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BY FEDERAL EXPRESS

Ms. Molly Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States of America v. Stringer, et al.*, No. 06-30100

Dear Ms. Dwyer:

The Chamber of Commerce of the United States of America (the "Chamber") and the Association of Corporate Counsel ("ACC") respectfully request the Court's permission to submit this letter brief as *amicus curiae* in support of defendants-appellees' petition for rehearing en banc of the April 4, 2008 Panel decision in the above-referenced matter. The Chamber and ACC believe that en banc review is warranted in this case to resolve a complex issue of exceptional importance to the nation's business community -- namely, whether and to what extent the Securities and Exchange Commission ("SEC"), or any other governmental entity, can actively conceal from an individual whom it is investigating the existence of a parallel criminal investigation. Fed. R. App. P. 35(a)(2). En banc review is also necessary to resolve a conflict between the Panel's decision in this case and the decision of the United States Supreme Court in *United States v. Kordel*, 397 U.S. 1 (1970), and to allow this Court "to secure [and] maintain uniformity of [its own] decisions." Fed. R. App. P. 35(a)(1).

The Chamber is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly makes *amicus curiae* submissions in cases that raise issues of vital concern to the nation's business community. ACC was formed in 1982 as the bar association for in-house counsel. With almost 24,000 in-house counsel members in over 80 countries, ACC represents the professional interests of attorneys who practice in more than 10,000 corporations (public and private, for- and non-profit). As an *amicus curiae*, ACC offers the Court the perspective of counselors "on the scene," who provide the majority of corporate legal counseling on a day-to-day basis for their

clients; accordingly, these lawyers develop and execute their client's defense strategies and their response to allegations brought against the company and its employees by prosecutors and enforcement officials. The Chamber and ACC believe, for the reasons discussed below, that the Panel's decision in this case violates fundamental constitutional principles and undermines important business interests.

Administrative regulation of corporations and other business entities has grown increasingly robust and complex in recent years, at a time when the federal government has also continued to step up its criminal enforcement of securities fraud and other white collar crimes. As a result, it is not uncommon in today's business environment for corporations and their employees to find themselves the subject of parallel civil and criminal proceedings based on the same subject matter.

"[T]he effect of such parallel proceedings," as one court has put it, "is to place the defendant in the jaws of a pincers." *SEC v. Oakford Corp.*, 181 F.R.D. 269, 270 (S.D.N.Y. 1998). Perhaps the most serious risk that corporations and their employees face from parallel proceedings is the threat of self-incrimination.[1] Employee witnesses are faced with a proverbial Hobson's choice between, on the one hand, invoking their Fifth Amendment rights in the civil proceeding (in which case, a jury is entitled to draw an adverse inference) or, on the other hand, waiving the privilege and testifying in the civil proceeding (in which case, that testimony can be used against him or her in a criminal proceeding). *See* Ralph C. Ferrara & David A. Garcia, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 38 Sec. Reg. & L. Rep. (BNA) 1329, 1332 (2006). Another disadvantage to businesses and their employees is that, given the amount of information sharing that takes place between civil and criminal investigators, the criminal prosecutor is generally afforded far broader discovery than it is otherwise entitled to under the Federal Rules of Criminal Procedure. *See id.* These risks and disadvantages are exacerbated where, as here, the defendant is kept in the dark about the existence of a parallel criminal proceeding. *See United States v. Scrushy*, 366 F. Supp. 2d 1134, 1139-40 (N.D. Ala. 2005) ("When a defendant *knows* that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. When a defendant does not know about the criminal investigation, the danger of prejudice increases.") (emphasis in original).

As commentators have observed, collaboration between the SEC and United States Attorneys Office ("USAO") – the two government agencies at issue in the *Stringer* case – is both common and problematic. *See generally* Ferrara & Garcia, *supra* at 1329-30. The *Stringer* case, which involves claims of securities fraud against three former executives of FLIR Systems, Inc., is a classic example of the improper use of parallel proceedings. The district court found that "the government did not advise defendants that it anticipated their

[1] Although corporations do not have Fifth Amendment rights, the invocation of the privilege by their employees can, of course, have serious implications for the corporation.

criminal prosecution," but rather "intentionally shielded [the USAO's] intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement." *United States v. Stringer*, 408 F. Supp. 2d 1083, 1088 (D. Or. 2006) (finding that this "strategy to conceal the criminal investigation from defendants was an abuse of the investigative process"). In other words, the district court found that "the government engaged in deceit and trickery to keep the criminal investigation concealed." *Id.* at 1089.

