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, 451 – 7th Street, S.W. Washington, D.C. 20410	)	
Petitioner,	)	
	)	**Misc. No. 98-92 (SS)**
v.	)	
THE HAMILTON SECURITIES GROUP, INC. and HAMILTON SECURITIES ADVISORY SERVICES, INC., 7 Dupont Circle, N.W. Washington, D.C. 20036	)	
Respondent.	)	

RESPONDENTS' REPLY TO PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO CONDUCT DISCOVERY

In its Opposition to Hamilton's Motion for Leave to Conduct Discovery, the OIG argues that Hamilton's motion should be denied not only because the OIG behavior referenced by Hamilton does not rise to the level of bad faith, but also because "discovery is not necessary to assist this Court to decide the merits of the case." Petitioner's Opposition, at 2. It is with regard to this latter contention that Hamilton now responds.[1] Contrary to the OIG's claim, discovery is necessary to ascertain whether certain statutory obstacles operate

[1] It should be mentioned, however, with respect to the allegations of bad faith, that the OIG's basic response – that this is not the "appropriate proceeding" for Hamilton to challenge the OIG's conduct – misses the point. A common thread of Hamilton's motion is that the OIG's investigation has expanded far beyond its reasonable parameters, such that an inquiry into the practices of HUD officials has sprawled into an investigation of, *inter alia*, the personal finances of a HUD contractor's principal, and those of her elderly uncle. Though indeed other

to preclude the enforcement of the OIG's subpoenas, for the three related reasons discussed below. Indeed, if discovery is not necessary, it is only because the evidence of the OIG's lack of statutory authority and abuse of judicial process is already sufficiently clear to bar subpoena enforcement.

ARGUMENT

In its Opposition, the OIG included the following statement as part of its discussion of the underlying facts:

> In early July 1996, the Civil Division of the United States Attorney's Office contacted the HUD OIG, advised OIG of the existence of the qui tam action, and requested the OIG's assistance in investigating the allegations in the qui tam action. . . . Thereafter, the OIG commenced an investigation of the allegations contained in both the Bivens Complaint and the qui tam action.

Petitioner's Opposition, at 3; *see also id.*, Declaration of Jack Rogers ¶ 5. If this statement is taken at face value, then the subpoena cannot be enforced. First, if the OIG's investigation of both the Bivens Complaint and *qui tam* action stemmed solely from a request by an agent of the Attorney General to assist in the investigation of the *qui tam* suit, then the subpoena was lacking in statutory authority when it was issued, as an improper delegation of power. *See* United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986) (administrative subpoena must be "within the statutory authority of the agency"); *see also* United States v. Powell, 379 U.S. 48, 57-58 (1964). Second, the fact that the OIG is now conducting an investigation of the merits of a *qui tam* suit also renders the subpoena unenforceable as lacking in statutory authority, because that responsibility is committed to the

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"appropriate proceedings" do exist to challenge these practices, such conduct also raises a question as to the OIG's good faith in this proceeding.

Attorney General by statute. Finally, even if statutory authority exists, the OIG's conduct constitutes an abuse of process which justifies this court's refusal to enforce the subpoena.

A. Discovery May Be Necessary to Demonstrate that the OIG Lacked Statutory Authority to Issue the Subpoenas Due To an Illegal Delegation of Power.

To see why the OIG's subpoenas are unenforceable as having been issued in furtherance of an unauthorized delegation of power, a review of the statutory language of the Inspector General Act of 1978 (IG Act), 5 U.S.C. App. 3, and of the *qui tam* Civil Investigative Demands section of the False Claims Act, 31 U.S.C. § 3733, will be helpful.

In the IG Act, Congress created the offices of Inspector General to combat fraud, waste, and abuse in the operation of Federal agencies. S. Rep. No. 1071, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S.C.C.A.N. 2676, 2679. In so doing, Congress contemplated a certain degree of interagency cooperation between the Department of Justice and the IG Offices in ferreting out fraud. *See id.* at 2681-82; United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1145 (D.C. Cir. 1987); *see also* 5 U.S.C. App. 3 § 2 (2). Specifically, the Inspectors General are authorized to obtain "information or assistance as may be necessary for carrying out" their IG Act duties, from "any Federal . . . agency or unity thereof." 5 U.S.C. App. 3 § 6 (a)(3). However, this "information or assistance" from Federal agencies may only be shared "insofar as . . . not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested." Id. § 6 (b)(1).

