

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

Petitioner,

v.

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

Respondents.

Misc. No. _____

**OPPOSITION TO PETITION FOR SUMMARY
ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS**

The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively referred to herein as "Hamilton"), by their undersigned counsel, hereby oppose the petition of Susan Gaffney, Inspector General of the United States Department of Housing and Urban Development ("HUD"), for summary enforcement of the subpoenae *duces tecum* served upon Hamilton by HUD's Office of the Inspector General ("OIG"). As grounds therefor, Hamilton respectfully states as follows:

INTRODUCTION

While the OIG has certain authority to issue subpoenae in conjunction with its legitimate investigatory power, the enforcement of those subpoenae are tempered by the protection of the Court once its process is implicated. Respon-

dents Hamilton assert that the enforcement sought by OIG exceeds its legitimate needs, and such information is plainly irrelevant to the scope of its investigation that it has, in only a meager way, articulated to date. In addition, through the Petition, the OIG continues to press for materials it has already been furnished, in a manner that can only be described as harassment. As such, the OIG's Petition should be denied.

By Order dated March 6, 1998, the Honorable Stanley Sporkin referred certain issues in this matter to Special Masters Irvin M. Pollack and Laurence Storch of Storch & Brenner, LLP. The Special Masters are overseeing the accumulation and organization of documents from Hamilton in response to the OIG's administrative subpoenae. In status reports dated March 23, 1998 and April 1, 1998 (attached hereto as Exhibits A and B, respectively) the Special Masters reported on the voluminous productions to date and their efforts to assess and categorize that information. In addition to hardcopy documents and computer disks or tapes produced to the Special Masters, the Special Masters also received information downloaded from Hamilton's computer network servers, personal computers and laptops by technical specialists from the Federal Bureau of Investigation with the consent and cooperation of Hamilton. See Exhibit A. Moreover, the Special Masters received as recently as March 30, information regarding 82 boxes of Hamilton records from an off-site storage company identified by Hamilton. See Exhibit B.

What is clear from the Special Master's reports -- and what is entirely mischaracterized in the Inspector General's Petition -- is that Hamilton has made tremendous efforts to retain, retrieve and produce vast sums of material notwithstanding the fact that HUD's refusal to pay monies owed to Hamilton and

HUD's 19-month investigation have led Hamilton into bankruptcy. Many of Hamilton's former employees and those remaining with the skeleton of the former company have been working without pay for a number of months to comply with the subpoenae and wind down Hamilton's operations. Hamilton's attempts to assist the OIG throughout this investigation with voluntary presentations regarding Hamilton's operations and information storage systems (even in the face of the OIG's unreasonable demands and apparent inability to understand computer programs and databases) has been motivated, in large part, by a desire to address promptly any allegations of criminal wrongdoing.

If the present and former directors of Hamilton had not suffered so greatly at the hands of the OIG's investigative team over the past 19 months (with no end in sight), they actually might find some humor in the following comment from the Inspector General's Petition:

[C]ompliance 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.

Petition for Summary Enforcement of Administrative Subpoenas at 20 (hereinafter "Petition"). The vindictive, perfunctory and self-serving attitude evident in that statement resonates throughout the Petition, and indeed, has pervaded the entire OIG investigation. The OIG's investigation; unsubstantiated rumors leaked to the media; and HUD's refusal to pay Hamilton money owed under its contract has led Hamilton to the door of bankruptcy. Ironically, the OIG now asserts that the subpoenae impose no burden on Hamilton specifically because Hamilton has no revenue-generating business - caused, of course, by the OIG.

That is nonsense – the burden is even greater. Hamilton no longer has its office space or its computers, and its employees have scattered, thus making it even more difficult to respond to the OIG’s shotgun approach.

Hamilton and its individual employees have strived to make available to the Special Masters virtually every piece of paper and/or electronic communication (including correspondence regarding purely personal matters) that went through their office and was retained -- whether by hardcopy or electronic backup. The burden of accumulating, retrieving and forwarding these materials to OIG (and subsequently, to the Special Masters) has been, and continues to be, overwhelming; and this comes on top of the hundreds of thousands of dollars in costs that Hamilton expended for producing thousands of pages of documents over the previous several months. Moreover, the OIG’s failure to modify its current request by recognizing what it has received, as evidenced by its continued request for documents already produced, has led to a chaotic situation that will only result in more staggering costs. Despite Hamilton’s tremendous efforts to comply with the subpoenae and the Court’s March 6 Order, as evidenced by the breadth and volume of material made available to Storch & Brenner (see Exhibits A and B), Hamilton opposes the OIG’s attempts to review irrelevant or privileged material as part of its broad-based fishing expedition.

