

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiffs, )

v. )

UNITED STATES DEPARTMENT OF )  
HOUSING AND URBAN DEVELOPMENT )  
451 7<sup>th</sup> Street, S.W. )  
Washington, D.C. 20410, and )

ANDREW M. CUOMO, )  
Secretary of the Department of Housing )  
and Urban Development )  
451 7<sup>th</sup> Street, S.W. )  
Washington, D.C. 20410, and )

Civil Action No.

NICOLAS P. RETSINAS )  
Assistant Secretary for Housing/ )  
Federal Housing Commissioner )  
Department of Housing and Urban Development )  
451 7<sup>th</sup> Street, S.W. )  
Washington, D.C. 20410, and )

SUSAN M. GAFFNEY, )  
Inspector General, )  
Department of Housing and Urban Development )  
451 7<sup>th</sup> Street, S.W. )  
Washington, D.C. 20410, )

Defendants. )

COMPLAINT FOR DECLARATORY, INJUNCTIVE, MANDAMUS,  
AND OTHER RELIEF

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## I. INTRODUCTION

1. This action for declaratory, injunctive, mandamus and other relief is brought by Washington, D.C.-based business and financial advisors, The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively "Hamilton" or "plaintiffs"), against the U.S. Department of Housing and Urban Development ("HUD") and various of its officials. Over the past 17 months, HUD has been taking a series of actions, outside of or which exceed their legal authority, which may have been intended to put, and are definitely having the effect of putting, Hamilton out of business. These actions, which have taken from Hamilton the capital on which it relies to operate and have prevented it from finding new clients and new funds with which to continue, include: an Inspector General's "investigation" conducted in a manner reflecting bad faith without any evidence of wrongdoing by Hamilton; the service of overbroad and duplicative subpoenas, sometimes for documents already in the possession of the agency; service of retaliatory subpoenas after Hamilton's principals have complained about the treatment they were receiving; leaks of inaccurate and incomplete information to the media about the HUD investigation; misstatements made to Hamilton's creditor financial institution with the likely intent and/or result that the financial institution would deny Hamilton operating capital; the subterfuge of canceling Hamilton's contract for government "convenience" when the reality was that the cancellation was politically motivated; and the improper interference with the

payment to Hamilton of approximately \$1.5 million due and owing by, and properly invoiced to, HUD.

## II. PARTIES

2. 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 and was founded by C. Austin Fitts, formerly Assistant Secretary for Housing/Federal Housing Commissioner at HUD in 1989-90. For HUD, HSG has helped design and support approximately \$12 billion of financial transactions and re-engineering and provided portfolio strategy for approximately \$400 billion of financial assets and liabilities, all related to housing and economic development of American communities. A large volume of this work was as the lead financial advisor to the Federal Housing Administration ("FHA"), for which HSG, through a subsidiary, helped design and support a \$10 billion loan sale program and advised on portfolio strategy and national housing reform policies.

3. Plaintiff Hamilton Securities Advisory Services, Inc. ("HSAS") is a Delaware corporation and subsidiary of HSG which was assigned a HUD contract and awarded the actual crosscutting financial advisory services agreement with HUD that is part of this dispute.

4. Defendant U.S. Department of Housing and Urban Development ("HUD") is a Department of the Executive Branch of the United States

Government established by Section 3 of the Department of Housing and Urban Development Act of 1965, codified as amended at 42 U.S.C. § 3532. Pursuant to statutory and regulatory authority, HUD creates business relationships with private companies, such as HSG, to provide it with consulting and other services.

5. Defendant Andrew M. Cuomo is the Secretary of HUD, empowered to administer HUD, including matters relating to Federal Housing Administration ("FHA") defaulted loans, agreements made with contractors, and compliance by HUD officials with rules and regulations. Secretary Cuomo is sued in his official capacity only.

6. Defendant Nicolas P. Retsinas is the Assistant Secretary for Housing/Federal Housing Commissioner of HUD, empowered to administer FHA's loan portfolio. Assistant Secretary Retsinas is sued in his official capacity only.

7. Defendant Susan M. Gaffney is Inspector General ("IG") of HUD, empowered to conduct investigations and inquiries pursuant to the authority given HUD by Congress and HUD's own rules and regulations. Inspector General Gaffney is sued in her official capacity only.

### III. JURISDICTION AND VENUE

8. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-06; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the All Writs Act, 28 U.S.C. § 1651; the Privacy Act, 5 U.S.C. § 552a; the Fourth and Fifth

Amendments to the United States Constitution; and federal common law. The Court, therefore, has jurisdiction under 28 U.S.C. §1331.

9. Venue lies in this district under 28 U.S.C. § 1391(e).

#### IV. FACTUAL ALLEGATIONS

##### A. FHA's Provision Of And Problems With Mortgage Insurance

10. The FHA provides insurance for single-family and multifamily residential housing mortgages. The availability of this insurance creates more opportunities for low and moderate income people to rent decent, safe and sanitary housing and buy their own homes.

11. During the 1980's, the number of defaulted FHA loans grew substantially. By 1993, HUD had accumulated a backlog of 2,400 multifamily mortgages and 95,000 single-family mortgages with an aggregate unpaid principal balance of \$11 billion. This inventory was so large that HUD staff had only enough time and resources to service its most troubled loans. Other loans were practically neglected, which meant HUD did little to prevent them from becoming troubled.

12. Because of this backlog, the larger mission of overseeing HUD's \$400 billion insured loan portfolio was virtually ignored. HUD's IG and FHA's outside auditors both found the huge inventory of past due mortgages to be a "material weakness" in HUD's internal controls. HUD became the only agency to be placed in its entirety on the General Accounting Office's "high risk" list.

13. HUD implemented a loan sale program to deal with problems in its portfolio. The HUD mortgage loan sale program was expressly approved by Congress. In response to challenges to HUD's statutory authority to sell mortgage loans from its inventory, Congress passed three amendments to Section 203 of the National Housing Act and then, in the Multifamily Housing Property Disposition Reform Act of 1994 (Pub. L. 102-233, approved April 11, 1994), Congress completely rewrote Section 203(k). These pieces of legislation eased the statutory requirements that HUD had to meet in order to sell mortgage loans.

14. The program, authorized by Congress, has been critical to HUD's improved management of its defaulted loan problem. Moreover, the loan sale program itself was a key element of a broader effort to re-invent HUD and create a new FHA based on the principles of sound financial management.

B. Hamilton's Relationship With HUD

15. Prior to its relationship with HUD, Hamilton had engaged in business with other clients. Specifically, these clients included Battery Park City Authority, General Electric Capital Asset Management Corporation, the Ford Foundation, the National Housing Partnership, the Maryland Department of Housing and Community Development, and others. As Hamilton's business with HUD increased, its business with other paying clients tapered off until, by the start of Hamilton's crosscutting services contract with HUD in 1996, Hamilton had dropped all other paying business clients who had any dealings with HUD or

related assets and liabilities so that Hamilton could serve as HUD's crosscutting financial advisor without creating potential conflicts of interest.

16. In February 1993, HUD issued a Request for Proposals ("RFP") seeking a financial advisor to assist it in the sale of single-family and multifamily mortgages, as well as to provide other housing advisory services. The scope of the RFP anticipated the future sale or refinancing of HUD-held mortgages. Hamilton submitted a bid for this contract.

17. After an eight-month competitive process, Hamilton won the procurement and signed a contract with HUD on September 30, 1993. The contract initially authorized up to \$5 million in services over a four-year period.

18. Hamilton had served as HUD's financial advisor since the inception of HUD's loan sale program in 1993. With the support of Hamilton and other financial advisors, HUD has successfully conducted 19 loan sales, disposed of more than 115,000 mortgages, and collected \$6.5 billion in proceeds. This program has saved the U.S. Government \$2.1 billion in avoided costs, as calculated on a "credit reform" basis, which represents a savings of \$21 for every American household. HUD has boasted to Congress and the media about the success of this program and the Clinton Administration has pointed to the program as one of its major accomplishments.

