IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel. ERVIN AND ASSOCIATES, INCORPORATED, Plaintiffs, v. THE HAMILTON SECURITIES GROUP, INC., et al., Defendants.	Civil Action No. 96-CV-1258 (Judge Louis F. Oberdorfer)

RELATOR'S MOTION TO EXTEND TIME FOR SERVICE UNDER FED. R. CIV. P. 4(m) OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS

Relator Ervin and Associates, Incorporated ("Ervin"), by counsel, hereby moves this Court, pursuant to Fed. R. Civ. P. 4(m), to enlarge the time within which Ervin may serve the Complaint on Defendants or, in the alternative, to stay all proceedings herein, until sixty (60) days after the government concludes its investigation associated with the subpoena enforcement action filed by the Inspector General for the Department of Housing and Urban Development in this court: Susan Gaffney v. Hamilton Securities Group, Inc., et al., Miscellaneous No. 98-92 (LFO) (the "Subpoena Enforcement Action"). Documents unquestionably relevant to this action, and to the government's intervention decision, are still being held by the government and are still being produced under supervision of the Special Master appointed in the Subpoena Enforcement Action. The record in that case demonstrates that Defendant Hamilton Securities Group, Inc. ("Hamilton") has obstructed and interfered with the government's investigations into the claims of the Qui Tam Action and that justice requires Ervin should not be put to the expense and

burden of proceeding with this litigation by being required to serve Defendants with process until such time as Hamilton's document production to the government, and the government's investigation is complete.

Further grounds in support hereof are described in Ervin's Memorandum of Points and Authorities in Support hereof. A proposed Order is attached.

Respectfully submitted,

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Counsel for Relator Ervin and Associates, Incorporated

Dated: June 24, 2000

LOCAL CIVIL RULE 7.1(M) CERTIFICATE

I hereby certify that on June 22, 2000, I discussed the relief sought herein with Rudolph Contreras, counsel for the United States, and Mr. Contreras represented to me that the government has no opposition to this Motion.

Wayne G. Travell

Wayne G. Travell

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2000, a true copy of the foregoing Motion to Extend Time for Service Under Fed. R. Civ. P. 4(m) or, in the Alternative, for a Stay of Proceedings, Memorandum of Points and Authorities in Support thereof and proposed Order was served by first-class mail, postage prepaid, upon the following:

Rudolph Contreras, Esquire
Department of Justice
555 Fourth Street, N.W.
Washington, D.C. 20001

Wayne G. Travell

Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel. ERVIN AND ASSOCIATES, INCORPORATED, Plaintiffs, v. **THE HAMILTON SECURITIES GROUP, INC., et al.,** Defendants.	Civil Action No. 96-CV-1258 (Judge Louis F. Oberdorfer)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RELATOR'S MOTION TO EXTEND TIME FOR SERVICE UNDER FED. R. CIV. P. 4(m) OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS

Relator Ervin and Associates, Incorporated ("Ervin") filed this Qui Tam Action, under seal, on June 6, 1996. Nearly four (4) years later, on April 21, 2000, the United States filed a notice of its election to decline intervention. Pursuant to Fed. R. Civ. P. 4(m), Ervin has 120 days from April 21, 2000, to serve Defendants with the Complaint, unless Ervin moves to enlarge that time for good cause. Thompson v. Brown, 91 F.3d 20 (5th Cir. 1996); Espinoza v. United States, 52 F.3d 838 (10th Cir 1995). Even where a Plaintiff fails to show good cause, the district court must consider whether a permissive extension of time is warranted under the facts of each particular case. Id.

During the time between the filing of this action and the government's eventual decision to decline intervention, the United States conducted both civil and criminal investigations into the allegations of this action and into the allegations of a related civil case Ervin filed in this Court on June 5, 1996, Ervin and Associates Incorporated v. Helen Dunlap, Civil Action No. 96-

CV1253 (the "Bivens Case"). Those investigations are still ongoing. In connection with these investigations, the Inspector General of the Department of Housing and Urban Development ("HUD"), at the request of the United States Attorney's Office, issued document subpoenas to Hamilton Securities Group, Inc. and Hamilton Security Advisory Service, Inc. ("Hamilton") on August 6, 1996, August 22, 1996, and October 24, 1997.

On March 26, 1998, after nearly twenty (20) months of informal efforts by the government to get Hamilton to comply with the subpoenas, HUD's Inspector General filed a Petition for Summary Enforcement (the "Subpoena Enforcement Action") on the grounds that Hamilton had made misrepresentations regarding its compliance with the subpoenas and had otherwise failed or refused to produce records to the government. See Petition for Summary Enforcement attached hereto as Exhibit A. In its Petition, the HUD OIG stated that it "has reason to believe that the back-up tapes contain records that are responsive to the OIG subpoenas and that have not already been produced." Id., p. 29, and that Hamilton was obstructing the government's access to those records:

> The failure to research back-up tapes, which date to as early as March 1996, is particularly significant given (1) Hamilton's policy of destroying e-mails in its active electronic message systems after sixty days and (2) a Hamilton directive issued on May 7, 1996 . . . six days after HUD learned of Ervin and Associates' intention to file the Bivens action, alleging contracting corruption and favoritism of Hamilton – that even archived e-mails should be deleted "at once" "[i]f you have any doubt whatsoever of the relevance of the archived messages to our obligation as government contractors for document retention . . ."

See Exhibit A, p. 11.

> Conspicuously missing from the list of tapes in Jenner & Block's possession is the first full back-up tape, for June 16-17, 1996 which Hamilton's attorneys previously had represented to be the earliest complete back-up tape available . . .
>
> The OIG has reason to believe that the back-up tapes contain records that are responsive to the OIG subpoenas and that have not already been produced. Indeed, Hamilton concedes as much.

See Exhibit A, pp. 28, 29.

During the course of Hamilton's resistance to the Subpoena Enforcement Action, the Honorable Stanley Sporkin appointed the law firm of Storch and Brenner to act as Special Master to review Hamilton's claims of privilege and to implement a plan to review Hamilton's electronic back-up tapes for documents responsive to the HUD OIG subpoenas.

HUD OIG represented to Judge Sporkin that:

> The subpoenas are reasonably focused on materials at the center of the OIG's investigation, namely, the allegations of, among other things, favoritism toward contractors, conflicts of interest, and bid-rigging within HUD's mortgage sales programs.

Exhibit A, p. 25. Among the records at issue in the Subpoena Enforcement Action are "electronic records, including e-mail, word-processing files, and certain other electronic records . . ." Id., p. 25.

As of today, Hamilton's production of documents is still not complete and there are still thousands of documents from electronic back-up tapes which have yet to be reviewed by the Special Master. This is especially significant given Hamilton's claim that it was a "mostly paperless" office. See Exhibit A, p. 15.

Hamilton has alleged in this Court that it has spent in excess of $2 million litigating its compliance with the HUD OIG subpoenas. See Motion to Unseal File and Opposition to Attorney General's Request for Further Extensions of Time, filed by Hamilton on May 21, 1999, at p. 7. It has retained at least five (5) different law firms of record to represent it in connection with the HUD OIG's effort to enforce its subpoenas.[1] This is despite Hamilton's representation in February 1998 that its reason for failing to comply with the subpoenas at that time was that it

[1] Those firms include: Jenner and Block; Morrison & Foerster; Brand, Lowell & Ryan; Jackson Campbell and the same attorneys who first entered their appearance for Hamilton at Jackson and Campbell are now employed by a fifth law firm, Drinker, Biddle and Reath.

was then "moribund" and without the resources necessary to comply with the HUD OIG subpoenas. See Exhibit A, p. 18. Despite that representation, Hamilton has continued to resist document production on the government, including an appeal (which Hamilton lost) to the D.C. Circuit, filed a claim against the United Stated in the Federal Claims Court and has sued Ervin for, among other things, having filed this lawsuit.

In its Notice declining intervention in this case, the United States took the extraordinary step of acknowledging that its intervention decision may change depending specifically upon the outcome of the document production from electronic back-up tapes now being produced and reviewed under the supervision of the Special Master:

> In particular, the Department of Housing and Urban Development's Office of Inspector General ("OIG") maintains a subpoena enforcement action before this Court against Hamilton [citation omitted]. The OIG will continue to pursue that matter and will review any evidence obtained therein. If evidence developed throughout that action calls into question the Department of Justice's analysis on this non-intervention decision, the Department of Justice may deem such a situation, amongst others, as good cause to intervene in this action at a later date.

Emphasis supplied. See Government's Notice of Election to Decline Intervention attached hereto as Exhibit E, p. 2. As set out above, the United States has acknowledged that there is a gap in its investigation that has been created by Hamilton's ferocious resistence to compliance with the HUD OIG subpoenas. (See Gaffney v. Hamilton, Misc. 98-96 (LFO) and The Hamilton Securities Group, et al. v. U.S. Department of Housing and Urban Development, et al., Civil Action No. 1:98 CV-0036 (SS) for the nearly four year history of the government's attempts to obtain documents relevant to this case from Hamilton.)[2] As the United States also acknowledges

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[2] In addition, to Hamilton's misconduct in responding to the HUD subpoenas and in possible spoliation of evidence, Hamilton and its counsel have been involved in numerous violations of the seal in this case. For example, in June of 1999, almost a year before the seal in this case was dissolved, Hamilton alleged in a suit against Ervin originally filed in the Superior Court for the District of Columbia, but later removed by Ervin to this Court (where it is currently lodged as The Hamilton Securities Group, Inc., et al. v. Ervin and Associates, Incorporated, et al., Civil Action No. 99-CV-1698 (LFO)), that Ervin was the relator in this case. See Exhibit B, ¶ 20. Further, in April of 1999, Hamilton's counsel published a letter to the Honorable Fred Thompson in which he identified Ervin as the

in the above-quoted statement, this gap may be filled by the documents obtained from the Hamilton back-up tapes now under consideration by the Special master in the Subpoena Enforcement Action.

The United States has had nearly four (4) years to force Hamilton to reveal critical and relevant documents which the United States deems relevant to its decision to intervene. Ervin has had only since shortly before April 21, 2000, to make an assessment as whether to go forward with the service of its Complaint. Because the documents most critical to the allegations of this complaint are tied up in the investigation still being conducted by the U.S. Attorney and by the HUD Inspector General, Ervin cannot, as a practical matter gain access to those unquestionably relevant documents until such time as the HUD IG closes her investigation and the information collected in the investigation is no longer subject to the investigative privilege and is thus made available to Ervin.[3] Given the unquestioned relevance of this information to the allegations of the Qui Tam Action, given the current unavailability of those documents to Ervin and given the immanence with which these documents will become available through the Special Master proceedings, Ervin has shown good cause, and this Court otherwise has the discretion, under Fed. R. Civ. P. 4(m) to enlarge the time within which Ervin must serve the Qui Tam Action until sixty (60) days after the conclusion of the government's investigation.

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relator in this then sealed case. See Letter from Michael J. McManus to Hon. Fred Thompson dated April 21, 1999, attached hereto as Exhibit C. Hamilton's president, C. Austin Fitts, later published her counsel's letter to Senator Thompson on her public website at www.solari.com/legal, despite her acknowledgment elsewhere on her website that the Qui Tam Action was then under seal. See Exhibit D attached hereto.

[3] Once the HUD IG investigation is closed, Ervin could obtain relevant documents either from defendants and/or the government through discovery. Until such time as the investigation is closed, Ervin cannot obtain these documents through discovery.

Respectfully submitted,

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Counsel for Relator Ervin and Associates, Incorporated

Dated: June 24, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel. ERVIN AND ASSOCIATES, INCORPORATED, Plaintiffs, v. THE HAMILTON SECURITIES GROUP, INC., et al., Defendants.	Civil Action No. 96-CV-1258 (Judge Louis F. Oberdorfer)

ORDER

UPON CONSIDERATION OF the Relator Ervin and Associates, Incorporated's ("Ervin") Motion to Extend Time for Service Under Fed. R. Civ. P. 4(m) or, in the Alternative, for a Stay of Proceedings; it is hereby

This the ___ day of _____, 2000

ORDERED, that Ervin's Motion shall be and hereby its **GRANTED**; and it is further

ORDERED, that the time within which Ervin may serve the Amended Complaint in this action on Defendants shall be, and hereby is, enlarged until sixty (60) days after the termination of the government's investigation associated with the Subpoena Enforcement Action, Susan Gaffney v. Hamilton Securities Group, Inc., et al., Miscellaneous No. 98-92.

The Honorable Louis F. Oberdorfer
U.S. District Court for the District
of Columbia

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EXHIBIT A

EXHIBIT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity as Inspector General, U.S. Department of Housing and Urban Development,
451 7th Street, S.W.
Washington, D.C. 20410,

Petitioner,

v.

THE HAMILTON SECURITIES GROUP, INC. and HAMILTON SECURITIES ADVISORY SERVICES, INC.,
7 Dupont Circle, N.W.
Washington, D.C. 20036,

Respondents.

Misc. No. 98-92

[redacted]

FILED

MAR 25 1998

PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS

Susan Gaffney, in her official capacity as the Inspector General of the United States Department of Housing and Urban Development ("HUD"), by her undersigned attorneys, hereby respectfully petitions the Court to issue an Order requiring The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively the "Hamilton Entities") to comply with the administrative subpoenas duces tecum served upon them by HUD's Office of the Inspector General (the "OIG"). In support of this petition, the Inspector General states as follows:

1. Jurisdiction is conferred on this Court by Section 6(a)(4) of the Inspector General Act of 1978, as amended, 5 U.S.C., App. 3, § 6(a)(4), and by 28 U.S.C. § 1345.

5 1

2. OIG was established within HUD pursuant to Section 2 of the Inspector General Act. See 5 U.S.C. App. 3, §§ 2, 11.

3. The OIG is authorized to exercise the powers provided by the Inspector General Act, 5 U.S.C., App. 3, § 6(a)(4), and to issue the subpoenas at issue in this case.

4. The Hamilton Entities are corporations which at all relevant times conducted business in the District of Columbia. The Hamilton Entities are affiliates in connection with their financial and proprietary interests, as well as regarding their control and direction. The last known business address for the Hamilton Entities is 7 DuPont Circle, N.W.; Washington, D.C. 20036-1108. According to District of Columbia corporate records, C. Austin Fitts is the registered agent for The Hamilton Securities Group, Inc. in the District of Columbia, and the official address for The Hamilton Securities Group, Inc. in the District of Columbia is 1410 Q Street, N.W., Washington, D.C. 20009. No reference to Hamilton Securities Advisory Services, Inc. could be located in the District of Columbia corporate records.

5. Under the Inspector General Act, the Inspector General is given broad powers to investigate possible fraud, waste and abuse, including the power to subpoena information "necessary in the performance of the functions assigned by this Act" 5 U.S.C. App. 3, § 6(a) (4).

6. The Inspector General Act provides that "in the case of contumacy or refusal to obey, [a subpoena] shall be enforceable by order of any appropriate United States district court." 5 U.S.C. § 6 (a) (4).

7. On August 8, 1996, August 22, 1996, and October 24, 1997, the OIG issued subpoenas to the Hamilton Entities. Those subpoenas require each of the Hamilton Entities to provide OIG with various records relating to the Hamilton Entities' involvement in HUD's mortgage

sales program, and to possible conflicts of interest in connection with the Hamilton Entities' role as a financial advisor to HUD.

8. The Hamilton Entities have acknowledged that they maintain and have possession of records responsive to the subpoenas which they have failed to provide to the OIG.

9. The OIG has made good faith efforts to address the concerns expressed by the Hamilton Entities about the subpoenas so as to resolve this matter without resort to the Court. Those efforts have been unsuccessful.

Additional grounds for this motion are set forth in the accompanying memorandum of points and authorities.

A proposed Order consistent with the requested relief is attached hereto.

