

Ninth Circuit No. 06-30100

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

J. MARK SAMPER,

Defendant-Appellee.

Court of Appeals No. 06-30100

District Court No.
CR 03-432-HA (Oregon)

**DEFENDANT-APPELLEE SAMPER'S
SUPPLEMENTAL BRIEF**

On Appeal from the United States District Court
District of Oregon
Hon. Ancer L. Haggerty, Chief United States District Judge

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Defendant/Appellee Mark Samper submits this Supplemental Brief in response to the fourth issue identified in the Government's Opening Brief.

STATEMENT OF THE CASE

Samper agrees with the Government's Statement of the Case, except to add that the district court granted Samper's Motion to Dismiss for Violation of Due Process on the basis of the government's exploitation of the conflict of interest. (ER1289: "Defendant Samper's Motion to Dismiss the Indictment for Violation of Due Process (Doc. #188-1) is GRANTED.")

STATEMENT OF ISSUES

Whether the government violated Samper's right of Due Process by taking advantage of his attorney's conflict of interest in representing cooperating witnesses in a joint civil/criminal investigation, by failing to advise Samper of the facts showing there was an actual conflict of interest, and by failing to seek the removal of his counsel.

SUPPLEMENTAL STATEMENT OF FACTS¹

1. SEC Approved Stoel Rives' Role as Samper's Counsel During the SEC Investigation

In February 2000, Mark Samper tendered his resignation as FLIR's Chief

¹ Samper incorporates the Statement of Facts set forth in the Appellees' Response Brief.

Financial Officer. (SER0790, SER0793). Shortly thereafter, Samper retained Peter Glade to represent him regarding a severance agreement with FLIR and several civil shareholder actions that were soon filed against FLIR and its officers. (SER1057).

FLIR was represented by Stoel Rives lawyers, Lois Rosenbaum and Barnes Ellis, in the civil shareholder actions. (SER1057). FLIR wanted Stoel Rives to also represent Samper and Ken Stringer. (SER1057-58). Rosenbaum told Samper “the best interests of all defendants favor the presentation of as unified a defense as possible and the minimization of defense costs.” The letter continued, “[b]ased on our present knowledge of the facts, we do not anticipate that any conflicts will arise among the defendants. * * *. We * * * undertake to inform you at the earliest possible time if we perceive that a conflict among any of the defendants is developing.” (SER1035). Thereafter, Stoel Rives represented Samper in the civil shareholder actions. Ellis told Samper and Glade that FLIR and Samper would either rise or fall together, and that it was in both parties’ interest to work together. (SER1058).

Stoel Rives also was Samper’s primary counsel in the SEC investigation. (SER1059). Glade became Samper’s “monitoring counsel,” which meant that he generally would be aware of events so that he could step in as Samper’s sole

counsel if a conflict of interest developed between Samper and Stoel Rives' other clients. (SER1058).

On June 22 and 23, 2000, SEC attorney Lorraine Echavarria took the sworn testimony of Tom Widdows, FLIR's former controller, in Portland. (SER0502). Widdows testified that Stringer and Samper consistently would override FLIR's revenue recognition policy and other accounting controls at the end of every quarter. (SER0503; *see also* SER0506-09). During this trip to Portland, Echavarria and Diana Tani met with Assistant U.S. Attorney Charles Gorder to ask that he open a criminal investigation into Samper and others. (ER0868).

The SEC sent out its first round of subpoenas to FLIR and Samper on June 30, 2000. (SER0510, SER0534). The Samper subpoena ordered the production of documents and sworn testimony. (SER0538). The SEC also subpoenaed 21 FLIR officers, directors, and employees. (SER0544-63).

On July 19, 2000, Rosenbaum told Echavarria that Stoel Rives was representing FLIR and a number of FLIR personnel, and that Stoel Rives was co-counsel with Glade for Samper. (ER1057). Echavarria responded by stating that Stoel Rives may have a conflict of interest in representing FLIR and the various individuals. (ER1058). She stated, "Although it is far too early in the investigation for the SEC staff to identify people who may possess liability, we are troubled by the scope and breadth of your representation." (SER1058).

Echavarria did not tell Rosenbaum that the SEC had already referred Samper to the USAO for prosecution, and that the USAO had accepted that referral. (ER0738-39).

Despite the conflict, Echavarria told Rosenbaum that the SEC would “honor” Stoel Rives’ representation of FLIR, Samper, and other individuals. (SER0567). Echavarria testified that she believed SEC policy precluded her from taking any further steps to remove counsel. (ER0231). However, the government did not produce any evidence of such a policy.

The SEC never again raised the issue of a conflict with Rosenbaum. (ER0232-34). Echavarria never discussed the matter with Glade. (ER0234). Echavarria admitted in the evidentiary hearing that she knew that Stoel Rives’ had a conflict of interest when she took the sworn testimony of Rosenbaum’s other clients, including Kim Hunter, Gina Chambers, and David Muessle, who provided damaging testimony against Samper. (ER0237-41, ER0246).

2. Stoel Rives Advised Samper to Cooperate with the SEC’s Investigation, and Did Not Advise About His Fifth Amendment Right

Rosenbaum advised Samper to cooperate in the SEC investigation and to give sworn testimony. (ER0742-43). She never advised Samper about his Fifth Amendment right not to testify, because she did not believe there was a criminal investigation. (ER0802). Glade swore that Rosenbaum said it was “ridiculous”

for Samper to assert the privilege against self-incrimination, and that Samper should testify to respond to the SEC's allegations. (ER1059). Rosenbaum did not have a conversation with Samper about the SEC Form 1662 warnings. (ER829-30).

Rosenbaum testified that, had she known about the SEC's referral to the USAO, she would have obtained a criminal defense lawyer for Samper and advised him of his Fifth Amendment privilege. (ER0802-03; *see also* SER1059). Samper testified that he was unaware that the SEC made a criminal referral in June 2000, and that, had he known, he would have followed the legal advice to remain silent and not cooperate in the SEC investigation. (SER1065).

On August 10, 2000, Rosenbaum told Echavarria that Stoel Rives was now representing additional FLIR representatives. (SER0571). At that point, Stoel Rives was representing FLIR and virtually every FLIR officer, director or employee who had been subpoenaed by the SEC. (*See* ER0240-41).

