

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,)

v.)

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

Defendants.)

) Civ. Action No. 96-CV-1258 (LFO) (AK)
) Civ. Action No. 99-CV-1698 (LFO) (AK)

**PLAINTIFF'S MOTION FOR ORDER
REQUIRING THE PRESENCE OF INSURANCE CARRIER
REPRESENTATIVE AT SETTLEMENT CONFERENCE**

Plaintiff, Ervin and Associates, Incorporated, through undersigned counsel, hereby moves this Court for an order requiring that a representative with authority for settlement from defendant Hamilton's errors and omissions insurance carrier be present at the upcoming settlement conference scheduled by this Court. As explained more fully below, the presence of the United States at this conference is necessary if resolution of these claims is to be seriously considered. Representatives for the United States have informed counsel for Ervin that they will participate in the settlement conference and have requested that a representative with authority from Hamilton's insurance carrier also be present at the conference. Ervin also believes that the presence of such an individual would be necessary to facilitate a full exploration of possible settlement options. Counsel for Ervin has conferred with counsel for defendant Hamilton who has stated that he is not able to provide a final response to this request for relief at this time.

BACKGROUND

This civil action began on June 6, 1996, when Plaintiff Ervin and Associates, Inc. ("Ervin") brought allegations of fraud against defendants Hamilton Securities Group, Inc., Hamilton Securities Advisory Services (hereinafter "Hamilton") and Williams, Adley & Company ("Williams, Adley") under the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. §§ 3729-3733. (Civil Action No. 96-CV-1258, hereinafter "the *qui tam* action."). Until October 1997, Hamilton was a contractor for the Department of Housing and Urban Development ("HUD") which directed HUD's mortgage loan sale program. Ervin has alleged, among other claims, that Hamilton directed a bid rigging scheme which steered mortgage notes to certain Wall Street bidders and which resulted in lost revenue for the government from the note sales and damage, therefore, to the United States Treasury. Ervin contends that defendant Williams, Adley fraudulently secured a contract from HUD in connection with the note sale program by agreeing to award defendant Hamilton a lucrative sub-contract as a kickback.

After Ervin filed the *qui tam* suit, the Office of Inspector General ("OIG") for HUD and the U.S. Department of Justice initiated an investigation into the allegations raised in Ervin's complaint. In October 1997, while this investigation was in progress, HUD terminated Hamilton's contract after it was discovered that Hamilton had given HUD incorrect slates of winning bidders in 1995 and 1996 in connection with two note sales, thereby resulting in \$3.88 million in lost revenue from those sales. At that time, HUD withheld \$1.5 million due to Hamilton as a setoff against this loss. Hamilton took the position at that time that the government's withholding of funds as an offset was improper because, in part, its insurance carrier had confirmed that "in the event of an ultimate determination of liability against

Hamilton," HUD's claim was covered by a \$10 million professional liability policy. See Exhibit One, Hamilton Letter Dated December 29, 1997 and enclosure (Jenner & Block Letter Dated December 22, 1997).

The government did not release the \$1.5 million to Hamilton, and on March 9, 1998, Hamilton filed a civil action in the Court of Federal Claims against HUD seeking the payment of the \$1.5 million (*Hamilton Securities Advisory Services, Inc. v. United States*, No. 98-169 C, (Ct. Fed. Cl.), hereinafter "the FCC action."). The FCC action is still pending in that court.

In June 1998, Ervin provided government investigators with evidence that Hamilton's failure to identify the correct winners of the two note sales was interrelated with Ervin's allegations in the *qui tam* case. After Ervin provided this evidence to the government, the Department of Justice filed a series of counterclaims against Hamilton in the FCC action. In at least one of these counterclaims, the government contends that Hamilton provided HUD with "false information about which group of bids would yield maximum sales proceeds. . ." during the two note sales. The Department of Justice, however, declined to intervene in Ervin's *qui tam* allegation based upon the same underlying facts.

