

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, <i>ex rel.</i>)	
ERVIN AND ASSOCIATES, INC.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	C.A. No. 96-CV-1258 (LFO)
)	
THE HAMILTON SECURITIES GROUP,)	
INC., <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

THE HAMILTON SECURITIES GROUP, INC.'S AND
HAMILTON SECURITIES ADVISORY SERVICES, INC.'S
MODIFIED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton"), by counsel, hereby submit the following modified proposed findings of fact and conclusions of law. Hamilton's modified findings and conclusions are focused on the four remaining issues in the case: (1) the North Central loan sale; (2) the Single Family #1 Reoffering; (3) Hamilton's subcontract under the Williams, Adley 8(a) contract; and (4) the award of the Crosscutting Task Order to Hamilton.¹

FINDINGS OF FACT

1. In the early 1990s, the United States Department of Housing and Urban Development ("HUD") faced a huge and increasing problem in managing and servicing its

¹ Ervin's claims with respect to Counts X, XI, XII were not pursued at trial; however, they have not yet been dismissed. Accordingly, at the end of Hamilton's Conclusions of Law, Hamilton briefly sets forth the content of the allegations and requests these claims be dismissed.

single and multifamily mortgage portfolio. By June 1993, HUD's Federal Housing Administration ("FHA") had an \$11.2 billion reserve against delinquencies in the multifamily portfolio alone. Tr. 07/20/04 at p. 117 ln. 9-20. To confront this problem, FHA established a program of mortgage loan sales as one of a series of strategies pursued to improve the health of the FHA portfolio. *Id.* at p. 118 ln. 9-12. The loan sales program had four primary goals: (1) return HUD staff to their responsibility of insuring new loans and maintaining the health of existing loans; (2) return dollars to the tax payer; (3) send a message to the industry that HUD would hold people accountable for repaying the loans; and (4) improve the properties for low income residents and neighborhoods. *Id.* at pp. 118 ln. 15-25 – 119 ln. 1-14.

2. Helen Dunlap, the Deputy Assistant Secretary for Multifamily Housing, was assigned by FHA Commissioner Nicolas Retsinas, to oversee the design of the loan sales program. *Id.* at p. 120 ln. 18-19.

3. Subsequently, on September 30, 1993, HUD awarded Hamilton Contract No. DU100C000018161 ("the 18161 Contract" or the "first financial advisor contract") for financial advisory services. Under the 18161 contract, Hamilton designed and developed the blue print for selling HUD-held mortgage notes through public auctions – the loan sales. Hamilton Exh. 8; Tr. 11/3/03 AM at p. 259 ln. 3-14; pp. 331 ln. 22 – 332 ln. 3; Tr. 7/20/04 at p. 122 ln. 16-22.² In addition, Hamilton was tasked with "all aspects of running asset sales and getting supportive services to assist in doing that such as conducting analyses, strategizing approaches to sales,

² Although Dunlap was responsible for implementation of the loan sales program, she was not involved in any way with the 18161 Contract procurement. Tr. 7/20/04 at p. 120 ln. 15-16. There is no dispute that Hamilton was properly awarded the 18161 Contract following a competitive bid process.

due diligence . . . it even included legal support services that would be necessary that's typical in an asset sale or a sale." Tr. 10/29/03 PM at p. 13 ln. 5-16; Tr. 7/20/04 at p. 122 ln. 16.

4. While operating under the direct authority of Retsinas and Dunlap within FHA, the loan sales program was designed to be collaborative with and as transparent as possible to other offices in HUD. Tr. 7/20/04 at p. 127 ln. 8-18; Tr. 7/19/04 at pp. 19 ln. 24-25 - 20 ln. 1-2. Hamilton worked extremely closely with various HUD offices – Housing, Procurements and Contracts, General Counsel, and the Inspector General. Tr. 7/19/04 at p. 18 ln. 8-22; Tr. 11/3/03 AM at p. 332 ln. 4-18. Kevin McMahan, Hamilton's FHA project manager, testified that "every decision, every recommendation, the alternatives, the pros and cons, were all available and present[ed] to this entire group." Tr. 7/19/04 p. 21 ln. 8-10.

5. Although Hamilton designed and developed the framework for the loan sales program, HUD retained final decision-making authority on all matters. Tr. 7/19/04 at p. 19 ln. 4-10; Tr. 11/3/03 AM at p. 332 ln. 19-21. Hamilton's role was to "analyze the options, present recommendations to HUD [officials], discuss [those recommendations] with them, [and] conduct further research as they so desired." Tr. 7/19/04 at p. 19 ln. 6-10. HUD officials, specifically Retsinas and Dunlap, retained independent authority over all loan sales decisions. Indeed, HUD did not always follow Hamilton's recommendations. *Id.* at ln. 12-14. Once HUD made a decision, Hamilton's job was to implement it. *Id.*

1. North Central Loan Sale

6. HUD, with Hamilton's assistance, conducted a series of loan sales between the Spring of 1995 and the Fall of 1996, beginning with the Southeast Multifamily sale in March

1995, followed by the National Performing Multifamily sale in August of that year. Tr. 7/20/04 at p. 130 at ln. 1-3; Ervin Exh. 77 at ¶¶ 1-2.

7. On September 19, 1995, bids were accepted for the third loan sale, mortgages for those properties in the western United States. This sale was known as the West of the Mississippi (“WOM”) note sale. *Id.* at ¶¶ 4-5. After additional loan sales, on August 8, 1996, a sale was held for properties in the north and central regions of the United States. This sale was known as the North and Central (“North Central”) note sale. *Id.* at ¶ 19.

8. Hamilton employed Bell Labs/Lucent Technologies (“Bell Labs”) as a subcontractor on the WOM and North Central sales to run an “optimization model” developed by Bell Labs. The optimization model was a proprietary, computer algorithm designed to select as winners that combination of bids which represented the maximum potential revenue to HUD. Tr. 10/30/03 AM at pp. 147 ln. 17 – 148 ln. 10; Tr. 10/30/03 PM at p. 113 ln. 6-22, p. 114 ln. 10-20; Tr. 10/31/03 PM at pp. 141 ln. 25 – 142 ln. 13.

9. Bidders on loan sales had the option of bidding on a single asset, the entire auction portfolio, or some subset of the whole. Bidders for both the WOM and North Central sales, were permitted to specify a “bid floor.” The bid floor permitted a bidder to condition its bids on winning a minimum amount of loans, measured by the aggregate Unpaid Principal Balance (“UPB”) of the notes. If a bidder was not selected by the optimization model as the winner of loans with an aggregate UPB equal to or greater than its bid floor, that bidder would be awarded no loans. Tr. 10/31/03 PM at p. 147 ln 18-24; Ervin Exh. 77 at ¶ 1. For example, if a bidder specified a bid floor of \$100 million UPB, but the optimization model selected that bidder as the winner of loans with a UPB totaling only \$90 million, that bidder would be

awarded no loans. On the other hand, if that bidder was selected as the winner of loans with a total UPB of \$110 million, it would be awarded all of those loans.

10. In determining the winning bids for the WOM sale, Bell Labs mistakenly used an optimization model which identified the submitted bid floors in terms of minimum revenue rather than minimum UPB. Tr. 10/31/03 PM at p. 149 ln. 15 – 151 ln. 3; Hamilton Exh. 44 at p.1; Ervin Ex. 77 at ¶ 6. This error was discovered by Bell Labs when the initial results were sent to Hamilton, but prior to Hamilton reporting the auction results to HUD. Therefore, to correct the error, Bell Labs technician Sol Schindler re-ran the model, this time prorating the bid floors to convert them from revenue to UPB. Tr. 10/31/03 PM at pp. 153 ln. 9 – 154 ln. 11; Ervin Exh. 77 at ¶¶ 7-8; Ervin Exh. 89 at Bates No. LUC 001200. Schindler informed Robert Robinson, the Hamilton employee overseeing the auction, that the prorated conversion was within one dollar of optimal. Tr. 10/31/03 PM at p. 211 ln. 2-14.³ Robinson did not tell anyone else at Hamilton about the error and he believed Schindler that it had been corrected to within one dollar of optimal. Tr. 7/19/04 at p. 74 ln. 6-7.

11. Schindler told Robinson that he would permanently correct the bid floor definition problem in the optimization model. *Id.* at p. 46 ln. 15-17; Ervin Exh. 77 ¶ 11. Hamilton was dependent on Bell Labs in this regard, as Hamilton did not possess the capacity to fix the model itself. Tr. 10/31/03 PM at p. 204 ln 5-23. Robinson accepted Schindler's representation and understood the model would be permanently fixed. Tr. 10/31/03 PM at pp. 204 ln. 16 – 205 ln. 7. True to his word, Schindler sought to fix the problem shortly after the

³ Later investigation revealed that the original mistake was the result of Bell Labs being given incorrect instructions on how the model should define bid floors. Ervin Exh. 77 at p. 2 ¶¶ 2-4.

WOM sale by creating a separate model in which bid floors were identified in terms of UPB. Ervin Exh. 77 at ¶12; Tr. 7/19/04 at p. 48 ln. 7. In so doing, Schindler did not dispose of the previous revenue-based model, and as a result Bell Labs retained two optimization models in its computer files. *See id.*

12. Robinson left Hamilton shortly after the WOM sale with the understanding that Schindler had addressed the problem. Tr. 7/19/04 at p. 48 ln. 8-12. Thereafter, Schindler suffered a heart attack and was no longer in contact with anyone involved in subsequent loan sales. Tr. 7/19/04 at p. 48 ln. 23-25; Ervin Exh. 77 at pp. 4-5 ¶¶ 11-18.

13. The North Central sale was the next loan sale after WOM to involve bid floors. The North Central bid floors were to be expressed in terms of UPB, just as those in the WOM. Prior to the sale, Hamilton employee Rick Wolf directed the Bell Labs technicians who replaced Schindler to run the optimization model in the same way as in the WOM sale. Tr. 7/19/04 at p. 49, ln. 10-12; Ervin Ex. 77 at ¶17.

14. Not realizing that Schindler had created a new model based on a UPB floor, the technicians used the revenue-based model, which had not been discarded. Tr. 7/19/04 at p. 49, ln. 10-12; Ervin Ex. 77 at ¶18.