Respectfully submitted,

Wilma A. Lewis

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United States Attorney

Daniel F. Van Horn

DANIEL F. VAN HORN, D.C. Bar #924092
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity as Inspector General of the U.S. Department of Housing and Urban Development, Petitioner, v. THE HAMILTON SECURITIES GROUP, INC., and HAMILTON SECURITIES ADVISORY SERVICES, INC., Respondents.	Misc. No. 98-92 FILED UNDER SEAL

FILED
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR SUMMARY ENFORCEMENT OF SUBPOENAS ISSUED PURSUANT TO 5 U.S.C. APP. 3 § 6(a)(4)

Introduction

This is a summary proceeding upon a petition filed by the Inspector General of the United States Department of Housing and Urban Development ("HUD"), pursuant to section 6(a)(4) of the Inspector General Act of 1978, 5 U.S.C. App. 3 § 6(a)(4). The Petitioner seeks the enforcement of three distinct administrative subpoenas duces tecum issued to each of Respondents on August 6 and 22, 1996, and October 24, 1997. The subpoenas, attached as Exhibits 1 through 6 to the Declaration of James Martin ("Martin Decl."), which is submitted herewith, require the Respondents, Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton"), to provide HUD's Office of Inspector General ("OIG") with various records relating to Hamilton's

involvement in HUD's mortgage sales program, and to possible conflicts of interest in connection with Hamilton's role as a financial advisor to HUD.[1] The Petitioner also requests that, pending final disposition of this petition, this Court take immediate possession of the backup tapes of Hamilton's electronic records system, Hamilton's financial records, and other materials sought by the subpoenas but not yet produced by Hamilton.

Hamilton has failed to comply fully with the subpoenas duces tecum. The Inspector General seeks enforcement of the subpoenas on the grounds that the appropriate standard has been met: the Inspector General is authorized by statute to issue the subpoenas in question, the records sought by the subpoenas are relevant to an authorized activity of the Inspector General, and the subpoenas are not unreasonably broad or burdensome.

This petition for summary enforcement is related to (1) a sealed qui tam action before this Court, Civil Action No. 96-1258 (SS), (2) The Hamilton Securities Group, Inc., et al. v. United States Department of Housing and Urban Development, et al., Civil Action No. 98-36 (SS), in which Hamilton, in its Complaint for Declaratory, Injunctive, Mandamus, and Other Relief, sought a declaration that the issuance of the October 24, 1997 OIG subpoenas is a violation of the Administrative Procedure Act and the Fourth and Fifth Amendments to the Constitution, an order quashing the October 24, 1997 subpoenas, and an injunction barring OIG from enforcing compliance with its subpoenas, and (3) Ervin & Associates, Inc. v. Helen Dunlap, U.S Department of Housing and Urban Development, et al., Civil Action No. 96-1253 (WBB), in which Ervin & Associates, Inc.

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[1] The subpoenas of August 6 and 22, 1996, were subsequently modified by negotiation and agreement of the OIG and attorneys for Hamilton. See Letter of October 28, 1997, from Judith Hetherton to David A. Handzo, Exh. 14 to Martin Decl., and proposed certificates of compliance enclosed therewith.

alleges, among other things, corruption and favoritism in the procurement of services associated with HUD's sale of defaulted mortgage notes.

Statement of Facts

A. Background - Initiation of the OIG Investigation

Among other things, HUD's Federal Housing Administration ("FHA") insures residential mortgages. FHA's residential mortgage insurance programs are among HUD's largest programs, and are designed to increase the supply of affordable housing for low- and moderate-income families. Generally, under FHA's insurance programs, when individual homeowners (commonly referred to as "single family mortgagors") or owners of apartment projects (commonly referred to as "multifamily mortgagors") default on mortgages insured by FHA, FHA pays the mortgagee the unpaid principal balance of the mortgage and takes an assignment of the mortgage. By 1993, HUD held single family and multifamily mortgage notes with unpaid principal balances totaling in excess of $11 billion. In response to this ever increasing inventory of formerly HUD-insured mortgages, HUD implemented the mortgage sales program. See Martin Decl. at ¶ 13.

Hamilton served as HUD's exclusive financial advisor in the mortgage sales program from the award of the initial financial advisor contract in September 1993 through December 1995, and as one of four financial advisors from January 1996 until October 1997. See Martin Decl. at ¶14. In 1996 and 1997, HUD was apparently Hamilton's only paying client. See Affidavit of C. Austin Fitts ("Fitts Affidavit"), submitted in support of Motion for a Temporary Restraining Order and a Preliminary Injunction in The Hamilton Securities Group, Inc., et al. v. United States Department of Housing and Urban Development, et al., Civil Action No. 98-36 (SS), at ¶ 20.

Two years and eight months after Hamilton first became a financial advisor to HUD, on June 5, 1996, Ervin & Associates filed a 253-page civil complaint in the case entitled Ervin & Associates, Inc. v. Helen Dunlap, U.S Department of Housing and Urban Development, et al., Civil Action No. 96-1253 (WBB) ("Complaint"). This lawsuit (the "Bivens action") involves alleged violations of Ervin's constitutional and statutory rights, and seeks preliminary and permanent injunctive relief, a declaratory judgment, and damages. Ms. Dunlap, the Deputy Assistant Secretary for Operations within HUD's Office of Housing-FHA, was sued in her individual capacity. Specifically, it was alleged that Dunlap had "usurped control and exercised unlawful influence over HUD's contract procurement process to confer huge procurements on her favored, hand-picked contractors and personal friends and companions, and to prevent Ervin from winning new contracts or hav[ing] its existing contracts renewed or extended." Complaint, ¶ 12 (emphasis in original). The case is assigned to the Honorable William B. Bryant

Among other things, the Bivens action complaint alleged that the first financial advisor contract awarded to Hamilton in September 1993 was enormously and illegally expanded, from $5 million dollars to $19 million, through non-competitive modifications, thereby depriving other contractors of the opportunity to compete fairly for the work. The complaint further alleged that the supposed competitive process by which the second financial advisor contract was awarded to Hamilton and three other financial advisors in 1996 was a sham. Complaint, ¶¶ 191, 194, 210-221, 278-280, 513. Further, it alleged that the award of a lucrative "crosscutting task order" to Hamilton under the second financial advisor contract (which was ultimately worth $20 million), was rigged for Hamilton by Dunlap, for the specific purpose of ensuring that Hamilton maintained control over all of the other financial advisors and the note sales process. Complaint, ¶¶ 13, 171-174, 190, 543-545.

The Bivens action complaint also alleged that HUD, through Hamilton and Dunlap, used Hamilton's control over the note sales process to embark on a complex scheme to deliver huge blocks of discounted multifamily and single family HUD-owned notes to a "tag team" of two prominent Wall Street firms, Goldman, Sachs & Co. and BlackRock Capital Finance L.P., with inside knowledge over the note sale process and connections with the Democratic Administration. It was alleged that this was accomplished through disclosure of material, inside information to select bidders, and provision of disinformation to other bidders. Complaint, ¶¶ 50-63, 148, 464, 469, 493-494, 499-500.

The Bivens action complaint alleged other irregularities in the award of a due diligence contract ultimately worth $30 million to a minority firm, Williams Adley & Company, who was allegedly forced subsequently to sub-contract with Hamilton for $5 million worth of financial advisory services. Complaint, ¶¶ 33, 36-41, 111-114, 181-182, 188, 239-241, 250-265, 313-326, 512. The complaint also alleged that numerous other awards of HUD contracts had been affected by favoritism, discrimination, and political influence. The Bivens complaint further alleged that Dunlap and other HUD employees were using Hamilton and other contractors to perform personal services--acting as their personal staffs, as legislative liaison, and conducting negotiations with the Office of Management and Budget--and were using contractors to engage in lobbying, all in violation of the Federal Acquisition Regulations. Complaint, ¶¶ 104, 169.

Also in June 1996, a qui tam complaint pursuant to 31 U.S.C. §§ 3729 et seq., was filed under seal in U.S. District Court for the District of Columbia, Case No. 96-1258 (SS). Among the named defendants were Respondents The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. The qui tam action was originally assigned to the Honorable Charles R. Richey and, following his death, to the Honorable Stanley Sporkin. Hamilton has been apprised of the existence

of the qui tam action, but has not been advised of the nature of the allegations or of any other information concerning the qui tam, which remains under seal.[2]

In July 1996, the HUD OIG, at the request of the United States Attorney's Office, commenced an investigation of the allegations contained in the qui tam action and certain of the allegations in the Bivens action. In the nineteen months since the investigation began, the HUD OIG, in coordination with the United States Attorney's Office and other law enforcement entities, has conducted a methodical investigation in an effort to explore the many, complex allegations in both the Bivens and qui tam actions, as well as many related allegations that have arisen in the course of the investigation. These allegations concern the actions not only of Hamilton, but of numerous other entities and individuals. The investigation is aimed at finding the truth in these matters, thereby either refuting the allegations and putting them to rest, or developing evidence for potential administrative, civil, and/or criminal actions and remedies the United States might pursue.

Should the Court find it desirable, the OIG is prepared to submit to the Court, under seal and in camera, a sworn proffer of evidence developed to date and current areas of focus of the investigation, insofar as it relates to Hamilton.

B. Issuance of OIG Subpoenas Duces Tecum to Hamilton and OIG's Efforts to Obtain Compliance with the Subpoenas

To further the investigation, the OIG issued administrative subpoenas duces tecum to Hamilton on August 6, 1996, August 22, 1996, and October 24, 1997. Identical subpoenas (see

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[2] Following this Court's order on or about November 25, 1997, the seal in the qui tam action was lifted for the limited purpose of advising Respondents that they were named as defendants in this qui tam action. On or about December 1, 1997, former Assistant United States Attorney Barbara Van Gelder advised Hamilton's then attorneys, Jenner & Block, of the existence of the qui tam action naming their clients as defendants. See Martin Decl. at ¶ 23.

Exhs. 1-6 to Martin Decl.) were issued on each of these three dates to Respondents The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc., the two Hamilton corporate entities with which HUD contracted. Hamilton has not fully complied with any of the subpoenas, as modified.

1. The August 6 and 22, 1996 Subpoenas

a. The Production of Records

The August 1996 subpoenas were modified significantly as a result of discussions between the OIG and Hamilton's attorney, Steven Rosenthal of Morrison & Foerster during August - November, 1996.[3] Hamilton produced responsive records over an eleven-month period, from August 1996 until June 1997, claiming in numerous communications that it was unable to comply any sooner. See, e.g., Letter of November 12, 1996 from Steven S. Rosenthal to Judith Hetherton, Exh. 9 to Martin Decl.; Letter of January 14, 1997 from David A. Handzo to Judith Hetherton, Exh. 11 to Martin Decl.; Letter of March 14, 1997 from Judith Hetherton to David A. Handzo, Exh. 12 to Martin Decl.; and Letter of June 17, 1997 from David A. Handzo to Judith Hetherton, Exh. 13 to Martin Decl. Although it had promised to submit a certificate of compliance upon completion of the production, between June 17, 1997, and October 28, 1997, Hamilton did not forward to the OIG

[3] Jenner & Block represented Hamilton in this matter from August 8, 1996 until January 29, 1998. OIG was informed that Jenner & Block withdrew from all representation of Hamilton as of January 29, 1998, but might choose to represent former employees of Hamilton in this matter, if requested. See Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh.24 to Martin Decl. On February 13, 1998, OIG was informed that Jenner & Block now represents Russell Davis, who co-founded Hamilton with Ms. Fitts in 1991 and was, until recently, still associated with Hamilton. See Letter of February 13, 1998, from David A. Handzo to Judith Hetherton, Exh. 27 to Martin Decl. Morrison & Foerster also represented Hamilton in this matter from August 8, 1996 until November 14, 1996, when it withdrew. Apparently, Hamilton is now represented by Brand, Lowell & Ryan; the date of commencement of their representation of Hamilton is unknown to OIG. Brand, Lowell & Ryan has also stated that the firm represents Ms. Fitts individually.

either responsive records, a certification that it had fully complied with the four subpoenas, or an assertion of privileges regarding records that had not been produced under the subpoenas. See Letter of October 28, 1997, from Judith Hetherton to David A. Handzo, Exh. 14 to Martin Decl., at p. 1.

In the meantime, the OIG completed its review of the records produced and determined the production was incomplete. On October 28, 1997, the OIG wrote to Hamilton's then attorneys, Jenner & Block, to ascertain whether Hamilton believed that it had completed production, and specified the areas with respect to which the OIG believes Hamilton's compliance with the August 1996 subpoenas, as modified, was incomplete. See id. at pp. 1-2. Among the outstanding issues were (1) whether Hamilton had searched its word processing files and electronic records systems other than its electronic mail ("e-mail") systems for responsive records; (2) Hamilton's refusal to search any of the backup tapes of its e-mail and other electronic records systems for responsive records; and (3) Hamilton's failure to produce several other categories of records. The OIG requested that Hamilton complete its production and certify that it had done so. The OIG submitted proposed certificates of compliance for each of the Respondents. Id.

b. The Inadequacy of the Certification of Compliance

Eventually, on December 22, 1997, C. Austin Fitts, Chairman of Hamilton, submitted a letter stating that "to the best of [her] knowledge, information and belief," Hamilton had conducted a "diligent and reasonable good faith search" for all records responsive to the August 1996 subpoenas, and had produced all responsive records, with certain listed exceptions. Letter of December 22, 1997 from C. Austin Fitts to Judith Hetherton, Exh. 19 to Martin Decl., at p.1. Ms. Fitts, however, had no personal knowledge of the efforts to comply with the subpoenas and did not aver that she did. Indeed, OIG had been informed as early as November 1996 that Kevin McMahan, a Hamilton

employee who had just changed from being an employee to a "consultant" both to Hamilton and to Hamilton's law firms, Morrison & Foerster and Jenner & Block, was in charge of producing Hamilton records responsive to the subpoenas. See Letter of November 18, 1996 from Judith Hetherton to Steven Rosenthal, Exh. 10 to Martin Decl., at pp. 1-2.[4]

In November 1997, a month before Ms. Fitts made her "certification," Hamilton's attorney again confirmed that the search for responsive documents had been conducted for the most part by Mr. McMahan, and conceded that Ms. Fitts had no personal knowledge of the searches, review, and production. See Letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl. at p.10. In fact, Ms. Fitts' "certification" of compliance provided no information as to how the searches for responsive records were conducted, or by whom, and provided no information from which one could determine what her definitions of "diligent" and "reasonable good faith" might be. This is particularly significant given that OIG has reason to believe that the searches for responsive electronic records may have been conducted by creating "rules" that would locate only records in the electronic mail database containing certain "search criteria." See Memorandum of September 17, 1996, from Kevin McMahan to Judith Hetherton, Exh. 7 to Martin Decl., at p. 12; Letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 5-6. Since Ms. Fitts' certification does not disclose what "rules" and "search criteria" were

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[4] On February 5, 1998, David Handzo of Jenner & Block confirmed that Mr. McMahan "was a consultant, first to Morrison & Foerster, and then to Jenner & Block, with respect to the production of documents in response to the IG subpoenas." He further stated that since Jenner & Block no longer represented Hamilton, "Mr. McMahan will no longer be providing these consulting services to Jenner & Block," but that he was free to consult for Brand, Lowell & Ryan or for Hamilton. See Letter of February 5, 1998 from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 2.

used, OIG cannot assess whether the searches conducted actually would have retrieved all, or even most, of the responsive records.

Furthermore, although Hamilton claimed to be a "paperless" office, Ms. Fitts acknowledged in her "certification" that Hamilton had searched only part of one "drive" of its word processing files for responsive records, and abandoned the search of that one drive without completing it. Letter of December 22, 1997 from C. Austin Fitts to Judith Hetherton, Exh. 20 to Martin Decl., at p. 2. Ms. Fitts claimed that completing the search of that drive or searching any of the other drives would have been too time-consuming, expensive and burdensome, and opined that it was not necessary because any responsive electronic files probably would have been duplicated in Hamilton's paper files or attached to e-mails that had been produced. Id.; see also letters of November 26, 1997, December 22, 1997, and February 5, 1998, from David A. Handzo to Judith Hetherton, Exhs. 17, 21, and 24 to Martin Decl.[5] Ms. Fitts did not even claim that anyone had made a comparison between the records actually produced and the responsive electronic records not produced but "assumed" to have been duplicated in the produced files. Nor did Ms. Fitts specify whether the hard drives on the employees' computers (the "C: drives") or discs containing archived electronic records had been searched. Moreover, Ms. Fitts conceded that Hamilton had failed to search any of the backup tapes of its electronic records systems for responsive records not on its active system as of August 21, 1996.