19. From the outset, HUD, with Hamilton's support, involved many HUD divisions as well as outside agencies, including the Department of the

Treasury, in the design and implementation of the loan sale program. They also made sure that HUD's own Office of Inspector General ("OIG"), Office of the Chief Financial Officer and Office of General Counsel ("OGC") all had significant input and on-going involvement in the program. The Office of Management and Budget ("OMB") reviewed and approved cost savings estimates before and after each sale. Congress, too, was involved from the beginning and remained a participant in the mortgage sale effort -- including the passage of 1994 legislation authorizing the program. Proposed rules for the sales were published regularly in the Federal Register. Both HUD's OIG and OGC reviewed the bid process, sales designs and internal controls and were regularly provided with written descriptions.

20. At no time during the sales design or implementation process did Hamilton receive negative feedback, complaints, questions, or contract inquiries from any of these participants. In fact, Hamilton received numerous compliments and commendations from HUD, OMB and other participants due to its work in this program. Indeed, the loan sale program itself, with Hamilton's advisory role, received numerous awards, including the Hammer Award given by Vice President Gore as a model for improved efficiency and re-engineering of government programs.



21. The following chart summarizes Hamilton's assignments for HUD during the period 1993 to 1997 demonstrating HUD's continued confidence and trust in Hamilton's abilities.

**SUMMARY OF HAMILTON'S ASSIGNMENTS FOR HUD: 1993 - 1997**

<b>Contract/Prime</b>	<b>Assignment</b>	<b>Time Frame</b>	<b>Task Order</b>
HC-18161/Hamilton	Financial advisor on sale of Section 221(g)(4) multi-family mortgages	1993	001
HC-18161/Hamilton	Financial advisor on sale of Section 221(g)(4) single family mortgages	1993-1994	002
HC-18161/Hamilton	Development of multifamily disposition plan, called the MAP	1993-1994	003
HC-18161/Hamilton	Design/implementation of pilot sales of subsidized mortgages to state housing finance agencies. Analysis of the Section 8 portfolio and consulting on policy alternatives	1995-1996	004
HC-18161/Hamilton	Financial advisor and due diligence support on sale of multifamily mortgages in the southeast	1994-1995	005
HC-18161/Hamilton	Support for FNMA reassignment; design of sales; marketing	1994-1996	006
HC-18161/Hamilton	Financial advisor on sale of multifamily mortgages in the West and South	1995-1996	007
HC-18161/Hamilton	Disposition analysis of the Section 530 premiums	1995	008
HC-18161/Hamilton	Financial advisor on two single family sales	1995-1996	009

Contract/Prime	Assignment	Time Frame	Task Order
HC-18161/Hamilton	Support for building relationships between FHA and rating agencies	1995	010
HC-18410/Williams Adley (Hamilton as subcontractor)	Design/implementation of the first structured transaction of partially subsidized multifamily mortgages	1995-1996	004
HC-18410/Williams Adley (Hamilton as subcontractor)	Financial advisor for sale of performing multifamily mortgages	1995	005
HC-18410/Williams Adley (Hamilton as subcontractor)	Consulting on credit reform issues and exploration of value of developing template models to estimate the credit subsidy of sales	1995	006
HC-18410/Williams Adley (Hamilton as subcontractor)	Consulting for the financial advisor on the sale of Title I loans	1995	009
HC-18437/Price Waterhouse (Hamilton subcontractor)	Multifamily product market, pricing and design support	1996	002
HC-16986/Coopers & Lybrand (Hamilton subcontractor)	Services and support in development a computer-based model to evaluate HUD's portfolio	1995	009
HC-16986/Coopers & Lybrand (Hamilton subcontractor)	FHA strategic planning	1994	010
HC-18505/Hamilton	Crosscutting financial advisory services on \$400 billion portfolio and mortgage sales	1996-1997	001

C. The Crosscutting Advisory Contract

22. With respect to HC-18505, the "crosscutting" services contract, Hamilton was to provide HUD with financial advisory services with respect to the management, investment, and sales associated with HUD's \$400 billion portfolio

for the period 1996 to 1998. In this crosscutting role, Hamilton helped HUD coordinate the work of up to 17 different contractors, including other financial advisors, due-diligence contractors, multiple law firms, and other HUD consultants; shared the experience and technology gained from all other previous loan sales in which they served as consultants; and insured consistency in policies and protocols.

23. As part of this work, Hamilton worked in several vital areas for HUD. These included mortgage sales, budgetary/credit subsidy support, strategic communications, portfolio strategy, and other portfolio-related work, including new product design and analysis and staff development.

24. For its work on this assignment, Hamilton was to be paid approximately \$10.4 million per year, over a two-year period. From this amount, Hamilton paid its many sub-contractors. This contract, in the period involved, amounted to almost all of Hamilton's paid work and income. To service this contract, Hamilton assigned a substantial amount of its non-administrative staff and a majority of all of its staff. In addition, Hamilton hired numerous contractors and outside companies, including Edgewood Technology Services, Global Business Network, Horizon Consultants, bizResources.com, Lucent Technologies/ Bell Laboratories, MelaNet/New Perspective Technologies, Ravitch, Rice and Company, and others.

25. To perform its work for HUD, Hamilton staffed their companies and forewent other types of work, including potential broker-dealer and investment advisory operations. Indeed, the crosscutting contract made it extremely difficult for Hamilton to work for other private clients outside of other Federal and other government agencies, due to the need for Hamilton to avoid potential conflicts of interest. This requirement, plus the later adverse publicity caused by HUD, made it extremely difficult for Hamilton to work for another Federal and other government agency as well. As a result, Hamilton did not take on any paying client other than HUD during the period it has served as HUD's crosscutting advisor.

26. Pursuant to the provisions of government-wide regulations, applicable to HUD fixed-price contracts (*see* 48 C.F.R. § 52.232-1), Hamilton sent invoices to HUD for payment of its completed services on a monthly basis in equal installments. The payment of invoices under this regulation is a ministerial act. HUD officials have a plain duty to make such payments and Hamilton has a plain right to receive these payments. HUD was aware of the importance of paying these invoices on a timely basis because of the amount of work Hamilton was doing on this contract and the percentage of Hamilton's work this contract entailed. HUD paid the majority of the invoices within twenty days of receipt.

D. Defendants Began To Feel Political, Legal, and Media Pressure About HUD's Loan Sale Program.

27. In 1994, Hamilton advised HUD that it would be in HUD's best interest to hire additional financial advisors to fully implement the loan sale

program. Hamilton made this recommendation even though doing so would result in it making less money than if it tried to keep all the work for itself.

28. Despite the need to address this issue expeditiously, HUD spent all of 1995 going through a procurement process. In the meantime, problem loans continued to be unattended. The slow pace of the procurement process also threatened to reduce the prices that would be paid to HUD for its mortgages since delaying the sales meant that assets would deteriorate in value and HUD would forgo increased recoveries. The need to act on these additional loans, in addition to Hamilton's excellent performance, convinced HUD officials during 1994 -1995 to expand Hamilton's contract to encompass more loan sales.

29. The value of HUD's mortgage portfolio was highly sensitive to the cost of carry and interest rate shifts. Delaying the sales during a time when interest rates were becoming less favorable to HUD would mean lower revenues from the sales on the order of millions of dollars lost to taxpayers.

30. At the same time, HUD's sales program was timed so as to take advantage of the existence of distressed asset departments that many bidders had established to compete for assets of the Resolution Trust Corporation ("RTC"). The RTC liquidations were winding down in 1995. If HUD had delayed its scheduled sales while new advisors were being procured, some of those distressed asset departments would have been dismantled, and the number of major bidders who would then later participate in HUD's sales would be reduced. Such lower

competition would have translated into lower prices, again on the order of millions of dollars.