On August 14, 2000, Echavarria took the sworn testimony of FLIR employee Kim Hunter who was represented by Rosenbaum. (SER0576A). Hunter testified that a transaction with Tyler Camera involved a rental agreement, suggesting that revenue from the sales order should not have been recognized. (SER0576B-C). She later stated that Samper told her to enter the transaction and that he was aware of the terms of the deal. (SER0576C). This transaction was

later alleged as Overt Act 13 in the Indictment. (ER0035). Echavarria admitted Hunter provided damaging evidence against Samper. (ER0239-40).

3. The SEC and USAO Discuss Stoel Rives' Multiple Representation and Decide to Take No Action

In August 2000, the SEC reported to the FBI that Samper had fraudulently recorded sales and accounts receivable on FLIR's financial statements for 1998 and 1999. (SER0577). In the October 3, 2000 meeting (discussed in defendants' joint brief), the SEC lawyers and Robinson discussed the conflict of interest issue. (ER0416; ER0447-48). Robinson testified twice during the evidentiary hearing about this meeting. On June 22, 2005, Robinson testified that there was a discussion about how FLIR was not cooperating with the SEC investigation. Robinson contemplated issuing grand jury subpoenas to produce cooperation. (ER0568-69). Robinson testified that he may have stated during the meeting that grand jury subpoenas would result in breaking up Stoel Rives' multiple representation, because people would obtain separate counsel. (ER0590, ER0613; *see also* ER0448, ER0450). Robinson testified that he knew Stoel Rives was representing many people, but he did not know whether he knew at the time that it represented Samper. (ER0590). Robinson testified again on October 31, 2005. In the intervening period, the government produced in discovery Robinson's handwritten notes of the October 3 meeting. Robinson's notes showed a reference

to Rosenbaum and Glade next to Samper's name. (ER0661). In this testimony, Robinson stated that he was, in fact, aware that Rosenbaum was representing Samper at the time of the October 2000 meeting with the SEC. (ER0685). The USAO and SEC decided in this meeting that the FBI would not interview the corporate officers so as not to jeopardize the SEC's ability to obtain statements from them. (ER1083). In Robinson's October 13, 2000 memorandum, he noted that the SEC soon would be interviewing Samper. (ER1077). "Absent a persuasive and complete explanation from [Samper], the case warrants prosecution." (ER1077).

On October 19, 2000, Samper began his first round of testimony before the SEC. (ER1080). Although Samper initially was subpoenaed to appear, his statement was voluntarily given, consistent with Rosenbaum's advice to cooperate. (ER1080).

The SEC reported to Robinson the results of Samper's sworn testimony. (ER1084). The SEC told Robinson that Samper had made admissions regarding certain transactions and that Samper was willing to be interviewed again. (ER1084-85).

Robinson's thought about issuing grand jury subpoenas to cause greater cooperation was short-lived. (ER0568). He decided that grand jury subpoenas

were not necessary, because FLIR became “very cooperative.” (ER0568; ER1103).

4. FLIR Affirms Its Commitment to Cooperate After December 11 Meeting

FLIR’s new-found cooperation arrived after a meeting in Los Angeles on December 11, 2000. Attending the meeting were FLIR executives, including its new CEO and Chairman of the Board Earl Lewis, and Stoel Rives attorneys Ellis and Rosenbaum. (SER0371). At this meeting, SEC told FLIR that it was not happy with FLIR’s cooperation. (*Id.*). SEC lawyers thought FLIR was not responding adequately to document requests. (ER0232-33). Lewis assured the SEC lawyers that FLIR’s cooperation would “increase” going forward. (SER0371). Thereafter, SEC lawyers said they were satisfied with FLIR’s cooperation. (SER0374). On December 15, 2000, Rosenbaum reaffirmed “our pledge to cooperate with your investigation in any manner we reasonably can.” (SER0645).

FLIR invited the SEC to tour its facilities and to hold informal interviews of FLIR employees on January 23-24, 2001. (ER1095-1102). Rosenbaum participated in those meetings and interviews. (ER1098, ER1011). In one meeting attended by Rosenbaum, Fitzhenry explained his efforts to obtain documents, including those maintained by Samper. (ER1101).

The SEC lawyers met with Robinson and the FBI agents on January 25, 2001, to describe the December 11 meeting and its two days at FLIR. (ER1096; ER1101-1102). The SEC lawyers described FLIR as “extremely cooperative.” (ER1095). Thus, Robinson decided not to conduct an “overt” FBI investigation, but instead would wait until “the conclusion of the scheduled [SEC] interviews * * * to determine the criminal violations to be pursued.” (ER1097).

5. Stoel Rives Continued to Represent Witnesses Providing Incriminating Evidence Against Samper

Through the course of the SEC /USAO investigation, Stoel Rives continued to represent FLIR employees who provided incriminating evidence against Samper. Gina Chambers told the SEC on February 5, 2001, that Samper had told her in April 1999 to destroy a sales order reversal log that showed that systems had been shipped to a bonded warehouse solely to recognize revenue and then later reversed. (SER0661-0679). Chambers said that Samper told her the he did not want people to review it. (SER0665). Chambers testified that Samper told her to identify systems in inventory that could be shipped as “placeholders” for the actual system ordered by the customer, Raytheon, to recognize revenue. (SER0762-69). This transaction later was alleged in the Indictment as Overt Acts 16 and 17 of the conspiracy. (ER0036). Chambers also told the SEC that in July 1999, Samper told her to incorrectly designate some units as “customer-owned

units.” (SER0775-78). That evidence was alleged in the Indictment as Overt Act 40. (ER0040). Echavarria admitted that Chambers provided damaging evidence against Samper. (ER0239-240).

Rosenbaum also represented David Muessle in the SEC investigation. (ER0772). Muessle became FLIR’s controller in 2000. (ER0773). In the December 11, 2000, meeting, the SEC identified several past transactions that the SEC felt warranted review. (SER0655). Muessle conducted that review. (*Ibid.*) Muessle also reviewed transactions identified by FLIR and its outside auditor. (ER0549; *see also* SER0743-45; SER0747-50). This review led to a restatement of FLIR’s financial statements in the Spring of 2001. (ER0548; SER0744). Muessle prepared transactions summaries, or “tracings,” that Rosenbaum then provided to the SEC. (SER0688). While represented by Rosenbaum, Muessle gave sworn testimony to the SEC about his analysis of these transactions. (SER0743-50). Several of the transactions later appeared in the Indictment against Samper, including sales to United Arab Emirates, Bell Helicopter, and Raytheon. (SER0690; SER0692; SER0727-30; ER0035-36; ER0041).