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[5] Hamilton's attorney had earlier conceded that, with respect to Hamilton's electronic record systems other than e-mail, Hamilton had searched only part of one of the drives on its computer system, the "K:Drive," and had abandoned the search because Hamilton assumed that all the responsive records found in that directory "most likely would have been" attached to e-mail messages or been included in hard copy files otherwise provided to the OIG. See Letter of November 26, 1997, from David A. Handzo to Judith Hetherton, Exh.17 to Martin Decl., at pp. 2-4.

The failure to search the backup tapes, which date to as early as March 1996, is particularly significant given (1) Hamilton's policy of destroying e-mails in its active electronic message systems after 60 days,[6] and (2) a Hamilton directive issued on May 7, 1996--six days after HUD learned of Ervin & Associates' intention to file the Bivens action alleging contracting corruption and favoritism of Hamilton--that even archived e-mails should be deleted "at once" "[i]f you have any doubt whatsoever of the relevance of archived messages to our obligation as government contractors for document retention . . . ."[7]

Ms. Fitts also stated in her "certification" that no responsive documents had been withheld on the grounds of privilege. Letter of December 22, 1997 from C. Austin Fitts to Judith Hetherton, Exh. 20 to Martin Decl., at p. 2.

2. The October 24, 1997 Subpoenas

a. Records Sought

The OIG subpoenas issued on October 24, 1997, sought the production of five basic categories of records

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[6] Hamilton has conceded that it was its policy to destroy records in its active electronic message systems after 60 days. See discussion, infra, at pages 26 - 31.

[7] An internal Hamilton memorandum posted on Hamilton's Collabra electronic bulletin board on May 7, 1996, advised all users of one of Hamilton's two e-mail systems--cc:Mail--that messages they had archived, which would not be deleted under the 60-day destruction policy, should be reviewed to determine whether they should be kept. See Exh. 33 to Martin Decl. In determining whether to keep archived messages, the cc:Mail users were instructed: "If you have any doubt whatsoever of the relevance of archived messages to our obligation as government contractors for document retention, then you are asked to delete the archives at once." Id. This instruction was given to Hamilton employees just six days after Ervin & Associates had advised HUD, on May 1, 1996, of its intent to file the Bivens action, which would allege favoritism of Hamilton and corruption in HUD's contracting, and disclosure by Hamilton of material inside information to select bidders in HUD's note sales, enabling them to win huge blocks of notes at discounted prices. See Martin Decl. at ¶ 4.

(1) **records concerning HUD's note sales** (11 items)

-- records pertaining to the selection of the winning bidders for each mortgage sale (Item No. 1);

-- records pertaining to the "optimization model" Hamilton employed to select the bids resulting in the optimal return to HUD, and communications with Lucent Technologies, which ran the optimization model (Item Nos. 9, 10);

-- records pertaining to the development of or changes to bid selection procedures (Item No. 11);

-- records pertaining to communications with the Office of Management and Budget concerning the mortgage sales, credit subsidy, and/or any FHA legislative or regulatory initiative (Item No. 12),

-- minutes or notes of meetings regarding the mortgage sales (Item No. 13);

-- records pertaining to post-auction reviews of the note sales (Item No. 14);

-- Freedom of Information Act and other fact sheets concerning the mortgage sales (Item Nos. 15, 21);

-- records identifying the bidders at each mortgage sale (Item No. 16);

-- bid packages and agreements of bidders for all mortgage sales (Item No. 17);

(2) **records concerning Hamilton's role as financial advisor and contractor to HUD** (6 items):

-- records regarding any conflicts of interest of Hamilton and its subcontractors in their roles as HUD contractors (Item Nos. 2, 3);

-- records pertaining to Neighborhood Networks, a HUD program advocated by Hamilton (Item No. 7);

-- records showing Hamilton drafted requests for proposals, statements of work, and other HUD contract materials (Item No. 8);

-- Hamilton invoices and supporting documentation for claims made under Task Order 6 of Hamilton's first financial advisor contract with HUD (Item No. 18);

-- any insurance policies associated with Hamilton's contracts with HUD (Item No. 22);

(3) **records concerning Hamilton's relationships with certain persons and entities** (3 items):

-- records concerning certain of Hamilton's non-HUD business ventures, namely its relationships or agreements with e.villages, Edgewood Technology Services, Inc., Adelson Entertainment, Inc., and ICS Communications (Item No. 4);[8]

-- agreements between Hamilton and any bidder at any FHA note sale (Item No. 5);

-- communications with Kathryn Rock[9] about employment opportunities for Ms. Rock with HUD, Hamilton, or elsewhere (Item No. 6);

(4) **Hamilton's financial records, and personnel records** necessary to verify payroll journals, determine the validity of Hamilton's pricing and cost claims under HUD contracts, and the absence of any improper relationships with HUD officials or non-HUD business affiliations in conflict with HUD contract firms (Item No. 19), as follows:

-- Any and all Hamilton general ledgers, journals, and other books and records of original accounting entry (including, but not limited to, payroll journals and voucher registers), and supporting documentation, whether maintained by Hamilton or for the benefit of Hamilton, including but not limited to:

-- employee time sheets and labor cost distribution records;
-- personnel records;
-- travel vouchers, trip itineraries, meal and other expense reimbursement records;
-- records reflecting the use of company credit cards and expense accounts;

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[8] Edgewood Technology Services, Inc. and e.villages [sic] are business ventures of Hamilton which involved the provision of computers and computer-related training and employment services to low and moderate income persons.

[9] Kathryn Rock was hired as FHA Comptroller in October 1995. She was a procurement official on Hamilton's contracts with HUD and, since October 1996, was the lead program official on FHA's mortgage sales. See Martin Decl. at ¶ 15.

(5) **records describing or pertaining to Hamilton's electronic records and communications systems,** including policies for the maintenance, retention, and/or destruction of records (Item No. 20).

The categories of records sought were drawn, to the extent possible, to exclude all records produced in response to the previous subpoenas. To the extent some overlap in description was unavoidable, the subpoenas made clear that records already produced need not be produced again. See, e.g., Instruction No. 4, Exh. 5 to Martin Decl., at pp. 3-4.

b. **Failure to Produce Responsive Records**

Following service of the subpoenas, Hamilton's attorney, David A. Handzo of Jenner & Block, engaged in several conversations with the OIG concerning compliance with the subpoenas. On November 7, 1997, Mr. Handzo assured the OIG that "Hamilton intends to move as quickly as possible to comply with the subpoenas," and requested a meeting "to discuss how the process can be expedited." See Letter of November 7, 1997, from David A. Handzo to Judith Hetherton, Exh. 15 to Martin Decl., at p. 2. Mr. Handzo detailed the steps Hamilton was taking to locate both responsive paper and electronic files. Id. at pp. 1-3.

In a discussion on November 13, 1997, Mr. Handzo again made clear that there were electronic records, including e-mail communications, responsive to most of the items in the subpoenas, and that many of the items were contained only in electronic files. See Letter of December 22, 1997 from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 11-20. He also made numerous representations about particular categories of electronic and other responsive records that could and would be produced, including communications concerning potential conflicts of interest of BlackRock and possibly others (Item Nos. 2, 3); records concerning Hamilton's business relationships with e.villages, Adelson Entertainment and others (Item No. 4), which "should

not be a problem" to produce; records pertaining to the optimization model and communications with Lucent Technologies (Item Nos. 9, 10), which would be "no problem" and "fairly simple to do"; and certain of Hamilton's financial records. Id. However, almost none of these representations were followed through on.

Instead, although Hamilton is purportedly a mostly "paperless" environment, Hamilton made available for inspection at the offices of Jenner & Block some 102 boxes of records of mostly "paper" files, representing them to be "all of the paper files generated in connection with Hamilton's work for HUD, with the exception of financial records." See Letter of February 5, 1998 from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 4. Hamilton refused to identify records responsive to the OIG subpoenas, and essentially said, "Look through these boxes and maybe you'll find something responsive."

An additional twenty (20) boxes of records, which the OIG was originally told were also available for review, were withheld. The OIG was first told that these 20 boxes were being withheld because it was believed that they contained some privileged records; now, however, it is claimed that all the documents are "irrelevant." See Martin Decl. at ¶ 18 and Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Dec., at p. 4. No specific privilege claims have been asserted for these twenty boxes, and the change in Hamilton's position from claiming that they are "privileged" to claiming that they are "irrelevant" has not been explained.

The OIG spent nineteen (19) staff days reviewing the 102 boxes of paper files as they were made available, the first 101 boxes between November 18 and December 29, 1997, and the 102nd

box on February 10, 1998, when it was made available for the first time.[10] See letter of January 26, 1998, from Judith Hetherton to David A. Handzo, Exh. 22 to Martin Decl., at p. 1; Letter of February 6, 1998, from Judith Hetherton to David A. Handzo, Exh. 5 to Martin Decl., at p. 1. The OIG determined that the 102 boxes of "paper" files contained only some of the responsive records, mostly with respect to the eleven (11) items in category 1 above--records concerning HUD's note sales--and miscellaneous electronic discs which happened to be scattered among the paper files. Moreover, no paper files were located for many of the Hamilton employees who were intimately involved in the note sales, and only limited files were located for others. See Letter of December 22, 1997 from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp 11-12; Letter of January 26, 1998, from Judith Hetherton to David A. Handzo, Exh. 22 to Martin Decl., at pp. 1-2.

Hamilton's attorneys attributed the absence of paper records to two factors: (1) while Hamilton employees were told to preserve responsive records after the October 24, 1997 subpoenas were served, many individuals had left Hamilton in the succeeding weeks and no instructions were given to them on exit procedures, thus it was unknown whether they had taken records with them (see Martin Decl. at ¶ 22); and (2) OIG should not expect to find paper files for these individuals because Hamilton was, after all, a "paperless" office. See Letter of February 5, 1998 from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 4.

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[10] On February 5, 1998, the OIG was advised that an additional box of records had been "recently discovered" by Hamilton and was now available for review. See Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 4. This box was subsequently reviewed by OIG, and appears to contain the files of Hamilton co-founder, Russell Davis, who left Hamilton some time in the Fall of 1997. See Martin Decl. at ¶ 19. The circumstances of its "recent discovery" are unknown. As indicated in note 3, supra, Mr. Davis is now represented by Jenner & Block.

The OIG requested that certain pages of the records and all of the floppy discs scattered among the 102 boxes be produced to it. See Letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 11-12; Letter of January 26, 1998, from Judith Hetherton to David A. Handzo, Exh. 22 to Martin Decl., at p. 1. Most of the requested records were eventually produced to OIG, namely 4,047 pages of paper files from the initial 101 boxes produced, 210 pages from the 102nd box, and the electronic discs.[11] Certain of the records contained in the 102 boxes and already reviewed by the OIG are, however, now being withheld on the grounds of privilege, although no specific privilege claim has been properly asserted for these records. See Martin Decl. at ¶ 18 and Letter of February 15, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl. at p. 5. Indeed, it appears that any privilege that may once have existed has been waived by the prior disclosure to OIG.

Instead of following through on their previous representations and making a serious effort to comply with the October 24, 1997 subpoenas, on December 10, 1997, nine days after being apprised of the existence of the qui tam complaint naming Hamilton as a defendant (see note 1, supra), Hamilton's attorneys sent a letter to the United States Attorney's Office demanding that the investigation of Hamilton be terminated within two weeks. See letter of December 10, 1997, from Leslie H. Lepow and David A. Handzo to Barbara Van Gelder and Richard Chapman, Exh. 18 to Martin Decl. Thereafter, at a meeting on December 18, 1997, with Assistant United States Attorneys

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[11] A total of 708 computer "floppy" discs were provided in February 1998, 285 of which were contained in two of the 102 boxes of records produced, and another 423 of which were scattered among the other 100 boxes of paper files. See Martin Decl. at ¶ 21. These discs include originals and copies of bid discs submitted by bidders in several of HUD's note sales, as well as some of Hamilton's own electronic records. Id. The Hamilton discs appear to be miscellaneous items from various Hamilton employees, and do not represent a comprehensive, systematic download of information from Hamilton's electronic records systems. Id.

from both the Criminal and Civil Divisions, Mr. Handzo and Mr. Lepow were advised that the investigation would not be terminated, and that full compliance by Hamilton with the OIG subpoenas was required. See generally letters of December 22, 1997 and January 26, 1998 from Judith Hetherton to David A. Handzo, Exhs. 19 and 22 to Martin Decl.

On December 22, 1997, the OIG forwarded a letter to Messrs. Lepow and Handzo advising of the outstanding issues regarding compliance with both the August 1996 and the October 1997 subpoenas, stating that it would be seeking enforcement of the subpoenas if full compliance was not forthcoming, and extending the date for compliance with the October 1997 subpoenas until January 9, 1998. Jenner & Block did not respond to the letter of December 22, 1997, although they remained as Hamilton's attorneys until January 29, 1998

Instead, on January 8, 1998, Hamilton's new attorneys, Brand, Lowell & Ryan, filed a Motion for a Temporary Restraining Order and Preliminary Injunction, and a Complaint for Declaratory, Injunctive, Mandamus, and Other Relief, in The Hamilton Securities Group, Inc., et al. v. United States Department of Housing and Urban Development, et al., Civil Action No. 98-36 (SS), seeking, among other things, to restrain the OIG from enforcing the subpoenas.

In the ensuing litigation, Hamilton has acknowledged that its production of records responsive to the October 24, 1997 subpoenas has been incomplete, but now claims that, despite the previous promises and agreements of its counsel, it cannot comply with the subpoenas because it is "moribund," "winding up its affairs," and does not have the resources to comply. See, e.g., Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 5. Most recently, on March 2, 1998, R.L. Rasmus Auctioneers, Inc. advertised in the Washington Post an auction of Hamilton's business equipment, which is scheduled to occur on Tuesday, March 10,

1998 . Martin Decl. at ¶ 24 & Exhibit 37. This advertisement also indicates that the equipment to be sold at auction includes numerous computers and peripherals, which could contain data sought by the subpoenas.

Hamilton thus refuses (1) to conduct any search of its electronic records for items responsive to the subpoenas on the grounds of lack of resources; (2) to produce any of the financial records responsive to the subpoenas because they are now needed by Hamilton to "wind up" its affairs; (3) to produce any records, electronic or paper, concerning its non-HUD business ventures and relationships with certain individuals and entities, which OIG has reason to believe may well have conflicted with Hamilton's role as HUD's financial advisor, but which Hamilton deems irrelevant to the OIG's investigation; and (4) to produce various other records sought by the subpoenas. Furthermore, Hamilton has failed to provide meaningful assurance that it has complied with the August 1996 subpoenas, and has failed to properly assert any legitimate claims of privilege it may have, despite the fact that it is withholding documents on the grounds of privilege.

Full compliance with the OIG subpoenas duces tecum issued to Hamilton is essential to complete the HUD OIG's investigation. The OIG has a right to full compliance which, as set forth below, can be accomplished by the OIG reviewing the subpoenaed materials subject to certain safeguards so as not to infringe upon any legitimate claims of privilege that Hamilton possesses.

Argument

The general standards that determine the enforceability of an administrative subpoena are well established. The courts play a "strictly limited role" when they consider petitions for enforcement of administrative subpoenas. See Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank. Bd., 878 F.2d 875, 879 (5th Cir. 1989). In particular, courts will enforce an administrative subpoena if: (1)

the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome. See United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Sandsend Fin. Consultants, Ltd., 878 F.2d at 879; United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1145 (D.C. Cir. 1987) ("[a]s a general proposition, and investigative subpoena will be enforced if the 'evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose' of the agency" (citations omitted)); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986) (same standards applied with respect to Inspector General subpoenas); United States v. Sec. State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973). The OIG is clearly authorized to conduct its investigation because it pertains to a program or operation of HUD, i.e., HUD's mortgage sales program. Further, the OIG's subpoenas seek evidence reasonably related to the investigation from its principal financial advisor on the mortgage sales program. Finally, compliance with the subpoenas is not unduly burdensome because Hamilton is now "moribund," and the OIG will conduct the review of the subpoenaed materials in such a way as to preserve any legitimate claims of privilege that remain.

