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

RESPONDENTS' MOTION TO QUASH SUBPOENAE OR,
IN THE ALTERNATIVE, MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

In related motions and pleadings, Respondent Hamilton has argued that the HUD Office of Inspector General's ("OIG") subpoenae are unenforceable in light of certain provisions of the *qui tam* Civil Investigative Demands section of the False Claims Act, 31 U.S.C. § 3733, as that statute relates to the Inspector General Act of 1978, 5 U.S.C. App. 3.[1] In a hearing before this Court on December 3, 1998, this issue was argued by the parties; however, without expressly deciding this issue, this Court resolved certain issues relating to the OIG's Petition for Summary Enforcement on other

[1] *See* Respondents' Second Supplemental Opposition to Petition for Summary Enforcement (Misc. No. 98-92, filed December 1, 1998); Respondents' Reply to Petitioner's Opposition to Motion for Leave to Conduct Discovery, Misc. No. 98-92, filed October 9, 1998; *see also* Movant's Opposition to Respondent's Filing of Pleadings *In Camera* (Misc. No. 98-347, filed October 6, 1998), and Movant's Response to Respondent's Reply thereto, (Misc. No. 98-347, dated November 30, 1998).

grounds.[2] In light of the importance of what Hamilton believes to be statutorily impermissible and unauthorized conduct by the OIG, Hamilton now reiterates this argument in the form of a motion to quash or, in the alternative, for a protective order,[3] in the hope that this Court will consider and expressly rule upon same.

ARGUMENT

The OIG included the following statement as part of its discussion of the underlying facts in its Opposition to Hamilton's Motion for Leave to Conduct Discovery:

> 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 subpoenae cannot be enforced, and should therefore be quashed. 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,[4] then the subpoenae were issued pursuant to an unlawful delegation of power, and the Attorney General's delegation was there-

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[2] To date, no order has been issued by this Court in resolution of the outstanding issues in this matter, Misc. No. 98-92, summarized in Respondents' letter of December 1, 1998, and referenced in the Pleadings Notebook which accompanied the letter. Respondents expect, however, that a proposed Order in resolution of certain issues in the Petition for Summary Enforcement will be filed by the Special Masters later this week.

[3] There are a total of 6 subpoenae that were issued to the two Hamilton entities. These subpoenae, issued on August 8, 1996, August 22, 1996, and October 24, 1997, are attached as Exhibits 1-6 to the OIG's Petition for Summary Enforcement. Two other subpoenae were also issued to Hamilton's principal, C. Austin Fitts, the challenges to which are presently before this Court in Misc. No. 98-347 and Misc. No. 98-262, respectively. A statutory argument identical to the one advanced herein was raised and briefed by the parties in those two matters.

[4] It is important to note that the OIG's investigation was prompted by a request from the Attorney General's Office. This is not a situation where there were two coincidentally parallel investigations being conducted, one by OIG and one by the Attorney General: the OIG is conducting the single investigation on the Attorney General's behalf.

fore lacking in statutory authority. Second, the fact that the OIG is now conducting an investigation of the merits of a *qui tam* suit also renders the subpoenae unauthorized and unenforceable as lacking in statutory authority, because that responsibility is committed to the 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 subpoenae. These three points are addressed in turn.

A. The OIG Lacked Statutory Authority to Issue the Subpoenae Because the Attorney General's Delegation of Investigatory Power Was Illegal.

For an administrative subpoena to be enforceable, its issuance must have been "within the statutory authority of the agency." United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986); *see* United States v. Powell, 379 U.S. 48, 57-58 (1964). This was not the case here, because the Attorney General ("AG") was statutorily forbidden from delegating its exclusive authority to investigate *qui tam* allegations.

To see how the OIG's investigative authority was obtained through 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 "informa-

tion or assistance as may be necessary for carrying out" their IG Act duties, from "any Federal ... agency or unit 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.*; *see also* § 3733(a)(2)(G) ("[t]he Attorney General may not, notwithstanding section 510 of title 28,[5] 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 sub-delegation 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: the AG 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 AG's delegation was illegal, and there is no reason to believe that the HUD OIG would have

[5] 28 U.S.C. § 510 allows the Attorney General to delegate certain of her duties to other Department of Justice agents.

initiated this investigation but for that illegal delegation. The subpoenae cannot be enforced under these circumstances, and should therefore be quashed.[6]

B. The OIG Acted Without Statutory Authority in Lending Its Highly Unregulated Subpoena Power to the Department of Justice.

Although the non-delegation clauses of § 3733(a) should end the matter, it is also apparent from the language, structure, and legislative history of the IG Act and the CID statute that the HUD OIG cannot conduct investigations of possible false claims violations. Indeed, to hold otherwise would undermine the will of Congress and would allow the Department of Justice to improperly augment its access to criminal discovery materials.

The OIG's lack of authority to issue its subpoenae is perhaps most starkly demonstrated when the statutory scope of IG subpoenae is compared with the statutory scope of CIDs. Presumably, Congress would not enact a statute which strictly circumscribes the AG's ability to obtain information regarding *qui tam* allegations, but does allow the AG to avoid those same restrictions by conducting its investigation through another agency (*i.e.*, the OIG) that enjoys relatively unrestricted subpoena power. However, it is on this untenable premise that the OIG's position must rest.

