

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5046
(Misc. No. 98-0092)

SUSAN GAFFNEY, Inspector General,
U.S. Department of Housing and
Urban Development,

Appellee,

v.

HAMILTON SECURITIES GROUP, INC., et al.,

Appellants.

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

The Inspector General of the United States Department of Housing and Urban Development (hereafter the "Inspector General"), appellee and petitioner below, hereby respectfully moves that the Court summarily affirm the decision by the District Court to enforce the administrative subpoenas issued by the Inspector General to The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (hereafter collectively "Hamilton"), appellants and respondents below. The District Court's decision, rendered by the Honorable Stanley Sporkin, is so clearly correct that summary affirmance is warranted.¹ See, e.g., Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Ambach v. Bell, 686 F.2d 974, 979 (D.C. Cir. 1982) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

¹ In accordance with Fed. R. App. P. 27(a)(2)(B)(iii), copies of the rulings under review are attached as an appendix to this motion.

I.

This case was brought pursuant to Section 6(a)(4) of the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3 § 6(a)(4), to seek enforcement of administrative subpoenas duces tecum issued to Hamilton by the Inspector General. Those subpoenas required Hamilton to provide the Inspector General with various records relating to Hamilton's involvement in the sale of defaulted mortgage notes by the United States Department of Housing and Urban Development (hereafter "HUD"), and to possible conflicts of interest with respect to Hamilton's role as HUD's financial advisor.

The subpoenas were issued in furtherance of an investigation of allegations of fraud, waste, and abuse affecting HUD's programs and operations. In particular, on June 5, 1997, Ervin & Associates, Inc. filed in the United States District Court for the District of Columbia a 253-page complaint (hereafter the "Bivens Complaint") against HUD, the Secretary of HUD, the Small Business Administration and its Administrator, and Helen Dunlap, the former Deputy Assistant Secretary for Operations within HUD's Office of Housing-Federal Housing. See Civil Action No. 96-1253-WBB (D.D.C.). The Bivens Complaint alleged, inter alia, corruption and favoritism in the procurement of services associated with HUD's sale of defaulted mortgage notes, and that HUD, through Ms. Dunlap and Hamilton, acting as HUD's financial advisor, improperly used Hamilton's knowledge of HUD's note sale program to carry out a

complex scheme to permit huge blocks of discounted multifamily and single family mortgage notes to be acquired by prominent Wall Street firms. See Declaration of Jack Rogers filed in support of Petitioner's Response in Opposition to Movants', The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc., Motion for Leave to Conduct Discovery (hereafter "Rogers Dec.") ¶ 3 (filed September 25, 1998) [R. 35].

In addition, on June 6, 1996, Hamilton was named as a defendant in a qui tam complaint (hereafter the "Qui Tam Complaint") that was filed pursuant to the False Claims Act, 31 U.S.C. §§ 3729 et seq., in the United States District Court for the District of Columbia.³ See Civil Action No. 96-1258-SS (D.D.C.). In early July 1996, the United States Attorney's Office in the District of Columbia advised the Inspector General of the existence of the Qui Tam Complaint, and requested the Inspector General's assistance in investigating the allegations contained in it.

² "[R. ___]" denotes the corresponding numbered entry in the District Court's electronic civil docket for Case No. 98-MS-92.

³ The Qui Tam Complaint was filed under seal and currently remains under seal. Although Hamilton has been advised of the fact that it is a named defendant in the Qui Tam Complaint, Hamilton has not been advised of the particulars of the Qui Tam Complaint. The Inspector General's petition to enforce the administrative subpoenas at issue here was filed under seal to insure that the confidentiality of the Qui Tam Complaint would be maintained. Hamilton subsequently moved to unseal the record in this case because none of the material filed herein involved disclosure of the substance of the Qui Tam Complaint. The Inspector General did not object to Hamilton's motion to unseal the record in this matter, and that motion was granted by the District Court by Order filed October 9, 1998 [R. 37].

Shortly thereafter, the Inspector General began an investigation of the allegations in both the Qui Tam Complaint and the Bivens Complaint. See Rogers Dec. ¶¶ 4-5.

The Inspector General's investigation is still in progress. That investigation is being conducted in coordination with the United States Attorney's Office and other law enforcement agencies, and is an effort to explore methodically, and uncover the truth about the many, complicated allegations in the Qui Tam Complaint, the Bivens complaint, and related allegations that have subsequently arisen during the course of the investigation. See id. ¶ 6.