A. The Investigation and the Issuance of the Subpoenas Are Within the Inspector General's Statutory Authority

The Inspector General is required by Congress "to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [HUD]" and to "conduct, supervise, or coordinate other activities . . . for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations." 5 U.S.C. App. 3 § 4(a)(1), (3). Such audits, investigations, and other activities ensure economy,

efficiency, and the prevention and detection of fraud or abuse in HUD programs and operations, and may be undertaken if "in the judgment of the Inspector General, [they are] necessary or desirable." Id. at § 6(a)(2). See, e.g., United States v. Coopers & Lybrand, 550 F.2d 615, 619 (10th Cir. 1977) (broad investigative powers given by statute to administrative agency "are not derived from the judicial function and are 'more analogous to the Grand Jury'") (quoting Morton Salt Co., 338 U.S. at 642-43); SEC v. First Security Bank of Utah, 447 F.2d 166, 168 (10th Cir. 1971) (same), cert. denied, 404 U.S. 1038 (1972). Thus, an Inspector General may undertake an audit, investigation, or other activity "'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" Sandsend Fin. Consultants, Ltd., 878 F.2d at 882 (quoting Morton Salt Co., 338 U.S. at 642).

The Inspector General Act of 1978 also grants authority to an Inspector General to require by administrative subpoena the production of records "necessary in the performance of the functions assigned by [the] Act," and provides that "in the case of contumacy or refusal to obey, [the subpoena] shall be enforceable by order of any appropriate United States district court." 5 U.S.C. App. 3 § (6)(a)(4). An Inspector General's subpoena power extends to all records "necessary in the performance of the functions assigned by [the] Act." 5 U.S.C. App 3 § 6(a)(4). It has been observed that "[p]erhaps the Inspector General's most important tool for ferreting out waste, fraud, and abuse is the extensive subpoena power created by Congress to aid his investigations." United States v. Aero-Mayflower Transit Co., 646 F. Supp. 1467, 1472 (D.D.C. 1986), aff'd, 831 F.2d 1142 (D.C. Cir. 1987). "Congress considered this subpoena power 'absolutely essential to the discharge of the [Inspector General's] functions.'" Id. (quoting S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 2676, 2709). Indeed, an Inspector General could

have no serious impact on the way Federal funds are expended "[w]ithout the power to conduct a comprehensive audit" of private institutions involved in the receipt of funds from Federal programs. Id.; see also United States v. Teeven, 745 F. Supp. 220, 224 n.6 (D. Del. 1990) (recognizing Inspector General's need "to have compelled access to the records of recipients of federal funds to ensure that fraud and abuse could be detected"). For these reasons, "a constricted interpretation [of the subpoena authority] would be at odds with the broad powers conferred on the Inspector General by the statute." Westinghouse Elec. Corp., 788 F.2d at 170; see also United States v. Medic House, Inc., 736 F. Supp. 1531, 1535 (W.D. Mo. 1989).

In the instant case, the OIG has undertaken an investigation of, among other things, the allegations contained in the Bivens action described above, including allegations of corruption and favoritism towards contractors, and bid-rigging within HUD's note sales program. Such an investigation is clearly within the authority of OIG because it relates to the programs of HUD, namely, HUD's mortgage insurance program. See 5 U.S.C. App. 3 § 4(a)(1). Given these circumstances, the conclusion is inescapable that the investigation and issuance of the subpoenas are well within the statutory authority granted to the Inspector General by 5 U.S.C. App. 3 §§ 4(a)(1), 6(a)(1), (2) and (4).

As noted above, should the Court find it desirable, the OIG is prepared to submit to the Court, under seal and in camera, a sworn proffer of evidence developed to date and current areas of focus of the investigation, insofar as it relates to Hamilton

B. The Information Sought by the Subpoenas Is Reasonably Relevant to the Inspector General's Investigation

The records sought by the subpoenas are relevant to the OIG's investigation. Relevance is defined extremely liberally with respect to administrative subpoenas. So long as the material requested "touches a matter under investigation," an administrative subpoena will survive a relevancy challenge. Sandsend Fin. Consultants, Ltd., 878 F.2d at 882 (quoting Equal Employment Opportunity Comm'n v. Elrod, 674 F.2d 601, 613 (7th Cir. 1982)). Moreover, an "agency's appraisal of relevancy . . . 'must be accepted so long as it is not obviously wrong.'" In re McVane, 44 F.3d 1127, 1135 (2d Cir. 1995) (quoting Resolution Trust Corp. v. Walde, 18 F.2d 943, 946 (D.C. Cir. 1994)).

The records sought here undoubtedly "touch" the matters at issue in the investigation (e.g., allegations of, among other things, favoritism towards contractors, bid-rigging within HUD's mortgage sales program, and possible conflicts of interest). With respect to the October 24, 1997 subpoenas, the records sought include: records concerning HUD's note sales (Item Nos. 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 21); records concerning Hamilton's role as financial advisor and contractor to HUD, including possible conflicts of interest by Hamilton and its subcontractors (Item Nos. 2, 3, 7, 8, 18, 22[12]); records concerning certain of Hamilton's relationships which may have created conflicts for it in its role as financial advisor to HUD (Item Nos. 4 and 5); communications with the HUD FHA comptroller about employment opportunities for her (Item No. 6); Hamilton's financial records, including all general ledgers and journals, travel and expense account records, and personnel records necessary to verify payroll journals, pricing and cost claims as well as the absence of improper

[12] The OIG believes that item No. 22, which seeks Hamilton's insurance policy(ies), is the only item from the October 24, 1997 subpoenas with which there has been full compliance.

gratuities or conflicts with HUD officials and financial market participants relating to HUD contractors (Item No. 19); and records describing or pertaining to Hamilton's electronic records and communications systems, including policies for the maintenance, retention, and/or destruction of records (Item No. 20).[13]

Should the Court find it desirable, the OIG is prepared to submit to the Court, under seal and in camera, additional information to specify in greater detail the relevance to the investigation of the various categories of records sought.

C. **The Subpoenas Are Not Unreasonably Broad or Burdensome**

After initially agreeing to produce many of the categories of records sought, Hamilton now says it is unable to comply with the subpoenas because it is going out of business, lacks resources, and thus the subpoenas are unduly burdensome. It is well settled that the burden of showing that the demand is unreasonable is on the subpoenaed party. See Powell, 379 U.S. at 58; Federal Trade Comm'n v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977). Where the agency inquiry "is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). Indeed, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." Texaco, Inc., 555 F.2d at 882; see also Aero-Mayflower Transit Co., 646 F. Supp. at 1472 (burden

[13] With respect to the August 6 and 22, 1996 subpoenas, as modified, Hamilton has never claimed that the categories of records sought by those subpoenas do not concern legitimate areas of inquiry for the OIG, or that all responsive electronic records have been produced. Rather, Hamilton claims that it would be too burdensome for it to search the various computer drives and the backup tapes to locate additional responsive records.

must be such as to "cripple their business" in order for compliance to be excused); Adams v. Federal Trade Comm'n, 206 F.2d 861, 867 (8th Cir. 1961) ("broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant"). Moreover, when a company chooses an electronic records system, it cannot be heard to complain that the difficulty or cost of retrieving records responsive to an appropriate legal demand for its records should excuse it from compliance on the grounds of undue burden; the necessity for a retrieval program or method is an ordinary and foreseeable risk of the choice of the electronic records system. See, e.g., In re: Brand Name Prescription Drugs Antitrust Litigation, 1995 U.S. Dist LEXIS 8281, N.D. Ill. (June 13, 1995).

The subpoenas are reasonably focused on materials at the center of the OIG's investigation, namely, allegations of, among other things, favoritism towards contractors, conflicts of interest, and bid-rigging within HUD's mortgage sales program. There are essentially four categories of responsive records at issue here: (1) electronic records, including e-mail, word processing files, and certain other electronic records; (2) financial records and supporting documentation, including relevant personnel records; (3) records concerning Hamilton's non-HUD business ventures and potential conflicts of interest Hamilton had in its role as financial advisor to HUD; and (4) certain miscellaneous records, including the originals of records produced as copies. With respect to the first two categories, the issues are easily resolved and require virtually no action by Hamilton. With respect to the third and fourth categories, Hamilton does need to identify the appropriate hard copy files or take other action, but this should be relatively easy and no undue burden; in fact, it may already have been done. Finally, Hamilton should be directed to submit a proper certificate of compliance, by a person with

knowledge of the searches conducted, and to make a proper assertion of privilege for documents claimed to be privileged but for which no privilege list has been submitted.

1. Hamilton's Electronic Records Systems and Backup Tapes

Hamilton has prided itself on being a "paperless" office; thus, the bulk of its records are in electronic format. According to information Hamilton provided to OIG in September 1996, Hamilton then had nine separate electronic records systems. Hamilton had three electronic message systems: Lotus cc:Mail (its communication link with HUD), Novell GroupWise, and Collabra Share, an electronic bulletin board where messages and information can be posted by topic. Hamilton also had the five following Microsoft software products: WORD (a word processing system), EXCEL, ACCESS, POWERPOINT, and PROJECT. Finally, Hamilton used Optus FACSys, a computer-based facsimile software package. See Exhs. 7 and 34 to Martin Decl.

Hamilton employees also had home office computer systems, and apparently used other electronic mail systems (e.g., America Online, MCI Mail) to communicate from their home computers with respect to Hamilton and HUD business matters. See Exh. 31 to Martin Decl.; see also Letter of November 26, 1997, from David A. Handzo to Judith Hetherton, Exh. 17 to Martin Decl., at p. 2. Hamilton at least planned to require that electronic records related to Hamilton business, residing off-site in these systems, be stored in an explicitly marked subdirectory called "HSG," with subdirectories corresponding to subsidiary organizations. See Exh. 31 to Martin Decl.

In creating this "paperless" office, Hamilton apparently intended to implement a document management and archival system to facilitate tasks such as document retrieval and deletion, but had not done so as of the time the OIG subpoenas were served in August 1996. See Exh. 34 to Martin Decl. Nevertheless, Hamilton had what it termed a "de facto" system for deleting messages on a

regular basis in its two electronic mail systems. Id. In cc:Mail, electronic mail messages older than 60 days were deleted on a weekly basis, but this deletion did not affect messages that had been archived, and the deletion process itself was occasionally suspended. Id. In Novell GroupWise, messages older than 60 days were deleted automatically by software. Id. In Hamilton's other electronic records systems, there was no uniform deletion policy. Id

Hamilton backed up its computer systems on a regular basis, and apparently also may have offloaded documents or files not needed to external storage or for permanent archival. See Exhs. 7 and 34 to Martin Decl. A full backup of the entire computer network, with the exception of the electronic message systems (cc:Mail, Collabra, and GroupWise), was done on a weekly basis, apparently on Sunday nights. See Letter of September 27, 1996 from Steven Rosenthal to Judith Hetherton, Exh. 8 to Martin Decl., at p. 7. A partial or "differential" backup of the entire system, which included a "snapshot" of existing cc:Mail, Collabra and GroupWise, as well as changes to or the addition of electronic documents on Hamilton's other software systems included in the previous full backup, was done on a daily basis. Id. It was apparently anticipated that each tape in the backup cycle would be over-written after three weeks, but this policy was not uniformly followed. See Exh. 34 to Martin Decl. at p. 1.

Hamilton has acknowledged, through its attorneys, that it possesses at least eight (8) full and thirty-two (32) differential backup tapes of its electronic records systems containing records responsive to the OIG subpoenas, as follows:

Full backup tapes (for 8 separate dates):

1996 --
June 16-17
July 21-22

July 28-29
August 18-19
August 25-26

1997 --

September 14-15
September 28-29
October 19-20

Differential backup tapes (for 32 separate dates):

1996 --

March 7
July 13, 23, 25, 26, 27, 29, 30, and 31
August 1, 2, 3, 4, 6, 7, 8, 12, 14, 16, 17, 20, 21, 22, 23, 24, 27, and 28

1997 --

October 21, 22, 23, 24, and 25

See Letter of September 27, 1996, from Steven Rosenthal to Judith Hetherton, Exh. 8 to Martin Decl., at pp. 7-8; Letter of February 17, 1998, from David A. Handzo to Judith Hetherton, Exh. 28 to Martin Decl. at p. 2.

The current location of the original backup tapes is unknown. Hamilton's former attorneys, Jenner & Block, have advised OIG that they possess certain backup tapes, but have declined to respond to inquiries whether the backup tapes currently in their possession are the originals, and when they came into possession of the tapes. See Letter of February 6, 1998, from Judith Hetherton to David A. Handzo, Exh. 25 to Martin Decl., at pp. 2-3; Letter of February 17, 1998 from David A. Handzo to Judith Hetherton, Exh. 28 to Martin Decl., at p. 2.

Conspicuously missing from the list of tapes in Jenner & Block's possession is the first full backup tape, for June 16-17, 1996, which Hamilton's attorneys previously had represented to be the

earliest complete backup tape available.[14] See Letter of September 27, 1996, from Steven Rosenthal to Judith Hetherton, Exh. 8 to Martin Decl., at p. 8; Memorandum of September 17, 1996, from Kevin McMahan to Judith Hetherton, Exh. 7 to Martin Decl., at p. 10. Moreover, in describing the backup tapes in Jenner & Block's possession, Mr. Handzo has cautioned that his "information about the contents of these tapes is anecdotal, however, and has not been independently verified." Letter of February 17, 1998, from David A. Handzo to Judith Hetherton, Exh. 28 to Martin Decl., at p. 2.

The OIG has reason to believe that the backup tapes contain records that are responsive to the OIG subpoenas and that have not already been produced. Indeed, Hamilton concedes as much. Hamilton has acknowledged that it has done no searches for electronic records responsive to the October 24, 1997 subpoenas, and it admits that it has never searched the backup tapes for records responsive to either the August 1996 or the October 1997 subpoenas. Hamilton's only reasons for not producing the backup tapes to the OIG at this point are its claims that the backup tapes also contain (1) communications that are attorney-client privileged, and (2) "confidential business information unrelated to Hamilton's work for HUD." See Letters of November 7, 1997, November 25, 1997, December 22, 1997, and February 5, 1998, from David A. Handzo to Judith Hetherton, Exhs. 15, 16, 21, and 24 to Martin Decl.

The OIG has offered a solution to Hamilton's claims of attorney-client privilege, which Hamilton has said is acceptable, but Hamilton has never proceeded to the next step to implement this

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[14] The location of the original backup tapes and the apparently missing backup tape for June 16-17, 1996, are of particular concern to the OIG because of indications in a Hamilton document produced by Jenner & Block in December 1997 that Hamilton had set up an "offsite e-mail production unit," had moved or was considering moving the back-up tapes "offsite," and was mulling over the question of "who owns [the] K drive," all apparently in anticipation of a possible bankruptcy filing. See Letter of January 29, 1998, from Judith Hetherton to David A. Handzo, Exh. 23 to Martin Decl., at p. 4; see also Exh. 36 to Martin Decl.

solution. The OIG has asked Hamilton to identify the attorneys with whom it had confidential attorney-client communications that would be privileged as to HUD and that are contained in either electronic mail communications or word processing files on the backup tapes. See letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at p. 6. The OIG has stated that it would arrange to have the original backup tapes reviewed by a third party, probably a technical expert, who would redact the privileged communications, based on the identifying information submitted by Hamilton, and provide a redacted copy of the tapes to OIG for its review. Id. In order to identify the appropriate technical expert, OIG requested technical information about the backup tapes, which Hamilton's attorney agreed to provide. Id. The OIG also requested a list of the names and e-mail addresses of all persons with whom Hamilton had attorney-client communications that were privileged as against HUD. Id. In this regard, Hamilton presumably had communications with attorneys who were subcontractors to HUD, about HUD business, and such communications would not be privileged as against HUD.[15] Thus, Hamilton should identify as privileged only those attorney-client communications that were not with HUD subcontractors about HUD business.

