

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official
capacity as Inspector General of the
U.S. Department of Housing and
Urban Development,

Petitioner,

v.

THE HAMILTON SECURITIES
GROUP, INC., and HAMILTON
SECURITIES ADVISORY
SERVICES, INC.,

Respondents.

Misc. No. _____

FILED UNDER SEAL

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

Introduction

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

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

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

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

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

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

Statement of Facts

A. Background - Initiation of the OIG Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The August 6 and 22, 1996 Subpoenas

a. The Production of Records

The August 1996 subpoenas were modified significantly as a result of discussions between the OIG and Hamilton's attorney, Steven Rosenthal of Morrison & Foerster during August - November, 1996.³ Hamilton produced responsive records over an eleven-month period, from August 1996 until June 1997, claiming in numerous communications that it was unable to comply any sooner. See, e.g., Letter of November 12, 1996 from Steven S. Rosenthal to Judith Hetherton, Exh. 9 to Martin Decl.; Letter of January 14, 1997 from David A. Handzo to Judith Hetherton, Exh. 11 to Martin Decl.; Letter of March 14, 1997 from Judith Hetherton to David A. Handzo, Exh. 12 to Martin Decl.; and Letter of June 17, 1997 from David A. Handzo to Judith Hetherton, Exh. 13 to Martin Decl. Although it had promised to submit a certificate of compliance upon completion of the production, between June 17, 1997, and October 28, 1997, Hamilton did not forward to the OIG

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

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

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

b. The Inadequacy of the Certification of Compliance

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

employee who had just changed from being an employee to a "consultant" both to Hamilton and to Hamilton's law firms, Morrison & Foerster and Jenner & Block, was in charge of producing Hamilton records responsive to the subpoenas. See Letter of November 18, 1996 from Judith Hetherton to Steven Rosenthal, Exh. 10 to Martin Decl., at pp. 1-2.⁴

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

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

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

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

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

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

What's
The
Cant
Hamilton
didn't
know
what
C'mon
going to
do!

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

2. The October 24, 1997 Subpoenas

a. Records Sought

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

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

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

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

- records pertaining to the selection of the winning bidders for each mortgage sale (Item No. 1);
- records pertaining to the "optimization model" Hamilton employed to select the bids resulting in the optimal return to HUD, and communications with Lucent Technologies, which ran the optimization model (Item Nos. 9, 10);
- records pertaining to the development of or changes to bid selection procedures (Item No. 11);
- records pertaining to communications with the Office of Management and Budget concerning the mortgage sales, credit subsidy, and/or any FHA legislative or regulatory initiative (Item No. 12);
- minutes or notes of meetings regarding the mortgage sales (Item No. 13);
- records pertaining to post-auction reviews of the note sales (Item No. 14);
- Freedom of Information Act and other fact sheets concerning the mortgage sales (Item Nos. 15, 21);
- records identifying the bidders at each mortgage sale (Item No. 16);
- bid packages and agreements of bidders for all mortgage sales (Item No. 17);

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

- records regarding any conflicts of interest of Hamilton and its subcontractors in their roles as HUD contractors (Item Nos. 2, 3);
- records pertaining to Neighborhood Networks, a HUD program advocated by Hamilton (Item No. 7);
- records showing Hamilton drafted requests for proposals, statements of work, and other HUD contract materials (Item No. 8);
- Hamilton invoices and supporting documentation for claims made under Task Order 6 of Hamilton's first financial advisor contract with HUD (Item No. 18);

- any insurance policies associated with Hamilton's contracts with HUD (Item No. 22);
- (3) **records concerning Hamilton's relationships with certain persons and entities** (3 items):
 - records concerning certain of Hamilton's non-HUD business ventures, namely its relationships or agreements with e.villages, Edgewood Technology Services, Inc., Adelson Entertainment, Inc., and ICS Communications (Item No. 4);⁸
 - agreements between Hamilton and any bidder at any FHA note sale (Item No. 5);
 - communications with Kathryn Rock⁹ about employment opportunities for Ms. Rock with HUD, Hamilton, or elsewhere (Item No. 6);
- (4) **Hamilton's financial records, and personnel records** necessary to verify payroll journals, determine the validity of Hamilton's pricing and cost claims under HUD contracts, and the absence of any improper relationships with HUD officials or non-HUD business affiliations in conflict with HUD contract firms (Item No. 19), as follows:
 - Any and all Hamilton general ledgers, journals, and other books and records of original accounting entry (including, but not limited to, payroll journals and voucher registers), and supporting documentation, whether maintained by Hamilton or for the benefit of Hamilton, including but not limited to:
 - employee time sheets and labor cost distribution records;
 - personnel records;
 - travel vouchers, trip itineraries, meal and other expense reimbursement records;
 - records reflecting the use of company credit cards and expense accounts;