15. In October 1996, while preparing for another loan sale, Wolf discovered a discrepancy between the bid package and the Bell Labs formula used in the WOM sale. Wolf brought this to the attention of others at Hamilton, and Hamilton president Catherine Austin Fitts formed a team designated as the “Manhattan Project” in order to “leave no stone unturned[,] find out what happened...and put procedures in place to ensure [it could not]

reoccur.” Tr. 10/31/03 AM at p. 189 ln. 16 – 190 ln. 1, p. 189 ln. 5-15, p. 190 ln. 1-13, p. 225 ln. 17-25; Tr. 11/3/03 AM at p. 307 ln. 4-12; Tr. 7/19/04 at p. 44 ln. 11-13; Ervin Exh. 77 at ¶ 20.

16. The Manhattan Project investigation concluded that due to Robinson’s departure and Schindler’s heart attack, the North Central staff at Hamilton and Bell Labs were not aware that Schindler had created a separate model using UPB as the bid floor input. Tr. 7/19/04 at p. 49 ln. 6-9; Ervin Exh. 77 at ¶¶ 12, 18. Indeed, Hamilton was not aware as to why Schindler created a new model rather than merely modifying the original or that Schindler retained the original model after creating the new one.

17. In early December, 1996, after investigating the facts of the WOM and North Central sales, Hamilton informed Kathy Rock, the FHA Comptroller and then head of the loan sales program, of the optimization error. Tr. 7/21/04 at p. 240 ln. 15-20. Hamilton drafted an initial report and met with Rock and Chris Greer of HUD to discuss the problem. *Id.* at p. 241 ln. 4-7; Ervin Ex. 102.

18. At HUD’s request, Hamilton submitted a more detailed December 20, 1996 memorandum to FHA Commissioner Retsinas and Rock that contained a thorough analysis of how the problem came to pass. *Id.* at p. 241, ln. 10-14; Ervin Ex. 77. Hamilton staff met with HUD officials to explain the situation and answer questions. Hamilton reported to these individuals because the team felt it necessary to “go right to the top” and Retsinas held ultimate authority within HUD for the mortgage loan sales program. Tr. 10/30/03 AM at p. 100 ln. 6-18; Tr. 10/31/03 AM at pp. 201 ln. 13 – 202 ln. 17 pp. 222 ln. 4 – 223 ln. 5; Tr. 11/3/03 AM at pp. 333 ln. 20 -334 ln. 9; Tr. 7/19/04 at p. 50 ln. 5-10. McMahan, former Hamilton CFO Brian Dietz and former Coopers & Lybrand employee Michael Brocks testified that all relevant information was

reported to HUD in the December 20, 1996 report. Tr. 7/19/04 at p. 49 ln. 22; Tr. 11/3/03 AM at p. 319 ln. 16-21; Tr. 10/31/03 AM at p. 224 ln. 15-18. The report included a reconciliation showing the change in the mix of bidders winning assets under the correct optimization. Tr. 10/31/03 AM at p. 242 ln. 22- 243 ln. 18. All bids were included in the reconciliation, and the computer did not distinguish between bidders based upon their identity. Tr. 10/31/03 AM at p. 244 ln. 1-14.

19. Rock and Retsinas in turn provided the memorandum to HUD's Office of the General Counsel in January, 1997. Tr. 7/21/04 at p. 242 ln. 4-22. Rock testified that she did not receive any further communication from the HUD general counsel regarding the issues in the report. Tr. 7/21/04 at p. 242 ln. 16-17.

20. Following its report to HUD, Hamilton also enacted procedures to prevent a reoccurrence of the problem that affected the North Central sale. Tr. 7/19/04 at p. 45 ln. 12-13; Tr. 10/31/03 AM at p. 223 ln. 6-9; Ervin Exh. 77.

2. Single Family Note Sale #1 Reoffering

21. On or about October 25, 1995, Hamilton conducted a sale of single family mortgage notes on behalf of HUD, referred to throughout this litigation as Single Family #1. Ervin Exh. 77 at ¶ 14.

22. Not all of the assets offered for sale in Single Family #1 were sold because the bids for some assets did not meet a bid floor imposed by HUD but not published to bidders. Tr. 10/31/03 PM at p. 165 ln. 5-23; Tr. 7/19/04 at p. 30 ln. 1-6. Had it accepted the bids for all the loans in the portfolio, HUD would have been required to receive a Congressional appropriation

to make up for the shortfall.⁴ Tr. 7/19/04 at p. 30 ln. 1-6. Accordingly, HUD decided to sell off a portion of the portfolio and reoffer the remaining loans so as not to forfeit all the due diligence costs and the expense of conducting a sale. Tr. 7/19/04 at pp. 30 ln. 17-25 – 31 ln. 1-18. In rejecting the inadequate bids, HUD exercised its right to accept or reject bids, which HUD reserved to itself in all documents sent to potential bidders. Tr. 10/31/03 PM at p. 166 ln. 19-23; Tr. 7/20/04 at p. 133 ln. 10-13; Tr. 7/19/04 at p. 31 ln. 19-25.

23. On November 6, 1995, HUD reoffered the remaining loans, but did not receive any adequate offers to purchase the entire lot. Tr. 7/19/04 at p. 32 ln. 7-11. As a result, HUD was required to select from among several partial bid packages, each of which covered a partially overlapping subset of the reoffering portfolio. *Id.* at ln. 12-14; Hamilton Exhs. 228, 231. Hamilton was responsible for assembling the bid information, presenting the options to HUD, and making a recommendation. Tr. 7/19/04 at p. 33 ln. 3-5; *see also* Hamilton Exh. 8 at p. C-6.

24. On or about November 7, 1995, Hamilton made a slide presentation to HUD which set out four potential award options for the Single Family #1 Reoffering. Tr. 10/31/03 PM at pp. 173 ln. 8 – 174 ln. 21; *see also* Hamilton Exh. 228; Ervin Exh. 233. For each alternative, the slides listed: 1) number of mortgage notes that would be sold; 2) the UPB of the notes sold; 3) the gross proceeds to be received; 4) the gross proceeds as percentage of UPB; and 5) the credit

⁴ In governmental parlance, this shortfall is known as a “positive credit subsidy”. As Helen Dunlap explained, the FHA fund subsidized its losses with tax dollars through “credit subsidy”. Tr. 7/20/04 at pp. 136 ln. 20-25 – 137 ln. 1-5. “A negative credit subsidy is when you have a profit on the portfolio, and a positive credit subsidy is when you have a loss on the portfolio....for a negative credit subsidy is [when] the government gets to appropriate less and positive means that it has to appropriate more.” *Id.* Within a fiscal year, HUD was permitted to offset positive and negative credit subsidies without the need to seek an appropriation so long as the aggregate annual number after each sale was negative. Because the Single Family #1 sale was the first loan sale of the HUD fiscal year, HUD needed to yield a negative credit subsidy on that sale, or be required to seek an appropriation. Hamilton Exh. 223.

subsidy that would be generated. *See* Hamilton Exhs. 228, 231 at HUD/KK 000508-000511.

None of the options was superior to the others in all of the categories. *Id.*

25. Hamilton recommended that HUD select "Option #4," the option with the highest negative credit subsidy. Tr. 7/20/04, at pp. 194, ln. 14-20; Hamilton Exhs. 228, 231 at HUD/KK 000508-000511. Contrary to Hamilton's recommendation, FHA Commissioner Retsinas chose "Option #1" – the option that sold the most loans and had the highest revenue, even though it resulted in a positive credit subsidy.⁵ Tr. 7/20/04 at pp. 137 ln. 14-15; Tr. 7/19/04 at p. 33 ln. 6-8, p. 34 ln. 3-9; Tr. 7/21/04 at p. 227 ln. 4-8; Hamilton Exhs. 228, 231 at HUD/KK 000508-000511. While the selection involved balancing competing policy interests, for HUD, selling the greatest number of loans was paramount. Tr. 7/20/04 at p. 138 ln. 7-8.

26. The winning bidders in the Single Family #1 Reoffering were a team consisting of BlackRock Capital Finance ("BlackRock") and Goldman Sachs and Company ("Goldman Sachs"). Neither BlackRock nor Goldman Sachs would have won the reoffering auction had HUD followed Hamilton's recommendation of selecting Option #4.

27. Ervin has alleged that Hamilton submitted a false certification and failed to disclose to HUD conflicts of interest arising from Hamilton business contacts with BlackRock and Goldman Sachs. Ervin further alleges that this conflict resulted in the BlackRock/Goldman Sachs team winning the Single Family #1 Reoffering and that the government was harmed by the amount of the difference in credit subsidy generated by the two options.

⁵ A positive credit subsidy on the reoffering did not require HUD to obtain a Congressional appropriation because, when combined with the negative credit subsidy generated by the original Single Family #1 sale, the aggregate credit subsidy for the sale was negative. *See* Hamilton Exh. 223.

28. Hamilton employed BlackRock as a subcontractor on the Partially Assisted loan sale because of BlackRock's reputation as a financial engineering firm. Tr. 10/30/03 PM at p. 131 ln. 1-14. Tr. 7/19/04 at p. 26, ln. 6-12. HUD was fully aware and did not object to BlackRock's subcontract with Hamilton. Tr. 10/30/03 PM at p. 131 ln. 15-18; Tr. 10/31/03 PM at pp. 176 ln. 2 – 177 ln. 19; Tr. 7/19/04 at p. 26 ln. 3-16; Tr. 7/21/04 at pp. 224 ln. 20-25 – 225 ln. 1-2. HUD was also aware that BlackRock was a bidder on other loan sales. Tr. 10/30/03 at p. 119 ln. 3-11; Tr. 7/21/04 at p. 225 ln. 3-6. In fact, Hamilton and HUD had specific discussions about proper steps to make sure BlackRock did not have access to information on sales on which it might be a bidder. Tr. 7/21/04 pp. 225 ln. 21-25 – 226 ln. 4-16.

29. Hamilton employee Grace Huebscher testified that it was neither uncommon nor improper in the industry for a competitor to team as a subcontractor on some loan sales and bid on others. *Id.* at pp. 133 ln. 24 – 134 ln. 3. Ervin produced no evidence contrary to this position. McMahan, who to this day is a HUD contractor and had extensive experience with conflict of interests as a government employee for the Resolution Trust Corporation ("RTC"), testified that in no way did Hamilton make a false certification to HUD concerning its business relationships. Tr. 7/19/04 pp. 27 ln. 2-16 – 28 ln. 3-22.