Section 3733 of the False Claims Acts provides that a civil investigative demand (CID) may be issued "[w]henever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims investigation." 31 U.S.C. § 3733 (a)(1). This power rests only with the

Attorney General (AG): "The Attorney General may not delegate the authority to issue civil investigative demands under this subsection." Id. The statute explicitly extends this non-delegation clause of false claim investigations to coordinate agencies in § 3733 (a)(2)(G): "The Attorney General may not, notwithstanding section 510 of title 28,[2] authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph."

In determining whether a subdelegation by the Attorney General is impermissible, "the central inquiry . . . is whether Congress intended to limit the delegatee's power to delegate." United States v. Touby, 909 F.2d 759, 769 (3d Cir. 1990). What we have here is a statute -- 31 U.S.C. § 3733 -- which expressly forbids the AG from delegating her authority to investigate potential false claims. Yet according to the OIG's representation in this case, the AG has done precisely that: she has delegated her authority to investigate *qui tam* false claims to the HUD OIG. Because *qui tam* investigations are solely the jurisdiction of the Attorney General, the HUD OIG lacked statutory authority to accept that illegal delegation.[3] The subpoenas cannot be enforced under these circumstances. If the OIG's statements in its brief leave any doubt with respect to the genesis of its investigation, limited discovery can provide the answer.

B. Discovery May Be Necessary to Demonstrate that the OIG Is Acting Without Statutory Authority in Lending Its Subpoena Authority to the Department of Justice.

[2] 28 U.S.C. § 510 allows the Attorney General to delegate certain of her duties to other Department of Justice agents.

[3] That the OIG might have had some other conceivable statutory basis of jurisdiction over this investigation's subject matter is immaterial. If the investigation was commenced due only to the AG's request, then as a matter of law, the delegation was void. *See* Touby, 909 F.2d at 969-71.

Irrespective of the nondelegation clauses, it is clear from the language, structure, and legislative history of the 1978 IG Act and the CID statute that the HUD OIG cannot conduct investigations of false claims violations. To hold otherwise would undermine the will of Congress and would create a risk that the government's access to criminal discovery materials might be improperly augmented.

To illustrate the risk in allowing the AG to conduct its false claims investigations vicariously through the OIG, consider the difference between AG *qui tam* CIDs and IG subpoenas. The section governing the procedure to be followed in issuing CIDs is eight pages in length in the U.S. Code. As one court recognized:

> Congress recognized the broad powers it was granting the Government in the CID statutes. Accordingly, Congress built various protections into the CID statutes to protect recipients from onerous requests for production or from being forced to divulge information subject to privilege under the Federal Rules.

United States v. Witmer, 835 F. Supp. 201, 205 (M.D. Pa. 1993); *see generally* AVCO Corp. v. United States Department of Justice, 884 F.2d 621 (1989). To highlight just a few of the protections built into the statute, one section provides that each CID "shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated." 31 U.S.C. § 3733 (a)(2)(A). Once issued, the subject of the investigation has extensive rights to prevent the disclosure of certain information. Under § 3733 (b)(1), all standards and defenses available to the subjects of grand jury investigations are available the recipient of the CID and, even more significantly, "the standards applicable to discovery requests under the Federal Rules of Civil Procedure" are equally available to CID recipients. Once the AG obtains this discovery information pertaining to its false claims investigation, that information must be

confidentially held by a "custodian of documentary material" designated by the AG. 31 U.S.C. § 3733 (i)(1). Other than authorized DOJ personnel, "no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator." Id. § 3733 (i)(2)(C). Additionally, this information cannot be disclosed to other agencies absent an application by the AG to a U.S. district court showing "substantial need." Id.

In contrast, the discovery procedures and restrictions in the IG Act are contained entirely in one section:

> (a) "[E]ach Inspector general, in carrying out the provisions of this Act, is authorized --
> . . . .
> (4) to require by subena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court[.]