Rosenbaum sent Muessle’s tracings to the SEC voluntarily, i.e., without a subpoena. (ER0245; ER1005). Echavarria in turn provided Muessle’s tracings and other documents relating to the Raytheon sale to Robinson. (ER0245; ER1105). Echavarria wrote, “because [the Raytheon invoice] is a totally false sale

with admissions from the company that it was a ‘duplicate billing’ – I predict [Robinson] will be very interested in this transaction.” (ER1105). This is the same e-mail in which Echavarria relayed Robinson’s instructions on developing a criminal false statement case against the defendants.

Robinson’s April 4, 2001 memo stated “just this week FLIR publicly restated its 1998 earnings, and in the process sent the SEC an explanation admitting to the bogus nature of some of its previously reported sales,” referring to Muessle’s tracings. (ER1103).

Throughout 2001, the SEC and USAO continued to discuss strategy and the evidence the SEC needed to develop to support a criminal indictment. (See ER1117, ER1132, ER1122, SER0781). In October 2001, Samper submitted to a second round of SEC examination, still represented by Stoel Rives counsel. (ER1160).

6. FLIR’S “Wells Submission” Lays Blame Upon Samper

On March 8, 2002, FLIR submitted to the SEC its “Wells Submission,” (SER0802), a formal filing in which the company under investigation attempts to persuade the SEC not to bring a civil enforcement action. (ER0731-32). The Wells Statement was drafted by Stoel Rives counsel. (ER0790-91; SER0812).

In this document, Stoel Rives stated that FLIR had fully cooperated with the SEC’s investigation and had terminated those responsible for FLIR’s problems.

“FLIR does not contest that significant accounting errors were made in the 1998 and 1999 fiscal years. However, the problems that existed in those years are the problems of a company that no longer exists.” (SER0802). Under new leadership, “the Company has been a model of responsible accounting and management.” (SER0802). Counsel described how an audit and the work of a Special Committee revealed accounting problems, and how top executives, including Samper, had been fired or asked to resign. (SER0804).

Stoel Rives also boasted of FLIR’s cooperation with the SEC, including voluntarily turning over Muessle’s tracings. (SER0810). Stoel Rives concluded that, “to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more individuals who may have been responsible” (SER0812), which implicitly included Samper.

Stoel Rives later negotiated a settlement agreement with the SEC, in which FLIR consented to a factual finding that fraudulent revenue recognition practices had occurred in 1998 and 1999. (SER0380-81; SER0890; SER0892). FLIR agreed to a cease and desist order, but faced no other sanction. (SER0901). It was not named as a defendant in the civil action SEC filed against Samper and others in September 2002. (ER1182). Samper settled that case by stipulating to a significant money judgment and an injunction against ever acting as an officer or director of an issuer of securities. (ER1169-74).

7. Rosenbaum Tipped Off the Government Regarding the Swedish Drop Shipment

After receiving a copy of the SEC complaint, Rosenbaum told the government about an unsubstantiated accounting entry showing \$4.6 million in revenue for a “drop shipment” from FLIR’s Swedish operation for the third quarter of 1999 (“Swedish drop shipment”). (ER0431-33; ER0246).

Muessle had discovered the entry in November 2000. His discovery led to a meeting on November 3, 2000, at the offices of Stoel Rives, attended by Samper, Muessle, Rosenbaum, and Lisa Kaner (attorney with Glade’s firm). (ER0531-32). At the time of the November 3 meeting, Muessle and Samper were both clients of Rosenbaum. (ER0772). Samper acknowledged his involvement in making the accounting entry, and said that he relied on Stringer for the data. (ER0534; *see also* SER0457). Muessle found no documents supporting the entry. (ER0539). He believed that the entry was fraudulent (ER0541), and that Samper and Stringer had made the entry in the third quarter 1999 consolidation schedules in order to meet a predetermined revenue goal. (SER0956).

In this same meeting, and in a subsequent telephone conference with Muessle and Rosenbaum, Samper also made disclosures about a sale transaction involving UAE/GHQ. (*See* SER0659). On November 10, 2000, Muessle faxed to Rosenbaum a “work paper” that summarized Muessle’s findings on the

UAE/GHQ transaction and the Swedish drop shipment. (SER0590-91). The work paper included Samper's comments in the presence of counsel about the UAE/GHQ transaction. (SER0591).

On November 22, 2000, Rosenbaum sent the SEC a redacted version of Muessle's work paper plus another summary regarding the UAE/GHQ sale. (SER0608; SER0635; SER0637).² Rosenbaum redacted from the documents Samper's statements in the presence of Rosenbaum. (*Ibid.*). Included under the same cover letter, Rosenbaum enclosed various other documents evidencing communications between Fitzhenry (also a Stoel Rives client) and Samper relating to the Swedish drop shipment entry. (SER0630-33). Those documents were redacted as well.

On November 27, 2000, Echavarria sent Rosenbaum a letter challenging her assertion of the attorney/client privilege and her redaction of communications between Fitzhenry and Samper. (SER0628). Echavarria also challenged Rosenbaum's redaction of what she described as accounting "journal entries" on the Muessle work papers. (*Ibid.*) Rosenbaum responded that FLIR would provide some of the documents in unredacted form. (SER0623). However, she

² What Rosenbaum sent on November 22 and in subsequent deliveries is confirmed by noting the Bates stamp numbers starting with "FLIR" referenced in her letter and on the document.

maintained that Muessle's memos were not accounting journal entries, thus reasserting the privilege. (SER0623; SER0642).

As discussed, on December 11, 2000, FLIR and Stoel Rives pledged increased cooperation in the SEC investigation. In the midst of the SEC's subsequent visit to the FLIR facilities with Stoel Rives counsel on January 23 and 24, Rosenbaum mailed to Echavarria documents pertaining to Muessle's 1999 Third Quarter Restatement, including Muessle's disputed memos about the Swedish drop shipment and the UAE/GHQ entries. (SER0657-59). This time, the documents were not redacted, and revealed Samper's privileged communications. (*See* SER0659). The UAE/GHQ transaction was later alleged in the Indictment as Overt Act 44. (ER0041).

