

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COPY

SUSAN GAFFNEY, in her official
capacity as Inspector General,
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 (SS)

**PETITIONER'S REPLY TO [RESPONDENTS'] HAMILTON SECURITIES'
SUPPLEMENTAL OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT**

On September 24, 1998, Petitioner filed a Status Report with the Court summarizing the proceedings to date in this matter, which concerns a Petition for Summary Enforcement of Subpoenas issued pursuant to the Inspector General Act, 5 U.S.C. App. 3 § 6(a)(4), filed on March 3, 1998. Petitioner advised that the Co-Special Masters appointed by the Court on March 6, 1998, to assist the Court by obtaining possession of the records potentially responsive to the subpoenas, pending a ruling by the Court on the Petition for Summary Enforcement, appear to have gathered most of the relevant materials in accordance with the Court's Orders of March 6 and 10, 1998. Petitioner also advised, however, that Petitioner had not gained access to many of

the most significant records, and that despite Petitioner's attempts to achieve resolution of several pending issues by negotiation with Respondents' counsel and through the good efforts of the Special Masters, the parties had been unable to resolve these issues.¹ Accordingly, Petitioner advised that in its opinion the time was now ripe for judicial resolution of these issues.

On September 30, 1998, pursuant to the Court's request of September 25, 1998, the parties filed a Joint Statement Concerning Pending Issues Awaiting Resolution by the Court, in which they presented an agreed briefing schedule on the principle issues, in the event the Court desired additional briefing. On October 9, 1998, the Court entered the order presented by the parties concerning the proposed briefing schedule, and the parties have subsequently filed pleadings addressing Respondents' claim to entitlement for protection of undisclosed proprietary information² and Respondents' request to conduct discovery.³ On October 14, 1998, Respondents

¹ Additional details concerning the background of these proceedings and the issues awaiting judicial resolution are set forth in the First, Second, and Third Reports of the Co-Special Masters, filed March 23, April 27, and September 8, 1998, respectively.

² See Hamilton Securities' Response Concerning the Protection of Proprietary Information, filed October 13, 1998; Petitioner's Reply to Hamilton Securities' Response Concerning the Protection of Proprietary Information, filed October 21, 1998; see also Petitioner's Status Report, filed September 24, 1998, at pages 5-9.

³ See Movants', the Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc., Motion for Leave to conduct Discovery, filed September 21, 1998; Petitioner's Response in Opposition to Movants', the Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc., Motion for Leave to Conduct Discovery, filed September 24, 1998; and Respondents' Reply to Petitioner's Opposition to Motion for Leave to Conduct Discovery, filed October 9, 1998.

Respondents' argument that discovery is required in order to determine whether the Attorney General violated 31 U.S.C. § 3733(a)(2)(G) by requesting the assistance of the Office of Inspector General in investigating the allegations of a qui tam complaint, and whether the subpoenas subsequently issued by the OIG are thus invalid, is based on a misunderstanding of the law. This issue is fully addressed in the government's Reply to Movant's Opposition to

responded to the remaining issues addressed in Petitioner's Status Report, filing a Supplemental Opposition to the Petitioner for Summary Enforcement ("Supplemental Opposition"). This pleading responds to the Supplemental Opposition.

The arguments presented by Respondents in their Supplemental Opposition are essentially a reprise of the arguments presented more than seven months ago in their Opposition to Petition for Summary Enforcement of Administrative Subpoenas, filed April 10, 1998 ("Opposition"). Thus, for the most part, Respondents' arguments have already been addressed in Petitioner's Reply to Respondents' Opposition to Petition for Summary Enforcement of Administrative Subpoenas, filed April 27, 1998 ("Petitioner's Reply to Opposition"), and other pleadings previously filed by Petitioner, including the original Petition for Summary Enforcement ("Petition"), the Memorandum of Points and Authorities in support thereof ("Petitioner's Memorandum"), and the Declaration of James M. Martin with attached exhibits ("Martin Decl."), all filed by Petitioner on March 3, 1998; and Petitioner's Response to Respondents' Exception to Recommendation of the Special Masters, filed April 27, 1998. Accordingly, Petitioner here will focus its presentation on summarizing those arguments and Petitioner's responses, and will invite the Court's attention to the sections of the pleadings where the arguments have previously been addressed.

Respondents also repeat their request that the Court grant them permission to take discovery in this matter, and now also request that the Court conduct an evidentiary hearing.

