IN THE 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,	)	
Petitioner,	)	
v.	)	**Misc. No. 98-92**
THE HAMILTON SECURITIES GROUP, INC. and HAMILTON SECURITIES ADVISORY SERVICES, INC.,	)	**FILED UNDER SEAL**
Respondent.	)	

HAMILTON SECURITIES' RESPONSE CONCERNING
THE PROTECTION OF PROPRIETARY INFORMATION

On April 29, 1998, this Court, the Honorable Stanley Sporkin, signed an Order which provided, among other things, that government personnel shall not disclose Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc.'s (collectively, "Hamilton") proprietary information to non-government personnel and that all government personnel who have access to Hamilton's documents and records shall execute a non-disclose agreement acceptable to the Special Masters which restricts disclosure of Hamilton's proprietary information to non-government personnel. In its September 24, 1998 status report to the Court, the Office of the Inspector General ("OIG") takes exception with the need for, and constraints of, the Protective Order.

Hamilton states that the Court was justified in entering the Protective Order, and that the OIG raised only untimely, hypothetical bases for objecting to the same. The OIG has stated that its investigation was initiated in response to a *Bivens* suit,

filed not by an uninterested third-party, but by a competitor of Hamilton's. Hamilton is thus amply justified in its concerns that its proprietary information not be disclosed.

The Court has the Authority and Responsibility to Provide Reasonable Protections to the Subject of an Administrative Subpoena

Protective orders are appropriate measures of protection in cases involving court enforcement of administrative subpoenae, including subpoenae issued by any of the Inspectors General. Numerous courts have held that protective orders may be necessary to strike a reasonable balance between an agency's investigative needs and the rights of individuals subject to an agency's subpoena authority. Courts have extended such protection to documents containing proprietary trade secrets, the disclosure of which to non-government individuals may compromise the company's competitive position.

This Court has considered, on numerous occasions, the courts' role in enforcing, denying, modifying or conditioning administrative subpoenae, including enforcement conditioned upon assurances of confidentiality such as protective orders. In a case involving enforcement of an administrative subpoena issued by the Office of Inspector General of the Resolution Trust Corporation, this Court stated:

> An agency invoking the aid of a court to enforce a subpoena may not tell a court it has no authority to condition or modify the subpoena to protect those whom enforcement of the subpoena may put at risk. After all, a court is not merely a "rubber-stamp" in subpoena enforcement proceedings. *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d at 974. A court may place "[s]ome limits ... on an agency's use of *court* process, since ... it is the court's process that compels the respondent to comply with these administrative demands.... [W]here the processes of the Court are involved, there must be opportunity for the Court to satisfy itself that the agency's power will be properly used."

Adair v. Rose Law Firm, 867 F. Supp. 1111, 1119 (D.D.C. 1994) (*quoting* RTC v. KPMG Peat Marwick, 779 F. Supp. 2, 3-4 (D.D.C. 1991)) (emphasis and omissions in original).

The Court denied the Rose Law Firm's request for a protective order regarding confidential client lists; however, the Court reached that conclusion only after analyzing in great detail the protection already agreed to by the OIG in the form of a "Confidentiality Undertaking", and finding that the Court could not fashion any protection that balanced better the interests of the agency and the interests of those who may be impacted by disclosure of the Firm's client lists. 867 F. Supp. at 1121. Nevertheless, the Court rejected the OIG's assertion -- as a blanket proposition -- that courts typically defer to an agency's own assessment of the adequacy of its written assurances of confidentiality. Noting that "enforcement of a subpoena is an independent judicial action, and not merely an action ancillary to an earlier agency action," 867 F. Supp. at 1118-19, the Court stated:

> It therefore necessarily falls within the Court's discretion to provide additional confidentiality protections beyond those offered by the agency when it concludes that the agency, in the exercise of its discretion, has not provided safeguards sufficient to protect the interests of those at risk.

Id. at 1119. *See also* International Trade Comm'n v. Tenneco West, 822 F.2d 73 (D.C. Cir. 1987) (upholding District Court's issuance of Protective Order relating to International Trade Commission's administrative subpoena because the agency had failed to offer Tenneco more than vague references to "practices" of nondisclosure and notice); United States v. Exxon Corp., 628 F.2d 70 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980) (Court upheld enforcement of Department of Energy subpoenas

subject to the terms of a detailed protective order proffered by the DOE after oral argument).

After the OIG raised with Hamilton and the Special Master its objection to the Protective Order entered by this Court, the parties attempted but were unable to agree on a form of Protective Order to replace the Order signed by the Court; hence, the Court's Protective Order is the only measure of protection available to Hamilton. The OIG offered a form of Protective Order, attached as Exhibit 4 to the OIG's September 24, 1998 Status Report, that offered no real protection at all. All of the protection ostensibly offered was subject to unilateral circumvention by the OIG without notice to Hamilton. Specifically, the OIG's proposed Protective Order states at Paragraph 3 that:

> The OIG shall not, without further permission of the Court, disclose the [protected] materials, or the information contained in them, to anyone outside of the OIG, **except as necessary in the furtherance of legitimate investigatory efforts of the OIG**. Such investigatory efforts may include interviews of witnesses....