The government's brief suggests that Rosenbaum consulted with Glade before turning over documents showing communications between corporate counsel Fitzhenry and Samper. (App. Br. 24). However, Rosenbaum's conversation with Glade about the Fitzhenry/Samper communication occurred on November 20, 2000 (SER0607), two days before Rosenbaum sent **redacted** versions of both the Fitzhenry/Samper communications and the Muessle documents. (SER0608; SER0630-41). Therefore, Glade clearly did not approve sending unredacted versions of any document. Additionally, Rosenbaum's note of her conversation with Glade on November 20 does not mention the protected

Samper/Muessle conversation with counsel. (SER0607). Glade swore that he did not agree to waive the attorney/client privilege with regard to Samper's conversation with Muessle about the Swedish drop shipment and the UAE/GHQ transaction. (SER1061).

After receiving a copy of the SEC complaint filed on September 30, 2002, Rosenbaum telephoned Echavarria and expressed surprise that the complaint did not allege the Swedish drop shipment. (ER0431). Rosenbaum then identified for the SEC the documents that related to this entry, including those that previously had been sent in redacted and unredacted form. (ER0431-32). Rosenbaum also identified Arne Almfors, the head of the Swedish facility, as a witness. (ER0246). Echavarria and Marren testified that the SEC was not aware of the significance of the Swedish drop shipment entry until Rosenbaum told them about it. (ER0246; ER0432-33).

On February 26, 2003, Assistant U.S. Attorney Allan Garten e-mailed Rosenbaum about scheduling a meeting with Muessle. (SER0453). On April 1, 2003, Marren e-mailed Rosenbaum about a meeting with Almfors to discuss the Swedish drop shipment. (SER1038). Marren said that she wanted "to understand the documents that you identified for us and the transaction in general more thoroughly prior to meeting with Arne." (*Ibid.*) Rosenbaum scheduled a telephone conference for Muessle to talk with SEC attorney Jose Sanchez.

(SER1036). Rosenbaum volunteered that “someone with a financial background” should be involved in these discussions. (*Ibid.*) Sanchez gave Rosenbaum a preview of the questions that he would ask Muessle, including, “Who was involved in and/or responsible for the initial adjusting entries in the 3rd Q 99 for the ‘Swedish drop shipments’? Are there any notes to these adjustments? How and where were these adjustments recorded on FLIR’s books and records?” (*Ibid.*) After the teleconference with Muessle and Rosenbaum, Sanchez wrote to Rosenbaum that the meeting was very helpful, and asked follow-up questions about the contents of Samper’s file. (SER1033). Rosenbaum responded: “We believe it would be helpful to have Mr. Muessle at Mr. Almerfors’ meeting with you Monday afternoon. Is this ok with you?” (*Ibid.*) The Swedish drop shipment would later be alleged in the Indictment as part of a scheme to defraud. (ER0013).

8. Stoel Rives Continued to Represent FLIR and Its Employees After USAO Surfaced in 2003

In January of 2003, Robinson and Garten, along with two FBI agents, met with Rosenbaum, Ellis, FLIR’s then-general counsel Steven Wynne, and Lewis to discuss the pending criminal charges. (ER1025-26). Lewis told Garten that FLIR would cooperate fully with the criminal proceeding. (ER1026). Wynne understood from the meeting that “the extent of [FLIR’s] cooperation with the

inquiry would be a factor in determining whether or not the company would be charged.” (ER1028).

On February 14, 2003, Garten wrote Ellis and Rosenbaum regarding FLIR’s cooperation in the criminal investigation. (ER1226). Garten stated, “I want to emphasize once again that the extent of the company’s cooperation will be critical to our final determination about the charges that may be brought.” (*Ibid.*) Garten demanded that the company waive the attorney/client privilege for the period 1997 through 2001. He stated, “as we ask for your help in assembling evidence relating to criminal conduct of certain former employees * * *, we do not expect you to interpose any privilege issues regarding any investigation that you undertook for FLIR.” (*Ibid.*)

Garten gave a list of witnesses that he intended to interview. (ER1228). He expected Stoel Rives attorneys or Wynne to advise each person on the list “to fully cooperate with us and hold nothing back.” (ER1227). Garten further stated:

“In this case, Flir seeks immunity from prosecution. In return, we expect that the company to actively assist us [sic] in assembling evidence, by way of documents and testimony, which will allow us to prove the charges and allegations in the SEC complaint, as well as other issues that we will be identifying for you. Our assessment of the extent of the company’s cooperation will be a function, in part, of how proactive you are in assisting us with our proof against the former employees identified in the SEC complaint. * * * Based upon [CEO Earl] Lewis’ express assurances that the company will do whatever it takes to assist us, I would assume that the *two of you* and knowledgeable employees within the company would be able to put

together the evidence of the obvious fraudulent conduct outlined in the SEC complaint in a rather short time frame.” (ER1229) (emphasis added).

Rosenbaum responded to Garten’s letter, stating “FLIR is committed to fully cooperating in your investigation. In furtherance of this commitment, FLIR has agreed to waive the attorney-client privilege for the period you requested (1997-2001) * * *.” (SER0927). She enclosed the file of another law firm that had conducted an investigation into the accounting allegations back in 2000. (*Ibid.*) Those file materials previously had been withheld as privileged. (*See* SER0925). She stated: “Barnes [Ellis] and I want to confirm to you that our intent is to cooperate with your investigation to the full extent permitted by our ethical obligations to other clients that we have represented in connection with the SEC investigation (Mark Samper, Robert Daltry, Steve Eagleburger, and Jim Fitzhenry).” (SER0927-28).

On February 19, 2003, Garten sent Ellis and Rosenbaum an e-mail listing the witnesses he wanted to interview, including Muessle, Chambers and Widdows. (ER1232). He stated: “The cooperation of these witnesses will then dictate how we proceed. In accordance with our conversation, I will expect that you will contact all of these witnesses, tell them of the nature of the investigation, and the imperative to cooperate fully.” (*Ibid.*) Garten added that he was “somewhat concerned” about Stoel Rives’ conflict of interest in having represented Samper,

adding “I leave this conflict issue up to you.” (*Ibid.*). Thus, the government was aware of the conflict of interest in Stoel Rives continued representation of FLIR.³

On February 20, 2003, Rosenbaum wrote to Glade about her contact with the USAO. (SER0949A). Rosenbaum did not tell Glade that FLIR was seeking immunity from prosecution. (SER1062). In fact, Rosenbaum told Glade that Garten told her that “the Company is not a focus of his investigation.” (SER0949A). Glade was not aware that Garten had asked Stoel Rives for assistance in developing evidence against Samper. (SER1062).