Hamilton has thus far insisted that it would not produce the backup tapes unless the OIG also agreed that "confidential business information unrelated to Hamilton's work for HUD" would be redacted before the tapes were provided to OIG. Hamilton does not claim any privilege here. Rather, it asserts that this business information is Hamilton's "intellectual capital" and must not be

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[15] We note that Hamilton has repeatedly stated that HUD has been its only client since January 1996, and undoubtedly many if not most of the communications on its backup tapes originated during the past two years and concern HUD business.

disclosed to its competitors lest its value evaporate. See Letter of February 17, 1998, from Judith Hetherton to David E. Frulla, Exh. 29 to Martin Decl., at p. 4. Hamilton, of course, has represented to this Court that it is "moribund," "winding up its affairs," and considering filing for protection from its creditors under the bankruptcy laws. To whom the "intellectual capital" will ultimately belong has not been determined.

In any event, the OIG has a legitimate investigative interest in Hamilton's non-HUD business ventures insofar as they evidence conflicts of interest, which the OIG has reason to believe Hamilton may have had in its role as HUD's financial advisor. The OIG has no interest in disclosing evidence of Hamilton's non-HUD business ventures except as may be necessary to further the OIG's legitimate investigative interests. Accordingly, the OIG has offered to subject itself to a protective order that would safeguard any legitimate concerns of Hamilton about disclosure of "confidential business information" to its competitors, while permitting the OIG to use evidence recovered from the backup tapes to further its legitimate investigative interests. See id. This should satisfy Hamilton's concerns. Hamilton's attorneys, however, have failed to respond to the OIG's offer.

In addition to the backup tapes, of course, Hamilton should be required to produce any computer discs or other tangible archives of data, as well as data from the hard drives of the individual computers used by its employees. In this connection, the proposed public auction of Hamilton's business equipment, which is currently scheduled to take place on March 10, 1998, will apparently include numerous computers and and peripherals which may contain electornic records responsive to the subpoenas. See Martin Decl. at ¶ 24 & Exhibit 37.

2. **Hamilton's Financial Records and Supporting Documentation**

Item No. 19 of the October 24, 1997 subpoenas seeks certain Hamilton financial records, including general ledgers, journals, other books and records of original accounting entry (including payroll journals and voucher registers), and supporting documentation, including but not limited to employee time sheets, labor cost distribution record, personnel records, travel vouchers, trip itineraries, meal and other expense reimbursement records, and records reflecting the use of company credit cards and expense accounts. See Exhs. 5-6 to Martin Decl., at Item No. 19. On November 25, 1997, Hamilton advised that it would produce the financial records, asking only that the production be done on site at Hamilton because Hamilton needed the records for its ongoing business operations as well as a then-anticipated audit by the Defense Contracting Audit Agency ("DCAA"), and did not have the resources to copy all of the records. See Letter of November 25, 1997, from David A. Handzo to Judith Hetherton, Exh. 16 to Martin Decl., at p. 2. Accordingly, Hamilton proposed that OIG senior auditor James Martin meet with Hamilton's Chief Financial Officer, Brian Dietz, "to come up with a plan which provides access to those financial records which will not hamper Hamilton's ability to conduct its normal business operations." Id.

Mr. Martin did meet with Mr. Dietz at Hamilton's office on December 5, 1997, to make arrangements to review the financial records. See Letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 18-19. He advised Mr. Dietz that the DCAA audit had been canceled. Mr. Dietz indicated that responsive financial records for 1996 and 1997 were on site at Hamilton's offices, but that records for 1993 through 1995 were in storage at Iron Mountain. Id. Mr. Martin requested that Hamilton retrieve the files from Iron Mountain and stated that OIG would review all the financial records together at the offices of Hamilton or Jenner

& Block. Id. Mr. Martin specifically advised that OIG needed access to non-HUD financial activities of Hamilton, which is a matter of routine when assessing the reasonableness of cost, and because the OIG was investigating possible conflicts of interest that Hamilton had in its work with HUD. Id.

Hamilton has not yet made the financial records available for review by OIG. On February 5, 1998, Hamilton's former attorney advised that "[t]o the extent that an agreement was reached, the financial records remain available at Hamilton." Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 5. The OIG advised that it would review the records on February 11, 1998, at Hamilton. See Letter of February 6, 1998, from Judith Hetherton to David A. Handzo, Exh. 25 to Martin Decl. at p. 3. On February 10, 1998, however, Hamilton's new attorney "postponed" the review, advising that, "with Hamilton's demise" it was "difficult to ensure former employee availability" to assist in the review on February 11. Letter of February 10, 1998, from David E. Frulla to Daniel Van Horn, Exh.26 to Martin Decl., at p. 1. Mr. Frulla promised "to find another mutually agreeable date promptly," and asked whether the OIG could provide "a more particularized request for the information that is sought," noting that the records were also needed by those seeking to "to wind down Hamilton's affairs." Id.

On February 17, 1998, having heard nothing further from Hamilton's attorney on the arrangements for the review of the financial records, the OIG advised Mr. Frulla that it saw "no reason why providing the OIG with access to these records should interfere with the need of Hamilton's business counsel and/or Mr. Dietz in winding up Hamilton's affairs." Letter of February 17, 1998, from Judith Hetherton to David E. Frulla, Exh. 29 to Martin Decl., at p. 3. The OIG indicated it was "perfectly willing to review the records on site at Hamilton, or at the offices of Hamilton's business counsel." Id. The OIG requested the identity of the attorney(s) representing

Hamilton with respect to "business" matters and matters involved in the determination whether to file for protection under the bankruptcy laws. Id. The OIG stated that it understood that the financial records were substantial, and it was "sure that accommodations can be made in the review of the records so that both parties do not need to look at precisely the same records at the same time." Id. The OIG noted that Mr. Frulla had that same day inquired of Assistant United States Attorney Van Horn "if the OIG would mind if someone else were present while the OIG reviewed the records, in order to ensure the security of the records." Id. The OIG stated that Mr. Frulla need not "be concerned about the security of the records while OIG is reviewing them. Nevertheless, OIG has no objection to someone from Hamilton or Hamilton's attorney's office being present while OIG reviews the financial records." Id. Hamilton has not responded to this letter, identified its "business" or bankruptcy counsel, or set a new date for the OIG to review the financial records.

The OIG has endeavored to accommodate any legitimate, ongoing need Hamilton may have for the subpoenaed records so as not to create an undue burden upon Hamilton, but Hamilton has failed utterly to cooperate, claiming that the records are needed by those seeking to "wind down its affairs." In truth, only a small subset of the financial records under subpoena can be required for this "winding down" process. Hamilton's refusal to permit review of the historical financial records, and to even identify its counsel for business matters and any anticipated bankruptcy filing, raises grave concerns about the continuing integrity of the records.

3. Records Concerning Hamilton's Non-HUD Business Ventures and Potential Conflicts of Interest in Its Role as Financial Advisor to HUD

The OIG subpoenas of October 24, 1997, seek records concerning Hamilton's role as financial advisor and contractor to HUD, including possible conflicts of interest by Hamilton and its

subcontractors (Item Nos. 2 and 3); records concerning certain of Hamilton's non-HUD business ventures which may have created conflicts for it in its role as financial advisor to HUD (Item Nos. 4 and 5); and communications with the HUD FHA comptroller about employment opportunities for her (Item No. 6). Hamilton has declined to conduct a search for records responsive to these categories in the October 24, 1997 subpoenas, citing its lack of resources.[16]

Hamilton's backup tapes assuredly contain electronic records responsive to these categories, and the OIG itself can search for those records when the backup tapes are produced to it. In addition to responsive electronic records, however, there may be responsive hard copy "paper" files. Hamilton, however, has produced only paper files concerning its "HUD business." But records responsive to these categories are unlikely to be located in files relating to HUD business. For example, Item No. 4 of the October 24, 1997 subpoenas specifically calls for records concerning Hamilton's private business ventures with Adelson Entertainment, Inc., ICS Communications, e.villages, and Edgewood Technology Services, Inc. Moreover, records concerning potential conflicts of interest of Hamilton and its subcontractors--Item Nos. 2 and 3--may not have been filed with Hamilton's HUD records, but rather elsewhere. Further, with respect to Item No. 6, concerning contacts with FHA Comptroller Kathryn Rock about employment opportunities, those records would most likely be in personnel records, which have not been produced to OIG.

Searching for the hard copy files responsive to Item Nos. 2-6 in the October 24, 1997 subpoenas can hardly be said to constitute an undue burden on Hamilton. In fact, it is possible that these records have already been identified and isolated, but not produced because Hamilton deems

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[16] Of course, as discussed above, Hamilton has also claimed that records concerning non-HUD business constitute Hamilton's "intellectual capital," which must be protected from disclosure to competitors.

them "irrelevant" to the OIG's investigation, or for some other reason. Indeed, Mr. Handzo indicated in a telephone conversation of November 13, 1997, that he had been advised there were records responsive to Item Nos. 2 and 3, and that production of records responsive to Item No. 4 "should not be a problem." See letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 13-14. Should Hamilton nevertheless refuse to produce or search for Item Nos. 2-6, the OIG is willing to undertake to locate the items itself in the files of Hamilton.

4. Miscellaneous Records

Directing Hamilton to produce the following records responsive to the OIG subpoenas should constitute no undue burden.

a. Records Responsive to Item No. 4.a. of the Subpoena of August 6, 1996: Communications with All Bidders

Item No. 4.a. of the subpoena of August 6, 1996, as modified, requires the production by Hamilton, with respect to the first HUD FHA single family loan sale, of "any and all communications with bidders between the closing of bids on October 25, 1995 and November 10, 1995 . . . ." See proposed certificate of compliance enclosed with letter of October 28, 1997, from Judith Hetherton to David A. Handzo, Exh. 14 to Martin Decl. Hamilton has repeatedly construed this item as calling for something less than it actually does. First, Hamilton construed it as requiring communications only with winning bidders, and said it had complied. See Letter of November 12, 1996, from Steven Rosenthal to Judith Hetherton, Exh. 9 to Martin Decl., at p. 1. When Hamilton was advised that the item required production of communications with all bidders, not just winning bidders, see Letter of October 28, 1997, from Judith Hetherton to David A. Handzo, Exh. 14 to Martin Decl., at p. 6, it acknowledged that it had searched only for communications with winning bidders, and accordingly

would undertake a search for responsive communications with unsuccessful bidders as well. See Letter of November 26, 1997, from David A. Handzo to Judith Hetherton, Exh. 17 to Martin Decl., at p. 3. When Hamilton again addressed this item, however, it stated that "no e-mail to or from unsuccessful bidders was found." See Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 2.

The item, however, does not call for just "e-mail." It calls for any and all "communications," which term encompasses the full range of means by which people communicate with one another, not just e-mail. Accordingly, the OIG requests that the Court order Hamilton to produce records or any communications (by any means whatsoever) with any bidders in HUD FHA's first single family mortgage note sale between the closing of bids on October 25, 1995 and November 10, 1995.

b. Originals of Records Responsive to August 6 and 22, 1996 Subpoenas

The August 6 and 22, 1996 subpoenas called for the production of original records, but provided that "legible, true and complete copies of the originals will be accepted in place of originals, provided that you make the original records available for inspection by representatives of the Office of Inspector General, upon request, during normal business hours." In producing responsive records, Hamilton provided copies, maintaining the originals. The OIG now requests the production of the originals of the documents that previously were produced in the form of copies.[17]

Hamilton has indicated that it is "moribund," and winding down its affairs. At this point, the originals of certain of the records responsive to the OIG subpoenas are in the possession of

[17] In contrast to the August 6 and 22, 1996 subpoenas, the October 24, 1997 subpoenas called for the production of original records. The OIG is separately filing a motion requesting that the Court order Hamilton immediately to deposit with the Court the originals of all records responsive to all the subpoenas, pending a ruling by the Court on the OIG's motion to enforce the subpoenas.

Hamilton's former attorneys, Jenner & Block (see Letter of February 17, 1998, from David A. Handzo to Judith Hetherton, Exh. 28 to Martin Decl., at p. 1); others are apparently located at Hamilton's offices (id., at p. 2); and yet others (including, possibly, the originals of the backup tapes) may be at some other "offsite" location(s). Hamilton's current attorneys advised the Court at the hearing in a related matter on February 18, 1998, that it is not at all clear that Hamilton will petition for protection from its creditors under the bankruptcy laws. The OIG is concerned that at any moment Hamilton may declare its total demise, and take no further responsibility for preservation of the originals of the responsive records. Moreover, given the current dispersal of the records and Hamilton's failure to comply with the subpoenas, the OIG has no confidence that the integrity of the records in Hamilton's possession is being safeguarded. Further, Hamilton's former attorneys, Jenner & Block, have indicated that if their former client instructs them to transfer the records in Jenner & Block's possession elsewhere, they will do so, although they have promised to give the OIG three business days' notice of such a request. Id., at p. 1.

Under the circumstances, the OIG requests that the Court direct Hamilton to produce to the OIG the originals of all documents and records responsive to the OIG subpoenas issued on August 6 and 22, 1996, as modified and clarified. This should cause no undue burden on the "moribund" Hamilton.

c. Records Pertaining to Hamilton's Electronic Records Systems

Item No. 20 of the subpoenas of October 24, 1997, called for the production of "[a]ny and all documents and records describing or pertaining to any and all electronic record or communications systems at Hamilton, including but not limited to policy(ies) for the maintenance, retention, and/or destruction of records on such systems." See, e.g., Exh. 5 to Martin Decl., at p. 9. Hamilton has

produced some records that fall into this category, but that production was voluntary and prior to a subpoena being issued for the information. Accordingly, the OIG has no assurance that the records it has received on this topic are the only records responsive to this item. Moreover, Mr. Handzo has advised that there are responsive attorney-client privileged communications, see Letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at p. 19, but no specific claim of privilege has been submitted. Requiring production of records responsive to this item and the proper assertion of any applicable privileges should cause no undue burden on Hamilton.

5. **Submission of a Proper Certificate of Compliance**

As detailed above (see pages 8 -11 supra), the OIG believes Ms. Fitts' letter certifying to Hamilton's compliance with the August 6 and 22, 1996 subpoenas is deficient in numerous respects. Accordingly, the OIG requests that the Court order Hamilton to submit an appropriate certificate of compliance, by an individual with personal knowledge of the searches conducted, stating under penalty of perjury that Hamilton has fully complied with the subpoenas as modified. Submitting a proper certificate of compliance by an informed person should not create an undue burden. Indeed, Mr. McMahan, who was in charge of the production as both a consultant to Hamilton, his immediate former employer, and to its law firms, is apparently available to do so. See note 4, supra.

6. **Submission of a Proper Claim of Privilege**

Hamilton is admittedly withholding, on the grounds of privilege, documents that are responsive to the OIG subpoenas. See Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 5. Despite assurance that a privilege index would be submitted, see id., none has been. The OIG requests that the Court order Hamilton to submit a proper claim of privilege, furnishing a written statement identifying each and every document and

record that is being withheld from production on the grounds of privilege (or otherwise) by date, author(s), addressee(s), each recipient, subject matter(s), and number of pages, and detailing the reason(s) for withholding the document with sufficient specificity to enable this Court to determine the validity of the claim. Cf. Fed. R. Civ. P. 26(b)(5). This should cause no undue burden on Hamilton. Indeed, although Jenner & Block ceased representing Hamilton on January 29, 1998, Mr. Handzo advised on February 5, 1998 that he was intending to submit a privilege index. See Letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 24 to Martin Decl., at p. 5.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that her Petition For Summary Enforcement be granted.

Respectfully submitted,

Wilma A. Lewis

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Summary Enforcement of Administrative Subpoenas, together with the accompanying memorandum of points and authorities, the supporting declaration of James M. Martin, and the attached proposed Order, was served on March 3, 1998, by hand delivering copies thereof to the Respondents and to the following counsel:

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EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE HAMILTON SECURITIES GROUP, INC.
802 Rhode Island Avenue, N.E.
Washington, D.C. 20002

and

HAMILTON SECURITIES ADVISORY SERVICES, INC.
802 Rhode Island Avenue, N.E.
Washington, D.C. 20002

Plaintiffs,

v.

ERVIN AND ASSOCIATES, INCORPORATED
7315 Wisconsin Avenue
Suite 1150 West
Bethesda, Maryland 20814,

SERVE: Prentice Hall Corporation
System Maryland
11 East Chase Street
Baltimore, MD 21202
[Registered Agent]

and

JOHN H. ERVIN
7315 Wisconsin Avenue
Suite 1150 West
Bethesda, Maryland 20814,

Defendants.