31. Hamilton agreed to take on the additional sales advisory work that HUD urgently requested in 1995. At the same time, Hamilton continued to advise HUD to seek additional loan sale advisors.

32. In the summer of 1995, HUD proposed legislation, called "mark-to-market," that would enable HUD to restructure thousands of over-subsidized multifamily projects, many of which had been financed with syndicated tax shelters over the last two decades. This initiative mobilized the private subsidized rental housing real estate owners and developers in opposition because they stood to lose substantial fee income if property ownership and servicing were opened to the competitive selection and price negotiation process. In addition, private investors were concerned about adverse income tax aspects of the legislation.

33. By late 1995, HUD had sold over \$2.8 billion in loans from its portfolio, saving the government an estimated \$540 million in costs. These savings represented improved private servicing of the loans by winning bidders. The loan sales provided substantial improvement in HUD's recovery rates and lower expense rates than prior work-out strategies that had been used by HUD and its contractors. Property owners and managers who were now required to meet contractual debt servicing obligations, renegotiate their loans or face foreclosure did not always welcome the loan sales. Existing HUD owners and managers could

no longer negotiate such attractive work-out costs with HUD and its contractors, like Ervin & Associates, but instead would have to negotiate with more aggressive loan sale winners. Parties who were no longer competitive in the market place had every reason to want to stop the loan sale program.

34. Notwithstanding the praise of the loan sale program and the fact that HUD had no complaints about Hamilton's performance, HUD program staff did receive complaints from defaulted borrowers, owners, managers, and servicers who suffered, or were concerned they would suffer, economic loss because of the increased efficiency caused by HUD's loan sale and mark-to-market efforts. These sectors also caused political interference with the program and Hamilton's role in it. In fact, defendant Retsinas told C. Austin Fitts in early 1996 that White House officials had told him and Marilyn Davis, then-Assistant Secretary of Administration, that they wanted to make sure that Hamilton was not awarded any of the contracts.

35. At the same time, the 1996 Presidential election was in progress, creating an atmosphere of administrative caution at HUD. As in all agencies, politically-appointed officials at HUD wanted to minimize the chance that their actions during an election year would be publicly criticized or become a subject of the campaign. This caution and concern provided those who had an interest in undermining the loan sale program and halting the advent of "mark-to-market" with the opportunity for expressing and effecting their opposition.

36. In January 1996, HUD finally hired additional advisors as Hamilton had recommended. Hamilton was among the four selected. The other three were Merrill Lynch, Cushman Wakefield, and CS First Boston. Hamilton had absolutely no role in the selection of these advisors.

37. Two disappointed bidders -- Ervin & Associates and Ernst & Young -- protested the award of the four selected by HUD. Rather than litigating the issue through the courts, HUD decided to re-open bids for a new evaluation. Subsequently, CS First Boston dropped out of the competition, and HUD chose Ernst & Young to be the replacement. Again, Ervin & Associates was not chosen, and again Hamilton had no part in the selection process.

38. HUD conducted its "Partially Assisted Sale" in May and June 1996. The sale of almost \$900 million in multifamily loans collateralized by projects receiving some form of affordable housing assistance from HUD validated HUD's earlier "mark-to-market" proposal and further alarmed large, subsidized real estate owners and developers, as conventional and corporate servicers continued to successfully out-bid and out-perform them on both loan sales and subsequent loan servicing contracts, and they intensified their public relations and lobbying efforts opposing Hamilton and the loan sales program.

39. At about the same time, Ervin & Associates filed another protest, and, before that was resolved in the administrative process, filed a lawsuit against HUD in federal court in June 1996. In addition to filing a 700 paragraph



complaint against the agency, Ervin & Associates also released its complaints and other allegations to the media. In an apparent attempt to widen its allegations as broadly as possible, Ervin & Associates included in its charges the claims that HUD had improperly favored Hamilton and also that Hamilton had improperly favored certain businesses with which it had relationships in the award of contracts and sub-contracts.

40. Ervin's actions may have had ulterior motives in addition to dissatisfaction with the outcome of the HUD contract selection process. As the largest servicer of HUD multifamily loans, Ervin had every reason to be upset when the success of HUD's loan sale program substantially outperformed the relatively low recoveries HUD had been getting from, as well as the high expense rates experienced with, Ervin's existing loan servicing. In addition, Ervin's relationships with the Department appeared to deteriorate as his additional bids on asset management contracts and financial advisory contracts were not successful.

41. The Ervin & Associates' complaint and public relations campaign created media attention and publicity. It also provided critics of HUD and especially the loan sale program and "mark-to-market" proposals with ammunition. HUD and the other defendants felt this pressure. Despite the obvious motives for Ervin & Associates' complaint, the lack of any role Hamilton had in the selection of contract winners, and the track record of success and savings that Hamilton had created (albeit at the expense of defaulted borrowers and the existing servicing and

property management infrastructure), in August 1996, HUD and all or some of the other defendants decided to open an Inspector General inquiry into various of the charges that Ervin & Associates was making.

42. When HUD and all or some of the other defendants opened the inquiry into Hamilton that is at issue in this action, HUD was close to concluding an audit that its IG Office had undertaken of the entire loan sale program in early 1996. This audit was conducted by the Denver Field Office of the HUD IG, rather than the IG's headquarters in Washington, to insure that the audit was done independently, by those with no prior knowledge of or bias towards the program. In the spring and summer of 1996, before the publicity generated by the Ervin & Associates complaint, members of the audit team told Hamilton officials that they were working on a positive report, and that a circulation draft with positive comments was already prepared.

43. The allegations by Ervin & Associates and the media to which it had spoken also spawned inquiries from Congress and the Department of Justice. The now accelerating snowball of inquiries were all directed at either HUD or its financial advisors, including Hamilton.

44. In summary, by mid-1996, HUD was faced with the past criticism of its troubled loan portfolio, the controversy surrounding its decision to undertake its ambitious loan sale program and its even more controversial "mark-to-market" proposal, the new attention the loan sale program was getting because of its

success at saving the government money and because of the media's inquiries, the need to defend itself against Ervin & Associates' complaint, and the questions that were being raised by Congress and others. Because of these events, HUD and all or some of the other defendants decided to retreat from its support of its commitment to the program and its contract with Hamilton. More than that, HUD and the other defendants began acting in a way to make Hamilton the scapegoat for the criticisms and scrutiny being directed at HUD.

E. Defendants Began Taking Steps, Putting Hamilton Out Of Business.

(1) The OIG's "investigation" is no longer in good faith.

45. Separate from the HUD IG Denver field office audit of the entire FHA loan sale program, which was almost completed and which Hamilton had been told would result in positive conclusions, the HUD IG opened up an investigation into Hamilton itself. By August of 1996, the IG began issuing broad subpoenas (described, *infra*) to Hamilton.

46. This (in effect) second investigation of Hamilton has already lasted for 17 months, with long periods of silence punctuated by short bursts of activity. Despite the mountains of information that Hamilton has provided to the IG over the span of the inquiry, there is no evidence that the HUD IG has spent its time learning, understanding and acquiring the depth of knowledge about mortgages, loan sales and optimization that it will need to do a real inquiry.

47. At this point, the HUD IG has issued three subpoenas to Hamilton and one to Austin Fitts. The first two subpoenas were issued to Hamilton more than a year and five months ago, on August 6 and August 22, 1996. The third subpoena was issued to Hamilton on October 24, 1997. Although 14 months elapsed between the second and third subpoenas, much of the information requested in the third subpoena was repetitive of that requested in the earlier subpoenas, suggesting that for more than a year the IG made no progress on its investigation or that the newest subpoena was issued solely to harass Hamilton.

