

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Fed. R. App. P. 29 and Circuit Rule 35-4 or 40-1, the attached Brief of the U.S. Chamber of Commerce as amicus curiae in support of the rehearing/petition for rehearing en banc is

√ Proportionately spaced, has a typeface of 14 points or more, and contains **1841** words.

Peter Buscemi

PROOF OF SERVICE BY HAND

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is One Market, Spear Street Tower, San Francisco, California 94105-1126. I served the following documents on February 20, 2007:

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I declare under penalty of perjury that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that the foregoing is true and correct.

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UNITED STATES OF AMERICA Plaintiff, V. COMPREHENSIVE DRUG TESTING, INC., ETC. Defendant.	CASE NUMBER 05-10067, 05-15006 & 05-55354 **DECLARATION OF SERVICE**

At the time of service I was a citizen of the United States, over the age of eighteen, and not a party to this action; I served copies of the:

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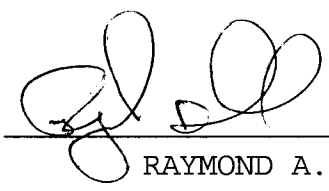
Signature: 

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