

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

Petitioner, :

v. :

Misc. No. \_\_\_\_\_

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

FILED UNDER SEAL

Respondents. :

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**MEMORANDUM IN SUPPORT OF MOTIONS FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION REQUIRING  
RESPONDENTS TO DEPOSIT MATERIALS SOUGHT BY SUBPOENAS WITH  
THIS COURT PENDING A DECISION ON THE PETITION FOR  
SUMMARY ENFORCEMENT OF SUBPOENAS**

The Inspector General of the United States Department of Housing and Urban Development ("HUD"), by her undersigned attorneys and pursuant to Local Rule 108(a), hereby respectfully submits the following memorandum of points and authorities in support of her motions for a temporary restraining order and a preliminary injunction in the above-captioned case.

The Inspector General is seeking an interim injunction requiring Respondents, The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. (collectively "Hamilton"), to deposit with this Court all original financial records, "non-HUD" business records, backup tapes, and all other materials demanded by the subpoenas issued to Hamilton by HUD's Office of Inspector General ("OIG"), pending this Court's decision on the merits of the Inspector General's petition for

summary enforcement of those subpoenas ("Petition"), which is being filed simultaneously herewith, and requiring Hamilton to preserve any and all other records that Hamilton has not yet identified as being responsive to the subpoenas. Motions for such interim injunctive relief are evaluated under the following criteria: (1) the likelihood that the movant will succeed on the merits of its claim; (2) whether it is likely that the movant will be irreparably harmed absent interim injunctive relief; (3) whether the issuance of the preliminary injunction will significantly harm defendants or others; and (4) the public interest. Randolph-Sheppard Vendors v. Weinberger, 795 F.2d 90, 110 (D.C. Cir. 1986); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Consideration of these factors demonstrates that interim injunctive relief is appropriate in this case.

#### **Likelihood of Success on the Merits**

Simultaneously herewith, the Inspector General has filed a memorandum of points and authorities in support of her Petition for summary enforcement of the subpoenas that OIG has issued to Hamilton. That memorandum, which is incorporated herein by reference, describes in detail the nature of the investigation with respect to which the subpoenas have been issued and the history of the OIG's attempts to secure voluntary compliance with the subpoenas. As shown therein, issuance of the subpoenas was clearly within the Inspector General's statutory authority, the information sought is reasonably related to the OIG investigation, and the subpoenas are not unreasonably broad or burdensome. Accordingly, given the "strictly limited role" courts play when they consider petitions for summary enforcement of administrative subpoenas, see, e.g., Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd., 878 F.2d 875, 879 (5th Cir. 1989), there is a strong likelihood that the Inspector General will succeed on the merits of this case. See United States v. Powell, 379 U.S. 48,

57-58 (1964); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1145 (D.C. Cir. 1987); United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986); United States v. Sec. State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973).

### **Irreparable Injury**

If the Court does not act promptly to secure the records responsive to the OIG subpoenas, it is likely that the Inspector General will suffer irreparable injury due to the loss of destruction of those records. In particular:

1. *Hamilton has asserted that it is "moribund," is "winding up its affairs," and may soon lose its office space.*

The Inspector General's Petition is related to 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, among other things, unsuccessfully sought an injunction requiring HUD to pay two invoices submitted by Hamilton and totaling more than \$1.5 million. In support of its request for relief, Hamilton's chief financial officer, Brian J. Dietz, declared under penalty of perjury that, unless HUD were ordered to pay the invoices, "Hamilton will face the likelihood of having to close down and be forced into bankruptcy." Affidavit of Brian J. Dietz, 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) ("Dietz Affidavit"), at ¶ 34. Mr. Dietz also stated "CVS, the landlord for Hamilton's office at 7 Dupont Circle, N.W., Washington, D.C., has notified Hamilton that it is in default under the lease and CVS's legal counsel has indicated that CVS will commence eviction proceedings to

regain possession of the office space unless Hamilton pays the delinquent rent." Dietz Affidavit, at ¶ 35

After the denial of interim injunctive relief in Civil Action No. 98-36, Hamilton's counsel represented that Hamilton is "moribund" and "is now seeking to wind up its affairs." See Plaintiffs' Response to All Defendants' Motion to Dismiss, to the HUD IG's Motion for Summary Judgment, and to HUD's Opposition to Plaintiffs' Preliminary Injunction Motion at p. 2, filed in Civil Action No. 98-36 (SS) (D.D.C.) on February 17, 1998.

Most recently, on March 2, 1998, R.L. Rasmus Auctioneers, Inc. advertised in the Washington Post an auction of Hamilton's business equipment. Martin Decl. at ¶ 24 & Exhibit 37. The advertisement states that the auction is scheduled to occur on Tuesday, March 10, 1998. Id. The advertisement also indicates that the equipment to be sold at auction includes numerous computers and peripherals, which could contain data sought by the subpoenas.