On March 5, 2003, Rosenbaum wrote Samper and Glade to say that the Department of Justice was investigating individuals named in the SEC suit, and possibly Robert Daltry. (ER1234). She stated that Stoel Rives would continue to represent FLIR, but that it would not represent any individuals. (*Ibid.*) Rosenbaum assured Samper that her representation of FLIR would be limited to advising FLIR and assisting it in “producing documents and arranging for witnesses to be interviewed by the DOJ.” (*Ibid.*)

³ In the Government’s response to Samper’s motion to dismiss, it claimed that Samper had failed to produce “any fact showing that the government had any knowledge of the conflict of Stoel Rives.” (CR 219, p.29.) Later in the proceedings, Stoel Rives provided Samper with the e-mail described here (ER1232) showing the government in fact knew of the conflict.

Rosenbaum asked for Samper's consent that Stoel Rives continue to represent the corporation, in light of what she now identified as a conflict of interest. She wrote: "Our role will be limited because we will not represent any witnesses or be present when any witnesses are interviewed by the DOJ." (ER1235).

Samper consented to Stoel Rives' continued representation of FLIR, based on the understanding that Stoel Rives' representation of FLIR was limited to assisting in document production and scheduling witness interviews, and that Stoel Rives would not take any action to compromise Samper's interests. (ER1237).

Rosenbaum did not limit her representation to only FLIR. She continued to represent more than a dozen former and present employees of FLIR, including Daltry, Muessle, and Chambers, who were providing deposition testimony and voluntary statements to the SEC, the USAO, and law enforcement. (SER1032; SER1040-41). Also, Rosenbaum did not tell Samper or Glade that she already had disclosed confidential and damaging information to the government regarding the Swedish drop shipment and the UAE/GHQ transactions.

At this time, the SEC was actively assisting the FBI in building a criminal case against Samper and the other defendants. (ER0496-0507; *see also* SER1027-28; SER0978-79; SER0983-89). Stoel Rives counsel knew that information

developed in the SEC investigation would be turned over to the criminal investigators. (SER0386-86A). Muessle, while represented by Stoel Rives, continued throughout 2003 to proactively provide assistance to the USAO by providing analysis about past transactions. (ER1029; *see also* SER0430-57).

SUMMARY OF ARGUMENT

The government violated Samper's Due Process right under the Fifth Amendment to the United States Constitution by failing to warn Samper that his attorney had an actual conflict of interest by virtue of her FLIR clients who were providing incriminating evidence against him, and by procuring Samper's cooperation through his conflicted counsel. In this circumstance, the government must either seek the removal of the conflicted counsel or advise the target of his status so that he may have an opportunity to seek new counsel and assert his privilege against self-incrimination. Because the government instead carried on a covert criminal investigation, using Stoel Rives and its clients to gather incriminating evidence against Samper, the district court correctly dismissed the indictment. Furthermore, the district court's suppression of evidence relating to the Swedish drop shipment and striking of relevant allegations from the indictment was an appropriate alternative remedy.

ARGUMENT

The Fifth Amendment provides that “No person shall * * * be deprived of life, liberty, or property without due process of law.” “As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941). In *United States v. Kordel*, 397 U.S. 1 (1970), the Supreme Court held that certain tactics may cross the line when the government ties together civil and criminal investigations, including, the failure “to advise the defendant in its civil proceeding that it contemplates his criminal prosecution,” or the creation of “any special circumstances that might suggest the unconstitutionality or even the impropriety of [a] criminal prosecution.” *Id.* at 11-12 (citations omitted).

A client’s relationship of trust with his attorney is a cornerstone of our legal system, particularly when the adversary has the power and reach of the federal government. It is fundamentally unfair for the government to engage in a covert criminal investigation when the government knows that the targeted person’s lawyer is also representing a cooperating party. The government’s conduct here was the sort of circumstance contemplated by *Kordel* that calls for dismissal. *See United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (dismissal of criminal case where government took advantage of an attorney’s multiple representation of several cooperating witnesses).

1. Government Policies Require Corporations To Turn Against Their Officers To Avoid Civil and Criminal Liability

Forming the background of Samper's claim of a Due Process violation are government policies directed at corporations wanting to avoid criminal and civil liability. These policies demonstrate the dynamic that prompted FLIR to respond to allegations of fraud by turning against persons it believed were responsible. As the government knew, Stoel Rives had an unresolvable conflict.

In June of 1999, the U.S. Attorney General issued what is known as the "Holder Memorandum" describing the factors prosecutors must consider when deciding whether to criminally prosecute corporations. (SER0458). The memo states: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges. * * *. [A] corporation's cooperation may be critical in identifying the culprits and locating relevant evidence." (SER0465-66). A corporation's cooperation may be coextensive with its obligation to cooperate in a civil or regulatory proceeding. (SER0466). Thus, FLIR's cooperation with the SEC would have factored into the USAO's analysis of whether it had cooperated enough to avoid criminal liability.

SEC policy also encourages corporations to turn against its employees accused of misconduct in order to avoid a civil sanction. (SER0795). The SEC considers: “Are persons responsible for any misconduct still with the company? Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred? * * * Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?” (SER0796-97). As Rosenbuam testified, the SEC gives weight to the corporation’s cooperation when deciding whether to initiate an enforcement action. (ER0741). In fact, Stoel Rives’ Wells Submission impressed the SEC with the fact that FLIR had fully cooperated with the government, including voluntarily turning over documents and waiving the attorney-client privilege. (SER0810).

Recently, a federal court held that the Holder Memo violated the due process rights of targeted employees, when the government used it to pressure the corporation to stop paying the attorneys fees of non-cooperating employees. *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006). The Holder Memo states that a corporation’s payment of a culpable party’s attorney fees may be considered by the prosecutor in weighing the corporation’s cooperation. In

response to government demands, the company in *Stein* (KPMG) agreed to pay the attorney fees of only those employees who agreed to cooperate with the government's investigation. *Id.* at 345. The district court ruled that this practice violated Due Process, adding:

“Nor did the government question the obvious conflict of interest manifest in Skadden's offer to recommend as counsel to targeted KPMG employees ‘law firms that were familiar with these types of proceedings and who understood that cooperation with the government was the best way to proceed.’ * * * Cooperation may have been the best way for KPMG to proceed, but it was not necessarily best for its employees. Skadden's effort to curry favor with the government by offering to seek to compromise the interests of KPMG's employees by inducing them to retain counsel who would serve KPMG's interest in cooperating and the government's apparent failure to take issue with it both are quite disturbing.” *Id.* at 345 n54.