48. Moreover, the manner in which this investigation is being conducted is both not credible and not professional, illustrating bad faith. When IG auditors have in recent weeks interviewed a former Hamilton employee closely involved in the loan sale program, it became clear from their questions that they are no further along in understanding the basic facts about Hamilton's work for HUD nor the loan sale program than they were at the start of the investigation. For example, they demonstrated very limited knowledge of how loan sales were conducted, what bid procedures were used, and how optimization worked. Their questions failed to provide any more depth than interviews conducted long before. In the same period, in November 1997, Hamilton delivered 101 boxes to their attorneys to be made available to HUD IG attorneys after they stated that it was urgent for the IG investigators to have access to them. Yet since that time, no one has performed a

detailed review of the contents or copied them but only inventoried the number of boxes delivered.

(2) Defendants have killed the Denver audit report.

49. It obviously would not comport with the actions HUD and the other defendants were taking to have the Denver audit report, complimentary to the loan sale program and Hamilton's role in it, be disclosed.

50. Despite the completion of the interviews and the meetings with Hamilton officials in which IG investigators indicated the report was drafted and ready to be released, HUD has never released it or indicated why it has not done so. When Hamilton officials in August 1996 asked Washington IG Office officials whether the Office was going to withhold the report because of the other actions being taken against Hamilton, defendant Gaffney herself stated that it would be unethical to not release the Denver Office's audit report. Nevertheless, this 14-month-old report, which in a circulation draft appeared to be favorable to the program and Hamilton's role in it, has never been released.

(3) HUD has issued overbroad and duplicative summonses.

51. In this case, the IG's information-gathering truly can be described as an improper fishing expedition. At various times, the HUD IG has requested information from Hamilton that would cover all of Hamilton's business relations, including those that have no bearing on Hamilton's work under the FHA crosscutting contract.

52. The subpoenas also request that Hamilton produce the same information repeatedly. The 1996 subpoenas, for example, sought all paper and electronic documents from January 1, 1993, to the present having to do with any contact between Hamilton and HUD; any contract between the two; all of the FHA mortgage sales; cost and financial information about Hamilton; and a wide range of communications between Hamilton and its sub-contractors and employees. The subpoenas also sought all paper and electronic documents from January 1, 1992 to the present having to do with communications among and between people at Hamilton, HUD, and sub-contractors, communications between Hamilton and specifically enumerated individuals at HUD, and other similar categories which duplicated in virtually every respect another request in the subpoena.

53. Then, the recent 1997 subpoenas to Hamilton called for information from Hamilton that the HUD IG had requested in earlier subpoenas, such as all paper and electronic documents "for the period October 1, 1993 to the present ... constituting or pertaining to bid selection decision packages ...;...conflicts of interest or potential conflicts of interest of Hamilton in connection with its status as a HUD contractor and/or subcontractor...;... conflicts of interest or potential conflicts of interest of Hamilton subcontractors or 'teaming partners' in connection with FHA mortgage sales...", as well as a wide range of communications among and between Hamilton and its employees, sub-contractors, and various HUD officials.

54. The HUD IG's subpoenas also requested information from Hamilton that HUD knew was already in HUD's possession. For instance, the August 22, 1996 subpoena states: "YOU ARE HEREBY REQUIRE TO PRODUCE: 1. All electronic communications between any officer, employee, contractor, subcontractors, or 'teaming partner' of Hamilton and any official, employee, contractor, of subcontractor of HUD ..." when virtually the only form of electronic communication between Hamilton and HUD is through HUD's own e-mail system. By law, HUD is required to maintain copies of these e-mails.

55. As a virtually "paperless office," Hamilton has experienced considerable strain with its data and information systems and considerable extra expense, compared with less technically sophisticated firms, in order to comply with this barrage of documentation demanded by the HUD IG.

(4) Defendants have caused or condoned leaks to the press and others.

56. The IG's Office and/or others at HUD have persisted in leaking to the media privileged and confidential, as well as known inaccurate and misleading, information about Hamilton and the on-going investigation.

57. In August 1996, the IG purportedly began an investigation of Hamilton. However, soon thereafter, and long before any substantive conclusion could have been warranted, someone at HUD identified as of "the highest authority in the HUD IG's office" leaked to a reporter at *U.S. News & World Report* misinformation that Hamilton was guilty of criminal misconduct.

58. Information was leaked by the HUD IG Office to *The Washington Times* in October 1997 about a HUD IG subpoena of Hamilton's records even before the subpoena was issued or delivered to Hamilton.

59. In February 1996, Hamilton notified HUD that certain documents requested under the Freedom of Information Act ("FOIA"), as part of the bidding process, should be treated as confidential and not be disclosed, as is customary for most businesses submitting these kinds of proposals. HUD's FOIA Office assured Hamilton that it would not release this information and would treat it as proprietary to Hamilton and subject to exclusion from FOIA under the Privacy Act. Nonetheless, excerpts of these documents, which had been supplied to the HUD IG in early fall 1996 pursuant to the original subpoena, were leaked to the press. These excerpts, as well as the misinformation leaked in October 1996, were included in a November 11, 1996 *U.S. News & World Report* story about Hamilton. Many of these same leaks have been repeated in the trade press (i.e., *Housing Affairs' Letter* and *Housing and Development Reporter*).

(5) Defendants have interfered, instigated or condoned interference with Hamilton's banks.

60. On October 20, 1997, false and misleading information was spread to Hamilton's primary creditor, Franklin National Bank, on an anonymous basis alleging that Hamilton was going out of business. This occurred right after HUD sent a hand-delivered letter to Hamilton canceling its crosscutting contract.



Hamilton decided to notify its bank of the cancellation, but was told by the bank that some anonymous person already made the "going out of business" call.

61. Then, in November 1997, the Federal Deposit Insurance Corporation ("FDIC") initiated an audit of Franklin National Bank's loan to Hamilton soon after HUD and the other defendants began leaking information to the press and taking other actions directed at Hamilton. This audit appears unusual as that very same loan had been previously reviewed by the regulators just a few months earlier in mid-1997.

(6) Defendants have instigated other non-merited investigations.

62. Not content with its own levels of review, summonses and inquiries, the HUD IG has been lobbying staff members of the Committee on Banking, Housing, and Urban Affairs of the U.S. House of Representatives to hold hearings on the issue of HUD's contract problems, with emphasis on Hamilton's activities under the financial advisory contract. This would result in Hamilton's having to respond to and pay for additional requests and subpoenas, and use time that it needed to keep itself in business, to comply with new inquiries.

63. On December 31, 1997, Hamilton was asked by the Department of Labor to help provide materials for an "inquiry" by the General Accounting Office ("GAO") on a closed joint venture contract that was Hamilton's only non-HUD federal contract except for an earlier contract with the RTC. On January 5, 1998, GAO thereupon issued its own series of comprehensive written questions to

Hamilton, demanding answers 8 days later, by January 13, 1998. The Department of Labor had already audited and approved this same contract during the normal closing procedures.

64. In August 1997, the Internal Revenue Service began a tax audit of the Hamilton profit sharing plan. This occurred just prior to HUD's termination of its crosscutting services contract with Hamilton. No Hamilton entity had ever before been audited by the Internal Revenue Service and no new filing or change in business justified this sudden audit

(7) Defendants have now issued retaliatory subpoenas.

65. In August 1996, C. Austin Fitts asked the OIG if the Denver audit would be withheld because it complimented the program and Hamilton, to which the OIG replied that such action would be unethical and then promptly served Hamilton with the second August 1996 subpoena

66. Then, after 17 months, the delivery of tens of thousands of pages of electronic and paper documents, the expenditure of over \$1 million in responding to HUD's requests, the loss of business, the laying off of employees, and the prospect that the campaign against it would not end, Hamilton's founder, Austin Fitts, on December 11, 1997, sent a letter from legal counsel to the Department of Justice and to HUD asking that the investigation be closed, that summonses be discontinued, that funds owed the company be released, and that Hamilton's good name be restored and Hamilton be cleared of any wrongdoing.