Respondent's Filing of Pleading In Camera and Movant's Request That It Be Furnished a Copy of Respondent's Memorandum of Points and Authorities in Opposition to C. Austin Fitts' Motion for Order Pursuant to Customer Challenge Provisions of the Right to Financial Privacy Act of 1978, filed October 19, 1998, in C. Austin Fitts v. U.S. Department of Housing and Urban Development, Misc. No. 98-347 (SS), at pages 8-12, which is incorporated herein by reference.

Respondents' request to conduct discovery, and the government's opposition, have been fully briefed by the parties as a separate issue.⁴ We will address below, however, Respondents' request for an evidentiary hearing.

I. The Reappearance of the Red Herrings

In their continuing effort to distract the Court from the issues to be resolved, Respondents repeat the accusations made in their original Opposition to the Petition for Summary Enforcement--that the government has leaked to the media information concerning its investigation and is responsible for Hamilton's financial difficulties. The government has addressed these allegations, along with numerous other "red herrings," in previous pleadings (e.g., Petitioner's Reply to Opposition at 2-6), and will address the renewed charges here only briefly.

A. Allegations of Leaks to the Media

Respondents state that they have been "crushed by the weight of . . . unsubstantiated leaks to the national media." Supplemental Opposition at 6. They offer absolutely nothing in support of their renewed contention. Their previous allegations that the government was leaking information to the media were conclusively refuted in (1) Petitioner's Response to Respondents' Exception to Recommendation of the Special Masters, filed April 27, 1998, at 13-17; (2) Petitioner's Reply to Opposition at 4, note 4; and (3) the Memorandum of Points and Authorities in Support of Defendant Gaffney's Motion to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, filed on January 27, 1998 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 12-16 and Exhibits 4-8, all of which

⁴ See note 3, *supra*.

the government incorporates by reference herein. Indeed, having nothing to support its previous contentions, Hamilton dismissed its injunctive proceeding, Civil Action No. 98-36 (SS), upon the representation of the Inspector General that she fully understood her obligations with respect to the release of information concerning an ongoing investigation and would continue to abide by them.

We cannot help but note that given Respondents' expressed concern about supposed leaks to the media by Petitioner, it is somewhat ironic that it was Petitioner who requested that this proceeding be sealed in part to "protect Respondents from adverse publicity concerning the ongoing investigation." See Motion to Seal Proceedings, filed March 3, 1998, at 2. Respondents never replied to Petitioner's Motion to Seal Proceedings, and the Court treated the proceedings as sealed. On September 22, 1998, however, Respondents moved to unseal the record, a motion which Petitioner did not oppose and which the Court granted orally on September 25, 1998, entering a written order to that effect on October 9, 1998

B. Allegation that Respondents' Financial Difficulties Were Caused by the Government's Investigation

Another "red herring" revived by Respondents is their claim that the investigation conducted by the Office of Inspector General ("OIG") of the U.S. Department of Housing and Urban Development ("HUD"), in conjunction with the United States Attorney's Office, has driven them out of business and they are now unable to search their electronic files for records responsive to the subpoenas not previously produced. This contention was also previously addressed in Petitioner's Reply to Opposition at 3-4, to which we invite the Court's attention. In sum, Hamilton has itself to blame for its financial predicament, which was caused by its almost exclusive reliance upon one client--HUD--for its revenue.

Hamilton has conceded that HUD was its only significant paying client. Opposition at 8 ("HUD contracts comprised the majority of Hamilton's revenue-generating workload").

Hamilton's contract with HUD and its crosscutting task order were terminated for convenience by HUD in October 1997, just six months before the task order would have expired in the normal course. Indeed, Hamilton staff, recognizing that Hamilton was nearing completion of its work under the HUD contracts and that no significant other source of revenue had been developed since Hamilton's inception in 1990, and also dissatisfied with failure of the principals to share the profits with them, began leaving Hamilton of their own accord in 1996. These departures accelerated when, in May 1997, Hamilton was informed that its contract and task order were likely to be terminated early for the convenience of the government, even before the expiration of the contract in the Spring of 1998, due to an anticipated consolidated procurement of financial advisory services for HUD.⁵ Finally, Hamilton's contract was terminated on October 17, 1997, six months prior to its natural expiration, following the discovery by HUD's Office of Procurement and Contracts of Hamilton's admission of "errors" it had made in its role as HUD's financial advisor. These "errors" had resulted both in HUD losing money and in the wrong bidders winning certain of the note sales, thus subjecting HUD to potential further monetary losses. In fact, Hamilton's current counsel is apparently being paid for by its insurance company, under its errors and omissions policy, on the theory that the "errors" Hamilton committed with respect to its use of the optimization model in connection with HUD's note sales are at least partly responsible for its current legal difficulties.