In a 2003 interview, Deputy Attorney General James Comey discussed the Government's strategy of enlisting corporations to investigate white collar crimes committed by its employees. (SER1048). He said corporations may have to waive the attorney/client privilege with regard to interviews of its employees. (SER1048). When asked whether requiring privilege waivers might create a conflict between the corporation and the targeted employee, Comey responded, “[E]mployees who have committed crimes, have no trust to undermine.” (SER1050). Comey added, if the corporation wants leniency under the federal sentencing guidelines, “then it will have to figure out a way to tell the Government

what it knows about the misconduct and to help us catch the wrongdoers.” (SER1050-51).

The policies set out in the Holder Memorandum create an inherent conflict of interest in having the same attorney represent the corporation and a targeted officer. Comey’s comments demonstrate that the government is aware of the tension between the corporation and its employees, and seeks to exploit that tension by pressuring corporations to require full disclosure from its employees and then requiring the cooperation to fully cooperate with the government.⁴

Putting aside the government’s dismissive attitude about the trust between an employee and a corporation, the government may not exploit a trust relationship between a client and his attorney. When the government opens a secret criminal investigation into a person also facing civil sanctions, the government cannot later disclaim any responsibility for a conflict of interest in having one lawyer represent the cooperating corporation, its employees/witnesses and the targeted person. The government’s policies create and exploit that conflict.

⁴ See also, N. Richard Janis, “Taking the Stand – Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed,” D.C. Bar Journal, March 2005.

2. The Government Violated Samper's Due Process Rights by Carrying On a Covert Criminal Investigation While Samper Was Represented by Counsel with An Actual Conflict of Interest

The Government relies upon *United States v. Haynes*, 216 F.3d 789 (9th Cir. 2000), and *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996), for the test of a Fifth Amendment claim of outrageous government conduct based on an intrusion into the attorney/client relationship. (App. Br. 51). The government never cited the *Haynes/Voigt* test in the district court as the relevant standard, instead arguing that Samper's attorneys were not government agents, as defined in *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998) (*See* CR 219, page 13). None of the cases cited by the government involve the unique facts of this case, *i.e.*, an attorney with an actual conflict of interest representing an unsuspecting target of an ongoing criminal investigation. The government's cases are marked by dispute and ambiguity as to whether the attorney actually represented the defendant at the time of the alleged government conduct. Here, that issue is not in dispute.

Furthermore, Samper's claim does not necessarily depend upon a finding of "outrageous" government conduct, although that was certainly present here. Rather, a Fifth Amendment claim also may be based upon government action or inaction results in ineffective assistance of counsel. *See Marshank*, 777 F.Supp. at 1519, *citing United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980).

Assuming the *Haynes* test is applicable here, the second prong – deliberate intrusion into the attorney client relationship – must be understood to include the government’s decision not to inform Samper of the facts that would reveal the extent of the conflict of interest. The Court in *Voigt* indicated that such failure to disclose could equate to a purposeful intrusion. *Voigt*, 89 F.3d at 1070 (government may have affirmative duty to inform defendant of conflict of interest caused by prior association with defendant’s lawyer), *citing United States v. Lopez*, 71 F.3d 954, 963-64 (1st Cir. 1995).

When the government becomes aware of a conflict of interest between an attorney and the client, it must bring the issue to the court’s attention, and, if necessary, move for disqualification. *United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991) *citing United States v. Agurs*, 427 U.S. 97, 1210-11 (1976); *United States v. Fulton*, 5 F.3d 605, 613 (2nd Cir. 1993) (admonishing government to immediately advise the court of the existence of a conflict). In this case, Robinson admitted that prosecutors have “an obligation * * * to police potential conflicts of interest.” (ER0586).

The government has the same obligation to warn the defendant of a conflict in the investigative phase of a criminal proceeding, because, even pre-indictment, the person is vested with a Fifth Amendment right to effective, conflict-free legal representation. *See Irwin*, 612 F.2d at 1185 (government interference may render

counsel's assistance ineffective in violation of Sixth and Fifth Amendments); *see also Marshank*, 777 F.Supp. at 1519-20 (government failed to advise target that his attorney had conflict of interest, while taking advantage of that conflict); *cf. Stein*, 435 F.Supp.2d at 366 (government's pre-indictment conduct in limiting defendants' access to funds for their defense violated Sixth Amendment because the government knew its actions would have an unconstitutional effect upon indictment).

The duty to inform Samper of all facts relevant to the conflict extended to the SEC, particularly because the SEC advocated for a criminal prosecution. The district court correctly dismissed Echavarria's claim that SEC policy precluded it from challenging Samper's choice of counsel. (ER1288). No such policy exists with regard to actual conflicts of interest. This issue arose in *SEC v. Higashi*, 359 F.2d 550 (9th Cir. 1966), in which the Court upheld a district court's decision not to disqualify an attorney who was representing multiple parties in an SEC investigation. At issue was a conflict between the Administrative Procedures Act (APA), which grants the right to counsel to any witness subpoenaed by a federal agency, and the SEC's sequestration rule, which prohibits a lawyer from attending the testimony of a witness other than his own client. The SEC's sequestration rule effectively prohibited multiple representation, whereas the APA provision gave witnesses a right to counsel of their own choosing. The Court of Appeals in

Higashi ruled that the APA provision prevails, and an attorney may represent both a corporation and a witness before the SEC *when there is no conflict of interest*. The fact that there was no conflict between the witness and the corporation was the deciding factor in *Higashi*. *Id.* at 553.

In *Kentucky West Virginia Gas Company P.U.C.*, 837 F.2d 600, 618 (3rd Cir. 1988), the Court discussed *Higashi* and held that the converse of its holding applied when a conflict of interest existed: “Inherent in the right to counsel is the right to the assistance of counsel unimpaired by conflicts arising from joint representation. * * * [W]here there exists a potential for conflict, ordering parties to retain separate counsel violates neither due process nor the APA.” *Ibid.* See also, *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1342 (D.C. Cir. 1980) (same).

The SEC argues that it could not have sought the removal of counsel in the course of the SEC investigation before commencement of a civil suit. (SEC *Amicus* Br. 23). However, the issue of conflicted counsel was litigated in *Higashi* in a subpoena enforcement action, not in a civil suit. Moreover, the SEC’s own rules of practice permit it to bar an attorney from appearing before the SEC for a host of reasons, including ethical violations. 17 C.F.R. § 201.102(e). In this case, Echavarria knew that Rosenbaum had a conflict of interest in continuing to represent Samper. Therefore, the SEC could have administratively removed Stoel Rives as Samper’s counsel. Moreover, it could have sought declaratory relief.