The administrative subpoenas that are at issue here were issued by the Inspector General to Hamilton on August 6 and 22, 1996 and on October 24, 1997. Although Hamilton produced records responsive to the subpoenas beginning in August 1996, Hamilton did not, in the Inspector General's opinion, comply fully with the subpoenas. The Inspector General filed a petition with the District Court to enforce the subpoenas on March 3, 1998, after the Inspector General learned of Hamilton's plan to terminate its business operations, vacate its offices, and sell much of its equipment at a public auction. See Memorandum of Points and Authorities in support of Petition for Summary Enforcement of Subpoenas issued pursuant to 5 U.S.C. App. 3 § 6(a)(4) at pp. 6-19 (filed March 3, 1998) [R. 1].

By Order entered December 18, 1998 [R. 56], the District Court effectively granted the Inspector General's petition, subject to certain conditions and limitations. The District Court reaffirmed that action by Order filed January 5, 1999 [R. 58]. This appeal followed.

II.

During the proceedings before the District Court, Hamilton argued that the Inspector General's administrative subpoenas should be quashed because, Hamilton claimed, the Attorney General had improperly delegated her duty to investigate the Qui Tam Complaint to the Inspector General and the Inspector General lacked authority to use her subpoena power to investigate qui tam actions on the Attorney General's behalf. Hamilton has stated that this claim will be the subject of the instant appeal. See Appellants' Statement of Issues (dated March 19, 1999).

As will be shown below, Hamilton's position is clearly without merit.⁴ Congress, in establishing inspectors general within federal agencies, expressly stated that it intended to "strengthen [] cooperation between the Agency and the Department of Justice in investigating and prosecuting fraud cases." S. Rep. No. 1971, 95th Cong, 2d Sess. at 7, reprinted in 1978 U.S. Code Cong. & Admin.

⁴ Hamilton did not even raise this claim in this matter until late 1998, more than two years after Hamilton began producing records responsive to the August 1996 subpoenas, and a year after Hamilton began producing records responsive to the October 1997 subpoenas.

News 2676, 2682. And, when Congress later vested the Attorney General with authority to investigate the same conduct through the issuance of a Civil Investigative Demand (hereafter a "CID"), it made equally clear that this new power was intended to "supplement," not supplant an inspector general's subpoena power. S. Rep. No. 345, 99th Cong., 2d Sess. at 33, reprinted in 1986 U.S. Code Cong. & Admin. News 5266, 5298. The Inspector General, therefore, has ample authority to investigate allegations of fraud, waste, and abuse affecting HUD's programs and operations, regardless of whether the alleged misconduct violates the False Claims Act or is otherwise under investigation by the Department of Justice.

A.

Hamilton contends that Congress intended the CID, which is authorized by 31 U.S.C. § 3733, to be the sole means of investigating possible violations of the False Claims Act, and that an agency inspector general may not issue subpoenas to further investigations of potential False Claims Act violations. These contentions, however, are contradicted by the Inspector General Act and are not supported by the text or legislative history of the False Claims Act.

1.

Hamilton's assertion that agency inspectors general cannot assist the Department of Justice in a False Claims Act investigation is inconsistent with the language, purposes, and

legislative history of the Inspector General Act. Aiding a False Claims Act investigation is fully consistent with the Inspector General's statutory duty to "prevent and detect fraud and abuse" in agency programs. 5 U.S.C. App. 3 § 2(2). The False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." United States v. Neifert-White, 390 U.S. 228, 232-33 (1968) A False Claims Act investigation thus serves purposes that are fully consonant with the Inspector General's duty to uncover and prevent fraud in HUD's programs.

Aiding a False Claims Act investigation is also consistent with the Inspector General Act's additional purpose of improving the effectiveness and efficiency of agency operations. 5 U.S.C. App. 3 § 2(2) A False Claims Act prosecution based on fraud perpetrated on an agency will be a highly effective means of deterring misconduct and promoting "economy, efficiency, and effectiveness" in program administration within the agency. See id. That such efforts may also benefit a False Claim Act investigation conducted by the Department of Justice is of no moment whatsoever. See United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1146 (D.C. Cir. 1987) ("So long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial"); accord United

States v. Educational Development Network Corp., 884 F.2d 737, 741-44 (3d Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