As Hamilton notes its objections to particular categories of information sought by the OIG subpoenae in the following sections of this Opposition, it respectfully requests that the Court carefully scrutinize the OIG’s stated need for such evidence. Despite a 19-month investigation (at what untold cost to taxpayers?) and strangulation of a financial advisor once lauded for its handling

of the HUD loan sales program, the OIG still has not made any formal claims against Hamilton.

The situation has become intolerable. Hamilton has already turned over hundreds of thousands of pages of documents to the OIG, yet the OIG continues to ask for those same documents.¹ It appears that there is no true focus to the OIG investigation; indeed, Hamilton questions if the OIG has even read many of the materials already produced.

In its papers, the OIG offers to submit to the Court for in camera review a sworn proffer of evidence developed to date and current areas of focus of the investigation. That is insufficient. Given the broad range and scope of the OIG subpoenae, the pending civil actions, and the continued threats of criminal prosecution of not only the corporations but of individuals as well, it is patently and fundamentally unfair to Hamilton that the focus of the investigation and the evidence developed to date not be shared with Hamilton. If, after 19 months and hundreds of thousands of pages of documents already produced, the OIG cannot pinpoint with greater specificity both the information it claims it needs, and the narrower timeframes within which it claims the alleged wrongdoing occurred, it is reasonable to conclude that no real evidence has been developed; hence, there is no justifiable focus to the investigation, and that the continued push for more and more information is but a harassing fishing expedition.

Moreover, as the OIG acknowledges in its papers, it has the burden of demonstrating the relevance of the documents sought to the investigation.

¹ Since 1996, Hamilton has spent well over \$1 Million in responding to the OIG subpoenae, and has provided the OIG with thousands of documents and tapes. See Exhibit C. Yet, despite this effort, the OIG continues to ask for the same documents over and over again.

Neither the Court nor Hamilton can determine or challenge, respectively, in any meaningful way, issues of relevance when the information sought is done so in a vacuum. The Court has the power to undertake an inquiry into the propriety and reasons for which the subpoenae were issued, and should do so at this time. See United States v. Powell, 379 U.S. 48, 58 (1964). By granting the relief requested herein, the Court will impose some reasonable restraints on a heretofore-unrestrained investigation.

Hamilton also asks the Court to question carefully two overriding issues raised by the Inspector General's Petition. First, the Inspector General insinuates throughout its 40-page Petition that difficulties Hamilton experienced responding to the subpoenae indicate an obstructionist attitude. Nothing could be less true. Additional documents, laptops and similar materials have been produced from time-to-time because of (a) Hamilton's continuing efforts to locate and produce documents responsive to the subpoenae (even from former employees) and/or (b) Hamilton's acquiescence to certain unreasonable demands to avoid even the appearance of obstruction (bearing in mind, of course, the unfair leverage the OIG has exercised by making unsubstantiated statements that it is conducting a criminal investigation). Hamilton has undertaken these efforts despite the fact that it has no business revenue to support its efforts to comply.

The second overriding concern has to do with the OIG's own failure to make sense of the many documents produced by Hamilton. For example, the OIG acknowledges that it spent 19 staff days reviewing 102 boxes of paper files as they were made available between November 18, 1997 and February 10, 1998. Petition at 15-16. The OIG states that those 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 disks which happen to be scattered among the paper files.” Petition at 16. As Hamilton will argue in the following sections, records concerning HUD’s note sales are the only relevant documents in the dispute between OIG and Hamilton at this time. Yet after reviewing these documents over 19 staff days and interviewing numerous Hamilton employees, the OIG still has not made any formal claims against Hamilton. Hamilton cannot be held responsible for the OIG’s inability to grasp issues or deal with the volume of materials that it has requested and received.