⁵ See letter of May 9, 1997, from Annette E. Hancock to C. Austin Fitts (Attachment 1 to Petitioner's Reply to Opposition).

In sum, Hamilton's demise was not caused by the government's investigation, but rather by its own failure to develop, since its inception in 1990, any significant revenue-generating business other than its contracts with HUD; and its demise was apparently accelerated by a few months on account of its own negligence.

II. Respondents' Failure to Produce All Responsive Electronic Records

The Special Masters appointed by this Court have advised the Court that it is their position that non-privileged information responsive to the OIG subpoenas stored in electronic media should be provided to the government, that it is Respondents' responsibility to designate privileged and non-responsive documents, and that "[w]ithout such designations by respondents, the data should be made available to the government in its entirety." Third Report of Co-Special Masters Irving M. Pollack and Laurence Storch, filed September 8, 1998 ("Third Report"), at 3.

Respondents, however, contend that "[t]he OIG has not presented any reason for this Court to believe that the electronic records contain significant documentation not already contained in the paper records or other electronic records already provided to the OIG." Supplemental Opposition at 8. On the contrary, the inadequacies of the previous searches for responsive electronic records, and the reasons to believe numerous responsive records have not been produced, are detailed at length in Petitioner's Memorandum, filed March 3, 1998, at 8-11, 14-19, and 26-31, and in Petitioner's Reply to Opposition at 16-20. The reasons include, but are not limited to, Respondents' admitted failure to search most of their computer drives for items responsive to the August 1996 subpoenas, their use of undisclosed search criteria to locate responsive records, and their failure to search the backup tapes of their electronic records systems despite their institution of a "deletion" policy shortly before the August 1996 subpoenas were

issued. Further, Respondents' own attorneys conceded that Hamilton conducted no searches of its computer and electronic records systems in order to locate records responsive to the OIG's October 24, 1997 subpoenas. See letter of February 5, 1998, from David A. Handzo to Judith Hetherington, Exhibit 24 to Martin Decl., at 5 ("With respect to electronic files [responsive to the October 24, 1997 subpoenas], Hamilton simply has not been able to conduct a search . . ."). Respondents' prior counsel went on to suggest that Respondents' failure to search the electronic media for responsive records could be remedied as follows:

A resolution of the dispute over the back-up tapes would resolve this issue as well, however, since back-up tapes duplicating Hamilton's computer system exist for dates shortly before the October [1997] subpoenas were served. If some agreement is reached by which you are given access to the back-up tapes, you will be able to search Hamilton's computer system as it existed on the date the subpoenas were served.

Id. In sum, the computer and electronic records for which the OIG is pressing have not previously been produced.

Respondents previously contended that their "alleged failure to produce all computer database material is largely moot in light of Hamilton's agreement to allow agents from the Federal Bureau of Investigation to download all information on the computers including backup tapes." Opposition at 13. Petitioner pointed out the fallacy of this argument in Petitioner's Reply to Opposition at 17-19, noting that the FBI backup tapes were created well after the subpoenas were issued, and that the more relevant backup tapes were the earlier ones created by Hamilton. Of course, Respondents refuse to search any of the backup tapes for responsive records, and also object to the government doing so.

Respondents now switch tack and try to downplay the significance of their electronic records, arguing that Petitioner's statement that Respondents prided themselves on having, to a

large extent, a "paperless" office is untrue, and that even if the searches for electronic records were inadequate, nevertheless anything responsive to the OIG subpoenas must be somewhere in the paper files they have produced. Supplemental Opposition at 8, note 3.

Respondents' claim is belied by the prior statements of its former project manager, Kevin McMahan, who signed Hamilton's second financial advisor contract with HUD, coordinated Hamilton's efforts for HUD under that contract, and subsequently took charge of Hamilton's document production efforts in response to the OIG subpoenas. In a memorandum submitted to the OIG, Mr. McMahan described in great detail the extent to which Hamilton's records were maintained electronically:

Hamilton is an electronic office. You will hear Hamiltonians talk about a "paperless" office. We aren't there yet by any stretch of the imagination, but that's where our thinking is and we have made great strides in that direction. Everything with HUD, with our teaming partners, our internal governance of the firm, business development activities, and in fact in some cases, with our attorneys, is done by email and with files attached to those emails. If you came to our offices, you wouldn't find row after row of file cabinets of paper. You will find, however, computers and network servers that contain an immense amount of information. While we are few in number -- with only 35 people -- we are prolific writers! The volumes of electronic documents that have to be reviewed to comply with your requests is mind-boggling . . . let me explain.