Consider the difference in breadth and restrictiveness between AG *qui tam* CIDs and IG subpoenae. 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.

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[6] The statutory analysis is complicated somewhat by the fact that the OIG claims to be now investigating not just the *qui tam* suit, but also the Bivens action. Hamilton is of the view that since the initial delegation was for only the *qui tam* investigation, the OIG's subsequent decision to add the Bivens allegations to its investigation cannot retroactively legitimize the AG's unlawful delegation.

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 (D.C. Cir. 1989). To highlight just a few of the protections built into the CID 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 United States district court showing "substantial need." *Id.*

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

> (a) "[E]ach Inspector general, in carrying out the provisions of this Act, is authorized --
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> . . . .
>
> (4) to require by subpena [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 subpoena, 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 subpoenae 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.

The OIG's position must necessarily be that the AG can conduct its *qui tam* investigation vicariously through the OIG, and that the AG is thereby entitled, through the use of IG subpoenae, to avoid the defenses to subpoena enforcement, confidentiality restrictions, disclosure requirements, and other discovery restrictions that are present in the CID statute but not present in the IG Act. However, this is an illogical reading of the statutes which would run roughshod over Hamilton's rights. Why would Congress have enacted such a restrictive CID statute if it could be so easily circumvented?[7] Indeed, using the technique herein employed, the AG will <u>never</u> need to comply with the CID requirements when it seeks documentary evidence for a *qui tam* investigation.

[7] This is most obviously nonsensical in light of the confidentiality restrictions of § 3733(i): would Congress *really* enact such strict, procedure-laden secrecy requirements, if the AG could just as easily delegate its investigatory authority over *qui tam* suits to an agency with no such restrictions?

A review of the pertinent legislative history further demonstrates that the subpoenae issued by the OIG in this case are irreconcilable 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 subpoenae, 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.

In light of the foregoing, it is not difficult to see what happened here. 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 delegated its duties to the HUD OIG, rather than conduct the investigation itself using CIDs? 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. Such gamesmanship amounts to a complete subversion of congressional will as expressed in the IG Act and the CID statute, and reflects a contemp-

tuous disregard for Hamilton's statutory rights. This Court should condemn this illegal practice, and quash the OIG's subpoenae as lacking in statutory authority.[8]

C. The OIG Is Abusing This Court's Process By Attempting to Circumvent the Protections Afforded to Subjects of False Claims Investigations.

Even if some statutory room exists for the OIG to answer the Attorney General's call to investigate *qui tam* allegations, then at a minimum, the OIG should be bound by the CID statute to the extent that Congress intended for certain rights and defenses to be available to *qui tam* defendants. *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 non-criminal proceedings might "expand rights of criminal discovery beyond the limits of

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[8] The decisions by the Third Circuit in Westinghouse and by the D.C. Circuit 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.* The court then distinguished 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). A fair reading of the Westinghouse opinion reveals that the court's 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 therefore be inferred that the result would 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 his authority to the Justice Department," 831 F.2d at 1144, turned, like Westinghouse, 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. These distinctions certainly counsel, and perhaps compel, a result in this case that is contrary to the result in Aero Mayflower.

Federal Rule of Criminal Procedure 16(b)"). It appears, however, that OIG has proceeded in disregard of Hamilton's rights under the CID statute, and in several instances, has already deprived Hamilton such rights. This disregard constitutes an abuse of process which renders the subpoenae unenforceable. *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). This Court should quash the subpoenae accordingly.

First, the OIG has not honored the requirements of 31 U.S.C. § 3733(a)(2)(A), which requires that each request for information "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." The OIG has identified no such potentially violative conduct, and has cited no applicable provisions of law.

Second, Hamilton has never been apprised of the defenses to subpoena enforcement available under § 3733(b)(1). Rather, the OIG has consistently taken the position that no defenses under the Federal Rules of Civil Procedure are available. Had Hamilton been informed of these statutory limits, it might well have exercised these rights and declined to disclose certain documents that were included among the 100-plus boxes already obtained by the OIG.

Third, Hamilton has reason to believe 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 *qui tam* investigations confidential. 33 U.S.C. § 3733(i). *See* Exhibit A.[9] Leaks to the media have

[9] For example, during the deposition of John Christopher Greer in the Bivens 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).

likewise been a recurring problem during the course of this investigation. In any event, the risk of such disclosures will persist so long as the OIG believes, as it evidently does, that it is that it is not governed by the CID statute's confidentiality restrictions.

The OIG's attempted and actual disregard of Hamilton's statutory rights constitutes a grave abuse of this Court's process. The subpoenae are unenforceable under these circumstances, *see* Powell, 379 U.S. at 57, and should therefore be quashed.

CONCLUSION

For the reasons stated above, the administrative subpoenae authorized by the OIG are unauthorized and unenforceable as a matter of law. Accordingly, Hamilton respectfully requests that the subpoenae be quashed, or that a protective order be issued which precludes their enforcement. If the Court is not inclined to do so, then Hamilton requests the issuance of a protective order which provides that Hamilton need only comply with the OIG's subpoenae to the extent that they were issued and executed in compliance with 31 U.S.C. § 3733, as intended by Congress. As a final alternative, Hamilton requests that this matter be deferred and its Motion for Leave to Conduct Limited Discovery be granted, so that this Court may resolve this Motion with the benefit of the OIG's discovery responses.

Respectfully submitted,

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