30. The sole evidence of any contact between Hamilton and Goldman Sachs are notes from a telephone conversation between Huebscher and a Goldman Sachs employee regarding prospective future business unrelated to the loan sales. Tr. 10/30/03 PM at pp. 122-123; Ervin Exh. 205. The contact was limited to a single conversation and no business relationship between Hamilton and Goldman Sachs ever developed. Tr. 10/30/03 PM at p. 123 ln. 21-22; Tr. 7/19/04 at p. 27 ln. 10-12.

31. There is no evidence that Hamilton acted improperly in order to benefit BlackRock or Goldman Sachs. Huebscher unequivocally denied that Hamilton did anything to influence the note sales in any way in an attempt to get business from BlackRock or Goldman Sachs. Tr. 10/30/03 PM at p. 132 ln. 15-18. Coopers & Lybrand employee Michael Brocks likewise testified that he never saw any indication that Hamilton gave certain bidders preferential treatment or insider information on any sale in which he was involved. Tr. 10/31/03 AM at pp. 218 ln. 23 – 219 ln. 20; *id.* at p. 225 ln. 5-9. Moreover, the undisputed evidence is that Hamilton's recommendation on the Single Family #1 Reoffering award would have resulted in BlackRock and Goldman Sachs losing the auction.

3. Williams, Adley 8(a) Contract and Hamilton Subcontract

32. In 1994, HUD decided to procure due diligence services from a minority-owned contractor through the Small Business Administration ("SBA") Section 8(a) program. The 8(a) program permitted HUD to procure services from a single contractor without competitive bidding. Tr. 10/30/03 AM at pp. 115 ln. 22 – 116 ln. 4.

33. At the time, Williams, Adley & Company, was a certified public accounting firm that provided a variety of accounting services including due diligence to government agencies. Tr. 7/19/04 at p. 83, ln. 21-25. Williams, Adley was a contractor to the RTC's loan sales program and had previously provided due diligence and financial advising services to HUD. *Id.* at p. 84-85, ln. 19-25, 1-2. During a routine promotional call in the summer of 1994, Williams Adley's marketing director, Joyce Gamble, learned from HUD employee Kate Trygstad that HUD might need due diligence services in the near future. *Id.* at 86, ln. 6-8; Williams, Adley Exh. 18. Within two months, HUD contacted Williams, Adley and requested an in-person presentation of the

firm's due diligence capabilities. *Id.* at ln. 19-22. Contemporaneously, HUD solicited presentations from at least two other due diligence contractors. Tr. 7/20/04 at pp. 139, ln. 11-14; 140 ln. 15-18.

34. In the fall of 1994, Henry Adley, the partner in charge of Williams, Adley's Washington office, and George Carr, a senior manager, made the presentation to Dunlap, HUD staff and technical advisers. *Id.* at p. 87, ln. 6-12. Adley was aware that his firm was being considered to provide work in connection with loan sales that were similar to the RTC sales Williams, Adley had previously serviced, but HUD had not yet provided him with any specific information about the program. Tr. 7/19/04 at p. 88 ln. 7-9. On October 7, 1994, HUD informed Williams, Adley that it had been "selected [] as the 8(a) firm of choice" and provided a Request for Proposal. Tr. 7/19/04 at pp. 89, ln. 17-19; Williams, Adley Exh. 20. No one from Hamilton was involved in the process or recommended that Williams, Adley be selected. Tr. 7/20/04 at p. 140 ln. 19-24. HUD simply believed that Williams, Adley was the best firm for the job. *Id.* at ln. 1-5.

35. On October 26, 1994, Williams, Adley responded to HUD's Request for Proposal by submitting both a technical and a cost proposal. Tr. 7/19/04 at pp. 90 ln. 22-25 – 91 ln. 7-10; Williams, Adley Exh. 23; Williams, Adley Exh. 24. After receiving this submission, HUD asked Williams, Adley regarding its capabilities to perform financial advisory services in connection with the program. Tr. 7/19/04 at p. 92 ln. 10-12. This request was not unusual. *Id.* at p. 93 ln. 1-4. Williams, Adley had previously contracted to provide financial advisory services under its RTC contracts, and in turn had subcontracted that work to other firms. *Id.* at pp. 84 ln. 24-25 – 85 ln. 1-2.

36. In preparing a response to HUD, Henry Adley contacted financial advisors at Kenneth Leventhal, Ernst & Young, Chemical Bank and Hamilton. Tr. 7/19/04 at pp. 93 ln. 10-17; *id.* at 94 ln. 23. Adley identified Kenneth Leventhal, Ernst & Young and Chemical Bank because he had previously worked with each of them. *Id.* at p. 93 ln. 10-17. While he had no prior connection with Hamilton, Adley contacted Hamilton after learning of Hamilton's role in the design and development of the loan sales program. *Id.* "After careful consideration in looking at the qualifications" of the firms it considered for this work, Williams, Adley selected Hamilton as one of its teaming partners. *Id.* at p. 95 ln. 16-17. No one from HUD steered Williams, Adley towards Hamilton. *Id.* at ln. 20-22.

37. On November 2, 1994, Williams, Adley submitted revised technical and cost proposals identifying a number of potential subcontractors, including Hamilton, which Williams, Adley might call upon should there be a need for their services. *Id.* at p. 96 ln. 1-5; Tr. 10/29/03 PM at p. 35 ln. 15-20; pp. 47 ln. 7 – 48 ln. 2; Tr. 10/30/03 AM at p. 115 ln. 14-18; Williams, Adley Exhs. 26-27.

38. On or about December 7, 1994, HUD awarded Williams, Adley a Section 8(a) "indefinite delivery, indefinite quantity" contract. Hamilton Exh. 10 at p. 2.; Tr. 10/29/03 PM at p. 39 ln. 11- Such a contract is used where the government cannot define up front the precise nature of the services it desires. *Id.* at p. 39 ln. 15-17. Instead, the contract defines the basic arrangement, setting out the broad base of tasks and responsibilities that will be needed. Specific work requirements are defined at a later date through a statement of work, which becomes the subject of negotiations, and the award of task orders is made against the basic indefinite quantity contract. *Id.* at pp. 39 ln. 18 – 40 ln. 3.

39. HUD contracting officer Annette Hancock knew Hamilton was serving as financial advisor to HUD on the loan sales program both when Williams, Adley submitted this proposal and when the 8(a) contract was awarded. Tr. 10/30/03 AM at p. 110 ln. 2-8; p. 115 ln. 19-21. Hancock testified that she ensured that the appropriate policies and procedures were adhered to and complied with in the award of the 8(a) contract. *Id.* at pp. 109 ln. 23 – 110 ln. 1.

40. Hancock testified that at the time of the award to Williams, Adley, she had no understanding as to who would perform loan sale advisory services under future task orders issued against the 8(a) contract. Tr. 10/29/03 PM at p. 45 ln. 14-20. She understood only that Williams, Adley “would solicit services from various vendors who provide whatever those supportive services that Williams, Adley needed to augment their resources.” Tr. 10/29/03 PM at pp. 49 ln. 24 – 50 ln. 10. Subcontractors would not be identified until Williams, Adley submitted proposals for task orders identifying the team Williams, Adley thought appropriate to perform the work. *Id.* at p. 45 ln. 25 – 46 ln. 4. It was up to Williams, Adley to assemble the team it believed necessary for any subcontracting roles. Tr. 10/30/03 AM at p. 115 ln. 7-9.

41. On February 22, 1995, Hancock was advised as to how Williams, Adley selected their subcontractors. Tr. 7/19/04 at p. 100 ln. 6-8; Williams, Adley Exh. 72. HUD never indicated any dissatisfaction with Williams, Adley’s process and finalized all subsequent task orders. *Id.* at 100 ln. 12-17.

42. HUD contracting personnel raised issues with regard to the fees Williams, Adley proposed for Hamilton’s work under the 8(a) contract, and those fees were the subject of negotiations. Tr. 10/30/03 AM at pp. 117 ln. 21 – 118 ln. 1; Tr. 7/19/04 at p. 97 ln. 19-24.

Hamilton proposed to charge HUD a fixed percentage per month of UPB of the portfolio being

sold for loan sale advisory services performed as a subcontractor to Williams, Adley. Williams, Adley Exh. 27, Schedule B. Adley worked on a day-to-day basis with Hancock and her staff in “negotiating and working out the details and finalizing task orders.” Tr. 7/19/04 at pp. 98 ln. 23-25 -99 ln. 2-5. After the negotiations the Office of Procurements and Contracts approved all costs in each particular task order. *Id.* at p. 99 ln. 8-14. In addition to the negotiations with Williams, Adley, the Office of Procurements and Contracts received information directly from Hamilton describing its pricing methodology, the pros and cons of the proposed approach, and why Hamilton considered the methodology appropriate and in HUD’s best interest. Tr. 11/3/03 AM at pp. 276 ln. 24 - 277 ln. 14.

43. When Hancock reviewed the Williams, Adley file and signed the award, she was satisfied that the proposed prices were appropriate. Tr. 10/30/03 AM at p. 118 ln. 2-7; *see also* Tr. 7/19/04 at p. 102, ln. 5-6. Having examined the pricing methodologies used by contractors in RTC asset sales, she believed Hamilton’s “basis points” methodology was typical for the industry. Tr. 10/29/03 PM at p. 22 ln. 9-19, p. 25 ln. 13-19.

44. At no time during the selection of Hamilton nor during performance of any of the task orders under the 8(a) contract did anyone from HUD coerce Adley into using Hamilton as a subcontractor. Tr. 7/19/04 at p. 102 ln. 7-12. Nor is there any evidence that Williams, Adley ever conspired with Hamilton to circumvent the contracting process. Ervin presented no evidence as to why Henry Adley, a highly successful government contractor, would risk his business and his reputation by entering into an agreement to defraud the government with a company and individuals he had never met before.

45. There has been no evidence presented that the fees charged by Hamilton for the work were not reasonable or that the work Hamilton provided under the Williams, Adley subcontract was not fully and satisfactorily performed.

46. As HUD's financial advisor under the first financial advisor contract, Hamilton was tasked with helping HUD develop and design the entire loan sale program. Tr. 11/3/03 AM at pp. 331 ln. 22 – 332 ln. 3. HUD required Hamilton to develop a schedule of the sales and the requirements to complete the sale. *Id.*

47. One of the tasks HUD asked Hamilton to perform as financial advisor was the drafting of statements of work for potential task orders. When the government was contemplating a series of loan sales it wanted to conduct, Hamilton was asked as financial advisor to draft potential statements of work that HUD might use at a later time. Tr. 11/3/03 AM at p. 262 ln. 9-13. Huebscher stated that it was not uncommon for HUD to ask Hamilton to draft task orders and that she had personally discussed Hamilton's doing so with HUD employee Bill Richbourg. Tr. 10/30/03 PM at p. 133 ln. 7-13; *id.* at p. 134 ln. 9-20.