We use the following software: WORD, EXCEL, ACCESS, POWERPOINT, PROJECT, all of which are Microsoft products, and our systems staff has determined that we have the equivalent of about 570,000 pages of this type. We use FACSYS for computer receipt of faxes and we have 20,000 pages of faxes on our computers at the office. As for email, we use two systems, one called cc:Mail and the other, GroupWise. cc:Mail is the communication link with HUD and we have about 192,000 messages and GroupWise has 800,000 messages. Connected to GroupWise is another program called Collabra. It's like a bulletin board where messages and information can be posted by topic. We have 645,000 postings in various forums.

Memorandum of September 17, 1996, from Kevin McMahan, Hamilton Securities, to Judith Hetherton, et al., Exhibit 7 to Martin Decl. (emphasis added); see also Petitioner's Memorandum,

filed March 3, 1998, at 15-16; Letter of February 5, 1998 from David A. Handzo to Judith Hetherington, Exhibit 24 to Martin Decl., at 4 (OIG should not expect to find paper files for many Hamilton employees because Hamilton was, after all, a "paperless" office). Clearly, Respondents' electronic records are significant and, to a large extent, not duplicated elsewhere. Respondents cannot justify their failure to produce certain records responsive to the subpoenas on the grounds that they have produced other records

Further, Hamilton claims that its previous costs of compliance with the OIG's subpoenas were substantial, and that it should not, therefore, have to provide the government with the rest of the materials responsive to the OIG subpoenas. Respondents claim that it cost them more than \$1 million to comply with the subpoenas, see Supplemental Opposition at 5, citing costs of production that they claim were in excess of \$10.00 a page (see letter of December 12, 1996, from Steven S. Rosenthal, Attachment D to Supplemental Opposition). While Respondents' claimed costs of production appear to be exaggerated and apparently include considerable attorneys' fees (see Memorandum from Kevin McMahan dated September 17, 1996, Exhibit 7 to Martin Decl., at 11-12), their costs were largely attributable to their own admitted failure to have established a system for archival and retrieval of electronic records prior to receipt of the OIG's subpoenas (see Petitioner's Memorandum at 26-27; letter of September 27, 1996, from Steven S. Rosenthal, Exhibit 8 to Martin Decl., at 5-7, 8-9; Exhibit 34 to Martin Decl.), their prolific communications habits, and their desire to have each record produced reviewed by attorneys.⁶ When a company chooses an electronic records system, it cannot be heard to complain that the

⁶ At the request of Respondents' former counsel, Petitioner had agreed to numerous modifications of the August 1996 subpoenas to lighten Respondents' burden of production.

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). Respondents cannot justify their non-compliance with the subpoenas on the grounds that they created an electronic records system instead of a paper filing system and retrieving records from it is simply too costly.

Further, Respondents claim that it is unfair to ask them to search their electronic records again to respond to the October 1997 because they already searched them once in response to the August 1996 subpoenas. Respondents fault the government for issuing the follow-up subpoenas of October 24, 1997, arguing essentially that investigators should understand at the outset all the records that will be required to complete their investigation. On the contrary, as the Court well knows, an investigation is not static. It is not at all unusual that, as an investigation progresses⁷ and the investigators interview additional witnesses, review the materials initially produced by a party, as well as the materials produced by others, they determine a need for additional records and documentation in the same or new areas.⁸

⁷ Contrary to Respondents' claims, the HUD loan sales were not concluded in 1994 and 1995, the government's investigation is not limited to the years 1994 and 1995, and all of the allegations were not well known by June 1996, as Respondents seem to think. See Supplemental Opposition at page 6. Indeed, Respondents acknowledge that Hamilton continued as a HUD contractor until October 1997.

⁸ Throughout their Supplemental Opposition, Respondents insinuate that the government has not reviewed the records it has, and thus should not be granted enforcement of its subpoenas. On the contrary, it is precisely because the government had reviewed the records it had, and had expanded its inquiry into additional areas, that the government issued the October 1997 subpoenas and also sought enforcement of both the August 1996 and October 1997

As noted above, the Special Masters have advised the Court that, in their opinion, it is Respondents' responsibility to designate privileged and non-responsive materials from their electronic data, and that "[w]ithout such designations by respondents, the data should be made available to the government in its entirety." Third Report at 3. The government agrees.