On June 4, 1999, prior to the point in which the seal on the *qui tam* case was lifted, Hamilton brought a claim in the Superior Court for the District of Columbia against Ervin alleging, among other things, that by filing the *qui tam* lawsuit, Ervin had tortiously interfered with Hamilton's contract with HUD and thereby caused HUD to terminate Hamilton's financial advisor contract. That action has been removed to this Court and has been consolidated by order of this Court with the pending *qui tam* action (Civil Action No. 99-CV-1698). Motions to dismiss the underlying claims were filed by all parties and denied by this Court in an Order dated

February 8, 2001. On February 22, 2001, this Court entered an Order referring this case to Magistrate Alan Kay for settlement negotiations.

This Court has already acknowledged that the United States may need to participate in settlement negotiations and required in its February 22nd Order that the negotiations involve the United States "to the extent appropriate."¹ Ervin has contacted counsel for the United States and they have now agreed to participate in these discussions.² However, the government has requested, and Ervin concurs with this request, that a representative with authority for settlement from Hamilton's insurance carrier be present at the settlement conference. Ervin now moves this Court for such relief.

ARGUMENT

The underlying transactions in this case have spawned the consolidated cases before this Court and one pending in the Court of Federal Claims. Ervin brings claims that defendants have defrauded the government while Hamilton contends that Ervin somehow improperly caused the

¹ The United States' presence at this conference is not only appropriate, but necessary for two reasons. First, the final authority for the compromise or settlement of *qui tam* claims rests with the United States. See 31 U.S.C. § 3730(c)(2)(B). Second, Ervin contends that the government's counterclaims in the FCC action constitute the pursuit of an "alternate remedy" to at least one of Ervin's *qui tam* claims and that, pursuant to 31 U.S.C. § 3730(c)(5), Ervin is entitled to the same rights – including participation in the FCC action and any share in a possible recovery – which it would have had if the United States had intervened in this portion of Ervin's *qui tam* lawsuit. The FCC action, therefore, is clearly intertwined with the underlying case and failing to include it (and the United States) would impede exploration of all settlement options.

² The current settlement conference is scheduled for April 6, 2001. Counsel for the United States has represented to Ervin's counsel that they are not available for substantive settlement discussions on that date, and it will be necessary for the parties to coordinate with this Court a new date for this conference. However, Ervin respectfully urges the Court to use the scheduled hearing set for April 6th as a brief scheduling conference to discuss, among other things, provisions for supplying the Court with confidential settlement statements and such other materials as the Court deems appropriate.

government to terminate its HUD contract. In the FCC action, Hamilton seeks payment of the \$1.5 million which HUD has withheld as an offset to HUD's claim that it lost \$3.88 million in revenue when Hamilton "provided false information" about winning bidders. Meanwhile, many of the facts underlying this counterclaim are also being pursued by Ervin as one of its False Claim Act counts in the *qui tam* lawsuit.

Given the interrelated nature of these claims, the logic of having all parties available at settlement negotiations is obvious. Ervin has now secured the agreement of the United States to participate in these negotiations. However, the United States has requested that an individual with authority for settlement from Hamilton's insurance carrier be present at these negotiations. Ervin believes this request is appropriate for the following reasons, and we move this Court for such relief.

First, it is widely acknowledged that settlement discussions are facilitated whenever the persons with authority for settlement are actually present at these discussions. For this reason, it is often standard policy for courts or court-sponsored mediators to require such persons to attend settlement. Second, Hamilton has previously taken the position that its insurance carrier has acknowledged that the government's \$3.88 million claim is covered by Hamilton's professional liability policy (in the event Hamilton is determined to be liable). See Exhibit One. Invariably, these settlement discussions will include discussions surrounding the FCC action, and, given Hamilton's position, the presence of a representative from that insurance carrier is certainly appropriate. Finally, regardless of whether the FCC action and the government's counterclaims are part of these discussions, it would be appropriate to have a representative from the insurance carrier present to the extent that Hamilton's policy may cover any claims arising from Ervin's *qui*

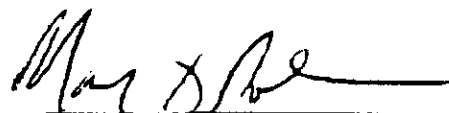
ram action.