Moreover, the legislative history of the Inspector General Act confirms that Congress intended inspectors general to use their investigatory powers to aid and facilitate the Department of Justice's investigations and prosecution of fraud. In hearings on the Inspector General legislation, a Department of Justice witness stressed the extent to which inspectors general could aid fraud investigations. He specifically pointed out that "[t]he consolidation of the audit and investigation functions will ensure that our present resources are more effectively utilized," and stressed that, with the establishment of an inspector general's office, "United States Attorneys will no longer have to penetrate an organizational maze to secure assistance within the agency, but will be able to address all their enforcement problems to one office." Legislation To Establish Offices Of Inspector General: Hearings On H.R. 8588 Before the Senate Subcomm. on Governmental Efficiency and the District of Columbia, 95th Cong., 2d Sess. 37 (1978) (testimony of John C. Keeney).

Congress accordingly explained that the establishment of independent inspectors general in additional agencies was intended to "strengthen. . . cooperation between the agency and the Department of Justice in investigating and prosecuting fraud cases." S. Rep. No. 1071 at. 7, reprinted in 1978 U.S. Code Cong. & Admin. News at 2682. Thus, as the Court of Appeals for the Third

Circuit has observed, "[a] review of the relevant legislative history indicates that Congress expected cooperation between the IG and the Department of Justice in investigating and prosecuting fraud cases." Educational Development Network Corp., 884 F.2d at 743 n.10.

2.

Hamilton also errs to the extent Hamilton claims that the enactment of statutory provisions empowering the Attorney General to issue a CID in furtherance of an investigation of possible False Claims Act violations supersedes the Inspector General's authority to subpoena information relevant to an investigation of possible fraud, waste, and abuse affecting HUD's programs. The relevant portion of the CID statute states:

The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

31 U.S.C. § 3733(a)(2)(G). Hamilton claims that this provision -- which by its plain terms is applicable only to CIDs that seek oral testimony and has nothing to do with Inspector General Act subpoenas for records -- by prescribing delegation of CID authority to seek oral testimony, reflects a Congressional design to displace the Inspector General's authority to subpoena records for use in

investigations of alleged violations of the False Claims Act. Hamilton's claim, however, finds no support in the text or legislative history of the CID statute.

Congress enacted the Attorney General's CID authority in 1986 as part of a set of amendments to the False Claims Act, see Pub. L. No. 99-562, 100 Stat. 3153 (1986), and in direct response to United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), a decision that curtailed the Department of Justice's ability to use grand jury materials in an investigation of civil fraud. In Sells, government attorneys sought to obtain grand jury materials for use in a civil prosecution under the False Claims Act. Id. 463 U.S. at 421-22. The Supreme Court, however, held that grand jury materials could be released for such purpose only by court order, and only upon a strong showing of particularized need. Id. 463 U.S. at 442-45. Sells thus deprived government attorneys of an important means of investigating civil fraud.

Congress responded to Sells by creating a new discovery tool for use in the investigation of fraud in civil cases: the CID. Congress explained that:

Currently, the Civil Division of the Department [of Justice] relies primarily on two sources for investigation of civil fraud cases: the work of agency Inspectors Generals (IGs) and material developed in criminal investigations, usually through the use of grand jury subpoenas. However, since the Supreme Court's decision in United States v. Sells Engineering Co., interpreting Rule 6(e) of the Rules of Criminal Procedure, the Civil Division has been largely unable to gain access to the information developed before the grand

jury. Therefore, in addition to supplementing the investigative powers of the IGs, [Civil Investigative Demand] authority would permit the Civil Division to gain access to evidence of fraud which might currently be unavailable to it due to the Supreme Court's interpretation of Rule 6(e).

S. Rep. No. 345 at 33, reprinted in 1986 U.S. Code Cong. & Admin. News at 5298 (emphasis added). As this legislative history demonstrates, Congress regarded CID authority as a "supplement" to the investigatory powers previously granted to agency inspectors general. Contrary to Hamilton's claim, nothing in the text or legislative history of this provision indicates any intent to qualify, restrict, or otherwise limit the subpoena power of inspectors general.

Hamilton has also attempted to infer limitations on the Inspector General's subpoena power, arguing that Congress would not have placed limits on the Department of Justice's use/dissemination of information obtained from CIDs if Congress intended for the Attorney General to be able obtain the same information through an Inspector General Act subpoena without limitations. The short answer to this argument is that Congress did not authorize the Attorney General to issue Inspector General Act subpoenas, and, thus, the Attorney General cannot use an Inspector General Act subpoena to avoid limitations that Congress placed on CIDs.