48. HUD also asked Hamilton to draft statements of work. Tr. 11/3/03 AM at pp. 332 ln. 22 – 333 ln. 4. Hamilton's drafts constituted work product for which the government could ultimately decide to issue a task order or not. Tr. 11/3/03 AM at p. 262 ln. 4-8. HUD took Hamilton's drafts and made the final decision as to what task orders it wanted to issue, what contract vehicles it wanted to use and what language to finally include in a task order. *Id.* at p. 262 ln. 13-15, p. 286 ln. 21-24, p. 288 ln. 24-25. Hamilton simply supplied the government with drafts to assist HUD as its financial advisor. *Id.* at pp. 286 ln. 25 – 286 ln. 1.

49. Prior to the issuance of individual task orders, Hamilton had no expectation that it would receive any of the financial advisory work required under the 8(a) contract. Hamilton budget documents prepared in January 1995 reflected revenue Hamilton *hoped* to derive from subcontracts under the 8(a) contract. Hamilton was not assured, however, of being selected the subcontractor. Tr. 11/3/03 AM at pp. 267 ln. 22 – 268 ln. 15; Ervin Exh. 194 at Bates Nos. 9628 to 9629. The budget reflected the range of income that might be available to Hamilton if it pursued certain contracts and was awarded them, under both a best case or “wishful thinking” scenario as well as a more conservative scenario. *Id.* at pp. 271 ln. 24 – 272 ln. 2. The budget was based on assumptions and forecasts of potential work. It did not and was not intended to reflect what Hamilton thought or knew was going to happen. *Id.* at pp. 273 ln. 23 – 274 ln. 6. Specifically in reference to the “credit reform” task order, Dietz testified that even once HUD issued a task order, Williams, Adley was still free to engage any other financial advisor it deemed appropriate. Tr. 11/3/03 AM at p. 296 ln. 3-19. Ervin produced no evidence contrary to Dietz’s testimony.

4. Crosscutting Task Order

50. Under its first financial advisor contract, Hamilton provided advice to HUD in connection with developing the entire loan sale program. Tr. 11/03/03 AM at p. 259 ln. 3-14. Beginning in the Fall of 1995, Hamilton suggested that HUD would benefit from having a crosscutting financial advisor who could look across HUD’s different portfolios and help advise the agency on how to dispose of its loans. Tr. 7/20/04 at pp. 142 ln. 22-25 – 143 1-8; Tr. 11/03/03 AM at p. 299 ln. 3-20. In addition to discussions with FHA, two members of the Office of the Inspector General, Chris Greer and David Deracola, attended the informational meeting where

this idea was first discussed. Tr. 7/19/04 at pp. 35 ln. 7-25 – 36 ln. 1-5. The idea of the crosscutting role was shared among the various HUD offices, including contracting. Tr. 7/19/04 at p. 38 ln. 1-16.

51. The original crosscutting concept involved HUD hiring additional in-house staff to provide advice on financial management of HUD's disparate portfolios. In an October 2, 1995 memorandum to Retsinas, Dunlap and Christopher Peterson discussed the lack of staffing resources and requested additional staffing for a the crosscutting function. Ervin Exh. 22, Attachment 8. Ultimately however, due to HUD's significant staffing shortages and the accelerating pace of the loan sales program, the agency chose to outsource the crosscutter. Tr. 7/20/04 at pp. 143-146; Tr. 7/19/04 at p. 36 ln. 12-24.

52. Shortly after joining HUD as FHA Comptroller in October, 1995, Kathy Rock was assigned the job of drafting the crosscutting task order. Rock created a first draft of the task order after reviewing old task orders, soliciting input from other HUD employees, including Dunlap and Chris Peterson, and receiving input from Hamilton employee McMahan. Rock then circulated her draft to various HUD staff members, including Dunlap and Trygstad. Tr. 7/21/04 at p. 228 ln. 1-23. After receiving comments, she turned the task order over to the Office of Procurements and Contracts. *Id.* at p. 229 ln. 1-2.

53. HUD chose to solicit proposals for the crosscutting task order from Hamilton, Cushman & Wakefield, First Boston and Ernst & Young, each of whom had been awarded separate financial advisory contracts through a competitive bid process. Hancock, the contracting officer, indicated that she did not believe competition for the task order was even necessary; HUD could have simply sole sourced it to one of its financial advisors. Tr. 7/20/04 at

p. 146 ln. 20-25. Nonetheless, HUD chose to compete the task order as a part of its practice of transparency in the loan sales program. *See id.* at p. 147 ln. 4-11.

54. The relator in this matter, Ervin & Associates, was an unsuccessful bidder for the second financial advisor contract under which the Crosscutter task order was awarded. Ervin. Exh. 143A at p. 2. Ervin's proposal ranked at or near the bottom among the qualified bidders for the financial advisor contract. *Id.* Subsequently, before filing this *qui tam* action, Ervin filed an unsuccessful bid protest of the contract awards to Hamilton and others. *See id.* at p. 1.

55. The task order was not written in a way that gave Hamilton any advantage over the other potential bidders. Tr. 7/21/04 at p. 235 ln. 11-13. In fact, because the tasks were fairly generic consulting activities, all the financial advisors were capable of responding. *Id.* at p. 236 ln. 6-9. However, it was made clear that the crosscutter contractor would not be eligible to conduct future loan sales, such that the financial advisors faced a choice between crosscutting and advisory work on individual loan sales. Ervin Exh. 262 at p. 2.

56. In February 1996, HUD sent out requests for proposals on the crosscutting task order. Ervin Exh. 262. The Office of Procurements and Contracts was responsible for sending the solicitation to the financial advisors. Tr. 7/21/04 at p. 230 ln. 10-15. Two of the advisors, Hamilton and Cushman & Wakefield, submitted proposals.

57. After receipt of the responses, HUD convened a Technical Evaluation Panel to analyze the respective submissions. The Panel consisted of HUD employees Rock, Trygstad Jacqueline Campbell, Audrey Hinton, and Gregory Bolton. Ervin Exh. 133 at Bates No. HUD 075 00768. Each of the Panel members conducted an independent review of the proposals before meeting together to discuss a recommendation. Rock testified that she found the

Hamilton bid superior, and that the Cushman proposal was more responsive to a solicitation for a specific sale rather than overall program management. Tr. 7/21/04 at pp. 236 ln. 22-25 – 237 ln. 1-8. The other Panel members also agreed that the Hamilton proposal was superior and the Panel's March 22, 1996 report unanimously recommended awarding the task order to Hamilton. Tr. 7/21/04 at p. 232 ln. 10; Ervin Exh. 133 at Bates Nos. HUD 075 00768 to 075 00772. Ervin failed to call any of the Panel members as witnesses.

58. The Panel's report was forwarded to Hancock who reviewed it and believed it did not adequately document the basis for Hamilton's selection. Tr. 10/29/03 PM at pp. 61 ln. 20 – 62 ln. 12. She therefore asked the Panel to review its findings and "be clear what characterization you would give each firm's proposal as it relates to whether or not their proposal is an acceptable one or not." *Id.* at pp. 62 ln. 18 – 63 ln. 1. Rock testified that Hancock came and talked to her about reclarifying the evaluation. Tr. 7/21/04 at p. 233 ln. 16-20. Based on Rock's explanation that the Cushman & Wakefield proposal seemed to misapprehend the nature of the task order, Hancock suggested to Rock that Cushman & Wakefield's proposal was "technically unacceptable." *Id.* at ln. 21-25.

59. The Panel's recommendation of Hamilton was also scrutinized by the Office of Inspector General, who met with Rock and others before the contract was awarded to discuss the basis for Hamilton's selection. Tr. 7/21/04 at p. 235 at ln. 3-12.

60. In a report dated April 25, 1996, Hancock's office was advised that Cushman & Wakefield proposal as technically unacceptable and explained why. Tr. 10/29/03 PM at p. 63 ln. 2-10; Ervin Exh. 134 at Bates Nos. HUD 075 00764 to 075 00765. Hancock accepted the Panel's

recommendation and passed it on for review to her supervisor, Craig Durkin. *Id.* at p. 73 ln. 7-16.

61. The terms of Hamilton's work under the crosscutting task order were also subject to another layer of review. Hancock requested a meeting with Hamilton to discuss clarifications and revisions to the scope of work in advance of HUD issuing the Crosscutting Task Order. Tr. 7/19/04 at pp. 40 ln. 18-25 – 41 ln. 1-8; Tr. 11/03/03 AM at p. 130 ln. 16-21; Ervin Exh. 142. Hamilton employees McMahan and Dietz met with Hancock and Trygstad for an entire day to discuss the scope of work under the Crosscutting Task Order. Tr. 7/19/04 at pp. 40 ln. 18-25 – 41 ln. 1-8; Tr. 11/3/03 AM at p. 336 ln. 19-21. During this extended meeting, the group discussed price, the specific language of the task order, and how Hamilton would develop a project plan. *Id.* at pp. 336 ln. 22 – 337 ln. 1. A few days after the meeting, McMahan sent via email to Hancock, Trygstad, and Ken Kitaraha a black-lined revised statement of work for the Crosscutting Task Order based on the discussion during the meeting. Tr. 7/19/04 at pp. 43 ln. 15-25 – 44 ln. 1-13; Ervin Exh. 142.

62. After receiving the revised scope of work incorporating the changes requested by Hancock, the Office of Procurements and Contracts issued the task order. Hamilton Exh. 7.

63. Hancock testified that she was not aware of any evidence that the competition for the Crosscutting Task Order was rigged or slanted in Hamilton's favor or that members of the evaluation team were under any influence of pressure to find Hamilton's offer superior. Tr. 10/30/03 AM at p. 137 ln. 2-10. Ervin produced no evidence to suggest otherwise.

64. There is no evidence that Hamilton did not fully and satisfactorily perform all the work under the Crosscutting Task Order. The fees for Hamilton's work were scrutinized by

the Office of Procurements and Contracts and Ervin presented no evidence that the fees charged were not reasonable.⁶

CONCLUSIONS OF LAW

A. Ervin Has Produced No Evidence To Support The Court's Subject Matter Jurisdiction.

65. Under the False Claims Act ("FCA"), Ervin bears the burden of proving all elements of its case, including subject matter jurisdiction, by a preponderance of the evidence. 31 U.S.C. § 3731(c); *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 525 (9th Cir. 1998). The FCA limits a federal court's jurisdiction to hear *qui tam* claims providing that the action did not arrive from publicly disclosed "allegations...in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media...or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" is defined as

an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B).