Petitioner's Status Report, Exhibit 4 (emphasis added).[1] Has there ever been an exception drafted that swallowed the whole more efficiently? Hamilton is left to wonder not only whether any "protected" document actually would escape OIG's black hole exception, but also whether the OIG feels that it can use and disseminate Hamilton's unprotected documents for reasons not in furtherance of legitimate investigatory efforts. The unwillingness of the OIG to offer reasonable safeguards for

[1] By referencing the broad exception in paragraph 3, Hamilton does not intend to imply that it otherwise agrees with the OIG's proposed safeguards. Many other issues exist. For example, the OIG would not agree to Hamilton's providing a definition of protected categories of documents, necessary because Hamilton no longer has the financial resources or staff to designate protected materials on a document-by-document basis. Hamilton even proposed a simple and quick procedure for the OIG to confirm with Hamilton whether a document was protected if it had any question about the document, but that was rejected out of hand by the OIG.

Hamilton's proprietary materials demonstrates the absolute necessity for maintaining the Court's current order.

The Protective Order Entered by the Court Achieves a Reasonable Balance Between the OIG's Investigative Needs and Hamilton's Need for Protection of its Proprietary Materials

The Court's Protective Order is appropriate in this case because it strikes a reasonable balance between the OIG's need to conduct its investigation of HUD's loan sales program and Hamilton's need to protect its investment in the cutting-edge tools and methodologies that it developed. The Protective Order is particularly appropriate because: (a) the OIG has access to hundreds of thousands of documents regarding the Department of Housing and Urban Development's ("HUD") loan sales program from Hamilton, HUD and other sources which would not be subject to the Protective Order; therefore, the Protective Order (which applies to only proprietary material) would not unduly impede the OIG's investigation; (b) the extraordinary measure of relocating all of Hamilton's business records to the Special Master, Storch & Brenner, has resulted in the OIG's access to documents that strain the limits of relevance and responsiveness (notwithstanding the OIG's complaints about Hamilton's counsel's review of documents at the Special Masters for a responsiveness determination); (c) Hamilton and its former principals invested tremendous time and resources in the proprietary methodologies and tools they devised and applied to their work for HUD (the methodologies and tools which are subject to protection as proprietary material were not "deliverables" under the HUD contracts); (d) the OIG already has shared information with one of Hamilton's most direct competitors, and finally, (e) because the government, itself, has insisted that

Hamilton protect the confidentiality of HUD's proprietary materials which are included in Hamilton's document collection.[2]

Hamilton has stated before and will reiterate that the OIG's investigation, now in its 28th month, has devastated the Company. Coupled with HUD's withholding of monies owed under the HUD contracts, the OIG investigation and the negative publicity surrounding the same has severely crippled and curtailed Hamilton's business. This was a company of more than 40 employees lauded by government officials for its visionary work and endless capacity. Some of the principals of Hamilton hope that once this seemingly endless investigation is behind them, they will be able to utilize and market their cutting-edge methodologies and tools in the private market, and thus rebuild their careers.

Of special concern to Hamilton is the prospect of the OIG's active and inexplicable collaboration with counsel for Ervin and Associates, the disgruntled HUD contractor (and Hamilton business competitor) that is suing HUD, the Secretary of HUD, the Small Business Administration and a former HUD official in Ervin and Associates, Inc. v. Helen Dunlap, et al., Civil Action No. 1:96-CV-1253 (D.D.C.) (the "*Bivens*" lawsuit). Hamilton also suspects that Ervin and Associates or its President, John Ervin, is the driving force behind the *qui tam* litigation relating to the HUD loan sales program. The *qui tam* litigation and the *Bivens* lawsuit were commenced in June 1996. Now, twenty-eight months later, the government still has not decided whether to intervene in the *qui tam* litigation. In a separate filing, Hamilton objects to the OIG's involvement in and collaboration with the *qui tam* plaintiffs. Hamilton adopts and incorporates the facts of that argument herein. The Protective Order is

[2] *See* the April 1 and April 7, 1998 letters from David J. Gottesman, Trial Attorney in the U.S.

necessary to assure that the OIG, in its zeal to assist Ervin and Associates, does not provide Hamilton's direct competitor with the blueprints to usurp Hamilton's business plans and cutting-edge methodologies. The link between the OIG's investigation and Ervin and Associates' lawsuit, coupled with the OIG's disingenuous assurances of confidentiality to Hamilton, should nullify any presumption of administrative regularity and good faith; thereby justifying this Court's imposition of extraordinary limitations on the OIG's use of Hamilton's proprietary materials. *See* Federal Trade Comm'n v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 974-75 (D.C. Cir. 1980).

For all of the reasons set forth above, Hamilton Securities states that the Court's Protective Order is necessary and appropriate under the circumstances; therefore, the Court should deny the OIG's request that the Court withdraw the Protective Order.

Alternatively, if the Court is swayed by the OIG's assertion that the current Protective Order places unreasonable restraints on the OIG, Hamilton respectfully suggests that the Court instruct the parties to negotiate a confidentiality agreement that reasonably balances the OIG's stated need to use Hamilton's proprietary documents with Hamilton's legitimate interest in protecting its confidential business records from public dissemination. Any such agreement should not place such an unreasonable burden on Hamilton, taking into account its present financial difficulties, to render the safeguards impractical.

Respectfully submitted,

Department of Justice Civil Division, attached hereto as Exhibit A.

By:_____

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October 13, 1998

CERTIFICATE OF SERVICE

This is to certify that on this _____ day of October, 1998, a copy of Hamilton Securities' Response Concerning the Protection of Proprietary Information was sent, via first-class mail, postage prepaid, to:

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