The Panel reversed, finding that, while the SEC may have been less than forthright in responding to defense counsel's inquiries as to the existence of a USAO investigation, it "made no affirmative misrepresentations." *Stringer*, Op. at 3564. Further, the Panel held that the "standard form" that the SEC sent to the defendants at the outset of the civil investigation, advising them that the SEC "often makes its files available to other government agencies," was "sufficient" to put defendants on notice of "the possibility that information received in the course of the civil investigation could be used for criminal proceedings." *Id.* at 3550.

This decision sets a dangerous precedent for both the business community and the SEC. First, it allows – and indeed, encourages – the SEC to push the envelope in concealing the existence of parallel criminal investigations, forcing witnesses to make critical decisions in the dark (as discussed above). Second, and relatedly, if witnesses come to fear the existence of an undisclosed parallel criminal proceeding, they will be reluctant to cooperate with the SEC even in situations where criminal proceedings are not under consideration, thereby compromising the SEC's civil enforcement mission.

The Panel's decision also is contrary to the Supreme Court's decision in *Kordel*. In *Kordel*, the Court indicated that the dismissal of an indictment would be warranted where, *inter alia*, (a) "the Government . . . has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution"; (b) the government departs "from the proper standards in the administration of justice"; *or* (c) there are "any other special circumstances that might suggest the unconstitutionality or even the impropriety of [the] criminal prosecution." *Kordel*, 397 U.S. at 11-12. The facts in *Stringer*, as found by the district court, appear to meet all three of these criteria.[2]

While it is, of course, necessary and appropriate for the SEC to advise witnesses at the outset of a civil investigation that any information the witness provides may be shared with criminal investigators, where, as was the case in *Stringer*, the SEC *knows for a fact* that a criminal investigation has *already* been initiated and the SEC has *already* provided information to the USAO in connection therewith, it cannot mislead a witness about those facts. Moreover, the SEC cannot and should not dissemble when asked – point blank – by defense counsel about

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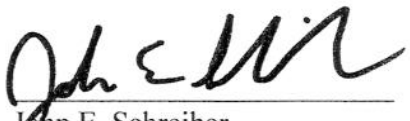
[2] We share the concern expressed by Judge Haggerty in his May 7, 2008 letter to this Court that the Panel seems neither to have accepted his findings of fact nor to have rejected them as "clearly erroneous," and note that this appears to provide an independent basis for rehearing.

such matters.[3] Government conduct of this sort constitutes the type of "departure from [the] proper standards in the administration of justice" contemplated by the Supreme Court in *Kordel* and, at a minimum, represents a situation in which there are "other special circumstances that might suggest the unconstitutionality or even the impropriety of [the] criminal prosecution." *See id.* at 11-12; *see also Scrushy*, 366 F. Supp. 2d at 1139-40 ("Failing to advise [a defendant] . . . about [a] criminal investigation of which he [is] a target . . . cannot be said to be in keeping with the proper administration of justice. Our justice system cannot function properly in the face of such cloak and dagger activities by those charged with upholding the integrity of the justice system.").

Consideration by the full Court is necessary to address these important issues and to reconcile the Panel's decision with *Kordel*. For the foregoing reasons, the Chamber and ACC believe that en banc review should be granted.[4]

Respectfully submitted,

DEWEY & LEBOEUF LLP



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[3] We agree with counsel for Stringer that, in this respect, the Panel's decision also conflicts with this Court's decision in *United States v. Robson*, 477 F.3d 13, 17-18 (9th Cir. 1973) (recognizing that the government has a "legal and moral duty" to respond fully and truthfully to witness inquiries).

[4] This letter brief complies with the requirements of Circuit Rule 29-2(c)(2), as it does not exceed 15 pages or 4,200 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May 2008, copies of the foregoing Amicus Letter in Support of Defendants-Appellees' Application for En Banc Rehearing were served via Federal Express upon the following:

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