⁶ Ervin's apparent reliance on the Cushman & Wakefield bid as evidence of the unreasonableness of Hamilton's fees is misguided. There has been no testimony that the Cushman proposal reflects the work actually performed by Hamilton. To the contrary, it was the conclusion of the Technical Evaluation Panel that Cushman's bid was technically unacceptable because it did not appreciate the nature of the task.

66. Ervin failed to present any evidence to establish that the remaining four allegations were not publicly disclosed and/or that he was the original source of those allegations. Although the government did investigate the claims set forth in Ervin's *Bivens* and *qui tam* complaints, that does not lead to automatic "original source" status. See *United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (a *qui tam* action is barred if the information that has been publicly disclosed *could have* led the government to investigate.) The *Springfield Terminal* court explicitly recognized that there may be situations in which publicly disclosed information is sufficient to raise an inference of fraud, but the government has nevertheless chosen not to investigate. *Springfield Terminal*, 14 F.3d at 654 ("When [the elements of a fraudulent transaction] surface publicly, or when [an allegation of fraud] is broadcast, however, there is little need for *qui tam* actions, which would tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue."). Thus, the simple fact that HUD OIG began investigating the loan sale program in response to Ervin's complaints does *not* constitute proof by a preponderance of the evidence that Ervin is the "original source" of his allegations. Indeed, the government has no discretion once a *qui tam* complaint has been filed: it must investigate. 31 U.S.C. § 3730(a)-(b).

67. Hamilton therefore respectfully requests that the Court dismiss the Second Amended Complaint for lack of subject matter jurisdiction.

B. Elements of False Claims Act liability

68. Under the FCA, Ervin bears the burden of proving all elements of its case, including subject matter jurisdiction, by a preponderance of the evidence. 31 U.S.C. § 3731(c); *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 525 (9th Cir. 1998).

69. The test for FCA liability is (1) whether there was a false or fraudulent claim, record, or statement; (2) made with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due. *See* 31 U.S.C. §§ 3729(a)(1), (a)(2) and (a)(7); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999).

1. False Or Fraudulent Claim, Record Or Statement

70. The FCA attaches liability not to fraudulent activity, but to false claims for payment resulting from that activity. *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551 (D.C. Cir. 2002). To prove an FCA allegation, therefore, the relator must produce evidence that the defendants actually submitted false demands for payment, or submitted false records or statements in order to get a false claim paid. *See United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 18 (D.D.C. 2003) (citing *Totten* for the proposition that submission of a false claim for payment must be pleaded as an element of an FCA claim).

71. It is not enough “to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted.” *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 314 F.3d 995, 1002 (9th Cir. 2002) (quoting *United States ex rel. Clusen v. Lab Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)).

72. In addition, a defendant incurs false claims liability for a failure to disclose information only where the defendant has a legal obligation to disclose that omitted information. *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453, 1461 (4th Cir. 1997).

2. Made With The Requisite Scierter (“Knowingly”)

73. The FCA only imposes liability for the “knowing” presentation of false claims, statements or records to the government. *See* 31 U.S.C. § 3729(a). The Act defines “knowing” and “knowingly” to mean

that a person, with respect to information—

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

74. Ervin has framed its claims in terms of “reckless disregard.” Reckless disregard is not a “relaxed” scierter standard. The United States Court of Appeals for the District of Columbia Circuit has stated that reckless disregard lies on a continuum between gross negligence and intentional conduct. *United States v. Krizek*, 324 U.S. App. D.C. 175, 111 F.3d 934, 941 (D.C. Cir. 1997). It is “a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care.” *Id.* Reckless disregard may be thought of as “an aggravated form of gross negligence” or “gross negligence plus.” *Id.* at 941-42; *accord United States ex rel. Aakus v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998); *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776, 792 n.15 (Ct. Cl. 1999).

75. As this court has previously ruled, the severity of conduct required to meet the standard underscores that innocent mistakes, mere negligence, or even gross negligence are not actionable under the FCA. *United States ex rel. Ervin & Associates v. Hamilton Securities et al.*, Order at 20, Civ. Case No. 96-1258 (D.C. January 7, 2004) citing *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992) (“Errors based simply on faulty calculations or flawed reasoning may be excused. . . . Proof of one’s mistakes or inabilities is not evidence that one is a cheat. . . . Bad math is no fraud.”); *UMC Electronics*, 43 Fed. Cl. at 794-95. “The Act is concerned with ferreting out ‘wrongdoing,’ not scientific errors.” *Wang*, 975 F.2d at 1421. “The statutory phrase ‘known to be false’ does not mean ‘scientifically untrue’; it means ‘a lie.’” *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478-79 (9th Cir. 1996).

76. The FCA does not impose liability for damages resulting from misunderstandings or inadequate communication. Where hindsight suggests additional channels of communication, a failure to implement such channels does not constitute extreme gross negligence under the FCA. *United States ex rel. Ervin & Associates v. Hamilton Securities et al.*, Order at 21, Civ. Case No. 96-1258 (D.C. January 7, 2004).

77. Moreover, a defendant’s disclosure to the Government of all the facts underlying a claim or statement may show that Defendant had no intent to deceive. *Wang*, 975 F.2d at 1421.

3. Materiality

78. The FCA imposes liability only for *material* misrepresentations. *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453, 1459 (4th Cir.), *cert. denied*, 522 U.S. 916 (1997).

79. A misrepresentation is material only when it is critical to the government's decision to pay a claim. See *United States v. TDC Management Corp.*, 351 U.S. App. D.C. 168, 288 F.3d 421, 426 (D.C. Cir. 2002); *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, No. 99cv3304 (RCL), 2003 U.S. Dist. LEXIS 3083, at *5-6 (D.D.C. Feb. 24, 2003) (false claims liability only for statements that affect a precondition of performance such that the government would not have honored the claim presented if it was aware of the falsity).

80. The District of Columbia Circuit applies a special materiality analysis to allegedly fraudulent failures to disclose information. Under the "implied certification" theory, a defendant's silence gives rise to false claims liability only when the party has violated a law or regulation and compliance with the law or regulation is so important to the contract that the government would not have honored the claim if it were aware of the violation. *United States ex re. Siewick*, 341 U.S. App. D.C. 459, 214 F.3d 1372, 1376 (D.C. Cir. 2000) ("Courts have been ready to infer certification from silence, but only where certification was a prerequisite to the government action sought."); *United States v. TDC Management Corp.*, 351 U.S. App. D.C. 168, 288 F.3d 421, 426 (D.C. Cir. 2002) (quoting *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994)) ("The withholding of such information – information critical to the decision to pay – is the essence of a false claim."); *Barrett*, 2003 U.S. Dist. LEXIS 3083 at *5; *United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 258, 264 (D.D.C. 2002).

81. Courts will not find FCA liability merely for non-compliance with a statute or regulation if compliance is not critical to the government's decision to pay. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786-787 (4th Cir. 1999) (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997)).

C. Ervin Has Failed To Prove Its False Claims Act Allegations By A Preponderance Of The Evidence.

1. There Is No Liability Where There Was No Contractual Duty To Optimize The Results.

82. As set forth more fully in its pending Motion for Summary Judgment on Count IX, Hamilton had no contractual duty to optimize the results of the North Central sale. Because there was no duty to optimize, any error resulting from the optimization model cannot yield FCA liability as a matter of law. *See United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 997 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999).

2. Hamilton Did Not Knowingly Present A Material False Statement To HUD In Connection With The North Central Loan Sale.

83. Count IX of the Second Amended Complaint alleges Hamilton knowingly presented HUD with a slate of winning bidders that did not maximize HUD's revenue in the North Central loan sale. At trial, Ervin set out to prove that "Hamilton act[ed] in reckless disregard of the truth or falsity of the auction optimization results" for both the WOM and North Central note sales. Tr. 10/29/03 AM at p. 21 ln. 18-20; *id.* at p. 22 ln 2-5.

84. Ervin has failed to prove either that Hamilton knowingly presented suboptimal results in the North Central note sale to HUD, or that the errors contained therein were material.

85. The evidence produced at trial proves Hamilton did not act in reckless disregard – i.e., with "aggravated gross negligence" – with regard to the North Central note sales. *United States v. Krizek*, 111 F.3d 934, 941-42 (D.C. Cir. 1997). Indeed, the evidence reveals the error was the product of a miscommunication which was fully disclosed to HUD as soon as Hamilton discovered and investigated it.

86. Schindler represented to Robinson that Bell Labs would permanently correct the problem with the optimization model following the WOM sale. Hamilton did not possess the capability to fix the model itself. Robinson accepted Schindler's representation and believed the model would be fixed. Tr. 10/31/03 PM at pp. 204 ln. 16 – 205 ln. 7. Robinson's reliance on Schindler's representation was reasonable and, indeed, correct because Schindler created a new UPB-based model shortly after the WOM sale. Tr. 7/19/04 at p. 48, ln. 7. However, unbeknownst to Robinson and Hamilton, Schindler chose to retain the original revenue-based model rather than dispose of it.

87. When the time came to optimize the North Central bids, Rick Wolf, who had no reason to believe that Bell Labs had two different optimization models, instructed Bell Labs to use the model from the WOM sale. Tr. 7/19/04 at pp. 49, ln. 10-13. Because Schindler had a heart attack and was unavailable, the new Bell Lab technicians were also unaware that Schindler had created a new model. *Id.* The Bell Labs staff ran the faulty model rather than the new UPB model. *Id.* This was an "innocent mistake" which is not actionable under the FCA. *Lamers*, 168 F.3d at 1018; *Wang*, 975 F.2d at 1420-21. Thus, while the results of the mistake in the North Central sale are similar to that which occurred in the WOM sale – an incorrect optimization model was used – the causes of the two mistakes are distinct.

88. At bottom, Ervin's North Central claim wrongly seeks to impose FCA liability for Hamilton/Bell Labs' failure to have adequate backup lines of communication. Had Schindler not been stricken and forced to leave Bell Labs suddenly, there is no evidence to suggest that the faulty model would have been used. The error was the direct result of Schindler not communicating to his successors that there were two models. However, as this Court ruled

previously, the failure to implement channels of communication does not rise to the level of “an aggravated form of gross negligence” or “gross negligence plus.” *United States ex rel. Ervin & Associates v. Hamilton Securities et al.*, Order at 21; see also *Krizek*, 111 F.3d at 941-42; accord *United States ex rel. Aakus v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998); *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776, 792 n.15 (Ct. Cl. 1999).