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

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

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

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

b. Failure to Produce Responsive Records

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

The records sought here undoubtedly "touch" the matters at issue in the investigation (e.g., allegations of, among other things, favoritism towards contractors, bid-rigging within HUD's mortgage sales program, and possible conflicts of interest). With respect to the October 24, 1997 subpoenas, the records sought include: records concerning HUD's note sales (Item Nos. 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 21); records concerning Hamilton's role as financial advisor and contractor to HUD, including possible conflicts of interest by Hamilton and its subcontractors (Item Nos. 2, 3, 7, 8, 18, 22¹²); records concerning certain of Hamilton's relationships which may have created conflicts for it in its role as financial advisor to HUD (Item Nos. 4 and 5); communications with the HUD FHA comptroller about employment opportunities for her (Item No. 6); Hamilton's financial records, including all general ledgers and journals, travel and expense account records, and personnel records necessary to verify payroll journals, pricing and cost claims as well as the absence of improper

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

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

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

C. The Subpoenas Are Not Unreasonably Broad or Burdensome

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

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

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

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

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

1. **Hamilton's Electronic Records Systems and Backup Tapes**

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

Hamilton employees also had home office computer systems, and apparently used other electronic mail systems (e.g., America Online, MCI Mail) to communicate from their home computers with respect to Hamilton and HUD business matters. See Exh. 31 to Martin Decl.; see also Letter of November 26, 1997, from David A. Handzo to Judith Hetherton, Exh. 17 to Martin Decl., at p.

2. Hamilton at least planned to require that electronic records related to Hamilton business, residing off-site in these systems, be stored in an explicitly marked subdirectory called "HSG," with subdirectories corresponding to subsidiary organizations. See Exh. 31 to Martin Decl.

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

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

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

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

Full backup tapes (for 8 separate dates):

1996 --
June 16-17
July 21-22

July 28-29
August 18-19
August 25-26
1997 --
September 14-15
September 28-29
October 19-20

Differential backup tapes (for 32 separate dates):

1996 --
March 7
July 13, 23, 25, 26, 27, 29, 30, and 31
August 1, 2, 3, 4, 6, 7, 8, 12, 14, 16, 17, 20,
21, 22, 23, 24, 27, and 28
1997 --
October 21, 22, 23, 24, and 25

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Hamilton's Financial Records and Supporting Documentation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Miscellaneous Records

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

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

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

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

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

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

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

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

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

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

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

c. **Records Pertaining to Hamilton's Electronic Records Systems**

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

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

5. Submission of a Proper Certificate of Compliance

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

6. Submission of a Proper Claim of Privilege

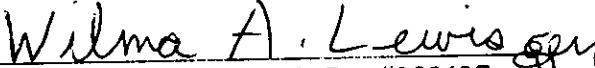
Hamilton is admittedly withholding, on the grounds of privilege, documents that are responsive to the OIG subpoenas. See Letter of February 5, 1998, from David A. Handzo to Judith Hetheron, Exh. 24 to Martin Decl., at p. 5. Despite assurance that a privilege index would be submitted, see id., none has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

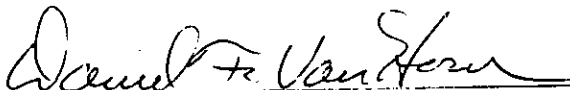
record that is being withheld from production on the grounds of privilege (or otherwise) by date, author(s), addressee(s), each recipient, subject matter(s), and number of pages, and detailing the reason(s) for withholding the document with sufficient specificity to enable this Court to determine the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

CONCLUSION

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

Respectfully submitted,


WILMA A. LEWIS, D.C. Bar #358637
United States Attorney


DANIEL F. VAN HORN, D.C. Bar #924092
Assistant United States Attorney

OF COUNSEL:

JUDITH HETHERINGTON
Counsel to the Inspector General
BRYAN P. SADDLER
Assistant Counsel to the Inspector General
U.S. Department of Housing and Urban Development
451 7th St., S.W. -- Room 8260
Washington, D.C. 20410
(202) 708-1613