99-0003864

Civil Action No. _____

COMPLAINT

I. INTRODUCTION

1. This action is brought by former United States Department of Housing and Urban Development ("HUD") business and financial advisors The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively,

TAB 1

"Hamilton") against HUD contractor Ervin and Associates, Incorporated, and its principal, John H. Ervin (collectively, "Ervin"). This dispute arises out of the strategic lawsuits brought by Hamilton's competitor, Ervin, for the wrongful and tortious purposes of causing the cancellation of Hamilton's financial advisor contract with HUD and the elimination of Hamilton as a future competitor, and to cause HUD to cease its loan sales program.

II. JURISDICTION AND VENUE

2. The subject matter jurisdiction of this Court is invoked pursuant to the provisions of D.C. Code Annotated, 1981 edition, *as amended*, Sec. 11-921(a).

3. Personal jurisdiction is invoked pursuant to the provisions of D.C. Code Annotated, 1981 edition, *as amended*, Sec. 13-334 and 13-423(a).

III. THE PARTIES

4. Plaintiff The Hamilton Securities Group, Inc. ("HSG") is a Delaware corporation with its principal place of business in Washington D.C. HSG provides investment banking and other financial advisory services to its clients. HSG served as HUD's financial advisor and helped, with its subsidiary Hamilton Securities Advisory Services, Inc., to design and implement an $11 billion loan sale program and advised on portfolio strategy and national housing reform policies.

5. Plaintiff Hamilton Securities Advisory Services, Inc. ("HSAC") is a Delaware corporation and subsidiary of HSG with its principal place of business in Washington D.C. HSAC provides investment banking and other financial advisory services to its clients, and helped design the loan sale program referenced herein.

6. Defendant Ervin and Associates, Incorporated, is a Delaware corporation with its principal place of business in Bethesda, Maryland. At all times relevant to

this Complaint, Ervin and Associates, Incorporated was a competitor of Hamilton in efforts to solicit contracts from HUD.

7. Defendant John H. Ervin is the president of Ervin & Associates, Inc. On information and belief, John Ervin is responsible for the decision to initiate the civil suits mentioned herein which were filed against Hamilton.

IV. FACTUAL ALLEGATIONS

8. HUD's Federal Housing Administration ("FHA") provides mortgage insurance for low- and moderate-income purchasers of single-family and multi-family residential homes. By the early 1990s, the size of HUD's insured loan portfolio was in the range of $400 billion.

9. In the late 1980s and early 1990s, a substantial portion of Defendant Ervin's income came through contracts with HUD in the areas of financial advisory services and the servicing of HUD loans and properties.

10. During the late 1980s and early 1990s, the number of defaulted FHA loans grew substantially. By 1993, an aggregate unpaid principal balance of $11 billion had accrued, involving over 2,400 multi-family mortgages and 95,000 single-family mortgages. The large volume of defaulted loans required significant HUD staff time, and detracted from HUD's ability to oversee and manage the non-troubled loans. In 1993 and 1994, HUD, with legislative support from Congress, sought authority to sell the defaulted mortgage loans.

11. Ervin opposed the loan sales program, because the divestiture of defaulted loans reduced the volume of HUD's portfolio, and thereby reduced the number of properties and loans which were available for Ervin's own loan servicing contracts. It was in Ervin's financial interest for HUD to retain as many mortgage loans and properties as possible, so that Ervin could continue to service them.

12. In 1993, in response to a HUD Request for Proposals (RFP), Hamilton submitted a bid for a contract as HUD's financial advisor to assist in the loan sales, and to provide general financial advice. Hamilton's bid was successful.

13. As a result of HUD's loan sales auctions, designed and implemented by Hamilton, over 115,000 mortgages were sold for a total price of $6.5 billion, creating a $2.1 billion savings to the U.S. Government. The success of this program was much lauded, and its several awards included Vice President Gore's coveted "Hammer Award" as a model of successful and efficient government re-engineering. However, this success also highlighted Ervin's comparative inefficiency, as Ervin's recovery rate proved far lower than that which was obtained through the loan sales auctions.

14. Between 1993 and 1996, Ervin placed unsuccessful bids for several asset management and financial advisor contracts, often filing protests when it lost out on bids. Though Hamilton did not and could not have played any role in these procurements, Ervin blamed Hamilton in the many protests filed by Ervin during those years.

15. In January 1996, HUD hired four financial advisors, including Hamilton, to assist in implementing the loan sales program. Ervin was an unsuccessful bidder for that work.

16. Hamilton was also awarded a "crosscutting" advisory contract from HUD, which involved the management and investment of HUD's $400 billion loan portfolio at a fee of $10.4 million per year, for two years. Hamilton's responsibilities in this role involved coordinating the work of 17 different contractors, including Ervin.

17. In early 1996, Ervin, with the apparent concurrence of the HUD Inspector General's office, prepared two lawsuits specifically designed to cause the cancellation of Hamilton's contracts, to effectuate the removal of Hamilton as a competitor,

and to kill the loan sales program that was adversely affecting Ervin's financial interests.

18. On June 5, 1996, Ervin & Associates filed a *Bivens* action against the United States, HUD, Henry Cisneros, Helen Dunlap, and other federal defendants, alleging corruption in the HUD Office of Multi-Family Housing's contract procurement process. In the complaint, Hamilton is derisively referred to as Ms. Dunlap's "contractor of choice," and the recipient of improper and illegal favors. Hamilton expressly denies the receipt of any such favors or preferential treatment.

19. Also in the complaint, Ervin accuses Hamilton, *inter alia*, of:

- "look[ing] the other way if [Ms. Dunlap] crosses the line of impropriety";
- exercising control over subcontractors that is "not appropriate";
- advising Ervin to manipulate Ms. Dunlap into improperly circumventing the procurement process;
- engaging in a conflict of interest and creating an "illegal pass-through" by accepting a $5 million contract from a minority-owned HUD subcontractor;
- engaging in insider trading in its conduct of the loan sales program by providing confidential information to two prominent wall street firms.

Each of these allegations by Ervin is false.

20. On June 6, 1996, Ervin filed a *qui tam* complaint under seal. Although the complaint presently remains sealed, the complaint was at one point unsealed by court order for the limited purpose of informing Hamilton that it is a named defendant in the complaint. The Department of Justice has yet to indicate whether the government will pursue the complaint on Ervin's behalf.

21. After the lawsuits were filed, Ervin – with the apparent assistance of the HUD Inspector General – provided documentary and oral information to the media

which, Ervin asserted, demonstrated that Hamilton was complicit in the alleged corruption surrounding HUD procurement procedures and the loan sales program. As a direct result of these leaks of unsubstantiated allegations, articles critical of Hamilton appeared in *U.S. News and World Report* and in *The Washington Times*, among other publications.

22. In August 1996, the HUD Office of the Inspector General opened civil and criminal investigations, ostensibly in response to various of Ervin's allegations. Broadly-worded subpoenae were issued to Hamilton by Inspector General Gaffney on August 6, 1996, and August 22, 1996. Many of the same documents were requested to be produced a second time in a third subpoena issued on October 24, 1997. The U.S. Attorneys' Office has declined criminal prosecution, but the onerous OIG civil investigation continues.

23. On October 17, 1997, HUD cancelled Hamilton's financial advisor contract as a result of the untrue allegations made by Ervin in its pleadings, and further purveyed by Ervin to the media, government investigators, and HUD officials.

24. Hamilton's $11 billion loan sale initiative was suspended.

25. Burdened by the loss of the HUD contract (which, at that time, was Hamilton's primary source of income) and by over $1 million in expenses incurred in responding to Inspector General Gaffney's subpoenae, Hamilton" business was ruined, and its access to the marketplace cut off. Hamilton has been unable to market its services to the private sector as it was once able to do, as Hamilton's once-stellar reputation has now been irrevocably destroyed as a result of Ervin's actions.

26. Ervin, with the demise of the loan sales program, is presently thriving. On information and belief, Ervin has been awarded contracts that would not have been received but for its scurrilous allegations against Hamilton.

V. STATEMENT OF CLAIMS

COUNT ONE
(Tortious Interference With Contractual Relations)

27. The allegations of Paragraphs 1 through 26 of this Complaint are by reference incorporated herein as allegations of this Count.

28. At the time that Ervin instituted the *Bivens* and *qui tam* actions in June 1996, Hamilton was a party to contract with HUD providing financial advisory services.

29. Ervin was aware of the existence of Hamilton's financial advisory services contract.

30. Ervin intentionally and maliciously interfered with the financial advisory services contract by procuring and instigating HUD's repudiation and cancellation of that contract.

31. As a consequence of Ervin's intentional interference, Hamilton has incurred substantial loss, including the benefit of its bargain with HUD, and irreparable harm to its reputation.

COUNT TWO
(Tortious Interference with Prospective Business Advantage)

32. The relevant allegations of Paragraphs 1 through 31 of this Complaint are by reference incorporated herein as allegations of this Count.

33. At all times relevant to this Complaint, a valid business relationship and expectancy as to future business existed between and among HUD and Hamilton, and among private and other governmental entities and Hamilton, such that Hamilton had reason to believe that it would be awarded additional contracts from HUD and/or that existing contracts would be extended or expanded, and that its good name would be

maintained such that its services could also be marketed to other private and governmental entities.

34. At all times relevant to this Complaint, Ervin was aware of these business relationships and expectancies.

35. Ervin, by their initiation and maintenance of the *Bivens* and *qui tam* actions, intentionally and maliciously caused the termination of Hamilton's business relationships with and expectancies.

36. As a consequence of Ervin's intentional interference, Hamilton has incurred substantial loss, including the loss of any and all additional and future business with HUD, as well as any other business with private or governmental entities due to the irreparable harm to Hamilton's reputation.

COUNT THREE
(Abuse of Process)

37. The relevant allegations of Paragraph 1 through 26 of this Complaint are by reference incorporated herein as allegations of this Count.

38. Defendants, by initiating and maintaining the allegations against Hamilton in the *Bivens* and *qui tam* complaints, sought and intended to eliminate Hamilton as a viable competitor, sought to end the loan sales, sought to destroy Hamilton's business, and thereby engaged in a perversion of the judicial process.

39. As a result of this perversion of justice, Defendants achieved an end not regularly or legally obtainable, *to wit*, the cancellation of Hamilton's financial services contract, the sullying of Hamilton's good name and reputation, the elimination of the loan sale program previously orchestrated by Hamilton.

40. Defendants' conduct was intentional and malicious and caused substantial damage to Hamilton, no less than its financial destruction and the elimination of any of its future business prospects.

VI. PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that this Court enter judgment against the Defendants Ervin and Associates, Incorporated, and John H. Ervin, and in favor of the Plaintiffs The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc., and award:

(1) Compensatory damages in excess of $100 million for all past, present and future economic and non-economic loss to Hamilton, including Hamilton's loss of the benefit of its bargain with HUD, the legal fees and expense expended by Hamilton as a result of the investigation instigated by Ervin, and its loss of future business opportunities, in such an amount as this court may determine;

(2) Punitive damages, based on Ervin's ill-will, recklessness, wantonness, willful disregard of the Plaintiffs' rights, and other aggravating factors tending to demonstrate the outrageousness of Defendants' conduct, in such an amount as this court may determine; and

(3) Such other and further relief as this Court deems just and proper including damages, injunctive relief, costs, interest and attorneys' fees.

VII. JURY DEMAND

The Plaintiffs demand a trial by jury on all counts.

Dated: June 4, 1999

Respectfully submitted,

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Kenneth E. Ryan (D.C. Bar #419558)
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EXHIBIT C

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April 21, 1999

HAND-DELIVERED
The Honorable Fred Thompson
Chairman, Government Affairs Committee
Room SD-523
Dirksen Senate Office Building
Washington, D.C. 20510-6250

Re: Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services

Dear Senator Thompson:

We represent Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, collectively referred to as "Hamilton". Hamilton is an investment banking firm that for a number of years was an outside contractor to the Department of Housing and Urban Development. In the mid 90s, Hamilton served in an instrumental capacity as HUD's financial advisor developing and implementing a number of sales of HUD's mortgage loan portfolio which saved the U.S. taxpayers in excess of $2.1 billion in credit subsidy savings. In June of 1996, another HUD contractor, Ervin & Associates, filed suit against HUD, the Small Business Administration, then-Secretary of HUD Henry Cisneros, and other government officials, more fully described below (as the "*Bivens* lawsuit"), and a sealed *qui tam* lawsuit against a number of undisclosed parties. Hamilton was not named as a defendant in the *Bivens* action, but while we do not know the allegations or the identity of the other defendants, we do know that Hamilton was named as a defendant in the *qui tam* action. As a result of these two lawsuits, Susan Gaffney, the HUD Inspector General, launched an investigation of Hamilton purportedly based on the allegations raised in the two lawsuits. In August of 1996, the HUD Office of Inspector General served two subpoenae on Hamilton, requesting the production of hundreds of thousands of pages of Hamilton's documents. Hamilton immediately began to work with the OIG to produce the requested documents.

In mid-November of 1996, Hamilton discovered the possibility of an error in the computer optimization program used to determine the winning bids in one of the mortgage loan sales. Hamilton immediately investigated the matter, including meetings with the subcontractor who developed the program, Lucent Technologies. Hamilton reported this matter in early December of 1996 to HUD, and followed-up with a written report to HUD of its investigation results. Hamilton believed that any

potential error had been corrected, and that the matter was closed. Hamilton heard nothing more on this matter, and in fact, continued to work on the development and implementation of future mortgage loan sales. Then on October 17, 1997, HUD suddenly and without warning terminated Hamilton's contracts. Even though at that time HUD apparently had not investigated the matter further, it cited the computer optimization model as the basis for Hamilton's termination. HUD refused to pay Hamilton for work that Hamilton had already completed at the time of the termination (approximately $2 million), and that dispute is now in the Federal Court of Claims.

One week later, on October 24, 1997, the HUD OIG served a third subpoena on Hamilton, which Hamilton immediately began to respond to. All tolled, Hamilton has spent in excess of $2 million responding to the OIG subpoenae. While the HUD OIG has repeatedly claimed that it is investigating both civil and criminal matters purportedly involving Hamilton, after nearly three years of this "investigation" the OIG has taken no formal action, although it does continue to burden Hamilton with requests for yet additional document production.

We represent Hamilton in all matters relating to the actions of the HUD OIG. Over the course of our working on it, there have been many aspects of this case which have been very puzzling to us, things and procedures which, in our experience, were unexplainable within the context of how cases are normally and reasonably handled. For example, other than oblique references to the sealed *qui tam* complaint and the 253-page *Bivens* filing, the government has repeatedly alluded to serious criminal and serious wrongdoing on the part of our clients, yet refuses to provide any meaningful specifics of what it contends our clients did wrong. This investigation has taken entirely too long based upon its purported genesis. The subpoenae issued by the HUD Inspector General Susan Gaffney are unusually broad for this type of investigation, and have gone well beyond the bounds of anything necessary to obtain relevant information. And most curious, this investigation is not being done consistent with procedures and practices normally seen in similar types of investigations, either by the FBI or Offices of Inspector General, in other words, it is not consistent with normal investigatory procedures. This is highlighted by Judith Hetherton's heavy involvement in this matter, which far exceeds any statutory authority she may have as Counsel to the IG, and which has included an extraordinary injection of factually incorrect yet sensationalist and prejudiced inquiries of a very personal nature into the lives of certain parties to this matter. Investigations are usually run by investigators, not the OIG's counsel. Yet that is clearly what is happening here. This indicates an unusual interest by the IG herself, who we now believe has a personal agenda inconsistent with the authority and mandate of her official position.

Since our introduction to this case nearly one year ago, we have repeatedly asked the government, through several different inquiries and on many separate occa-

sions, just precisely what is the nature, focus, intent and purpose of what to us now appears to be a politically motivated, never-ending and pointless investigation of Hamilton and some of its former employees. To date, the information we have obtained leads us to believe that this matter is being driven by questionable motives, for which the HUD OIG is directly responsible and accountable.