89. In considering whether the North Central error constitutes gross negligence plus, it is instructive to consider the D.C. Circuit’s *Krizek* case. In *Krizek*, a physician husband and his wife were found to have defrauded the government by “upcoding” requests for Medicare and Medicaid reimbursement; that is, reimbursement requests were submitted with treatment codes reflecting lengthier and more involved treatments than patients actually received. *Id.* at 936. Dr. Krizek’s wife, who prepared and submitted the coded reimbursement requests, submitted requests on several occasions totaling more than 21 hours of patient time in a single day. In at least eleven instances, the reimbursements totaled more than 24 hours. *Id.* at 936-37. The court found Mrs. Krizek acted with “reckless disregard” by 1) completing submissions with little or no factual basis, 2) making no effort to determine how much time the doctor spent with patients, and 3) billing close to or in excess of 24 hours in a single day. *Id.* at 942. The doctor was found to meet the scienter standard because he “utterly failed” to review bills submitted on his behalf. *Id.*

90. In contrast to the brazen conduct in *Krizek*, which was repeated on scores of occasions and could have been detected with minimal effort, the North Central optimization error was a single event whose detection was masked by the sheer size – in excess of \$620 million – of the transaction. Indeed, while the *Krizek* court found it significant that the billing

requests were greatly inflated, the North Central auction results differed only 0.2% from optimal.

91. In addition, Hamilton fully documented and disclosed to HUD the source of those errors. Ervin has produced no evidence to contradict the testimony of Brocks and McMahan that as soon as the bid floor instruction discrepancy was discovered in October 1996, Hamilton immediately mobilized the Manhattan Project team “to get to the bottom of this . . . to report the absolute truth to . . . HUD and . . . to put procedures and protocols in so that this doesn’t happen again.” Tr. 10/31/03 AM at pp. 221 ln. 20 – 222 ln. 3. The results of that investigation were reported to senior HUD staff, FHA Commissioner Retsinas and FHA Comptroller, Rock. Tr. 10/31/03 AM at pp. 222 ln. 4 – 223 ln. 5; Tr. 11/3/03 AM at pp. 333 ln. 20 – 334 ln. 9; Ervin Exh. 77. Evidence that Hamilton was open with the government about its mistakes “suggests that while [Hamilton] might have been groping for solutions, it was not cheating the government in the effort.” *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992).

92. Finally, Ervin has not proven by a preponderance of the evidence that the errors reported by the Manhattan Project team on the North and Central sale amounted to “material” misstatement. A misrepresentation is material only when it is critical to the government’s decision to pay a claim. See *United States v. TDC Management Corp.*, 351 U.S. App. D.C. 168, 288 F.3d 421, 426 (D.C. Cir. 2002); *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, No. 99cv3304 (RCL), 2003 U.S. Dist. LEXIS 3083, at *5-6 (D.D.C. Feb. 24, 2003). The optimization errors amounted to only 0.2% of revenues in the North and Central sale. Ervin Exh. 77 at p. 1. Ervin neither called Retsinas nor inquired of Rock as to whether or not they would have

awarded loans to the incorrectly named winners if they were aware of the optimization errors. Nor did any other government witness testify to this fact. Indeed, the only testimony as to the materiality of these errors was elicited by the Court from Dietz, who testified that neither HUD's Office of Housing nor an independent auditor would consider the error "material" in light of the size of the note sales. Tr. 11/3/03 AM at p. 339 ln. 4-21; pp. 339 ln. 22 – 340 ln. 6. Moreover, the fact that neither, Retsinas, Rock, nor the Office of General Counsel took any action in response to the December 20, 1996 memorandum strongly suggests that HUD did not consider the error material. Therefore, in the absence of any evidence to the contrary, the Court should find the optimization error on the North and Central note sale is immaterial.

93. Because Ervin has failed to prove Hamilton knowingly presented HUD with material false statements in connection with the North Central loan sale, the Court should find for Hamilton on Count IX of the Second Amended Complaint.

3. Hamilton Did Not Knowingly Present A Material False Statement To HUD In Connection With The Single Family #1 Reoffering.

94. Neither Ervin's opening statement at trial nor its pretrial statement identifies a false claim, record or statement which Hamilton allegedly presented to HUD in connection with the Single Family #1 Reoffering. Tr. 10/29/03 AM at p. 22 ln. 8-12; Ervin Pretrial Statement at p. 5. To prove an FCA allegation, the relator must produce evidence that the defendants actually submitted false demands for payment, or submitted false records or statements in order to get a false claim paid. *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551 (D.C. Cir. 2002); *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 18 (D.D.C. 2003).

95. Ervin's claim centers on the allegation that Hamilton recommended to HUD that it award assets to the bidders identified in "Option #1" rather than those in "Option #4." Ervin

alleges the latter option would have resulted in greater revenue to HUD in the form of a “negative credit subsidy.” Ervin Pretrial Statement at p. 5. Those options, along with two other potential award scenarios, were presented by Hamilton to HUD in a series of slides. *See* Hamilton Exh. 228. The slides presented to HUD identify for each alternative scenario the number of loans sold, UPB of loans sold, the gross proceeds as a percentage of UPB, the gross proceeds, and the credit subsidy and the revenue generated. *See* Hamilton Exh. 228.

96. Ervin has failed to carry its burden of proof with regard to the Single Family #1 Reoffering. The evidence demonstrates shows that Hamilton recommended the very option Ervin claims was the correct choice -“Option #4.” Tr. 7/20/04 at p. 193 ln. 24-25 – 194 ln. 1-2, 14-20. Dunlap participated in the meeting in which Hamilton presented the four options and testified that Retsinas, contrary to Hamilton’s recommendation, made an “active and clear” decision to select the option that sold the most loans, “Option #1.” *Id.* at p. 137 ln. 14-20.

97. Hamilton’s recommendation of Option #4 is dispositive because Ervin’s theory is that Hamilton defrauded HUD by not disclosing that it was pursuing business with Goldman Sachs and BlackRock, the successful bidders when Retsinas selected Option #1. Tr. 10/29/03 AM at pp. 52 ln. 23 – 53 ln. 1. The lynchpin of this claim was Ervin’s bald, and now discredited allegation that Hamilton influenced HUD to select the BlackRock/Goldman Sachs bid.

98. In any event, there was no additional conflict for Hamilton to report. HUD was fully aware of BlackRock’s subcontract with Hamilton on the Partially Assisted note sale. Tr. 10/30/03 PM at p. 131 ln. 15-18; Tr. 10/31/03 PM at pp. 176 ln. 2 – 177 ln. 19; Tr. 7/19/04 at p. 26 ln. 3-16; Tr. 7/21/04 at pp. 224 ln. 20-25 – 225 ln. 1-2. Indeed, HUD and Hamilton specifically discussed steps to make sure BlackRock did not have access to information on sales on which it

might be a bidder. Tr. 7/21/04 pp. 225 ln. 21-25 – 226 ln. 4-16. In light of the plain disclosure of the BlackRock relationship, Ervin's claim that Hamilton filed a false conflict of interest certification is without merit.⁷

99. There being no evidence that anything improper occurred in connection with the Single Family #1 Reoffering, the Court should find for Hamilton on Count II of the Second Amended Complaint.

4. Hamilton Did Not Commit A False Claims Act Violation In The Procurement Of The Williams, Adley 8(a) Contract, Hamilton's Subcontract, Or Any Task Order Under The 8(a) Contract.

100. As with the Single Family #1 Reoffering, it is unclear what false claim, statement or record Ervin alleges Hamilton made in relation to the Williams, Adley 8(a) contract. Counts XIII and XIV of the Second Amended Complaint allege Hamilton solicited and received a "kickback" of guaranteed subcontracting from Williams, Adley and that Hamilton and Williams, Adley submitted exaggerated pricing estimates for task orders under the contract. Sec. Amend. Compl. ¶¶ 198-203. More recently, however, Ervin has pursued a fraudulent inducement theory of liability, alleging every claim made under the 8(a) contract was "tainted" by fraud. *See* Ervin Memorandum in Support of Cross-Motion for Summary Judgment on Counts XIII and XIV at p. 5-6 (filed May 2, 2003). Now, in its pretrial and opening statements, Ervin claims Hamilton and Williams, Adley formed a secret exclusive subcontracting agreement

⁷ Ervin's half-hearted claim that a single conversation between a mid-level Hamilton employee and someone at Goldman Sachs amounts to an organizational conflict of interest is unsustainable, particularly given the undisputed evidence that Hamilton and Goldman Sachs never did any business together.

and that Hamilton manipulated the 8(a) procurement process to avoid competing for loan sale advisory work. Ervin Pretrial Statement at p. 2-3; Tr. 10/29/03 AM at p. 23 ln. 2-5.

101. The vagueness and wavering nature of Ervin's allegations demonstrates that this action is simply a belated bid protest masquerading as a *qui tam* action. There has been no evidence that Hamilton and Ervin conspired to evade procurement regulations. Ervin has not claimed that Hamilton failed to perform the work under the subcontract. And no one testified that the work under the contract was not performed and/or was not performed to the standards of the government.

102. Ervin's allegations regarding the 8(a) contract do not state a coherent theory of how HUD was fraudulently induced to pay or forego money. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) (payment or forfeiture of funds by government in reliance on material false statement is an essential element of false claims liability). It is not enough "to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted." *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 314 F.3d 995, 1002 (9th Cir. 2002) (quoting *United States ex rel. Clusen v. Lab Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)).

103. Williams, Adley learned of the 8(a) contract through its own marketing efforts. Tr. 7/19/04 at p. 86 ln. 6-14. HUD selected Williams, Adley prior to the the time Henry Adley had even heard of Hamilton. *Id.* at p. 93 ln. 21-22. Adley considered a number of firms before selecting Hamilton as its subcontractor to perform the financial advisory work. *Id.* at ln. 10-15. At no point did anyone from HUD attempt to influence Williams, Adley's decision to select Hamilton. *Id.* at p. 102 ln. 7-12.

