

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES *ex rel.*** )  
**ERVIN AND ASSOCIATES, INC.** )

Plaintiffs, )

v. ) Civ. Action No. 1:96-CV-1258 (LFO)

**THE HAMILTON SECURITIES** )  
**GROUP, INC. *et al.*** )

Defendants. )

**PLAINTIFF ERVIN AND ASSOCIATES, INC.'S RESPONSE TO HAMILTON  
SECURITIES GROUP, INC.'S AND HAMILTON SECURITIES ADVISORY  
SERVICES, INC.' SUPPLEMENTAL MEMORANDUM**

On January 8, 2001, defendants Hamilton Securities Group, Inc.'s and Hamilton Securities Advisory Services, Inc.'s ("Hamilton") filed a Supplemental Memorandum in support of their Motion to Dismiss or, in the Alternative for Summary Judgment, citing certain statements made by counsel for relator and counsel for the United States. For the reasons set forth below, however, these statements do not support Hamilton's arguments for dismissal.

**L     These Statements Do Not Establish That Ervin's Allegations Are Based Upon a Public Disclosure of Allegations of Fraud or Fraudulent Transactions.**

In its response memorandum, plaintiff Ervin established that, in order for 31 U.S.C. § 3730(e)(4)(A) to bar Ervin's *qui tam* lawsuit, its allegations must be based upon "allegations of fraud" or "fraudulent transactions" that were previously disclosed to the public through one of the fora set forth in the statute -- in general, a hearing or a government audit, report or investigation. See Plaintiff/Relator's Response to Defendant Hamilton's Motion to Dismiss

(hereinafter "Resp. Mem.") at 18. Ervin then set forth evidence that proved that there was no government investigation until *after* Ervin's lawsuit was filed (indeed, the lawsuit initiated the investigation). Resp. Mem. at 15-17. Therefore, it is impossible for Ervin to have "reformatted . . . allegations . . . already under investigation," as Hamilton argues, because no such investigation existed, and the public disclosure bar simply does not come into play.

Hamilton contends that statements made by Ervin's counsel support Hamilton's arguments that Ervin is "not the original source" of its allegations and that Ervin's allegations were dependent upon the HUD OIG investigation. Supplemental Memorandum at 2-3. Yet, none of these statements prove the essential fact missing from Hamilton's argument, nor can they: that there was a government investigation *prior* to Ervin's original *qui tam* lawsuit. In the absence of such an investigation (or a government report or audit), the fact that Ervin may have received information from HUD employees is entirely irrelevant to the public disclosure analysis. To hold otherwise would resurrect the standard that Congress overturned in 1986 -- the government knowledge bar. Resp. Mem. at 18-19.

Even if, contrary to fact, there had been a public disclosure, Ervin established in its response memorandum that it was an "original source" because it had "direct and independent" knowledge of the information on which it based its allegations. Resp. Mem. at 4-8, 20-21. Hamilton contends, however, that Ervin's acknowledgment that the government was attempting to investigate the details of its allegations, somehow "underscores that Ervin is not the original source" of its allegations. Supplemental Memorandum at 3. First, this conclusion simply does not follow from the statement that Hamilton cites. The statement only discusses the government's attempt to find a motive behind Hamilton's alleged actions and does not even

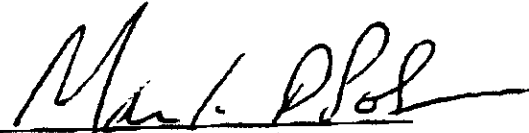
remotely suggest or admit that Ervin received its core information indirectly or dependent upon some public disclosure. Moreover, it cannot be the case, as Hamilton's argument implies, that the mere fact that the government is investigating the details of a *qui tam* complaint's allegations somehow robs the relator of original source status, otherwise no relator could ever be an original source and this provision of the statute would be rendered superfluous. Similarly, the fact that Ervin amended its complaint is inconsequential. See Supplemental Memorandum at 3-4. There is nothing in the public disclosure bar, or any case law supporting it in this jurisdiction, which suggests that a *qui tam* relator cannot supplement its original allegations with newly discovered evidence.

Finally, the fact that counsel for the United States acknowledged that there was a link between Ervin's *qui tam* lawsuit and its *Biven's* lawsuit is also inconsequential. See Supplemental Memorandum at 4-5. This statement in no way establishes that the United States, in the *Biven's* lawsuit, was seeking to remedy any allegations of fraud against Hamilton or any other defendant.

## II. Conclusion

The statements that Hamilton cites do not support its earlier arguments. For the reasons set forth above and in its original Response Memorandum, plaintiff respectfully requests that this Court deny defendant Hamilton's motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,



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