67. The letter was delivered by hand to the agencies in the morning. That afternoon, Hamilton's attorneys were called by Judith Heatherton, counsel to the HUD IG, to ask if they would accept service of a new summons, this one, for the first time, directed at Ms. Fitts personally and seeking all of her personal financial records at Franklin National Bank from October 1993 to December 1997. The period went far beyond the term of the crosscutting contract, and this subpoena increased the anxiety of Franklin National Bank, which had refused to extend additional credit to Hamilton, causing further injury to the company.

(8) Defendants have engaged in a subterfuge to withhold money due and owing to Hamilton.

68. In October through December 1996, Hamilton discovered a discrepancy between the instructions in the packages sent to would-be bidders of defaulted FHA loans and the operation of the "optimization model," a software program by which the bids submitted would be evaluated, in part of the loan sale program. Hamilton promptly brought this discrepancy to the attention of defendant Retsinas and other senior HUD officials when the error was understood and quantified. At that point, Hamilton's work had helped save the government \$1.9 billion in avoided costs, according to estimates reviewed and approved by OMB. These savings would rise to \$2.1 billion by the time the crosscutting contract was terminated in October 1997. Hamilton estimated the potential maximum effect of the modeling discrepancy on sales proceeds to be \$3.8 million, or approximately 0.05% of total proceeds and 0.18% of total net savings. Hamilton acted as an

agent in the loan sale and not as a guarantor or underwriter and was not paid according to net proceeds. HUD and Hamilton recognized at the time that Hamilton was not financially liable for the discrepancy.

69. None of these officials made any response to or criticized Hamilton at the time. Nor did these or any other officials, including officials from the Office of the IG, ever dispute or independently try to verify Hamilton's estimate of the potential effect of the discrepancy on loan sale proceeds at that or any other time. Indeed, the officials notified said they appreciated the fact that Hamilton had found the discrepancy and had taken corrective actions so as not to disrupt the progress of scheduled loan sales.

70. Hamilton corrected the optimization model floor bid instructions and even instituted new and more stringent internal control procedures and then proceeded in its work as HUD's crosscutting financial advisor. Three subsequent sales of defaulted mortgage loan packages went forward, with representatives of HUD's program offices and General Counsel present, and with Hamilton playing this role over the next nine months. As before, Hamilton did the work, submitted invoices, and was paid in a timely manner.

71. Then in April 1997, HUD notified Hamilton without warning that HUD intended to consolidate various contracts and would cancel the crosscutting contract "for convenience of the government" at the time a new financial advisory contract was to be put into place. No default, breach, or failure to perform by

Hamilton was alleged. Despite the claim that this cancellation was for "convenience," HUD also announced that it would be seeking bids on a new similar advisory contract. At this time, a year was left on the contract, with payments to Hamilton of approximately \$10 million still to be paid.

72. Hamilton decided to enter the bidding for any new contract that was awarded and to find additional or alternative work to replace that which was going to be potentially lost. The companies planned their activities around use of the money still owed by HUD and still being earned. Neither HUD nor any of the defendants made any statements that Hamilton's work should stop while a new contract was designed; nor did the defendants indicate that HUD would stop paying on the invoices submitted for the work that had been or was being done.

73. In light of the announced plans for a new contract, Hamilton developed a new non-HUD related project requiring it to raise \$10 million in the first year. It began preparations for a private placement memorandum and solicitation. Again, it was counting on HUD to follow government regulations and on HUD's history of paying Hamilton for work being done and invoices being sent. The new project required approximately \$2.0 million for its start-up phase.

74. Pursuant to the regulations and historical practice, Hamilton submitted invoice #17 for \$868,417.00 (for work done through September 25, 1997) on September 26, 1997, and was told by HUD officials that it would be approved for payment on or before October 17, 1997.

75. Despite announcing in April that it would end the crosscutting contract only when a new contract was awarded, HUD then notified Hamilton on October 17, 1997, by a hand-delivered letter, that it was abruptly ordering Hamilton to stop work immediately, even though no new awards had been made, even though Hamilton had submitted a new bid of its own which was still pending, even though Hamilton was still engaged in providing advisory services to HUD under the contract, including services in connection with two pending loan sales, the preparation of HUD's Fiscal Year 1999 budget request, and the reengineering of HUD's multifamily programs, and even though October 17 was the date HUD said invoice #17 would be approved for payment.

76. Prior to October 17, 1997, despite Hamilton's weekly meetings with and written reports to authorized program and contracting representatives, Hamilton received no notification under the contract that any problem existed. In fact, within a few weeks of this action, HUD's Chief Financial Officer testified at Congress that "we have a successful asset sales program that has made us the leader in the federal government in this area (emphasis added)."

77. HUD then withdrew the pending financial advisory RFP and thereby suspended the loan sale program. As a result, HUD ended up stopping all loan sales, which is causing HUD substantial losses on advisory fees expended in preparing for the canceled sales and on future losses of recoveries on the loans as they deteriorate in HUD's portfolio. These losses far exceed the \$3.8 million loss

that HUD alleges Hamilton contributed to causing. *Real Estate Alert* reported in its November 17, 1997 issue that HUD had "abruptly" canceled loan sales pending replacement of Hamilton as crosscutting financial advisor and that "[c]utting Hamilton loose,... was the easiest way for this to respond to the controversy and avoid a possible congressional investigation." A HUD spokesman was reported as saying, "we're trying to figure things out."

78. On October 24, 1997 Hamilton then submitted invoice # 18 for \$636,839 which is the pro rata portion of a regular monthly payment for work from September 26, 1997 through the date of the cancellation letter and also notified HUD that it would be submitting a separate termination claim. Despite HUD's plain duty to pay these amounts and Hamilton's plain right to payment, neither invoices ## 17 nor 18 has been paid.

79. Regarding Hamilton's termination claims, HUD also has improperly delayed the routine cost audit for another HUD/Hamilton contract, thereby postponing the closing of the contract and the resolution of future payments that Hamilton has estimated to be approximately \$500,000. According to HUD's IG, the close-out audits are being delayed pending completion of the IG investigation of Hamilton. Hamilton's costs mount daily, due to interest charges, penalties, legal expenses, and staff time, and will continue to mount so long as the contract close-out is delayed.

- (9) Hamilton has repeatedly requested that defendants stop ignoring or violating regulations in withholding funds due and owing to it and defendants have refused.

80. In the October 17 letter announcing HUD's decision to withhold funds, HUD official Annette Hancock stated that, "The Department is currently withholding any further payments due and owing Hamilton under the terms and conditions of Contract DU100C000018505 and Task Order 001 until such time as the debt [the \$3.8 million Hamilton estimated the bidding discrepancy might cost] is satisfied" (emphasis added). Ms. Hancock claimed that HUD was relying on its authority in Federal Acquisition Regulations, specifically, 48 C.F.R. § 32.610, to keep the funds. However, that regulation does not apply to the instant situation, was not (as opposed to other FAR provisions) incorporated or referenced in any contract between HUD and Hamilton, and was not followed by HUD either in their October 17, 1997 letter or in HUD's subsequent dealings with Hamilton. Indeed, the October 17 letter goes on to ask that Hamilton make this as a "voluntary payment" thereby undermining HUD's entire justification for withholding the payment in order to protect its claim.

81. Hamilton contested that HUD had any regulatory right to a self-help set-off and repeatedly has asked HUD officials to pay the invoices and not to hold them up as part of any action HUD was taking against Hamilton as part of the so-called investigation or otherwise. On October 22, 1997, for example, Hamilton's attorneys, Jenner & Block, wrote to HUD pointing out that the actions being taken



by HUD, including the withholding of payments, was improper. The letter vigorously contested the application of the set-off regulation. They advised HUD that there was no "contractual debt" by stating that the discrepancy found had not affected HUD's benefit in the optimization model used by Hamilton, nor could it be seen as a failure to perform on the part of Hamilton under the contract, nor that Hamilton would even be liable for such an error as a financial advisor rather than underwriter or guarantor. They also pointed out HUD's violations in applying the set-off provision by stating that HUD had not discharged its duty under the provision to determine the validity of the alleged "debt." They asked to meet with HUD as soon as possible.