In the event, however, that the Court is not inclined to provide the electronic media directly to the government for review, there is another solution which the government proposed months ago. The government proposed to review the Hamilton electronic records, including backup tapes, itself under a procedure that would protect any legitimate attorney-client privileged communications. See, e.g., Petitioner's Memorandum, filed March 3, 1998, at 29-31; see also letter of May 7, 1998, from Judith Hetherington to Laurence Storch, Esq., at 7-8, and attached Stipulation and Agreement (attached hereto as Exhibit A). Under this procedure, Hamilton would identify the attorneys with whom it had confidential attorney-client communications that would be privileged as against HUD and that are contained in electronic mail communications, word processing files, or other electronic records on the backup tapes in question. Hamilton would provide a list of the names, firms, addresses, and e-mail addresses of its attorneys, and specify the time periods during which the attorney-client relationship existed.⁹ The electronic records would then be processed by a technical computer expert, who would redact the communications with

subpoenas. Respondents' erroneously conclude from the letter of August 20, 1998, from OIG Associate Counsel Bryan Saddler, referring to the length of time taken to duplicate certain electronic discs produced by Respondents, that those discs had not been reviewed by the OIG. In fact, the discs have been reviewed and found to contain mostly HUD loan information and bidder data concerning the loan sales.

⁹ Hamilton has already provided a list of its attorneys, although some additional information and some clarifications would be required before this list would be adequate for the purpose envisioned.

attorneys based on the attorney identifiers, and provide a redacted copy of the tapes to OIG for its review.¹⁰

Respondents, however, continue to object to review of the backup tapes and other electronic records by the OIG, and steadfastly refuse to do it themselves. Accordingly, Petitioner asks the Court to order the production of the electronic media to the government for its review.

III. Respondents' Failure to Produce All Responsive Electronic and Other Financial Records

Respondents state that "[c]opies of a great deal of supporting records for Hamilton's financial data have been produced as part of the paper document production to the OIG," and that "Hamilton has previously provided financial information to the OIG for Hamilton Securities Group and Hamilton Securities Advisory Services, the two companies involved in providing services to HUD regarding the loan sales." Supplemental Opposition at 9. Respondents then conclude that, in their view, they have produced enough financial data, and should not have to comply fully with the terms of the subpoenas.¹¹ Specifically, Respondents object to the

¹⁰ Respondents indicated they were inclined to agree to this procedure at one point, with one caveat--that communications not related to Hamilton's contract performance for HUD be redacted, on account of the "confidential nature of Hamilton's business endeavors." See letter of November 25, 1997, from David A. Handzo to Judith Hetherington, Exhibit 16 to Martin Decl. The government pointed out, however, that Hamilton's non-HUD business ventures may well evidence conflicts of interest with its role as a HUD contractor. In that regard, the government proposed a Stipulation and Agreement under which the government would protect any legitimate proprietary information identified by Respondents. See attachment to Exhibit A hereto.

¹¹ Respondents' suggestion, at page 9 of their Supplemental Opposition, that the scope of the financial information to be provided to the government by Hamilton was the subject of prior agreement between Brian Dietz, Hamilton's former Chief Financial Officer, and two OIG auditors, Mr. Martin and Mr. Rogers, is totally inaccurate. The OIG's early efforts to obtain the financial records, and the many promises made by Mr. Dietz and Hamilton to produce them, which were subsequently broken, are detailed in Petitioner's Memorandum, at 32-34.

production of their electronic accounting system, the Solomon IV system, on the grounds that it contains records relating to affiliates of Hamilton that did not provide services to HUD under Hamilton's contracts, and also to the production of any paper files concerning Hamilton's affiliates. Respondents claim that "there was non-responsive material on the [Solomon] system, in other words information which has not been subpoenaed, is proprietary," and which "includes information for other companies who did not business with HUD." Supplemental Opposition at 9-10. Respondents also claim that producing this information would place "additional burdens" on them. Id. at 10.

Contrary to Respondents' contention, the materials at issue are subject to the OIG's subpoenas. Item No. 19 of the OIG subpoenas of October 24, 1997 seeks:

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:

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

The subpoenas define "Hamilton" as including "'Hamilton Securities Advisory Services, Inc.,' 'The Hamilton Securities Group, Inc.,' and/or any affiliate or subsidiary of these entities."

Respondents now claim that financial information concerning the Hamilton affiliates or subsidiaries can have no relevance to the government's investigation, since it is claimed these entities did no work for HUD. Respondents continue to ignore the fact that the government has repeatedly stated that it is investigating, among other things, conflicts that Respondents may have had between the work they did for HUD and other private business ventures they were attempting to undertake. See, e.g., Petitioner's Memorandum at 34-36; Petitioner's Reply to Opposition at

11-15.