2. *Hamilton's records are scattered among various locations.*

At this point, it is OIG's understanding that certain of the records responsive to the OIG subpoenas are in the possession of Hamilton's former attorneys, Jenner & Block (see Letter of February 17, 1998, from David A. Handzo to Judith Hetherington, Exh. 28 to Declaration of James M. Martin ("Martin Decl."), filed in support of the Petition, at p. 1); other records 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). 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 upon 3 days notice to the OIG. *Id.*, at p. 1.

3. *Hamilton has failed to give adequate assurance concerning the preservation of originals.*

Hamilton has acknowledged that it possesses at least eight (8) full and thirty-two (32) differential backup tapes containing records responsive to the subpoenas. The OIG is unaware of the current location of the original backup tapes sought by the subpoenas. Hamilton's former attorneys, Jenner & Block, have advised 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 Hetheron to David A. Handzo, Exh. 25 to Martin Decl., at pp. 2-3; letter of February 17, 1998 from David A. Handzo to Judith Hetheron, Exh. 28 to Martin Decl., at p. 2.

Conspicuously missing from the list of backup tapes that Jenner & Block claims to possess at this time 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. *See* Letter of September 27, 1996, from Steven Rosenthal to Judith Hetheron, Exh. 8 to Martin Decl., at p. 8; Memorandum of September 17, 1996, from Kevin McMahan to Judith Hetheron, 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 Hetheron, Exh. 28 to Martin Decl., at p. 2.

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 Hetherington to David A. Handzo, Exh. 23 to Martin Decl., at p. 4; see also Exh. 36 to Martin Decl.

4. *Hamilton has not ensured that Hamilton's ex-employees do not take Hamilton's records with them as they leave.*

During a telephone conversation on December 12, 1997, Mr. Handzo advised the OIG that a number of Hamilton employees had left Hamilton in recent weeks. He also advised that no instructions concerning exit procedures had been given to these employees upon their departures. When these employees left, Hamilton recovered their computers but it was not known whether these employees took any of the records in their offices with them. See Martin Decl. at ¶ 22. Therefore, it appears that Hamilton has not taken precautions to ensure that terminated employees do not damage or remove records responsive to the subpoenas. ✓

5. *Hamilton is unable or unwilling to make responsive records available to OIG.*

On November 25, 1997, Hamilton advised the OIG that it would produce its financial records, asking only that the production be done on site at Hamilton's office 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 Hetherington, Exh. 16 to Martin Decl.,

at p. 2. Accordingly, Hamilton proposed that OIG senior auditor James Martin meet with Mr. 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 met 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 Hetherington 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 Hamilton's 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. Hamilton did not produce the records.

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 Hetherington, Exh. 24 to Martin Decl., at p. 5. The OIG then advised that it would review the records on February 11, 1998, at Hamilton's office. See Letter of February 6, 1998, from Judith Hetherington 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 Hetherington to David E. Frulla, Exh. 29 to Martin Decl., at p. 3. Hamilton has not 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 is unable or unwilling to produce the records.

#### **Harm to Hamilton and Third Parties**

The requested interim injunction will not result in any harm to Hamilton or to third parties. The injunction will not require Hamilton to compromise any objections it may have to the subpoenas but will merely help insure that all responsive records are preserved until the proceedings with respect to the Inspector General's Petition are completed. Moreover, because Hamilton is now admittedly "moribund," Hamilton has no need for the responsive records in order to conduct any business operations. Finally, the proceedings with respect to the Inspector General's Petition can be expeditiously completed because of the summary nature of those proceedings. Thus, any delay in "winding up" Hamilton's affairs as a result of the Court taking temporary custody of the responsive records will be minimal, and should not have any materially adverse effect on that process.



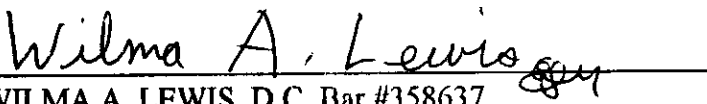
### The Public Interest


The public interest favors the requested interim injunction because, absent such relief, there is a clear danger that any Court order enforcing the OIG subpoenas will be frustrated by the loss or destruction of the responsive records, which would in turn impair the Inspector General's ability to investigate possible fraud, waste, and abuse affecting HUD's programs.

### Conclusion

WHEREFORE, for all of the above reasons, the Inspector General respectfully requests that this Court enter a temporary restraining order and a preliminary injunction: (1) requiring Hamilton to deposit with this Court all original financial records, "non-HUD business" records, backup tapes, and all other materials demanded by the subpoenas, pending this Court's decision on the merits of the Petition for Summary Enforcement of the Subpoenas; and (2) requiring Hamilton to preserve any and all other records that Hamilton has not yet identified as being responsive to the subpoenas.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motions for a Temporary Restraining Order and Preliminary Injunction, together with the accompanying memorandum of points and authorities and the attached proposed Order, was served on March 3, 1998, by hand delivering copies thereof to the Respondents and to the following counsel:

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