82. In addition to pointing out that HUD did not have authority to withhold the funds due and owing, Hamilton and its attorneys also pointed out to HUD that it had no need to withhold the funds even if the FAR set-off regulation was applicable because Hamilton carried an errors and omissions insurance policy for claims of up to \$10 million arising from mistakes made by Hamilton or its employees in the course of their work. Hamilton confirmed that the liability insurance would protect HUD against any claim HUD had in the event Hamilton had made a mistake for which it had legal liability. As one example, Hamilton wrote HUD on November 13, 1997, pointing out the harm HUD's and the other defendants' actions were causing and explaining that any legitimate claim HUD might have would be covered by the insurance policy. Hamilton also requested a

deferment pursuant to the set-off regulation which applies when such withholdings are disputed and when the harm to a claimant greatly outweighs any benefit to the government in immediate action.

83. Neither HUD nor any of the other defendants responded to the November 13 letter. Therefore, on December 10, 1997, Hamilton sent another letter to HUD complaining about HUD's action and pointing out how they violated regulations and failed to respond to Hamilton's request for a deferment, especially in light of their insurance coverage. Moreover, in its letter of December 10, 1997, Hamilton requested that if HUD did nothing else, it at least should issue a final decision so that Hamilton could appeal the withholding of funds under the Contract Disputes Act, providing Hamilton with an avenue to challenge the withholding. In addition, Hamilton's attorneys sent a letter to the Department of Justice on the same day explaining the impact the delayed investigation and subpoenas had and were having on Hamilton, and that HUD was without legal authority for withholding payments owed Hamilton. Neither Hamilton nor its attorneys received a written response or explanation from HUD or the defendants.

84. On December 22, 1997, Hamilton and its attorneys sent a series of letters to HUD again complaining about the agency's actions, requesting that the withheld funds be released and explaining the harm the agency was causing. One of these letters was written by C. Austin Fitts to Secretary Cuomo himself,

explaining that the agency's actions and inactions would soon cause Hamilton to go out of business.

85. HUD sent a response on December 22, 1997 stating that it had not leaked information to the media and that the agency expected full compliance with the subpoenas to which Hamilton objected. The response made no statements regarding the other issues that had been raised. On December 23, 1997, HUD officials, after over two months of refusing to meet when asked in October 1997, did agree to a meeting to be held on January 2, 1998. Hamilton explained that this was pushing it to the brink of disaster because, among other things, another payroll was due on December 31, 1997. HUD did not provide Hamilton with any earlier date.

86. On December 29, 1997, Hamilton again wrote to HUD stating that it had no basis to withhold the payments because Justice Department attorneys had now indicated that the money could be delinked from the investigation of Hamilton and Hamilton's insurance company had reiterated the coverage of a liability policy

87. On December 30, 1997, Deputy General Counsel Howard Glaser sent a response to Hamilton. In his letter, Glaser again asserted that HUD had regulatory authority, pursuant to 48 C.F.R. § 32.610, to withhold the funds that the agency had conceded were due and owing. Specifically, Glaser wrote: "HUD is exercising its common law right, and right in accordance with the Federal Acquisition Regulations, to withhold and/or set-off the debt... There is nothing in

[the contracts with Hamilton] which would preclude HUD from exercising these rights . . .”

88. On January 2, 1998, Hamilton's attorneys met with Howard Glaser, John Kennedy, John Opitz, and others from HUD. Again, they complained about HUD's actions and inactions and specifically requested the release of funds so that Hamilton could stay in business to contest the events described in this complaint. Again, they contested that the FAR set-off regulation did not apply to the situation of an error reported by Hamilton a year before, that HUD had not followed its regulations in undertaking such a set-off provision (*e.g.*, determining the debt amount, issuing a final decision, granting a request for deferment), or that HUD was acting outside its discretion in applying this regulation in light of the irreparable harm being caused to Hamilton (*i.e.*, putting it out of business). HUD officials stated that they had the power to take the actions and provided no relief to Hamilton. This suit follows HUD's refusal to act.

F. Defendants' Actions Have Caused And Continue To Cause Irreparable Harm In That They Are Designed Or Will Result In Putting Hamilton Out Of Business.

89. Between January 1996 and October 1997, Hamilton's contract with HUD has amounted to almost all of its income. This reliance is not unusual in government contract relations where potential conflicts of interest must be guarded against, combined with investigations that preclude other business relationships. When defendants decided to interfere with the payment of invoices # 17 and #18,

what had been a mere ministerial act, they knew or should have known that their action would threaten the continued existence of Hamilton.

90. Officials at HUD, including the defendants, also are aware that it takes considerable time and effort for any company to respond to administrative subpoenas such as those served on Hamilton. In fact, Hamilton spent thousands of hours of employees' and sub-contractors' time responding to these subpoenas. In addition, because HUD has sought documents and computer files which Hamilton needs for current operations, Hamilton also has had to undertake the costs of copying the materials involved and endure the disruptions to its information systems of managing such a massive data storage and retrieval exercise. To date, there have been more than 27,000 pages of documents and more than 133 computer files summonsed by HUD. Producing and copying this material has cost Hamilton over \$1 million dollars and interfered with the routine performance of its information systems, which are vital to its model of running a virtually paperless office.

91. Notwithstanding the productions Hamilton made between August 1996 and June 1997, in October 1997 HUD served additional dragnet subpoenas on Hamilton which call for "all data, documentary evidence, papers, communications, correspondence, reports, notes, memoranda, drafts, accounts, electronic mail, telephone messages, calendar entries, diary entries, charts, and other information, whether in paper form or stored on audiotape, videotape,

computer, electronic, magnetic, or other media" pertaining to bid packages, potential conflicts of interest, e. villages, . . ." As explained in more depth above, these new subpoenas call for much material that has already been supplied to HUD, that is readily available in HUD's own files, and that is not relevant to Hamilton's crosscutting contract. Compliance with these subpoenas could cost Hamilton additional hundreds of hours and hundreds of thousands of dollars.

92. Publicity that a company is under an Inspector General investigation and under suspicion of criminal wrongdoing can cause the company to lose business and financial backing. Because of the potential impact of publicity and sensitive to preserving an entity's presumption of innocence, there are strict regulations which prohibit leaking of law enforcement information. Indeed, virtually all codes of professional responsibility and court rules include prohibitions against leaks of investigative materials to the public. In addition, various statutes protect against the disclosure of information about a company or of the fact that the company asks to be exempt from disclosure.

93. In addition to the harm that can be caused by even accurate publicity about an investigation, inaccurate and incomplete information can cause even greater harm, particularly if that information raises doubts about the core operations of business, such as the financial integrity of a fiduciary concern, like a financial advisor. If government agents provide the press with only one side or

with misleading bits and pieces of their work, then subsequent news articles can be even more harmful to those involved.

94. As a result of the leaks that have occurred in this case, Hamilton has been told by prospective clients and business partners that they do not want to do business with it. Few federal, state or local government agencies, or private clients want to contract with a firm that is under federal investigation. This investigation is especially harmful to Hamilton's potential advisory and broker-dealer activities.

95. Similarly, these leaks have made it impossible for Hamilton to raise new capital from financial institutions, private investors or the capital markets, thereby restricting Hamilton's access to the capital needed to pursue its new business interests or significantly raising Hamilton's cost of capital.