104. The 8(a) contract awarded to Williams, Adley was an incomplete shell, known in contracting parlance as an “indefinite delivery, indefinite quantity” contract. Tr. 10/29/03 PM at p. 39 ln. 11-13. Such contracts serve as a “basic ordering agreement.” Tr. 11/3/03 AM at p. 258 ln. 8-13. Funds are not paid out under that agreement until the government issues task orders for specific jobs. Hancock testified that specific work requirements were defined through statements of work, which became the subject of negotiations, and the award of task orders against the basic indefinite quantity contract. *Id.* at pp. 39 ln. 23 – 40 ln. 3. Before HUD ever paid out money to Hamilton under the subcontract, it would have (1) received a proposal from Williams, Adley identifying Hamilton as its subcontractor and describing its fees, and (2) had an opportunity to negotiate with Williams, Adley and Hamilton over the work to be done and the fees to be charged. There is no evidence of any secret arrangements. Instead, the evidence shows that the information HUD needed to make an informed decision was fully disclosed before HUD paid Hamilton a single dollar.

105. Ervin has failed to prove its allegations of impropriety. HUD contracting officer Hancock testified that she ensured the appropriate policies and procedures were adhered to and complied with in the award of the 8(a) contract. Tr. 10/30/03 AM at pp. 109 ln. 23 – 110 ln. 1. Hancock knew Hamilton was serving as financial advisor on the loan sales both when Williams, Adley submitted its November 2, 1994 proposal naming Hamilton a potential subcontractor and when the 8(a) contract was awarded. Tr. 10/30/03 AM at p. 110 ln. 2-8; p. 115 ln. 19-21; Williams, Adley Exh. 27. Issues were raised with regard to the fees Williams, Adley proposed for Hamilton’s work under the 8(a) contract, and those fees were the subject of negotiations. Tr. 10/30/03 AM at pp. 117 ln. 21 – 118 ln. 1; Williams, Adley Exhs. 72, 95.

Hancock testified that when she reviewed the file and signed the award, she was satisfied that the proposed prices were appropriate. *Id.* at p. 118 ln. 2-7. Ervin has adduced no contrary evidence.

106. Finally, Ervin has presented no evidence as to why Williams, Adley, a successful government contractor, would risk its reputation and entire business by entering into a conspiracy with Hamilton, a company it did not know, to defraud the government. Ervin's alleged scheme is just not credible.

107. Ervin has failed to carry its burden of proof with regard to the 8(a) contract. The Court should therefore find for Hamilton on Counts XIII and XIV of the Second Amended Complaint.

5. Hamilton Did Not Conspire With Officials In HUD's Office Of Housing To Rig The Competition For The Crosscutting Task Order.

108. Ervin's pursuit of its allegations regarding the Crosscutting Task Order is merely the act of a disgruntled contractor protesting a contract that it did not receive. In fact, prior to filing this action, Ervin did protest his failure to receive an award of the Second Financial Advisory contract, under which the Crosscutting Task Order was issued. *See* Ervin Exh. 143A. His bid protest was not successful. The Crosscutter claims in this action are nothing more than another iteration of the bid protest dressed up in *qui tam* clothes.

109. In its opening statement, Ervin broadly alleged that Hamilton and officials in HUD's Office of Housing conspired to rig the competition for the Crosscutting Task Order, making that competition a "sham." Tr. 10/29/03 AM at p. 23 ln 16-20. This allegation was stated more specifically in Counts XV and XVI of the Second Amended Complaint, where Ervin alleged that Hamilton provided a "kickback" in the form of a promise of future employment to

FHA controller Rock. During trial, Ervin's claim morphed again. Now, Ervin asserts that (1) the government was harmed by the selection of Hamilton because another bid was less expensive; and (2) Hamilton should have been disqualified from the bidding because it contributed to the drafting of the task order. However, the evidence has not supported Ervin's claim. The award of the Crosscutting Task Order was fully scrutinized in advance by the FHA Program Staff who selected Hamilton, the Office of Inspector General and the Office of Procurements and Contracts. In addition, Hamilton's contribution to the task order did not render it ineligible to bid and, in any event, no false claim was submitted.

a. Hamilton's Proposal And Pricing Were Fully Vetted By HUD.

110. Early on in its first financial advisor contract, Hamilton advised HUD that it needed a crosscutting financial advisor who could look across HUD's different portfolios and help advise the agency on how to dispose of its loans. Tr. 11/03/03 AM at p. 299 ln 3-20. When the program staff's request for additional internal resources was turned down, Hamilton helped to identify generic tasks for a crosscutting advisor. Hamilton did not, however, tell HUD it should hire Hamilton in this role. Tr. 11/03/03 AM at p. 300 ln 6-10.

111. HUD procured the services of a crosscutting financial advisor under the second financial advisor contract. Tr. 10/29/03 PM at pp. 55 ln. 15 – 56 ln. 3. Because separate contracts had already been awarded to HUD's financial advisors through a competitive process, HUD did not have to compete the Crosscutting Task Order, but chose to do so as part of its goal of transparency in the loan sales program. Tr. 7/20/04 at pp. 146, ln. 20-25 – 147 ln. 1-11; Tr. 7/21/04 at p. 230 ln. 17-18. Hamilton and Cushman & Wakefield both submitted proposals in

response to the crosscutting solicitation. Tr. 10/29/03 PM at p. 58 ln. 18-22; p. 59 ln. 19-24; Ervin Exh. 258 (Cushman & Wakefield proposal).

112. A Technical Evaluation Panel was convened to evaluate those proposals. Tr. 10/29/03 PM at p. 61 ln. 4-9; Tr. 7/21/04 at p. 231 ln. 4-7. The Panel members individually considered the two proposals before meeting as a group to discuss their conclusions. Tr. 7/21/04 at p. 231 ln. 8-15. The Panel's report to Contracting Officer Hancock unanimously recommended awarding the task order to Hamilton. *See* Ervin Exh. 133.

113. Hancock felt the Panel's report did not adequately document the basis for its selection of Hamilton, particularly in light of the cost difference between the two proposals. Hancock asked the team to review its findings and "be clear what characterization you would give each firm's proposal as it relates to whether or not their proposal is an acceptable one or not." Tr. 10/29/03 PM at pp. 61 ln. 20 – 62 ln. 12; pp. 62 ln. 18 – 63 ln. 1. Hancock spoke to Rock, one member of the Panel, about reclarifying the evaluation, Tr. 7/21/04 at p. 233 ln. 16-20, and raised the issue of whether or not Cushman & Wakefield's proposal was technically unacceptable. *Id.*

114. Meanwhile, the Panel's recommendation of Hamilton was also being reviewed by the Office of Inspector General, who met with Rock and others to discuss the basis for Hamilton's selection. Tr. 7/21/04 at p. 235 ln. 3-12; Ervin Exh. 139. In a March 26, 1996, interview with OIG staff, Rock articulated the reasons that the Panel had chosen Hamilton. Ervin Exh. 139.

115. In a report dated April 25, 1996, Trygstad provided Hancock's office with a revised technical analysis that concluded that the Cushman & Wakefield proposal was

technically unacceptable. *Id.* at p. 63 ln. 2-10; Ervin Exh. 134. Hancock accepted the recommendation and passed it on for review to her supervisor, Craig Durkin. *Id.* at p. 73 ln. 7-16.

116. In addition to the Technical Evaluation Panel and the Office of Inspector General, the terms of Hamilton's work under the crosscutting task order were also subjected to further review by the Office of Procurements and Contracts. Hancock requested a meeting with Hamilton to discuss clarifications and revisions to the scope of work in advance of HUD issuing the Crosscutting Task Order. Tr. 7/19/04 at pp. 40 ln. 18-25 – 41 ln. 1-8; Tr. 11/03/03 AM at p. 130 ln. 16-21; Ervin Exh. 142. Hamilton employees McMahan and Dietz met with Hancock and Trygstad for an entire day to discuss the scope of work under the Crosscutting Task Order. Tr. 7/19/04 at pp. 40 ln. 18-25 – 41 ln. 1-8; Tr. 11/3/03 AM at p. 336 ln. 19-21. During this extended meeting, the group discussed price, the specific language of the task order, and how Hamilton would develop a project plan. *Id.* at pp. 336 ln. 22 – 337 ln. 1. A few days after the meeting, McMahan sent via an email to Hancock, Trygstad, and Ken Kitaraha a black-lined revised statement of work for the Crosscutting Task Order based on the discussion during the meeting. Tr. 7/19/04 at pp. 43 ln. 15-25 – 44 ln. 1-13; Ervin Exh. 142. Only after receiving the revised scope of work incorporating the changes requested by Hancock did the Office of Procurements and Contracts issue the task order. Hamilton Exh. 7.

117. Hancock testified that she had no evidence that the competition for the Crosscutting Task Order was rigged or slanted in Hamilton's favor or that members of the Panel were under any influence of pressure to find Hamilton's offer superior. Tr. 10/30/03 AM at p. 137 ln. 2-10. The fees Hamilton charged were fully examined and approved by Hancock

and her superior. Moreover, Ervin presented no evidence that Hamilton did not perform its work on the task order fully and satisfactorily. HUD received full value from Hamilton under the Crosscutting Task Order.

b. Hamilton's Role In Drafting The Crosscutting Task Order Does Not Support FCA Liability.

118. Ervin's claim that Hamilton is liable under the FCA because it contributed to the task order is meritless for several reasons.

119. First, Rock described in detail her drafting of the Crosscutting Task Order. She received input for the initial draft from several sources, one of which was Hamilton, who provided some generic financial advisor language. Tr. 7/21/04 at p. 236 ln. 6-9. Moreover, nothing in the language of the task order gave Hamilton an unfair advantage over other financial advisors. Indeed, Ervin has not identified any portion of the Task Order that is allegedly tilted for Hamilton's benefit.

120. Second, drafting task orders is not per se improper. Hancock testified that she knew of instances in which the HUD Office of Housing had requested contractors to draft task orders. Tr. 10/30/03 AM at p. 118 ln. 9-16. She stated that it "could be inappropriate" for a contractor to draft statements of work for contracts or task orders it then competes for, but did not define the circumstances in which such action would be inappropriate. Tr. 10/30/03 AM at pp. 140 ln. 18 – 141 ln. 1. Drafting task orders alone does not necessarily give the drafter a competitive advantage in bidding for that task order or affect the likelihood the drafter will actually do the work under that task order (Tr. 11/3/03 PM at p. 287 ln. 18-25, p. 288 ln. 6-23), particularly in light of HUD's practice of sometimes publishing notices in the Federal Register describing anticipated contracts in advance of letting them for bids. *Id.* at p. 303 ln. 5-11. It is

telling that none of the witnesses indicated that the language of the Crosscutter gave Hamilton an unfair advantage.