In its Petition, the Inspector General states that “the OIG’s subpoenas seek evidence reasonably related to the investigation from its principal advisor on the mortgage sales program.” Petition at 20. Hamilton contends that the OIG is entitled to that evidence (which has already either been produced or is accessible from HUD itself) and nothing more. Unfortunately, the OIG’s subpoenae are far more invasive. Once Storch & Brenner has itemized and categorized the documents in its possession, and subject to privilege claims upon review of those documents by Hamilton’s counsel, OIG should have access only to any additional materials it can identify that are “reasonably related to the investigation from its principal financial advisor on the mortgage sales program” not previously produced. Hamilton’s objections to specific categories of discovery sought via the OIG’s Petition are set forth below.

**Proprietary Business Information
Outside of Hamilton's HUD Contract**

The OIG should not have access to Hamilton information regarding business ventures and prospective business ventures outside of the scope of Hamilton's contract to serve as advisor for the HUD mortgage sales program. The OIG has no authority to investigate non-HUD-related matters, and subpoenae seeking to do that are not enforceable. United States v. Morton Salt Co., 338 U.S. 632 (1950). Moreover, Hamilton and the Hamilton's directors have a legitimate interest in protecting the proprietary business information (including computer programs) that Hamilton designed.² The requests are simply too broad and burdensome. While HUD contracts comprised the majority of Hamilton's revenue-generating workload, Hamilton had every right to consider, evaluate and pursue business outside that area. OIG should not be allowed to embark on a fishing expedition through such information. Again, the vindictiveness of OIG's approach on these issues is evident in its Petition.

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 disclosed to its competitors lest its value evaporate. ... 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.

² Ironically, the U.S. Department of Justice, counsel for HUD in Hamilton Securities Group, Inc. v. HUD, cautioned Hamilton's counsel that HUD's "business, trade secret, proprietary or other information ... should remain confidential, and therefore should not be disclosed to the outside world." See Exhibit D.

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.

Petition at 30-31. The above excerpts evidence OIG's desire to have unrestrained access to all of Hamilton's business records, simply by claiming it has a "legitimate" investigative interest without providing any basis for making such a claim. Just because Hamilton has been driven out of business does not deprive it of its property rights. There are means by which the Special Master can determine if there is any potential evidence of any conflicts of interest without the wholesale and unrestricted transfer of Hamilton's records to the OIG. This has been previously suggested to the OIG, but rejected for no good reason. (Exhibit C).

The objectionable requests appear at Items 4 and 5 of the October 24, 1997 subpoena, in which OIG seeks:

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 (Items No. 4);

Agreements between Hamilton and any bidder at any FHA note sale (Item No. 5)

This Court should not allow OIG access to Hamilton's proprietary business material in the absence of *prima facie* evidence of conflicts of interest relating to Hamilton's non-HUD business. Any such showing by the OIG should be fairly substantial in light of the length and extent of the OIG's investigation to date. The OIG has reviewed 102 boxes of Hamilton's documents

relating to the loan sales program over "19 staff days" (Petition at 15-16); interviewed numerous Hamilton employees; obtained and reviewed HUD's documents; and, it is fair to assume, conducted substantial witness discovery within HUD as well. Nevertheless, the Inspector General still has not made any formal allegations against Hamilton.

With no reasonable explanation of support for it, the OIG makes the naked assertion that all of the information it seeks "touches" on the matters at issue in the investigation. That assertion is insufficient to meet its Morton Salt burden. The OIG is well past the beginning of its investigation, and has already been supplied a great deal of information. Its demands must now be "not too indefinite and the information sought ... reasonably relevant." United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). Merely saying it is so doesn't make it so, and the OIG's overall requests are both too indefinite and unsupported as reasonably relevant.

The individuals who devoted their finances and talents to Hamilton for more than seven years have legitimate interests in the proprietary "intellectual capital" that they developed while at Hamilton. Indeed, that intellectual capital is the only remaining resource these individuals have that may allow them to recover from the disruption to their careers occasioned by OIG's over-reaching investigation.

Notwithstanding the fact that Hamilton has turned this information over to Storch & Brenner already (to the extent that such information was in its possession or control), substantial burden remains for Hamilton if the Court permits the OIG access to the wide and unfocused scope of materials sought. To properly defend itself, Hamilton would have to review the material itself and

delineate privileged material before OIG has access. Allowing access to such information also will create additional burdens further down the road in the form of motions to strike or limit introduction of irrelevant information. Limiting the discovery up front is the only way to adequately address the burden on Hamilton.