96. Because of the impact of all of the defendants' actions, Hamilton's income flow has gone from approximately \$900,000 per month in September 1997 to essentially \$0 per month today. Hamilton has had to lay off 28 employees, including specialists in mortgage trading, data management, data mapping, information systems, and accounting. In order to make the November payroll for the remaining 17 employees, Ms. Fitts had to liquidate her retirement savings in Hamilton's profit-sharing plan and in the process incurred substantial taxes and penalties for taking an early distribution. Hamilton has had to cancel contracts with sub-contractors and other providers of goods and services, and is being

threatened with legal action by disgruntled contractors and vendors seeking payment of debts.

97. In addition to its payroll costs, Hamilton is accumulating substantial debts for rents, utilities, telephones, mailings, supplies, interest, penalties, and legal expenses just to deal with the HUD dispute. As of this point, Hamilton has accumulated payables and bank debt of about \$1,500,000. Hamilton is behind in its payroll by approximately \$170,000. In the following few weeks, it has another payroll, and employee expenses, of approximately \$150,000 to meet. It owes approximately an additional \$14,500 in rent, \$20,000 in insurance premiums, and nearly \$5,000 in utility bills for the month of January. Hamilton's inability to resolve these debts means that in the near future Hamilton could lose access to these necessary services without which it could not continue to remain in business.

98. Hamilton has spent considerable time and expense building its reputation, its potential client base, and the expertise among its personnel and business associates. With respect to Hamilton's remaining employees, this includes a licensed architect, investment banker, broker-dealer, systems analyst, computer scientist, attorney, graphic designer, certified public accountant, communications specialist, and Internet specialist.

99. Unless it is able to have the \$1.5 million it already has earned and properly invoiced released by HUD, plus the funds that will be due from HUD in future audited contract costs, plus the funds that are being withheld for contract



close-out expenses, and unless it is able to clear its good name of the unsubstantiated charges openly and surreptitiously leveled against it, Hamilton will have no ability to finance continuing operations, to pursue new business opportunities, or to keep the personnel and clients in which it has invested so much. No award of damages in the future in this and other litigation will be sufficient to compensate Hamilton for these losses or enable Hamilton to overcome the irreparable loss to its business reputation. Without immediate release, Hamilton will face the likelihood of having to close down and be forced into bankruptcy to obtain protection from its creditors.

100. Hamilton's situation is urgent for the following reasons: Hamilton's current employees have not been paid for work performed during the month of December 1997 and substantially all of those employees have indicated that they will be forced to leave Hamilton in order to seek alternative employment unless they are paid immediately; AT&T, the lessor of Hamilton's telephone equipment, has indicated that they will remove the equipment unless they receive payment this week on all outstanding invoices, approximately \$16,600; CVS, the landlord for Hamilton's office at 7 Dupont Circle, N.W., Washington, D.C., has notified Hamilton that it is in default under the lease and CVS's legal counsel has indicated that CVS will commence eviction proceedings to regain possession of the office space unless Hamilton pays the delinquent rent; Hamilton's revolving line of credit with Franklin National Bank of Washington, D.C. is due and payable and the bank

can declare the loan in default (and commence legal action to obtain possession of the collateral for the loan) unless payment is made immediately; and Hamilton is delinquent on payment of certain of its basic utilities (local phone, long distance phone, electric, etc.) and these services will be discontinued in the coming weeks unless payment is made on the outstanding invoices. Finally, on January 6, 1998, Hamilton was told that on January 9, 1998 a notice will be sent from the insurance finance company indicating that if Hamilton does not pay the monthly insurance premium of \$13,136 before January 20, 1998, Hamilton's Errors and Omission Insurance Policy will be cancelled.

101. By the time that defendants decide that HUD has investigated Hamilton enough or even by the time this Court will hear the merits of this case in the ordinary schedule of the courts, it will be too late. Once it defaults on its future obligations, has to lay off more or the rest of its staff, and loses its potential private sector clients, Hamilton will not be able to put things back together if later on it should be found to have been right on all pending issues and will not be in a position to pursue its current new business interests.

COUNT 1

(Administrative Procedure Act)  
(Improper Withholding Of Properly-Invoiced Payments)

102. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 101.

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103. The Administrative Procedure Act provides that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

104. The APA enumerates the following widely recognized standards governing agency decision-making, which require a reviewing court to:

(1) compel agency action unlawfully withheld or unreasonably delayed; and  
(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
- (D) without observance of procedure required by law.

5 U.S.C. § 706 (1), (2).

105. Defendants' decision to withhold the payments HUD concedes are "due and owing" to Hamilton violates government-wide regulations requiring the prompt payment of invoices, 48 C.F.R. § 52.232-1. Such payments are the nature of a ministerial act. Defendants have a plain duty to perform and Hamilton has a plain right to have the payments made. There exist no other adequate remedy by which their right can be vindicated.

106. Nor is defendants' decision to withhold the payments HUD concedes are "due and owing" authorized by the regulations (including 48 C.F.R. § 32.610), cited in Ms. Annette Hancock's October 17, 1997, letter to Hamilton because,

among other reasons, the amounts in question are not "debts" as defined in the regulation and HUD has not followed this regulation, *e.g.* determined amount of any debt, issued final decision, granted deferment, in its dealings with Hamilton. Indeed, HUD itself has conceded that the set-off provision is not applicable by calling for Hamilton to make a "voluntary" payment of the amount in question.

107. The defendant's violations of various regulations in withholding of payments and improper invocation of and failure to comply with 48 C.F.R. § 32.610 in withholding payments due to Hamilton violate the APA, 5 U.S.C. §§ 706(2)(A)-(D).

### COUNT 2

(Due Process Clause)

(Improper Withholding Of Properly-Invoiced Payments)

108. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 107.

109. The Due Process Clause of the Fifth Amendment to the U.S. Constitution states that, "No person shall be deprived of . . . life, liberty, or property without due process of law." U.S. Const. amend. V.

110. Hamilton has a liberty and property interest in and to the contracts it had with the government and its eligibility to compete for and be awarded other government contracts.

111. The defendants' decision to withhold the payments that it concedes are "due and owing" to Hamilton, its insisting on Hamilton making a "voluntary"

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payment of those funds, and its refusal to provide Hamilton with a forum to contest this improper withholding deprive Hamilton of its property without due process in violation of the Fifth Amendment.

COUNT 3

(Administrative Procedure Act)  
(Issuance of Overbroad, Duplicative and Retaliatory Subpoenas)

112. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 111.

113. An agency's purposeful issuance of subpoenas which are overbroad, duplicative, outside the scope of the agency's authority to inquire, retaliatory, and otherwise in bad faith represents agency action which is arbitrary and capricious, an abuse of discretion, in excess of statutory and constitutional authority and right, and without observance of procedure required by law and thus in violation of the APA, 5 U.S.C. §§ 706(2)(A)-(D).

114. The defendants have issued subpoenas to Hamilton that are overbroad, duplicative, outside the scope of the agency's authority to inquire, retaliatory, and otherwise in bad faith for, *inter alia*, the following reasons: the subpoenas are designed to harass Hamilton and pressure it into settling with HUD, not to obtain pertinent and relevant information, these subpoenas are overbroad in that they seek Hamilton to expend large sums of money and commit its personnel to retrieve materials having nothing to do with Hamilton's involvement with HUD and nothing to do with any issue in dispute between Hamilton and HUD, the

subpoenas are duplicative because they repeat demands for information already made and seek material already in HUD's possession. The subpoenas also have been issued in retaliation for Hamilton's actions to complain about the treatment from the defendants that it has been given.

115. These subpoenas issued in this manner and for these reasons violate Sections 706 (2)(A)-(D) of the APA.

**COUNT 4**  
**(The Fourth and Fifth Amendments)**  
**(Issuance of Overbroad, Duplicative and Retaliatory Subpoenas)**

116. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 115.