Under the circumstances of this case, therefore, it is appropriate to require that a person with authority for settlement from defendant Hamilton's insurance carrier be present at these settlement negotiations.

CONCLUSION

For the foregoing reasons, Plaintiff Ervin and Associates, Incorporated respectfully requests that this Court grant its Motion for an Order Requiring the Presence of Insurance Carrier Representative at Settlement Conference.

Respectfully submitted,



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(703) 82108949 (fax)

Attorneys for Plaintiff/Relator

Dated: March 23, 2001

EXHIBIT ONE

The Hamilton
Securities
Group, Inc.

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HAMILTON

December 29, 1997

Howard Glaser, Esq
Deputy General Counsel
U.S. Department of Housing and Urban Development
Office of General Counsel
451 7th Street, SW
Room 10214
Washington, DC 20410-4500

RE: Hamilton Securities Advisory Services, Inc.; HUD's
Withholding of Payments Due Under Contract No. DU100C000018505

Dear Mr. Glaser:

The U.S. Department of Housing and Urban Development ("HUD") is wrongfully withholding contract payments due to Hamilton Securities Advisory Services, Inc. ("Hamilton") totaling \$1,505,256. Members of the Office of General Counsel have communicated that are two reasons why HUD has taken this action:

- there is an ongoing investigation and HUD has been requested to withhold Hamilton's contract payments until the investigation is completed; and/or.
- HUD is withholding the contract payments as security for HUD's \$5.88 million claim for a "voluntary repayment" by Hamilton because Hamilton has not provided sufficient evidence that it carries insurance that could cover this claim.

Over the past few weeks our attorneys at Jenner & Block have addressed your concerns as follows:

- On December 18, 1997, Jenner & Block met with Assistant US Attorneys Van Gelder, Alexis and Chapman. At that meeting, the Department of Justice indicated that any investigation and the withholding by HUD of contract payments to Hamilton are not "linked," so that the existence of an investigation is not a basis for withholding the contract payments, and agreed to call you to confirm that these payments should be delinked; and
- A copy of Hamilton's professional liability insurance policy was provided to Mr. John Kennedy of the HUD Office of General Counsel on December 12, 1997. In addition, on December 23, 1997, Mr. Kennedy was provided with a letter from Jenner & Block which confirmed with our professional liability insurance carrier that HUD's claim, in the event of an ultimate determination of liability against Hamilton, is covered by a \$10 million per claim

HAMILTON

Howard Glaser, Esq.

December 29, 1997

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professional liability policy. Please see enclosures. The insurance company is available to confirm this verbally with Mr. Kennedy at his convenience.

We presume that the above successfully addresses the causes that led you to withhold our contract payments. Accordingly, we request that you authorize immediate payment to Hamilton of the \$1,505,256 being withheld by HUD. In addition, we request that a check be processed immediately so that we may pick it up today. Failure to do so before the end of the year will cause irrevocable harm to Hamilton, its employees and its creditors.

Sincerely yours,



C. Austin Fink
Chairman

cc: The Honorable Andrew Cuomo
Mr. Jon Cowan
John Opitz, Esquire
John Kennedy, Esquire
Mr. Willie Gilmore
Mr. Nicolas Reznick
Mr. Dwight Robinson
Ms. Annette Hancock
Mr. Craig Durkin

Enclosures

LAW OFFICES
JENNER & BLOCK

601 THIRTEENTH STREET, N.W.
SUITE 1250
WASHINGTON, D.C. 20005

(202) 637-4000
(202) 637-9000 fax

FOR MORE INFORMATION
CALL (202) 637-4000
OR VISIT OUR WEBSITE
WWW.JENNERBLOCK.COM

WE REQUEST THAT
YOU RETURN THIS
MAIL TO US AT THE
ADDRESS SHOWN
ON THE ENVELOPE

LESLIE M. LEPOW

December 22, 1997

OWNER'S DIAL DIAL (202) 637-4000
OWNER'S DIAL ADDRESS FROM (202) 637-4000

Howard Glasser, Esquire
Deputy General Counsel
Room 10214

John P. Kennedy, Esquire
Associate General Counsel for
Finance and Regulatory Enforcement
Room 9236

BY HAND DELIVERY

Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Re: Hamilton Securities Advisory Services, Inc. ("Hamilton"); HUD's
Withholding of Payments Due Under Contract No. DU100C000018505

Gentlemen:

On behalf of our client, Hamilton Securities Advisory Services, Inc. ("Hamilton"), we have over the past few weeks repeatedly contacted your respective offices to schedule a meeting to discuss our client's financial plight resulting from HUD's wrongful withholding of contract payments. The withholding of this money has pushed our client to the brink of extinction. It is imperative that we meet this week to discuss this matter.