As a matter of first course, it would seem to be a simple enough proposition to at least be able to find out who is actually leading this investigation. Apparently no one is, or at least no one has been willing to accept or acknowledge that responsibility. Both Dan Van Horn (the Assistant United States Attorney representing the HUD OIG in court proceedings in this matter) and Ms. Hetherton have repeatedly advised us that neither one of them is running the investigation, and we have been directed to AUSAs Tony Alexis (civil) and Dick Chapman (criminal) as those in charge. We have met with both Mr. Alexis and Mr. Chapman, who impressed us as being professional, reasonable and straightforward in their discussions with us. They both advised us that they too were not running the investigation, but they believed that Ms. Hetherton was. We believe that she is, at least on a day-to-day basis. Given that Mr. Van Horn and Ms. Hetherton have repeatedly suggested both civil and criminal implications from whatever "it" is, I believe we are at the very least entitled to know who is running the show.

Equally mysterious is just what is being investigated? We have repeatedly asked that question, and after nearly three years of an investigation I am amazed at the government's inability to articulate any meaningful response to that question. I have worked opposite the U.S. Attorney's Office in both civil and criminal cases before, and while I do not expect the government to give away their strategy or the inner workings of their case, I have never had anyone so unwilling or unable to tell me simply and precisely what they were investigating. Yet Mr. Van Horn and Ms. Hetherton have felt free to suggest in court proceedings that significant wrongdoing has taken place, perhaps even fraud, and have apparently provided the Court (Judge Stanley Sporkin, United States District Court for the District of Columbia) with some indication of what they are investigating for its *in camera* review. Yet for some unknown and unexplained reason they are afraid to address that issue with us. Initially, we concluded that whatever it is that has been given the Court in secret must indicate that the investigation is focused in reality on some other party, and not on Hamilton, for we could think of no other legitimate reason why that basic information was not shared with us. We also believe that whatever it is the OIG has told the Court must be so irrefutably disproven by the facts that disclosing that information to us would give us cause to have the investigation terminated immediately, and those responsible for it punished. But it appears that the truth is even more ominous than that; this is not simply just a case of an investigation yielding no results, but rather an investigation aimed from its inception at destruction rather than illumination.

Ms. Hetherton has told us that the HUD OIG began its investigation in July of 1996, at the request of the U.S. Attorney's Office. The HUD OIG was to investigate the allegations contained in Mr. Ervin's *qui tam* suit, filed in June of 1996. That suit was filed and remains under seal, and Hamilton has not been made aware of any of the allegations contained in that lawsuit. Therefore, for her to tell us that Hamilton is being investigated for the allegations raised in the *qui tam* is to tell us nothing at all. Yet Mr. Van Horn and Ms. Hetherton have obviously seen those allegations, as they were the premise for Mr. Van Horn's *in camera* submissions to the Court. By now, as a result of the past two and a half years of production of documents, Mr. Van Horn has had access to virtually all of Hamilton's documents. How is that neither Mr. Van Horn nor the OIG can tell us the specifics? It is fundamentally unfair that Hamilton has been subjected to numerous leaks to the press, conjectures and statements about potential civil and criminal wrongdoing for **three years** without being able to respond to these secret allegations.

The HUD OIG also asserts that Hamilton is being investigated as a result of the allegations in Mr. Ervin's *Bivens* action, but that too tells us absolutely nothing. Our question has always been rather pointed and direct: Precisely what is it that Hamilton or any of its employees did wrong? The *Bivens* action sheds no meaningful light on that. First, Hamilton is not even a defendant. Second, while Hamilton is mentioned in the complaint, the best that can be gleaned from those references is that those defendants who are alleged to have done something wrong used Hamilton to do so. What are the accusations that Hamilton did wrong?

The *Bivens* action, 253 pages long, with 851 numbered paragraphs, was filed against Helen Dunlap, former Assistant Secretary of HUD; Henry Cisneros, former Secretary of HUD; Philip Lader, former Administrator of the Small Business Administration; HUD itself; the Small Business Administration; and the United States. The complaint describes itself in ¶ 12, which states:

> reduced to its essence, this complaint is about power, money and Dunlap's close relationships with HUD's contractors and subcontractors. The thrust of this Complaint is that Dunlap has usurped control and exercised unlawful influence over HUD's contract procurement process to confer huge procurements on her favored handpicked contractors and personal friends and companions, and to prevent Ervin from winning new contracts or have its existing contracts renewed or extended. Her efforts, and those of individuals at HUD under her control, are orchestrated to bypass the normal procurement processes which are intended to prevent the very abuses to which Dunlap has subjected and is subjecting Ervin and others.

Much of the complaint deals with Ervin's allegations that Ms. Dunlap abused her power to discriminate against him and other white males, specifically alleging that Ms. Dunlap had turned HUD into "white boy's hell", yet ironically alleging at the same time that the beneficiaries of Ms. Dunlap's actions were prominent Wall Street big money firms – firms predominantly populated, directed and run by white men. Hamilton is not directly accused of any wrongdoing, but is mentioned in the complaint as a woman-owned company which did obtain HUD contracts, and whose contracts were extended. Hamilton did act as HUD's financial advisor for HUD's loan sales, and Ervin does assert that the optimization model employed by Hamilton used in selecting the successful bidders was "intentionally complex", giving "advantages" to only the biggest bidders, a curious allegation given that the complaint also acknowledges that in the first loan sale, small investors were in fact successful. But these flimsy assertions can and should have been readily and quickly investigated, and are hardly justification for the OIG's oppressive actions.

There are additional factors which demonstrate that the OIG's assertion that the investigation is based on the *qui tam* and *Bivens* complaints simply makes no sense. For example, the *Bivens* matter makes complaints about Williams Adley (another HUD contractor) and suggests improper conduct relating to the contracts between Williams Adley and HUD and Williams Adley and Hamilton. Yet, in an audit report issued by the OIG more than three months **after** the *Bivens* action was filed, and a month after the OIG issued its first subpoenae to Hamilton, some Williams Adley contracts were noted as having been audited. It is inconceivable to us that if the OIG was truly concerned about the *Ervin* allegations, it would not have looked further at Williams Adley than it did in that audit. And, despite sharing information with Ervin at various times during the course of his three-year pursuit of the *Bivens* case, no evidence has surfaced in any way implicating Hamilton in wrongdoing. Thus, the justification that the investigation was spurred by the *Bivens* action rings hollow.

We also know that John Ervin made about $7 million a year servicing mortgages for HUD, and he has admitted that he loses out if those loans are sold to private-sector companies. Prior to the commencement of the loan sales, Ervin was a consistent beneficiary of HUD contracts. Between 1989 and 1994, he won more than $25 million in HUD contracts. His firm, Ervin & Associates, grew from a staff of five to more than 40 people, although the head count has fallen back significantly since the loan sales began. Yet, this is the man on whose word this investigation has begun, and on whose allegation the investigation is based? While Mr. Ervin has ugly motives for destroying Hamilton, and may be acting in collusion with the OIG, we believe that the OIG has its own motives for destroying Hamilton.

The question arises then, is the OIG conducting this investigation in an attempt to collect information and evidence relating to the allegations made in the *qui*

tam action? If that is the case, we believe that is patently illegal, and we are entitled at this point to know exactly who authorized this investigation, and under what authority. In addition, we ask why is it taking so long and why is the government allowing it to take so long?

It impossible to believe, based on the meager statements in a complaint directed entirely at other parties, that justification exists for a two and a half year investigation, which has cost Hamilton millions of dollars in actual costs and tens of millions of dollars in lost shareholders' equity and opportunity costs. Hundreds of thousands of documents have been produced, many witnesses have been questioned by the OIG and the FBI, yet no conclusions or recommendations, or even basic information, has been turned over to the U.S. Attorneys' Office. While initially we didn't understand why the OIG so singularly pursued Hamilton with such a vengeance, we now believe that we do.

We have serious reason to suspect that the HUD IG, Susan Gaffney, is directing a personal vendetta, the goal of which is to destroy Hamilton and the reputations and economic well being of its former employees. The best evidence of this is her handling of an OIG audit which we reference as the "Denver audit". In the regular course of conducting the loan sales, an OIG audit of the sales was to be conducted. Because of the close association of the Washington OIG office with the loan sales, the Denver field office was asked to do the audit, to avoid the potential of a "friendly" audit being conducted. We believe, however, that Susan Gaffney was personally responsible for having the Denver audit buried, precisely because the audit was very favorable to Hamilton, a conclusion that Susan Gaffney did not want to hear. We have reason to believe that Ms. Hetherton, and the investigators assigned to work with her on this particular matter, closely monitored the development of the Denver audit, even though the whole purpose of having the audit done out of the Denver office was to avoid coloration by the D.C. office. We have reason to believe that, at the personal direction of Susan Gaffney, the Denver audit was shut down for purely political purposes, over the objection of the team conducting the audit, and has been suppressed even though Ms. Gaffney personally promised Catherine Austin Fitts (Hamilton's President and CEO) that the Denver audit would not be withheld, because to do so "would be unethical".

We also think we know why Ms. Gaffney has followed this contemptible course. Hamilton and its successor, with the information and knowledge they developed, stand in the way of both Ervin and the OIG in their quest for money. Hamilton was instrumental in the development, management and oversight of the HUD loan sale programs, which involved over $9 billion worth of sales at a known savings of over $2 billion to the U.S. taxpayers, and Ms. Fitts was the driving force behind the disclosure and performance-based policies that favored taxpayers and communities, but were

offensive to traditional "players" working for HUD. Thus what was at stake here, to both Ervin and the OIG, was to make sure that no more loan sales take place. Ervin managed HUD properties, that's where he made most of his money. If HUD sells off its properties, there's nothing for Ervin to manage and he doesn't make any money. With the advent of these lawsuits and the OIG's investigation, the HUD loan sale process essentially came to a halt. As funds were transferred away from loan sales, almost identical corresponding funds were provided to the OIG to expand its power and to beef-up its enforcement proceedings. Obviously, if HUD has no properties, then the HUD OIG has no authority for its enforcement efforts at what are now privately-held properties. The OIG needs the government to maintain control over the housing to enable it to obtain bigger budgets and more power.

In our view, this explains why the OIG would so viciously pursue Hamilton. We respectfully request that you immediately investigate these concerns. We ask that you consider the following matters as well.

The OIG has had, for years now, hundreds of thousands of pages of documents relating to the loan sales, produced by Hamilton, HUD, and other parties. Well over a year ago, the OIG interviewed several people who were involved with or had knowledge of Hamilton's work with HUD. Throughout the course of Hamilton's document production, the OIG had the benefit of meeting with former Hamilton employees, who described exactly the nature of Hamilton's document keeping and what was being produced to the government. The OIG has had the benefit of both the document production and deposition discovery taken by Ervin's lawyers in the *Bivens* case. The OIG has had access to Hamilton's financial records, and has subpoenaed Ms. Fitts' personal bank accounts, even those which did not come into existence until long after Hamilton's work with HUD had been terminated. The OIG has even harassed elderly members of Ms. Fitts' family, causing agents to show up at their doors with subpoenae for records of a family-owned farmhouse that does not even have complete indoor plumbing.

We would like to know just what governmental purpose was served by these actions, or for that matter any of this unending and seemingly unfocused investigation? What benefits are being provided to the taxpayers for an investigation that is no closer to reaching any conclusions than it was nearly three years ago when the investigation began, and which has taken nearly three times as long as it took to investigate, litigate (through several trips to the Court of Appeals and Supreme Court), impeach and try the President of the United States? I suggest to you that the OIG has reached no conclusions for two reasons: first, because there's only one that can be reached, but one that is very embarrassing to the OIG, *i.e.*, nothing wrong or illegal took place, certainly as regards to Hamilton or any of its employees. Second, there

was never any intent to reach any useful conclusions, but only to destroy Hamilton for purely self-serving reasons.

We are also mindful of the fact that the OIG is investigating the optimization issue relating to certain loan sales in which Hamilton served as an advisor to HUD. We understand that the OIG has reviewed documents from Lucent Technologies, the creator of the optimization program, and has spoken with employees of Lucent Technologies. If the OIG has taken the time to understand and master the optimization issue, and has looked at the information relating to its use in the loan sales, the OIG must now know that there was no wrongdoing or illegality involved on the part of Hamilton or any of its employees. The entire optimization issue was brought to the attention of HUD **by Hamilton**! It is astounding that by bringing forth an issue that would never have been discovered except by its own due diligence, and which at most indicates a potential error that at most could have resulted in an economic correction representing a tiny fraction of the overall value of the loan sales, Hamilton has been driven out of business and its former employees have been denied access to the marketplace, at great cost. All this because the OIG cannot competently and honestly conclude what should have been a rather straightforward investigation. This is highlighted by the fact that Ms. Gaffney refuses to provide Hamilton access to the Denver audit, which she knows speaks favorably of Hamilton's actions regarding the loan sales. The OIG's behavior is nothing short of outrageous, and we believe this is but further proof of the true intent of its "investigation".

Ironically, the loan sales themselves were initiated in response to an OIG audit report which claimed that HUD's holding of the mortgages at issue was a "material weakness in its operations". It was this report that provided the basis for the OIG's headquarters' close involvement in all aspects of the loan sales as they were taking place, and that close involvement was the reason why the audit function was shipped to Denver. As part of the audit, members of the Denver OIG audit team actually sat in on one sale, and concluded that there was no way that bid rigging could have taken place, and that in a sealed bid auction (as were the loan sales), you can't favor any one bidder, particularly with the use of the optimization model and where there is open access to all loan information to all interested and qualified bidders. Surely the government should have been able to confirm these findings by now, yet the investigation continues. Hamilton is entitled to know why.

We are also very concerned about the tie-in between the withholding of Hamilton's nearly $2 million plus fees owed by HUD, and the investigation. Hamilton was assured some time ago that the $1.5 million withheld from it was not tied to the investigation. We don't believe that. For one thing, the justification advanced by HUD for withholding Hamilton's money is that it is a set-off for a purported $3.8 mil-

lion loss resulting from the optimization issue, the same optimization issue which is the subject of the investigation.

In yet another irony, in their answers to Ervin's requests for admissions filed in the *Bivens* action, the HUD defendants deny those of Ervin's assertions that attempt to involve Hamilton in any wrongdoing. Indeed, the government appears to be taking positions in that case that contradict the positions it is taking regarding the investigation of Hamilton.

In addition, the timing of the OIG's third subpoena (issued in October of 1997), which specifically sought information relating to the loan sales and the optimization issue, is extraordinarily suspicious, as it was served only one week after HUD determined to terminate Hamilton's contracts, refused to pay the monies owed to Hamilton, and made a claim for $3.8 million against Hamilton. Our suspicion is heightened by the fact that Hamilton had reported the optimization issue to HUD nearly **one year** previously, in December of 1996, and by the fact that the existence of the subpoena had to have been leaked to the press, since it was reported in the newspaper before it was served on Hamilton.

This ties-in with our concern about the length of time it is taking for the government to take any action on the *qui tam* case. By statute, once a *qui tam* has been filed by a private party, the government has 60 days within which to either accept the case for handling by the government or allow the private party to proceed on its own. The fact that the government has continued to roll over the 60-day decision-making period for nearly three years now, gives rise to our suspicion that the OIG is either working closely with Ervin's lawyers in the development of information through the *Bivens* case, or that the government, lacking any supporting evidence on which to base the handling of the *qui tam* action, is unjustly prolonging its decision-making process in the hopes that, finally, something will develop as a result of the Ervin/OIG investigation. Who is guiding the decision to continually roll over the *qui tam*? Surely after nearly three years the government knows something.

To date, the OIG's investigation has achieved the following dismal results:

- Many of the experienced and highly-dedicated professionals in the Office of Housing/FHA have left HUD in frustration, and several have been forced to retain legal counsel personally to fend off unjustified charges of contracting abuse, mismanagement and other illegal activities.

- HUD's loan sales program, which had saved the U.S. taxpayers in excess of $2.1 billion in credit subsidy savings, has been sus-

pended indefinitely, leaving a large inventory of loans secured by rent subsidized properties to be worked out by state housing finance authorities, depriving the taxpayers of hundreds of millions of dollars more in credit subsidy savings.