A version of Respondents' argument was raised by Respondents in their original Opposition, and refuted by Petitioner in Petitioner's Reply to Opposition at 11-15. As Petitioner said there:

Hamilton would have the Court believe that the OIG is not permitted to investigate conflicts of interest of government contractors if such an investigation would require the OIG to look into the contractor's relationships with entities other than the government or other contractors. Hamilton can cite no authority for this unusual proposition because there is none. Fortunately, the law is not as myopic as Hamilton would have it be.

* * *

Hamilton contends that Item No. 19 is "overly intrusive" and irrelevant because, although almost all of its revenue came from HUD, "Hamilton was never obligated to devote all of its resources exclusively to the HUD contracts." Opposition, at 11. Hamilton misses the point. Hamilton's financial relationships with its subcontractors, at least one of whom -- BlackRock Capital Finance L.P.-- was also a bidder on HUD's note sales, is obviously relevant to the OIG's investigation of Hamilton's potential conflicts of interest, as are Hamilton's financial relationships with other individuals and entities with whom Hamilton may have had conflicts of interest in connection with its role as HUD's financial advisor. The OIG's interest in Hamilton's potential conflicts is legitimate, given Hamilton's role as HUD's financial advisor on the sale and restructuring of an \$11 billion dollar portfolio and the allegations that have been made. One would have thought Hamilton would welcome the opportunity to show it had no conflicts as a HUD contractor, if indeed that is the case. In any event, the relevance of the financial records sought, both to the determination of any conflicts of interest and to a determination whether HUD got what it paid for when it contracted with Hamilton, is obvious. Hamilton makes no case to the contrary.

Further, financial records already produced by Respondents show transfers of money from accounts of Respondents--the two entities that contracted with HUD--to accounts of other Hamilton affiliates. Thus, in order to complete its investigation, the government is compelled to "follow the money" and determine how it eventually was applied. To accomplish this, Petitioner must have the records it subpoenaed, of all Hamilton affiliates

IV. The Inadequacy of Respondents' Initial Certificate of Compliance

Respondents claim that the government has offered no reason why the Court should reject as inadequate the Initial Certificate of Compliance with the subpoenas filed by Respondents on May 27, 1998. On the contrary, the government has provided Respondents with extensive reasons why this certification is inadequate.

The Court's order of March 6, 1998, provides that Hamilton is to submit a certification of compliance, as follows:

IT IS FURTHER ORDERED that a representative(s) of Respondents with personal knowledge of the matter and of the searches that have been conducted for records responsive to the subpoenas of August 6 and 22, 1996, as modified, and of October 24, 1997, shall submit to the Court and to Petitioner a certification of compliance, made under penalty of perjury, that all records described above have been delivered intact, without deletion or alteration, to the Special Master; provided, however, that if the Special Master determines that such certification is not feasible, then Respondents shall provide a certification regarding compliance as shall be satisfactory to the Special Master

Order of March 6, 1998, at page 3.

The "Initial Certification of Compliance" consists of a certification from C. Austin Fitts, President of The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc.; letters from two of Hamilton's former attorneys; and an affidavit of Raul Ludert, the "residential manager" for 7 Dupont Circle, N.W., where Hamilton's offices were located.

The certification of Ms. Fitts does not satisfy the Court's order, in that it is not based on Ms. Fitts' "personal knowledge of the matter and of the searches that have been conducted for records responsive to the subpoenas of August 6 and 22, 1996, as modified, and of October 24, 1997" Ms. Fitts concedes that her certification is based only on "some personal knowledge" and is otherwise dependent upon "reports from others, including counsel, with more direct

responsibility for the retention, collection and production of documents pursuant to the three administrative subpoenas (as modified) and the March 6 Order." The "others" are not specifically identified. We know, however, that for at least eighteen months, from August 1996 until January 1998, the person in charge of production in response to the OIG subpoenas was Kevin McMahan who, as noted above, was Hamilton's former "project manager." Mr. McMahan is not just a "former employee with technical knowledge of Hamilton's computer systems," supplemental Opposition at 4, as Respondents would have the Court believe. Mr. McMahan is the person who signed Hamilton's second financial advisor contract with HUD, and coordinated Hamilton's efforts for HUD under that contract. Initially a Hamilton employee, shortly after the OIG subpoenas were issued to Hamilton Mr. McMahan became a consultant both to Hamilton and to each of the law firms who handled the document production, Morrison & Foerster and Jenner & Block. Mr. McMahan worked on the subpoena production with other Hamilton employees and consultants, at an "off-site" location set up at his home. Mr. McMahan was said to be available for further services when Respondents' second set of attorneys in this matter, Jenner & Block, withdrew from representation of Respondents.¹² No reason for failing to produce his sworn certification or that of the "others" has been offered, other than Hamilton's impecuniousness.¹³

¹² 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.