5 U.S.C. App. 3 § 6 (a)(4). The IG is not expressly required to disclose either the nature of the alleged violation or the statute alleged to be violated. The statute mentions no confidentiality restrictions. The permissible scope of IG subpoenas is, according to the OIG, "quite broad," and not deserving of a "constricted interpretation." Petitioner's Reply to Respondent's Opposition to Petition for Summary Enforcement, at 9. Also unlike § 3733, the standards of the Federal Rules of Civil Procedure are not, according to the OIG, available as defenses in the enforcement proceeding. Id. at 6-7. Indeed, the OIG chastises Hamilton for suggesting to the contrary: "Hamilton seems to think that this subpoena enforcement proceeding is nothing more than a civil discovery dispute." Id. at 6.

Faced with the burdensome CID requirements, the AG apparently decided that it could obtain far more information with far fewer restrictions if it enlisted the OIG, and the OIG's unfettered subpoena power, to conduct the false claims investigation on its behalf. Why else would the AG have asked for the HUD OIG's assistance, rather than conducting the investigation itself, as required by statute? Apparently, the offices of the HUD IG and the AG agreed to engage in an end run around the onerous CID discovery and confidentiality requirements, so that the AG could do indirectly that which it could not accomplish directly.

The OIG's gamesmanship amounts to a complete subversion of congressional will as expressed in the CID statute: using the technique herein employed, the AG will never need to comply with the CID requirements when it seeks documentary evidence for a *qui tam* investigation. Nor are the OIG's techniques reconcilable with Congress' intended use of IG subpoena power. As stated in the Committee Report to the 1978 IG Act:

> The committee intends, of course, that the Inspector and auditor general will use this subpoena power in the performance of his statutory functions. *The use of subpoena power to obtain information for another agency component which does not have such power would clearly be improper*.

S. Rep. No. 1071, 95th Cong., 2d Sess. 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2709 (emphasis added). And so here, because the Department of Justice lacks an investigative tool as strong as an IG subpoena, the OIG's use of its subpoena power to obtain information for the DOJ is improper. Indeed, through use of IG subpoenas the AG stands to gain evidence which it would otherwise not be entitled to obtain, without the notice requirements otherwise required, and without the confidentiality restrictions otherwise attendant in false claims investigations.

The decisions by the Third Circuit in Westinghouse and by the D.C. Circuit Court in Aero Mayflower support these conclusions. In Westinghouse, the respondent sought to quash a Department of Defense IG subpoena on the ground that the IG was attempting to obtain information for an entity that lacked subpoena power, the Defense Contract Audit Agency. 788 F.2d at 165-67. In support of this argument, the respondent relied on the legislative history to the IG Act quoted above. Id. at 167. The court disagreed with the respondent's argument because "it overlooks a critical difference between the 1978 and 1982 Acts." Id. Here the court was distinguishing between the 1978 Act, which created the HUD OIG, and the 1982 Act, which created the DOD OIG. The 1982 Act added a section to the 1978 IG Act which was specific to the DOD OIG, and which gave criminal investigative authority to the DOD OIG that the other Inspectors General did not have. 5 U.S.C. App. 3 § 8 (c). Given that the court was quite clear that its decision turned on the differences between the language and legislative history of the 1978 and 1982 Acts, *see* 788 F.2d at 167-69, it can be inferred that the result might well have been different had the DOD OIG been organized under the 1978 Act, as was the HUD OIG.

The decision in Aero Mayflower that the DOD OIG did not "improperly delegate[d] his authority to the Justice Department," 831 F.2d at 1144, also turned in large part on the extensive criminal investigative authority granted solely to the DOD OIG in the 1982 Act. Id. at 1145 & n.3 (the provision in § 8 (c)(5) "charging the Department of Defense Inspector General with guidance of all Defense Department Activities relating to criminal investigations . . . applies only to the Department of Defense Inspector General"). Also distinguishable is the court's conclusion that the DOD OIG did not sidestep the grand jury subpoena process because "[t]he Inspector General subpoenas clearly did not operate to circumvent statutory

or other limitations on the Justice Department's investigative powers." Id. at 1146. Again, the contrast with this case is clear: the HUD OIG is circumventing a statutory limitation on the DOJ's investigative powers, as stated in the CID statute.