117. The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law..." U.S. CONST. Amend. V.

118. The Fourth and Fifth Amendments to the United States Constitution prohibit an agency from issuing subpoenas that are overbroad, duplicative, and outside the scope of the agency's authority to inquire. The sources of law also prohibit an agency from issuing a subpoena that is retaliatory; seeks to annoy and

harass; seeks to achieve the compromise of an alleged debt or obligation; that is not related to the investigation; or is otherwise in bad faith.

119. The agency subpoenas to Hamilton transgress these constitutional requirements for, among others, the following reasons: the subpoenas are designed to harass Hamilton and pressure it into settling with HUD, not to obtain pertinent and relevant information, these subpoenas are overbroad in that they seek Hamilton to expend large sums of money and commit its personnel to retrieve materials having nothing to do with Hamilton's involvement with HUD and nothing to do with any issue in dispute between Hamilton and HUD, the subpoenas are duplicative because they repeat demands for information already made and seek material already in HUD's possession, the subpoenas also have been issued in retaliation for Hamilton's actions to complain about the treatment from the defendants that it has been given.

120. These subpoenas issued in this manner and for these reasons violate the Fourth and Fifth Amendments to the U.S. Constitution.

COUNT 5  
(Administrative Procedure Act)  
(Improper Disclosure Of Information)

121. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 120.

122. The Freedom of Information Act provides protection for agency records that are confidential. 5 U.S.C. § 552.

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123. Other sources of authority provide for confidential treatment of agency investigative information and documents. See 18 U.S.C. § 1905; 5 C.F.R. § 2635.902(y), (aa); 24 C.F.R. § 0.1. Moreover, the Inspector General Act, 15 U.S.C. App. 3, does not authorize, as a part of the HUD OIG's appropriate functions, the leaking that is occurring.

124. An agency's purposeful disclosure of such investigative information, information it promised to keep confidential, and inaccurate information constitute agency action which was arbitrary and capricious, an abuse of discretion, in excess of statutory authority, and without observance of procedure required by law.

125. Defendants have improperly disclosed or caused the disclosure of information and misinformation about Hamilton to the press, to Hamilton's financial institutions, and other others.

126. These disclosures violate Sections 706 (2)(A)-(D) of the APA.

COUNT 6  
(Privacy Act)  
(Improper Disclosure Of Information)

127. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 126.

128. The Privacy Act provides, in part, that:

Whenever an agency

. . . .  
(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,



the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a(g)(1)(D).

129. An agency's purposeful disclosure of investigative information, information it promised to keep confidential, and inaccurate information constitute agency action which violates the Privacy Act.

130. Indeed, the HUD IG subpoenas at issue expressly state that the Privacy Act applies to information obtained pursuant to these processes.

131. Defendants have improperly disclosed or caused the disclosure of information and misinformation about Hamilton to the press, to Hamilton's financial institutions, and other others.

132. These disclosures violate the Privacy Act.

COUNT 7  
(Due Process Clause)  
(Improper Blackballing Of Hamilton)

133. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 132.

134. Hamilton has a liberty and property interest in and to the contracts it had with the government and its eligibility to compete for and be awarded other government contracts.

135. Defendants have taken actions, including, without limitation: the subterfuge of canceling Hamilton's crosscutting contract for government

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convenience; the withholding of funds that Hamilton has earned; defendants' attempts to exhaust Hamilton's current assets; and defendants' actions to deny Hamilton future business and funds without any basis, without providing Hamilton with proper notice, and without providing Hamilton recourse to contest these actions. Defendants also have refused to issue a final decision on its actions from which Hamilton could appeal under ordinary contract and other procedures.

136. These actions alone and together violate the Due Process Clause.

COUNT 8  
(Due Process)  
(Actions Putting Hamilton Out Of Business)

137. Plaintiffs reassert and reallege the allegations contained in paragraphs 11 through 136.

138. Hamilton has a liberty interest and a property interest in and to its continued business, its reputation, keeping its present employees and customers, and keeping its relationship with its financial institutions, and, indeed, its very existence.

139. HUD has taken actions, including without limitation, the issuance of subpoenas intended to cause Hamilton to exhaust its present resources, the withholding of funds due and owing to deprive Hamilton of obtaining funds it needs to operate, and the dissemination of information about Hamilton intended to cause or resulting in causing Hamilton from being unable to obtain new funds

without any basis, without providing Hamilton with proper notice, and without providing Hamilton recourse to protest or seek redress against these actions.

140. These actions violate the Due Process Clause.

PRAYER FOR RELIEF

Wherefore, plaintiff asks this Court to enter in Order:

A. Declaring that Defendants' actions withholding funds that they had a plain duty to pay, and that were due and owing, and to which Plaintiffs had a plain right are not justified as in accordance with the regulations and common law they have cited, or other applicable regulations, constitutes arbitrary and capricious agency action, an abuse of agency discretion, were without observance of procedure required by law, and is a deprivation of property without due process of law in violation of the APA and the Constitution (Counts 1 & 2);

B. Declaring that Defendants' overly broad, burdensome and bad faith investigation where there has been no discovery of any wrongdoing, issuing subpoenas intended to burden Hamilton rather than elicit relevant and original information, and issuing subpoenas in retaliation for Hamilton asserting its rights, were arbitrary, capricious, and an abuse of its discretion in violation of the APA and violated rights protected by the Fourth and Fifth Amendments to the Constitution (Counts 3 & 4);

C. Declaring that Defendants' actions to disclose to the media and public investigative and inaccurate information about HUD's investigation, their

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failure to keep confidential information that was provided by Hamilton with an assurance of confidentiality, and disclosure to Hamilton's financial institution were arbitrary and capricious agency action, were an abuse of agency discretion, were in violation of applicable confidentiality statutes, regulations, and standards, and thus violated the APA (Count 5);

D. Declaring that Defendants' actions to disclose to the media and public investigative and inaccurate information about HUD's investigation, their failure to keep confidential information that was provided by Hamilton with an assurance of confidentiality, and disclosure to Hamilton's financial institution were violations of the Privacy Act (Count 6);

E. Declaring that Defendants actions to blackball Hamilton from future government work has deprived Hamilton of its property and liberty without due process of law in violation of the Fifth Amendment to the United States Constitution (Count 7);

F Declaring that Defendants actions which were intended to put or which are putting Hamilton of out business deprived Hamilton of its property and liberty without due process of law in violation of the Fifth Amendment to the United States Constitution (Count 8);

G. Temporarily restraining and preliminarily and permanently enjoining Defendants from continuing to withhold payment on invoices # 17 and #18 (Counts 1 & 2);

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H. Temporarily restraining and preliminarily and permanently enjoining Defendants from further delaying its closeout audit of one of its HUD contracts and assessing the close out payments required to be made to Hamilton (Counts 1 & 2);

I. Temporarily restraining and preliminarily and permanently enjoining Defendants from taking actions which lack authority and were taken for improper political purposes (Counts 1-8) ;

J. Temporarily restraining and preliminarily and permanently enjoining Defendants from making any statements to the press or public concerning its dealings with Hamilton until all investigations which it is conducting or has instigated and all litigation concerning Hamilton have concluded (Counts 5 & 6);

K. Quashing the subpoenas to Hamilton and Ms. Fitts issued on October 24, 1997 and December 11, 1997 to the extent that they already have not been answered (Counts 3 & 4);

L. Issuing a writ of mandamus for Defendants to follow HUD's regulations, specifically relating to the prompt payment of invoices and the set-off of debts (Count 1);

M. Awarding plaintiffs their costs and attorneys fees to redress the bad faith actions taken by HUD; and

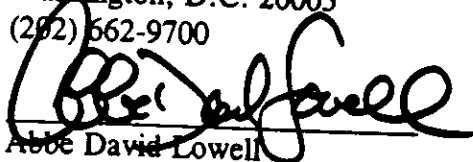
N. Awarding such other relief as the Court may deem appropriate.

Dated: January 8, 1998

Respectfully submitted,

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