Hamilton's Financial and Personnel Records

As with the OIG's attempts to discover evidence regarding Hamilton's non-HUD business, the OIG's request for all of Hamilton's financial and personnel records is overly intrusive, too broad and overly burdensome. OIG seeks:

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

- 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

While it is true that much of Hamilton's revenues were derived from its HUD contracts, Hamilton never was obligated to devote all of its resources exclusively to the HUD contracts. Hamilton had employees working on non-HUD business (as discussed above) and additional plans for the future. Financial and personnel records relating to such activities, absent *prima facie* evidence of some wrongdoing relating to HUD is overly invasive. Indeed, the OIG acknowledges that it wants such materials, in part, "to verify ...the absence of

any improper relationships with HUD contract firms." Petition at 13. One can only wonder how far the OIG feels it may go to verify the absence of any improper activity that it may imagine. The Court should not permit the OIG to continue in such an unfocused manner, which is quickly becoming akin to the Salem witchhunts (that is, everyone finally believes that the accused is not a witch only after she fails to survive submersion in the local river). For the same reasons articulated above, at this point the OIG must document with particularity the focus of its investigation and the specific basis and needs for its access to all of the information it seeks.

Legislative or Regulatory Initiatives

The OIG's October 24, 1997 subpoena also seeks Hamilton's records regarding legislative or regulatory initiatives. Specifically, Items 7 and 12 seek:

records pertaining to communications with the Office of Management and Budget concerning ... any FHA legislative or regulatory initiative, and

records pertaining to Neighborhood Networks, A HUD program advocated by Hamilton.

Petition at 12. As with other proprietary business activities not directly associated with Hamilton's contracts with HUD, discovery of the above-described information is beyond any reasonable inquiry that the OIG may have at this time.

Computer Databases

The OIG's Petition is replete with references to computer servers, personal computers and laptops and the documents that may be contained therein. Hamilton's objections to the OIG's discovery of its computer databases

are not distinct from the objections set forth in the preceding sections. In other words, Hamilton contends that some computer programs and computer data falls within the above categories. Hamilton merely notes in this section that the OIG's references to Hamilton's alleged failure to produce all computer database material is largely moot in light of Hamilton's agreement to allow agents from the Federal Bureau of Investigation to download all information on the computers including backup copies. Hamilton agreed to that procedure in compliance with the terms and spirit of the Court's March 6, 1998 Order. As with other items addressed in the March 6 Order, Hamilton is preparing a Certification regarding its efforts to produce documents to Storch & Brenner in accordance with the Order.

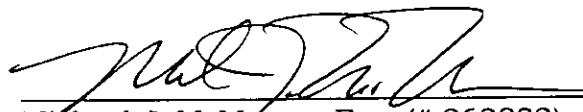
Hamilton does note, however, that the OIG's continued request for the computer information by way of its Enforcement Petition is the clearest evidence of its harassing tactics. Despite repeatedly being told by Hamilton counsel that information sought in the subpoenae has been produced, the OIG has made no effort to narrow its requests to include acknowledgement of the materials it has received. There is no justification for the oppressive behavior

CONCLUSION

For all of these reasons, Hamilton respectfully requests that the Court deny the Inspector General's Petition in its entirety, or, in the alternative, to require the OIG to advise the Court and Hamilton of the "evidence" developed to date and the focus of its investigation, and if more information is sought to

request it with greater particularity in conformance with a properly focused and specified investigation.

Respectfully submitted,



Michael J. McManus, Esq. (# 262832)
Kenneth E. Ryan, Esq. (# 419558)
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower - Suite 300
Washington, DC 20036-3437
202/457-1600


Counsel for The Hamilton Securities
Group, Inc. and Hamilton Securities
Advisory Services, Inc.

CERTIFICATE OF SERVICE

This is to certify that on this 10th day of April, 1998, a copy of the foregoing Opposition to Petition for Summary Enforcement of Administrative Subpoenas was served, via first-class mail, postage prepaid, on the following:

Judith Hetheron, Esquire
U.S. Department of Housing and
Urban Development
Office of Inspector General
Office of Legal Counsel
451 - 7th Street, S.W., Room 8260
Washington, D.C. 20410

Daniel F. Van Horn, Esquire
Assistant United States Attorney
555 - 4th Street, N.W.
Room 10-104
Washington, D.C. 20001



Michael J. McManus