To be sure, the HUD OIG may well have been authorized to conduct an investigation of the allegations in the Bivens Complaint (were it not for the AG's illegal delegation), but once the *qui tam* allegations became involved, the OIG was required under its own statute and under 31 U.S.C. § 3733 (as applied to the OIG through 5 U.S.C. App. 3 § 6 (b)(1)) to confine its investigation to its own statutory responsibilities. In any event, discovery may be necessary to ascertain whether the OIG is, in fact, conducting the AG's false claims investigation.

C. Discovery May Be Necessary to Demonstrate that the OIG Is Abusing This Court's Process By Attempting to Circumvent Its Criminal Discovery Restrictions.

Even if the interest in allowing coordinated investigations with the Department of Justice could somehow allow the OIG to answer the Attorney General's call to investigate alleged false claims (despite the commitment of that responsibility to solely to the AG), the OIG must, at minimum, subject itself to the strictures of the CID statute, and refuse to disclose the fruits of its investigation to any other agency or party.

Based on the available evidence, it appears that the OIG has not met this burden. This willingness to disregard the requirements of the CID statute and to share the fruits of the *qui tam* investigation constitutes an abuse of process sufficient to bar enforcement of the subpoenas. *See* Westinghouse, 788 F.2d at 166-67 (subpoenas issued for improper purposes constitute an abuse of process, and are unenforceable); Powell, 379 U.S. at 57 (same). It is apparent from the pleadings that the OIG has not complied with the CID statute. It is

likewise apparent that the OIG is enabling the AG to sidestep the strict criminal discovery rules and confidentiality obligations prescribed by Congress for *qui tam* investigations by lending out its comparatively unregulated subpoena power, and is thereby undermining the strictures of 31 U.S.C. § 3733. *See* United States v. LaSalle National Bank, 437 U.S. 298 (1978) (forbidding the IRS from issuing subpoenas prior to Justice Department investigations where doing so "would permit the Government to expand its criminal discovery rights"); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (en banc), *cert. denied*, 449 U.S. 993 (1980) (expressing concern that noncriminal proceedings might "expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16 (b)").

The OIG's conduct amounts to a total disregard of the rights of Hamilton and its principals as potential criminal defendants. It has not complied with the CID statute's notice requirements per 31 U.S.C. § 3733 (a)(2)(A). With 100-plus boxes of documents, it is highly likely that AG has acquired from the OIG evidence that it would otherwise not be entitled to obtain. With respect to the CID statute's confidentiality restrictions, Hamilton suspects that the OIG is liberally sharing the fruits of its investigation with Ervin & Associates, the plaintiffs in the Bivens Complaint, even though Congress manifested a specific intent to keep the fruits of false claims investigations confidential. 33 U.S.C. § 3733 (i).[4] Even if no such sharing of information has yet occurred, the risk of such disclosure will persist so long as the OIG believes, as it evidently does, that it is that it is not governed by the false claims discovery

[4] For example, during the deposition of John Christopher Greer in the Bivins action, counsel for the plaintiffs suggested that he take a break to "call Judy." The context reveals that this was a reference to Judith Hetherton, Esquire, Counsel to the HUD Inspector General, with whom counsel was apparently on a first-name basis. Following an off the record discussion, counsel announced that the parties had "sought guidance from the Inspector General's office concerning specific events which occurred on June 5, 1995 going forward." Exhibit A (Dep. at 425-26).

restrictions. In any event, only through a grant by this Court of leave to conduct limited discovery may Hamilton ascertain whether and to what degree the OIG has disclosed confidences and documents to the AG and other parties.[5]

WHEREFORE, your Movant respectfully requests that this Court grant Hamilton's motion for leave to conduct limited discovery.

Respectfully submitted,

October 12, 1998

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[5] This need is highlighted by the OIG's outrageous refusal to produce a government audit, believed to be favorable to Hamilton, initiated to review the loan sale process which is at the heart of the government's investigation.

CERTIFICATE OF SERVICE

This is to certify that on this _____ day of October, 1998, a copy of this Reply to Petitioner's Opposition to Motion for Leave to Conduct Discovery was sent, via first-class mail, postage prepaid, to:

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