¹³ We note that, two years ago, in a letter dated November 18, 1996, Petitioner specifically raised with counsel for Hamilton the question who would be in a position to provide the certification that would ultimately be required, given Mr. McMahan's role as consultant to both the law firm and Hamilton. Respondents' counsel assured Petitioner that Hamilton would

There are numerous other deficiencies in Ms. Fitts' certification, or reasons to question the adequacy of the certification, including the following:

1 Ms. Fitts certifies that "[a]ny responsive materials in Hamilton's possession of March 6, 1998 were produced." The subpoenas, however, were issued on August 6, 1996, August 22, 1996, and October 24, 1997. The question is whether all responsive materials in Hamilton's possession on those dates were produced.

2. There is evidence suggesting that Hamilton may have destroyed records responsive to the subpoenas, including the following:

(a) Hamilton has never produced the earliest acknowledged full backup tape of its electronic records systems, dated June 16-17, 1996. This backup tape was acknowledged to exist both by Hamilton's former lawyer, Steven Rosenthal, and by Kevin McMahan, who was in charge of the document production. Nor has Hamilton ever offered any explanation for the disappearance of this backup tape. This tape is particularly significant, given evidence that Hamilton employees were instructed to delete files around the time that Hamilton became aware of the allegations concerning contracting corruption at HUD, and relevant communications may have been deleted from the system before later backup tapes were made (see Petitioner's Memorandum at 27-29);

(b) During the securing of records at Hamilton on March 10, 1998, the OIG discovered original Hamilton financial records in a padlocked red dumpster in the basement, marked for destruction (see Declaration of Richard W. Holmes, Exhibit B hereto; Declaration of Jack W. Rogers, Exhibit C hereto);

(c) As the Special Masters reported to the Court in the Second Report, dated April 27, 1998, several Hamilton employees and consultants entered the Hamilton premises on March 6 and 7, 1998, after the Special Masters ordered the premises sealed. At least one of these individuals, Hamilton's computer consultant Elliot Cook, did so in defiance of the Special Masters' order, and admittedly permitted another person to remove a computer from the premises. Further, the Special Masters concluded that Mr. Cook statement concerning his whereabouts at a certain time on March 6, 1998, was contradicted by other evidence;

3. Ms. Fitts attempts to suggest through her own certification and the affidavit of Raul Ludert that any deficiencies that might exist in Hamilton's production have been caused by "FBI agents" who "moved some materials in and out of Hamilton's office suite."

have no problem providing the certification.

In fact, representatives of the Special Masters oversaw the process, and FBI agents were not moving any records in and out of the premises (see Declaration of Richard W. Holmes, Exhibit B hereto; see also the First Report of Co-Special Masters, filed March 23, 1998, at 2-3). The moving of records that was done was (a) by Hamilton's auctioneer to Record Masters and Storch & Brenner, with the oversight of the Special Masters' representatives, and (b) by OIG representatives, who retrieved records from the trash outside of Hamilton's offices, with the approval and oversight of the Special Masters' representatives, and turned over the records directly to the Special Masters' representatives. *Id.* Thus, any deficiencies in Hamilton's production or certification of compliance are not attributable to the government;

4 Ms. Fitts limits her certification to any materials that "possibly could be responsive to the March 6 Order and that had not previously been produced to the Office of Inspector General," suggesting that some unexplained discrimination was made in what was produced;

5 The certification does not specifically state that it is made "under penalty of perjury," as required by the Court's order.

Petitioner requests that, as directed by the Court's order, Respondents be required to submit sworn certifications from persons "with personal knowledge of the matter and of the searches that have been conducted for records responsive to the subpoenas of August 6 and 22, 1996, as modified, and of October 24, 1997" In the absence of such certifications based upon personal knowledge, Petitioner requests that the Court reject the initial certification of compliance, and direct that the Special Masters provide Petitioner with full access to all of Respondents' records in their custody.

V. Respondents' Claims of Attorney-Client Privilege

With respect to the claims of attorney-client privilege that Respondents have asserted in refusing to produce to Petitioner certain documents, Petitioner is not asking the Court to rule on the merits of the claims at this time. As stated by Petitioner in the Joint Statement filed September 30, 1998, at 4, "all that Petitioner asks at this time is that the Court empower the Special Masters to make initial determinations on such matters." Petitioner does not believe that

discussions with Respondents on this issue would be worthwhile, since Petitioner would not have access to the documents in question. There are, however, several items that Petitioner wishes to challenge. Accordingly, Petitioner requests that the Court empower the Special Masters to make initial determinations as to whether the identified and challenged items are in fact subject to attorney-client privilege.