121. More importantly, the Federal Acquisition Regulations (“FAR”) specifically allow for a contractor to supply the services to a work statement that it assisted in preparing. 48 C.F.R. §9.505-2(b)(1) and (b)(3). The FAR states that

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services – or provides material leading directly, predictably, and without delay to such a work statement – that contractor may not supply the system, major components of the system, or the services **unless** –

...

(ii) It has participated in the development and design work . . .

...

(3) For the reasons given in 9.505-2(a)(3), **no prohibitions are placed on development and design contractors.**

48 C.F.R. § 9.505-2(b)(1) and (b)(3); *see also Vantage Assocs. v. United States*, 59 Fed. Cl. 1, 12 (Ct. Cl., 2003). The rationale stated in Subsection (a)(3) for allowing development and design contractors to participate in this manner directly addresses Hamilton’s situation.

In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

48 C.F.R. § 9.505-2(a)(3). This rationale echoes Hancock’s testimony that an “incumbent” contractor may enjoy a natural advantage in competing for future work and that employing

incumbents with a shorter “learning curve” could be advantageous to HUD. Tr. 10/30/03 AM at pp. 118 ln 17 – 119 ln 7, p. 120 ln 6-12.

122. Hamilton, as a development and design contractor, was permitted to and successfully did compete for the task order. HUD’s decision that Hamilton was the best choice for the job is entitled to great deference. *Multimax, Inc. v. Federal Aviation Administration*, 231 F.3d 882, 887 (D.C. Cir. 2000) (“Where a procurement decision requires an agency to assess an offeror’s qualifications to perform a contract, our review is ‘especially deferential.’”) (citations omitted). There is simply no FCA claim to be made on these facts.

123. Ervin has failed to prove by a preponderance of the evidence that the competition for the Crosscutting Task Order was in any way “rigged” in favor of Hamilton. The Court should therefore find for Hamilton on Counts XV and XVI of the Second Amended Complaint.

6. Ervin Has Produced No Evidence To Support Its Damages Claims.

124. Ervin has produced no evidence to support its claims that the government suffered millions of dollars of damage as a result of Hamilton’s actions. In the absence of any testimony that the government would have acted differently had it known a given piece of information, Ervin has not proven that the government suffered damages *at all*. Indeed, HUD received the full benefit of Hamilton’s work under the various contracts and subcontracts. Ervin introduced no Hamilton invoices or other requests for payment to support its allegations regarding the amounts of claimed damages.

125. Damages under the FCA must be proven with reasonable certainty, meaning that evidence must show both the fact of the damages is certain and that the amount of damages can

be reasonably computed. See John T. Boese, *Civil False Claims and Qui Tam Actions, Appendix F: Sample Jury Instructions (2) in a Reverse False Claim Case*, adapting jury instructions approved by the United States District Court for the District of Maryland in *United States ex rel. Berge v. The Board of Trustees of the State of Alabama*, Civ. No. N-93-158 (Jury Instructions) (D. Md. June 13, 1995), and jury instructions proposed in *Croswell v. Northrup Corp.*, CV 88-967 (C.D. Cal.). Ervin has failed to do this.

a. Williams, Adley Subcontract

126. With respect to the Williams, Adley subcontract, Ervin wrongly claims entitlement to the full amount Hamilton received under its subcontract. However, Ervin presented no evidence that Hamilton failed to perform under the subcontract. To the contrary, the only evidence as to Hamilton's performance plainly shows that Hamilton carried out its obligations fully and satisfactorily. Tr. 10/30/03 AM at p. 119 ln. 22-23. Faced with the fact that Hamilton gave the government the services for which it contracted, Ervin argues that because Hamilton should not have received the subcontract, the government is entitled to demand all of its money back.

127. Such a theory turns the law of damages on its head. In *Ab-Tech. Constr., Inc. v. United States*, 31 Fed. Cl. 429 (1994), the United States brought a qui tam claim against a SBA 8(a) minority contractor for concealing facts relating to non-minority control of the business. The United States argued that even though the contractor had performed all of the work under the contract, the fraud on the government regarding the justified a return of all amounts paid under the contract. This argument was flatly rejected:

Damages represent compensation for a loss or injury sustained.
Here, however, no proof has been offered to show that the

Government suffered any detriment to its contract interest because of Ab-Tech's falsehoods. Rather viewed strictly as a capital investment the Government got essentially what it paid for. *Id.* at 434.

So too in this case where there has been no allegation that any of the work under the Williams, Adley subcontract was not properly performed, yet Ervin claims entitlement to the full amount paid on the contract.

b. Crosscutting Task Order

128. The analysis with respect to Ervin's claim as to the Crosscutting Task Order is similar to the Williams, Adley contract. Ervin has presented no evidence that HUD did not receive the work as required by the Crosscutting Task Order. Indeed, the evidence plainly shows that Hamilton did perform all of the work fully and satisfactorily.

129. Ervin's attempt to use the Cushman & Wakefield bid as a measure of damages is a red herring. The Cushman bid was determined to be technically unacceptable and Ervin presented no evidence to suggest that this determination was not correct.⁸ Moreover, the fees charged by Hamilton were fully analyzed by the Office of Procurements and Contracts in an all day meeting before the contract was awarded and found to be reasonable. Tr. 7/19/04 at pp. 40 ln. 18-25 – 41 ln. 1-8; Tr. 11/3/03 AM at p. 336 ln. 19-21.

⁸ In fact, when it serves Ervin's purposes in arguing that Hamilton gained an unfair advantage with respect to the Crosscutting Task Order, Ervin cites the Panel's finding that the Cushman bid was technically unacceptable as evidence that Cushman could not submit an acceptable bid. Ervin cannot have it both ways.

c. Single Family # 1 Reoffering

130. Any calculation of damages caused by the Single Family #1 sale is purely speculative. Ervin suggests that it is entitled to the difference in credit subsidy between Option #1, which was selected, and Option #4, which Ervin claims should have been selected. However such a simple analysis is inappropriate because (1) the two options involve wholly different sets of loans and (2) the government was entitled to select loan sales winners based on factors other than credit subsidy. Indeed, the undisputed evidence is that HUD's primary goal was to sell the most loans possible, and was primarily focused on credit subsidy only when it might require HUD to seek a Congressional appropriation.

131. More significantly, Dunlap's confirmation that Retsinas chose Option #1, against Hamilton's recommendation definitively establishes that there was no loss to the government as a result of Hamilton's actions. Tr. 7/20/04 at p. 137, ln. 14-20, p. 194 at ln. 14-20.

d. The North Central Sale

132. With regard to North Central, Ervin claims as damages the difference between the revenue anticipated under the UPB-based optimization model and that generated by the revenue-based model that was used. However, without consideration of a number of other factors not raised by Ervin, including the rate at which winning bidders actually went to closing with HUD, the amount of damages cannot be reasonably computed. Ervin presented no evidence regarding the actual return HUD received on the North Central sale or the expected return had the UPB-based model been used. As former Hamilton CFO Dietz testified, "on these loan sales until everything closes you don't know what the optimal result is. Even the optimization model had some assumptions built in that everybody is going to close. So with

the recalculation that also assumed that everybody would close on the sale. If they didn't, it may not wind up being the optimal result." Tr. 11/3/03 AM at p. 310 ln 7-15.

133. Despite the clear need for expert testimony to calculate the actual difference in the amount HUD would have received, Ervin presented no damages expert. The optimization shortfalls reported in the December 20, 1996 memorandum are, standing alone, too speculative to constitute a reasonable calculation of damages. Accordingly, Ervin's North Central claim fails.

7. Ervin Has Produced No Evidence Of Collusive Bidding In Support Of Count X.

134. In Count X, Ervin alleges members of the BGO Team colluded with other bidders in determining what assets to bid on and what price to bid in the Midwest Multifamily sale. Sec. Amend. Compl. at ¶ 255. In addition to never describing how Hamilton is implicated by this accusation, Ervin also failed to raise the issue or introduce any evidence on it at trial.

135. Ervin has failed to meet its burden of proof as to this count. The Court should therefore find for Hamilton on Count X of the Second Amended Complaint.

8. Ervin Has Produced No Evidence That Hamilton Charged HUD For Improper Personal Services, Exaggerated The Harm To The government Of Competitively Procuring Note Sale Services, Or Provided False Records In Support Of Exaggerated Cost Estimates Under The First Financial Advisor Contract.

136. In Counts XI and XII of the Second Amended Complaint, Ervin alleges that under the first financial advisor contract Hamilton (1) charged HUD for personal services provided to senior HUD officials which were not included in any contract or task order, (2) provided false records and statements to HUD which exaggerated the harm to the government

that would result from the time required to competitively procure note sale services, and (3) provided false records or statements to support exaggerated cost estimates for task orders. Sec. Amend. Compl. at ¶¶ 257-267.

137. Ervin failed to raise these allegations in either its pretrial or opening statement, and produced no evidence to support them at trial. The only testimony elicited concerning the first financial advisor contract established that it was modified from its initial ceiling of \$5 million to \$19 million (Tr. 10/29/03 PM at pp. 20 ln. 13- 21 ln. 8), and that the fee computation method employed by Hamilton was typical for the industry (Tr. 10/29/03 PM at p. 22 ln. 9 – 19; pp. 24 ln. 24 – 25 ln. 19).

138. Ervin has failed to carry its burden of proof as to any element of these allegations. The Court should therefore find for Hamilton on Counts XI and XII of the Second Amended Complaint.

Respectfully submitted,

By: _____/s/_____
Michael J. McManus (D.C. Bar #262832)
Jeffrey J. Lopez (D.C. Bar # 453052)
Christine D. Bell (D.C. Bar #472629)
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
202/842-8800

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

Dated: August 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2004, a true and correct copy of the foregoing The Hamilton Securities Group, Inc.'s and Hamilton Securities Advisory Services, Inc.'s Modified Proposed Findings of Fact and Conclusions of Law was served electronically by the Court's electronic filing system on the following parties:

Aaron L. Handelman, Esq.
Michael P. Freije, Esq.
Eccleston & Wolf, P.C.

Joseph P. Hornyak, Esq.
Sonnenschein Nath & Rosenthal

Brian Sonfield, Esq.
U.S. Attorney's Office

_____/s/_____
Michael J. McManus