Howard Glasser, Esquire
 John P. Kennedy, Esquire
 December 22, 1997
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As we have repeatedly stated in correspondence to your offices and others at HUD in the past, HUD's demand for a "voluntary repayment" of \$3.88 million is not a valid basis for withholding \$1.5 million of funds due Hamilton for contract services already performed.

Several points merit mention:

- HUD's legal basis for "claiming" \$3.88 million has never been articulated or accompanied by a Contracting Officer's decision, as required by the FAR;
- The Contracting Officer's letter requesting "voluntary repayment" cites as authority for the repayment demand a contract provision in a contract that was not in effect for one of the sales in which Hamilton's performance allegedly prejudiced HUD;
- The Department's claim appears predicated upon the notion that Hamilton functioned as a guarantor or indemnifier of the proceeds of lease sales. This is not the case, and to seek a liability based on such a theory is spurious;
- The invocation by HUD sources of a Justice Department inquiry as a basis for the withholding is not justified, as was confirmed to us in a meeting with AUSA's Ver Gelzer, Alexis and Chapman on December 18, 1997, who stated that the two actions are not "linked";
- Lastly, literally two days before HUD terminated Hamilton's contract, HUD contracting officials informed Hamilton that its most recent invoice of \$868,000 would be approved for payment.

Significantly, as we have repeatedly pointed out to the Department, without conceding any basis for liability, the alleged performance errors by Hamilton are covered by insurance in the event of an ultimate determination of liability. In other words, HUD has already been rendered secure.


See Letter of October 21 from the undersigned to HUD's Contracting Office (Azzene Hancock), November 13 from Hamilton (CFO - Brian Dietz) to HUD's Contracting Office, December 13 from the undersigned to John Kennedy, HUD's Associate General Counsel.

Edward Glaser, Esquire
John P. Kennedy, Esquire
December 22, 1997
Page 1

HUD's steadfast refusal to meet with us and the simultaneous withholding of funds due under a fixed price contract can only be, therefore, for the purpose of punishing Hamilton, clearly not for any contractual purpose. Such action is fundamentally unfair and will cause irreparable injury.

We reiterate our desire to meet with you as soon as possible to discuss the release of funds to Hamilton.

Sincerely,


Leslie H. Lopow

WHL/af

- cc: Ms. C. Austin Pitts
- David A. Hendon, Esquire
- Ms. Annette Hancock
- Barbara Van Gelder, Esquire
- Anthony Alexis, Esquire
- Richard Chapman, Esquire
- John Ortiz, Esquire

CERTIFICATE OF SERVICE

I certify that on this 23rd day of March, 2001, I caused to be placed in the United States mail, postage prepaid, a true and correct copy of the foregoing Plaintiff's Motion for Order Requiring the Presence of Insurance Carrier Representative at Settlement Conference and Proposed Order to the following addressees:

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Kenneth E. Ryan
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Washington, D.C. 20005


MARK D. POLSTON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED
MAR 27 2001
CIVIL DIVISION

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

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Plaintiffs,)

v.)

) Civ. Action No. 96-CV-1258 (LFO) (AK)

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

Defendants.)

ORDER

Upon consideration of Plaintiff Ervin's Motion for Order Requiring the Presence of Insurance Carrier Representative at Settlement Conference, it is hereby ORDERED this _____ day of _____, 2001 that said Motion is GRANTED. It is further ORDERED that a representative with authority for settlement from the insurance carrier for defendant Hamilton be present at the settlement conference before this Court.

ALAN KAY
UNITED STATES MAGISTRATE JUDGE

cc:

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