VI. Respondents' Request for an Evidentiary Hearing

Respondents request an evidentiary hearing before the Court rules on Petitioner's request for summary enforcement of the OIG subpoenas, arguing that "live testimony" is necessary to "illuminate the burden felt by Hamilton and the unreasonableness displayed by the OIG." Supplemental Opposition at 13. Respondents have had ample opportunity to present any evidence they wish as to burden and unreasonableness by way of affidavit. Further, insofar as Respondents rely on the affidavit of Raul Ludert in support of their contentions that "no original financial records of Hamilton were found in any dumpster at Hamilton," and "it was counsel for the OIG who attempted to stage photographs suggesting that documents, actually placed in the dumpsters by the FBI, were placed there by Hamilton," Supplemental Opposition at 12, the affidavit is contradicted by the prior statement of Respondents' own counsel and no testimony can illuminate this matter.

Respondents offer Mr. Ludert's affidavit to suggest that the red dumpsters in the elevator room in the basement of the building in which Hamilton had its offices were almost empty on March 9, 1998; that the government moved them upstairs that same day, unfastened them, and placed other documents in them; and that the government then staged photographs of the red dumpsters the next day, March 10, to make them appear full. See Affidavit of Raul Ludert,

Attachment G to Supplemental Opposition.

The issue of the contents of the red dumpster was brought to Respondents' attention by the government on the very day the contents were examined, which was March 10, not March 9 as Mr. Ludert claims. The government informed the Special Masters and Respondents' counsel of the discovery of original financial records apparently responsive to the subpoenas in the locked dumpster in the basement. See letter of March 10, 1998, from Judith Hetherington to Irving Pollack and Laurence Storch, copied by facsimile to David E. Frulla, counsel for Respondents (Exhibit 5 to Petitioner's Reply to Opposition), at 1. The next day, March 11, Respondents' counsel replied, agreeing that the padlocked dumpster, which he referred to as a "locked box," had been opened on March 10, and that it contained documents that were being processed under the "trash protocol":

10. **Locked box at Hamilton:** We understand that Hamilton informed HUD OIG representatives about a box that was formerly padlocked at Hamilton and that this box was opened on March 10, 1998. We understand that these documents are being handled according to the protocol set forth in #9, above.

Letter of March 11, 1998 from David E. Frulla to Irving Pollack and Laurence Storch (Exhibit 4 to Petitioner's Response to Respondents' Exception to Recommendation of the Special Masters), at 4 (emphasis added). Thus, Respondents' counsel's own statement contradicts Mr. Ludert's statement that the padlock was removed on March 9 and that the dumpster was "almost empty." See also Affidavit of Richard W. Holmes, Exhibit B hereto.

Further, insofar as Respondents attempt to suggest through Mr. Ludert's affidavit that the government "staged" photographs to make the dumpsters appear full, the photographs that were taken speak for themselves. See Affidavit of Jack G. Rogers, Exhibit C hereto, and


accompanying photographs. The photographs were taken only to document that the container was not just a "locked box" but a dumpster labeled for destruction; indeed, no contents are visible.

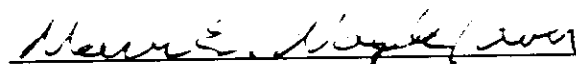
Respondents also appear to be relying on Mr. Ludert's affidavit to suggest that any deficiencies that might exist in Hamilton's production or certification of compliance have been caused by "FBI agents" who "moved some materials in and out of Hamilton's office suite." In fact, representatives of the Special Masters oversaw the entire process, as described above. While the Special Masters have already reported to the Court on this process, see First Report of Co-Special Masters, filed March 23, 1998, at 2-3, if the Court has any concerns about it, it would seem that the appropriate resolution would be to ask the Special Masters for a further report, rather than to hold an evidentiary hearing.


CONCLUSION

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

Respectfully submitted,


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CERTIFICATE OF SERVICE

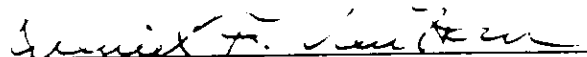
I hereby certify that the foregoing Petitioner's Reply to [Respondents'] Hamilton Securities' Supplemental Opposition to Petition for Summary Enforcement was served by first class mail on November 12, 1998, addressed to the following:

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