- The financial advisors in the Office of Housing that had a grasp of the complex FHA portfolio problems and how they could be resolved consistent with HUD's mission to serve communities, residents and taxpayers have had their contracts with HUD terminated. One of them, Hamilton Securities, once a thriving, cutting-edge business employing 40 extremely talented professionals, has essentially been put out of business, as a result of a two and a half year campaign of leaks of false information to the press and Congressional staff, the wrongful withholding of nearly $2 million of funds from Hamilton, and the nearly $2 million expended by Hamilton to respond to the unfocused and repetitive demands of the OIG in pursuing its subpoenae, all of which have destroyed the full value of shareholders' equity. As a result, Hamilton has lost tens of millions of dollars of shareholders' equity and opportunity costs in lost business revenue.

- As a result of the OIG's unjustified destruction of Hamilton and the false allegations made against it, Hamilton's former employees have been deprived access to the marketplace for many of the ideas and concepts they had developed while at Hamilton, at a loss of millions and millions of dollars, and personal financial security for their families.

- Legislative support for introducing competition into management servicing and ownership of HUD supported properties and FHA insured loans has been thwarted, and the unworkable "demonstration program", which favors the owners and managers of assisted-housing projects and state HFAs, has been extended.

This is hardly an enviable achievement, although I'm sure the OIG takes solace in the fact that its own budget, through enforcement roundups in public housing developments and asset forfeitures to be used as cash acquisitions for the OIG, has been increased. Surely this is not a result that those who believe in honest government would be proud of, and it cannot be said that the millions of dollars spent on this investigation by the government have been worthwhile.

The government's actions have been so inappropriate that, as I noted earlier, we have even considered whether or not Hamilton is the true target of any investigation, for surely within nearly three years' time someone of competence and integrity, with the taxpayers best interests in mind, heading such an investigation would have reached some type of conclusion. Certainly, the fact that Mr. Van Horn insists on hiding behind "*in camera*" justifications demonstrates this possibility, as well as indicates that the government has no case, no evidence, and no justification for its continued actions. Good investigators and prosecutors who know they have a case do not fear sharing that with targets. We can only conclude that any allegations Mr. Van Horn has contrived to the Court are without merit, at least as far as Hamilton is concerned. If there is another target, there's no justification for the continued harassment of Hamilton. It is neither moral nor legal to destroy Hamilton just to get to another party.

Finally, what consideration has been given, and by whom, of the effects that the government's action has had on Hamilton and its former employees? Surely at some point in this Orwellian nightmare someone has said that the fairness to the citizens involved must be considered, that the needless toll taken by this investigation must be ended, and even compensated. We are aware of the statutory provisions that allow for compensation from those responsible for the type of harm that has befallen Hamilton and its former employees, and we are now investigating the means to pursue those remedies.

Hamilton and its former employees, over whom the government has held the threat of both civil and criminal prosecution for nearly three years, are entitled to know the status of this investigation. They are entitled to know why the government won't release information favorable to them, and they are entitled to know who is responsible for prolonging their difficulties and causing them such great financial loss.

Again, we ask that you initiate an immediate inquiry into this most serious matter. We stand ready to render whatever assistance is needed and will gladly answer any questions you may have.

Very truly yours,

Michael J. McManus

MJM/gw

cc: Mr. Thomas J. Pickard
Assistant Director
Federal Bureau of Investigation

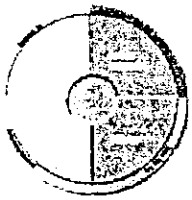
Ms. Sylvia Matthews
Acting Deputy Director for Management
Office of Management & Budget

The Honorable June Gibbs Brown
Inspector General – PCIE
Department of Health & Human Services

The Honorable Robert H. Hast
Acting Assistant Comptroller General
General Accounting Office

The Honorable Dan Burton
Chairman, Government Reform Committee
United States Congress

EXHIBIT D



Gideon

HOME: LEGAL: BACKGROUND

Introduction • Our Story • Timeline • Background • Letter to Congress • Investigations/Audits • Cases • Chronology • Resources

Solari is managing the liquidation of The Hamilton Securities Group ("Hamilton"). The company was founded by Catherine Austin Fitts in 1994 and began operations on March 22, 1998, after operations in Hamilton ended. Solari was created to be an investment advisor specializing in financing community equity through alternative media with private equity.

Hamilton was an employee-owned investment-banking firm, also founded by Catherine Austin Fitts, doing business in Washington from 1990 to 1998.[1] Before founding Hamilton, Ms. Fitts was a member of the Board of Directors of Dillon, Read & Co., Inc. and then served as Assistant Secretary of Housing-Federal Housing Commissioner in the Bush Administration. Starting in late 1993, Hamilton served as the lead financial advisor to the Department of Housing and Urban Development ("HUD") in reengineering the Federal Housing Administration portfolio of mortgage insurance and mortgages, including approximately $10 billion of mortgage loan sales of the HUD held single and multifamily mortgages.[2]

HUD instituted the loan sales program because, prior to the loan sales program, HUD was recovering only about 35 cents for each dollar of mortgage insurance payments it made on defaulted mortgages. The HUD mortgage loan sales program saved U.S. taxpayers in excess of $2.1 billion (in the form of credit subsidy savings), increasing HUD's recovery rate on defaulted loans to about 70 - 90 cents for each dollar expended by HUD. As a result, HUD was able to:

- Contribute $2.1 billion to reduce the federal deficit and to fund ongoing HUD programs,thus reducing the need for Congressional appropriations;
- Lower the amount of credit subsidy needed to originate new mortgage insurance; and
- Address what HUD's auditors had considered one of HUD's most significant material weaknesses. **Click here for GAO report stating HUD's material weaknesses.**

Vice President Gore's Reinventing Government Initiative awarded a Hammer Award for excellence in reengineering government to the HUD loan sales team for cutting red tape, empowering employees to improve service to the Department's customers and lifting the burden of managing and servicing HUD owned mortgages from headquarters and field staff. The HUD loan sale program was considered a resounding success in both reengineering circles and in the financial markets. **Click here** for FHA Performance Report. **Click here** for a link to the GAO report stating HUD's credit subsidy computations were reasonable. **Click here** to view a list of articles in maior business publications about the success of the loan sales program.

In June of 1996[3] , a HUD mortgage loan servicing contractor whose business, historically, consisted of servicing HUD held mortgage loans (and therefore was losing business as HUD moved to loan sales), filed a ***Bivens*** action, [4]**Ervin and Associates, Incorporated v Helen Dunlap, et al**. naming HUD, the Small Business[5] Administration, then-Secretary of HUD Henry Cisneros, and other HUD officials associated with the loan sales program as defendants. Hamilton was not named as a defendant, although among the allegations raised in this suit were charges that HUD engaged in contract favoritism toward Hamilton and that insider trading and bid rigging activities resulted in favoring certain "Wall Street" bidders for HUD loans. No detail was provided to explain how any such "insider trading" scheme could have been carried out or what type of information could have been given to one bidder that would have provided a bidding advantage. The suit involved the characterization of HUD as a "white men's Hell" where minority "8A" contractors were improperly favored over white men and "Wall Street" firms were favored over "little guys."

This complaint was subsequently amended on August 1, 1996, when Ervin and Company filed the **First Amended Complaint for Preliminary and Injunctive Relief and Declaratory Relief**. The Amended Complaint, numbering over 200 pages of dozens of charges against HUD, Helen Dunlap[6] and others, provided a more robust description of the "insider trading" schemes allegedly hatched by Hamilton and a "tag team" of preferred Wall Street bidders. Specific charges included:

- Misrepresentation of the quality of the single family loans;
- Use of a "flawed" bid optimization model that unfairly advantaged large bidders;
- Failure to acknowledge that the assets sold in the securitized transaction were "securities" under federal securities laws; and
- The selective illegal disclosure of material inside information to favored Wall Street bidders.

Unbeknownst to Hamilton, at approximately the same time, June of 1996[7], a sealed ***qui tam*** lawsuit[8] under the **Federal False Claims Act** was filed on behalf of HUD against a number of undisclosed parties. Soon after the filing of the Bivens and qui tam suits, Susan Gaffney, the HUD Inspector General ("IG" or "HUD IG"), launched an investigation of Hamilton and served two subpoenae on the company in August of 1996. According to later statements made by counsel for the Office of Inspector General ("OIG"),[9] the government initiated the investigation as the result of allegations raised in the qui tam lawsuit. The subpoenae requested hundreds of thousands of documents relating to Hamilton's work with HUD. **Click here to see the August 6,1996 subpoena and Click here to see the August 22,1996 subpoena.** The vast majority were either HUD documents that HUD already had in its possession or documents that had been supplied to HUD as part of ongoing work or to support HUD OIG audits, in some cases on multiple occasions.[10] In the fall of 1996, the HUD OIG also served a subpoenae on eVillages, Inc. a joint venture between Hamilton and Adelson Entertainment Company,[11]as a part of its investigation of Hamilton.

It is worthy of note that from 1996 until the present, HUD and the Department of Justice consistently have taken the position in the Bivens case that the allegations of Ervin and Associates in that action are without merit, notwithstanding the fact that many of these allegations appear to have formed the basis for the investigation of Hamilton.[12]

HUD ACTIONS DURING THE 1996 PRESIDENTIAL ELECTIONS AND THE 1997 FISCAL YEAR FEDERAL BUDGETING SEASON

Hamilton immediately began to work to produce the requested documents. During ensuing discussions with HUD, it turned out that HUD interpreted the already broad subpoenae as encompassing not only materials relating to HUD contracts with Hamilton and the work performed under those contracts, but also proprietary business documents and private financial information unrelated to HUD and HUD contracts.

would not be released.[19] Accordingly, Ms. Fitts reminded Ms. Gaffney in a telephone conversation of her previous assurances. Soon thereafter, on August 22, 1996, Hamilton was served a second subpoena by the HUD OIG.

Notwithstanding the requirement in Section 3733 of the Federal False Claims Act that when a subpoena[20] is served, the target of a *qui tam* suit must be informed that it has been named in such a case, the nature of the conduct constituting the alleged violation of false claims law under investigation and the applicable provisions of law alleged to have been violated, Hamilton was not informed that it was named as a defendant in the *qui tam* action until December of 1997 via conversation between the Department of Justice ("DOJ") with Hamilton's attorneys.

The failure of the DOJ to make the required disclosures to Hamilton was critical to the harm, in terms of both financial losses and harm to business and professional reputation, that Hamilton's business and shareholders suffered. For example, *USNWR* reporters were insistent that the investigation was a "criminal" investigation and that it had been triggered by serious wrongdoing. In fact, an investigation under the False Claims Act has a far different meaning and appearance for business purposes from the one implied through HUD leaks described to Ms. Fitts by the *USNWR* lead reporter. We believe that if DOJ and HUD had honored the provisions of the False Claims Act in August 1996, Hamilton would be a prosperous business today and Catherine Austin Fitts would still own her home and her interest in family farmland.

In a meeting between the Department of Justice and Hamilton's attorneys in December 1997, the Department of Justice said that it would communicate to HUD that the investigation did not require that HUD hold back payments owed to Hamilton and that it ought to discontinue duplicative discovery requests.[21] The DOJ position implied by such promises appeared to contradict actions by the US Attorney's Office and other parts of Justice, as well as HUD representations regarding the actual content of the Department of Justice's communications with HUD.[22]

As of March, 2000, Hamilton has still not been informed of the allegations against it. The Department of Justice has obtained the equivalent of approximately twenty-one court ordered extensions of its 60-day statutory period for deciding whether to adopt the case since June, 1996, extending the rollover period from 60 to roughly 1,245 days as of February 1, 2000. To date, the OIG and DOJ have failed, in over three years, to review fundamental documents critical to the operation of the loan sales that demonstrate the falsity of the alle-gations, and to grasp a basic understanding of how the loan sales worked and who were the winning and losing bidders. According to logs held by the Special Masters indicating the dates and times Hamilton and representatives of the OIG and DOJ have reviewed documents, only two OIG investigators have signed in to review documents over the past *10 months* as of February, 2000. Had Hamilton been informed that it was a party to a qui tam over three years ago as required by the law, Hamilton would have been able to publicly respond to repeated, usually inaccurate, press leaks, apparently by HUD sources, as well as to Ervin's allegations. Solari believes that if the government had not circumvented basic disclosure requirements, Hamilton would be an ongoing business. The failure to follow the disclosure requirements of the False Claims Act facilitated a three and a half year trial by leaks and innuendo and hundreds of allegations that never permitted those who were targeted a forum in which to address and refute specific allegations.

Hamilton cannot confirm who filed the *qui tam* action, since it is still sealed as of this writing (March, 2000). However, based on press leaks and the sequence of events surrounding the filing of the *qui tam*, including the filing of the Bivens action and other events described below, Hamilton believes Ervin & Associates is at least one relator under the qui tam. In October, 1999, Hamilton discovered through press accounts about **a quarterly report filed by Goldman, Sachs & Co**. that the DOJ had informed Goldman Sachs it and certain of its bidding partners had been named in a qui tam action involving insider trading activities in connection the purchase of $4.7 billion of mortgage loans from HUD. In November, 1999, Goldman, Sachs filed an **S-1 registration statement** for the public offering of its securities with the Securities Exchange Commission divulging more specific allegations against Goldman Sachs in the qui tam suit including:

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* ERVIN & ASSOCIATES,	
Plaintiffs,	Civil Action No. 98-1258 (LFO)
v.	FILED IN CAMERA UNDER SEAL
THE HAMILTON SECURITIES GROUP, INC., et al.,	
Defendants.	

THE GOVERNMENT'S NOTICE OF ELECTION TO DECLINE INTERVENTION

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the United States notifies the Court of its decision not to intervene in this action

Although the United States declines to intervene, we respectfully refer the Court to 31 U.S.C. § 3730(b)(1), which allows the relator to maintain the action in the name of the United States; providing, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Id.

Therefore, the United States requests that, should either the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, this Court solicit the written consent of the United States before ruling or granting its approval.

Furthermore, pursuant to 31 U.S.C. § 3730(c)(3), the United States requests that all

pleadings filed in this action be served upon the United States; the United States also requests that orders issued by the Court be sent to the Government's counsel. The United States reserves its right to order any deposition transcripts and to intervene in this action, for good cause, at a later date.

In particular, the Department of Housing and Urban Development's Office of Inspector General ("OIG") maintains a subpoena enforcement action before this Court against Hamilton. Gafney v. Hamilton, 98-ms-92 (LFO). The OIG will continue to pursue that matter and will review any evidence obtained therein. If evidence developed through that action calls into question the Department of Justice's analysis on this non-intervention decision, the Department of Justice may deem such a situation, amongst others, as good cause to intervene in this action at a later date.

Finally, the United States respectfully requests that only the complaint, this notice, and the Court's Order be unsealed and served upon the defendant. All other contents of the Court's file in this matter (including, but not limited to, any applications filed by the United States for an extension of the sixty-day investigative period or for any other reason, oppositions filed by the United States in response to the relator's motions, reply briefs, memoranda, and supporting

documents) should remain under seal and not be made public or served upon the defendant.

A proposed order accompanies this notice.

Respectfully submitted,

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Acting Assistant Attorney General

WILMA A. LEWIS
United States Attorney

MARK E. NAGLE
Chief, Civil Division

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* ERVIN & ASSOCIATES,	
Plaintiffs,	Civil Action No. 98-1258 (LFO)
v.	FILED IN CAMERA UNDER SEAL
THE HAMILTON SECURITIES GROUP, INC., et al.,	
Defendants.	

ORDER

The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court rules as follows:

IT IS ORDERED that,

1. the complaint be unsealed and served upon the defendant by the relator;

2. all other contents of the Court's file in this action remain under seal and not be made public or served upon the defendant, except for this Order and The Government's Notice of Election to Decline Intervention, which the relator will serve upon the defendant only after service of the complaint;

3. the seal be lifted as to all other matters occurring in this action after the date of this Order;

4. the parties shall serve all pleadings and motions filed in this action, including supporting memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The

United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time;

5. all orders of this Court shall be sent to the United States; and that

6. should the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting its approval.

IT IS SO ORDERED,

This _____ day of _____, 2000.

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2000, I caused a copy of the foregoing Government's Notice Of Election To Decline Intervention and Proposed Order to be served by first class mail, postage prepaid, upon:

Wayne G. Travell, Esq.
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2010 Corporate Ridge, Suite 400
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