At the very least, the SEC should have disclosed to Samper facts showing an actual conflict of interest. The SEC should have impressed upon Samper or his conflict-free counsel that Stoel Rives' clients were providing evidence exposing him to criminal liability and that he was the target of a criminal prosecution. The government instead concealed the criminal investigation. The only time the SEC raised the issue of a potential conflict of interest was in Echavarria's letter to Rosenbaum on July 19, 2000. (ER1058). But there, Echavarria misleadingly told Rosenbaum that "it is far too early in the investigation for SEC staff to identify people who may possess liability." Echavarria did not tell Rosenbaum that the USAO already had opened a criminal investigation into Samper, or that Palmquist and Widdows already had accused him of securities fraud. Her "warning" was not adequate because she failed to advise of an actual, current conflict of interest in having Stoel Rives continue as counsel for Samper.⁵ The SEC never raised the conflict issue with Glade and never again raised it with Rosenbaum. The government cannot rely upon Rosenbaum's earlier letter to Samper – written in the context of the civil shareholder suits before the SEC investigation – because that letter said that Stoel Rives *did not* have a conflict in representing multiple parties.

⁵ The government also cannot rely on the general language in Form 1662 about multiple representation, because it failed to notify Samper of Stoel Rives' specific conflict arising from the criminal investigation.

(ER1034). Samper never waived the conflict, because he never was told that he was the target of a criminal investigation or that FLIR was cooperating against him.

The government also may not rely upon Glade's representation of Samper. Rosenbaum was Samper's primary counsel during the SEC investigation; Glade served as "monitoring" counsel. (SER1058). Glade was not privy to many aspects of the SEC investigation and FLIR's level of cooperation. (SER1060-61). He also was not aware that some at FLIR came to believe that Samper was involved in fraudulent transactions, or that FLIR would not defend past revenue recognition or other accounting practices when Samper was CFO. (SER1061). Glade's involvement did not cure the taint caused by Stoel Rives' cooperation with the government. *See Hoffman v. Leeke*, 903 F.2d 280, 287 (4th Cir. 1990) (presence of conflict-free counsel at trial did not cure adverse consequences of having conflicted co-counsel); *United States v. Tatum*, 943 F.2d 370, 378-79 (5th Cir. 1991) (same).

The government's strategic choice not to disclose the criminal investigation to Samper served the same invidious purpose as a physical intrusion into the defense camp. Samper was in the USAO's sights for criminal prosecution in June of 2000. In October 2000, the SEC and USAO specifically discussed Stoel Rives' multiple representation and considered issuing grand jury subpoenas which would

have caused Stoel Rives' clients to seek separate counsel. (ER0448, ER0450). The USAO chose not to issue grand jury subpoenas because FLIR started cooperating. (ER0568). The government knew that Rosenbaum's advice to cooperate would extend to Samper. The USAO and FBI consciously chose not to surface so as not to jeopardize the SEC's ability to obtain statements from Samper. (ER1083). The government knew that Samper's lawyer would advise him to remain silent and not cooperate if he knew that he was the target of a criminal investigation. So it hid that fact. Echavarria made sure that a court reporter would not tell Rosenbaum about Robinson's involvement. (ER1245).

The USAO specifically took interest in Samper's sworn testimony in October 2000, as it continued to monitor the SEC investigation and plan for a criminal prosecution. (ER1077; ER1084). The USAO gave instructions to the SEC on how to develop a false statement case against Samper. (ER1103). After Rosenbaum voluntarily provided Muesse's transaction summaries to the SEC, Echavarria provided them to Robinson to develop fraud allegations against Samper. (ER1105; ER0245). The USAO and the SEC discussed Samper's testimony about specific transactions and how the evidence implicated him. (ER1077; ER1105; ER 1084). Before Samper's second round of testimony in October 2001, the USAO told the SEC lawyers the type of evidence needed to support a criminal indictment. (SER0781). They discussed how this round of

interviews would be more confrontational. (ER1132). They discussed how Samper might not settle with the SEC if he knew the USAO was involved in the investigation. (ER1117). The SEC and USAO repeatedly discussed strategy on multiple issues leading up to the indictment. Under these circumstances, the government owed Samper a duty to inform him of the conflict, rather than to exploit it by leveraging Rosenbaum's divided loyalties.

Remarkably, the government persists in its contention that whatever wrongs the SEC committed cannot be imputed to the government. But as in *United States v. Scrushy*, 366 F.Supp.2d 1134, 1140 (N.D. Ala. 2005), the SEC and USAO purposefully concealed from Samper a joint investigation. Under these circumstances, the SEC's role in violating Samper's Due Process requires remedy.

3. The Government's Conduct Prejudiced Samper

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court held that prejudice is presumed in a claim of ineffective assistance of counsel when counsel is burdened by an actual conflict of interest. "In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. * * * [I]t is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. * * * Prejudice is presumed only if the defendant

demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’ *Cuyler v. Sullivan*, [446 U.S. 335, 350 (1980)] (footnote omitted).” *Strickland*, 466 U.S. at 692.

There is good reason to presume prejudice here. Rosenbaum undisputably represented conflicting interests. Rosenbaum represented Samper over a three year period during the SEC investigation. She was in a position to gain his trust, hear his confidences, and render seemingly good advice to cooperate. She invited him to speak freely with Muessle within the attorney/client privilege. The full extent of the intangible forms of prejudice resulting from her divided loyalties is difficult to measure, but no less extant than concrete examples.

Even without the benefit of a presumption, Samper can demonstrate prejudice. As the Court stated in *Irwin*, prejudice can result from the government obtaining information and defense strategy from the defendant, “and from other actions designed to give the prosecution an unfair advantage at trial.” *Irwin*, 612 F.2d at 1187. Pursuant to Rosenbaum’s advice to cooperate, Samper provided several days of sworn testimony and documents responsive to a subpoena. Had Samper been advised that he was the target of a criminal investigation, his lawyers would have advised him to hire a criminal defense attorney, and he would have exercised his Fifth Amendment privilege. (ER0802-03; SER1059; SER1065).

Instead, through Samper's testimony, the government learned how he would defend his role in FLIR's recognition of income on questionable transactions.

Rosenbaum's disclosure of the Swedish drop shipment is further evidence of the prejudice, as well as illustrative of how the conflict played out in the government's favor. The government argues that (1) Muessle's analysis of this accounting entry is not privileged; and (2) Muessle independently provided his analysis to the USAO without SEC and Stoel Rives involvement. The government misses the mark on both points.

Muessle's discovery of the accounting entry in November 2000 caused counsel to call a meeting in which Samper made admissions. Stoel Rives represented Muessle and Samper at the time. (ER0772). This conversation with counsel occurred in the midst of the SEC investigation into past transactions, as well as civil shareholder suits. The conversation was protected by a common law joint defense theory. *See Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964). The fact that Muessle was reviewing past transactions and making corrections that would become public does not mean that Samper's statements in the presence of counsel were non-privileged. *See Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968) (attorney/client privilege protects underlying documents used in patent proceedings); *United States v. Schlegel*, 313 F.Supp. 177, 179-80 (D.Neb. 1970)

(oral conversation between client and attorney about filing of tax return was privileged, aside from information incorporated into the filed return); *United States v. Jeremiah*, 1975 WL 794 (D.Or) (work papers and communications leading up to filing of return are privileged, following *Schlegel* case); *Apex Municipal Fund v. N-Group Securities*, 841 F.Supp. 1423, 1428 (S.D. Tex. 1993) (following *Schlegel* case). Rosenbaum's initial conduct in sending redacted versions of documents that referenced these entries demonstrates that she and Samper regarded the meeting as within the attorney/ client privilege.⁶

Apart from the issue of privilege, Rosenbaum was ethically bound not to tip off Echavarria with regard to the Swedish drop shipment. She not only disclosed the entry, she offered that it should have been included in the SEC's allegations of fraud and referred them to the relevant documents. She identified Arnie Almerfors as a witness. (ER0246). Rosenbaum's information about the entry arose from her role as Samper's attorney. Rosenbaum's disclosure was part of FLIR's response to the government's ongoing pressure on FLIR to cooperate and disclose wrongdoing. The SEC would not have learned about the Swedish drop

⁶ Ironically, when Muessle was asked at the evidentiary hearing about his conversation with Rosenbaum about the Swedish drop shipment, FLIR's lawyer objected on the ground of attorney/client privilege. (ER0544). The court overruled the objection because FLIR, through Rosenbaum, previously had waived the privilege at the request of the USAO. (SER0166; SER0927).

shipment were it not for the conflict of interest and the government's willingness to let it work to its benefit.

Furthermore, there was no evidence that Muesle and Wynne provided this information to the government independent of Rosenbaum's tip. In fact, the government never argued this point below, and, therefore, it is not preserved for appeal.⁷ Moreover, the evidence was clear that the USAO "piggybacked" from evidence developed by the SEC. The SEC never focused on this entry until the phone call from Rosenbaum. (ER0246). FBI Agent Chris Davis, who was assigned to the case in November of 2002, met with Echavarria in Los Angeles in late 2002 or early 2003 to obtain a briefing on the SEC investigation and the transactions at issue. (ER0205-06). It is fairly obvious that Agent Davis' meeting with Muesle about the Swedish drop shipment resulted from his briefing with the SEC lawyers shortly beforehand. The fact that Wynne, not Rosenbaum, attended Muesle's meeting with the FBI does not show that Muesle independently went to the FBI with this evidence, particularly since it was Rosenbaum who scheduled the meeting. (SER0953). Additionally, Rosenbaum continued to assist the SEC lawyers in developing evidence of the Swedish drop shipment through 2003. (See, *supra*, Statement of Facts, Section 7).

⁷ The government's argument below is set out in the record at CR 420, pp. 4-7.

4. Dismissal of the Indictment Was the Appropriate Remedy

The government's brief fails to address the fact that the district court dismissed the indictment against Samper, it did not merely suppress evidence. (See ER1289: "Defendant Samper's Motion to Dismiss the Indictment for Violation of Due Process (Doc. #188-1) is GRANTED.") The district court correctly determined that dismissal of the indictment was the appropriate remedy. This is not a case in which the government exploited an attorney-client relationship in order to gain an identifiable piece of evidence that can be excised from the trial. *Compare United States v. Rogers*, 751 F.2d 1074, 1078 (9th Cir. 1985) (suppression appropriate where court can identify and isolate evidence obtained in violation of Fifth Amendment). Rather, the "taint of the government's transgressions spreads to all of the evidence" obtained against Samper. *See Marshank*, 777 F.Supp. at 1522.

As a result of Stoel Rives' conflict and its advice to Samper to cooperate with the SEC, the government obtained many days of testimony and insight into how Samper would defend himself against a whole panoply of allegations. There is no way to cure the taint by suppressing Samper's statements, because regardless of whether the jury would know what Samper said to the SEC, the prosecution would tailor its evidence in anticipation of his defense. Stoel Rives counsel and their clients actively assisted the government in building its criminal case against

Samper. Their participation in the prosecution of this matter was so thoroughgoing and systematic that it is impossible to carve out the parts of the case that would not have been present had Samper enjoyed conflict-free representation from the outset.⁸

The district court's alternative remedy of suppression should be upheld in the event this Court overrules its decision to dismiss. *See Haynes*, 216 F.3d at 796-97 (suppression of evidence appropriate when private investigator for defense attorney turned over privileged information to the government). At the very least, Samper's sworn testimony and all documents he provided to the SEC should be suppressed, as these were obtained through the advice of his conflicted counsel. Also, the Court correctly struck allegations relating to the Swedish drop shipment from the indictment. The government never would have discovered that entry were it not for Rosenbaum's disclosures and the government's willingness to rely upon her to identify documents and witnesses.

⁸ Samper hereby incorporates portions of the appellees' joint brief discussing dismissal as the appropriate remedy.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order dismissing the indictment against Samper.

DATED this 9th day of February, 2007.

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STATEMENT OF RELATED CASES**Circuit Rule 28-2.6**

There are no related cases pending before this Court.

DATED this 9th day of February, 2007.

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**CERTIFICATION OF COMPLIANCE
TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the brief of Appellee J. Mark Samper is proportionately spaced, has a typeface of 14 points, and contains approximately 8,990 words.

DATED this 9th day of February, 2007.

HOEVET, BOISE & OLSON, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing DEFENDANT-APPELLEE SAMPER'S SUPPLEMENTAL BRIEF on:

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