Furthermore, if Congress intended the CID procedures to supersede or otherwise restrict the independent subpoena powers conferred by the Inspector General Act, Congress could have said so

explicitly in the text of the statute. Repeals by implication are strongly disfavored in the law and there is a heavy presumption against inferring limitations on existing statutory authority from congressional silence in a later enacted statute. Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986). Thus, absent some express, textual limitation on the Inspector General's investigatory powers, it must be presumed that the CID statute does not disturb an inspector general's investigatory power to "prevent and detect" fraud, waste, and abuse affecting agency programs.

There are two additional flaws in Hamilton's attempt to infer limitations on the Inspector General's subpoena power. First, the additional procedural protections governing CIDs are commensurate with the Attorney General's vastly greater investigatory and prosecutorial powers, and do not reflect any intent to divest an inspector general's investigatory power in False Claims Act cases. A CID, for example, permits the Attorney General to compel oral testimony or answers to interrogatories -- important and more intrusive investigatory powers that are not vested in agency inspectors general. See 31 U.S.C. § 3733(a)(1)(B) & (D). Moreover, the Attorney General's heightened investigatory powers are conjoined with a prosecutorial power to commence a civil action against the target of the investigation under the False Claims Act, a power held by no other governmental official. See 28 U.S.C. § 516 (reserving conduct of litigation in which the United States is a party to Department of Justice officials). Thus, the fact that

the Congress has imposed additional procedural requirements on CIDs does not, as Hamilton has argued, indicate that Congress intended to displace the Inspector General's subpoena power in False Claims Act cases. It instead reflects Congress's considered judgment that the Attorney General has greater, qualitatively distinct powers that call for a different set of procedural safeguards.

Second, Inspector General Act subpoenas are subject to analogous safeguards that afford comparable, albeit not identical, protection to the target of a False Claims Act investigation. For example, Hamilton has noted that the CID statute imposes various checks on improper disclosure of investigative materials, see 31 U.S.C. § 3733(i), and has implied that no comparable safeguards exist for materials obtained by administrative subpoena. But material obtained by administrative subpoena is subject to institutional and statutory protections against inappropriate public release. An Inspector General has a strong institutional incentive to avoid improper public release of subpoenaed documents, principally because the release of such information could compromise an on-going investigation. Federal statutes regulating governmental records establish further safeguards against inappropriate public disclosure of subpoenaed information. See, e.g., Ortiz v. United States Dep't of Health and Human Serv., 70 F.3d 729, 732 (2d Cir. 1995) (Inspector General's investigative files not subject to disclosure under Freedom of Information Act, 5 U.S.C. § 552), cert. denied, 517 U.S. 1136 (1996); CNA Financial

Corp. v. Donovan, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987) (party may bring "reverse" Freedom of Information Act suit to bar disclosure to third party of confidential business information), cert. denied, 485 U.S. 977 (1988); Covert v. Herrington, 667 F. Supp. 730, 735-40 (E.D. Wash. 1987) (Privacy Act of 1974, 5 U.S.C. § 552a, barred Inspector General's disclosure of personally identifiable information), aff'd 876 F.2d 751 (9th Cir. 1989). See also 5 U.S.C. App. 3 § 5(e)(1) (Inspector General Act does not authorize disclosures prohibited by other federal law). Moreover, a court has ample power to issue protective orders to prevent an inspector general from unauthorized use or disclosure of confidential or privileged information contained in subpoenaed documents. Taken together, these powers and duties establish ample protection against improper disclosure of subpoenaed material.

At bottom, nothing in 31 U.S.C. § 3733 suggests any intent to displace the Inspector General's established power to subpoena records that may be relevant to a False Claims Act case. Congress plainly intended CIDs to supplement rather than supersede an Inspector General's investigatory powers, and there is nothing in the legislative history to suggest that Congress was dissatisfied with the established procedural safeguards that already protect recipients of Inspector General Act subpoenas.

III.

Therefore, based on the foregoing, the Inspector General respectfully submits that the District Court's decision to enforce

the administrative subpoenas at issue here should be summarily affirmed.

Wilma A. Lewis
WILMA A. LEWIS
United States Attorney

R. Craig Lawrence
R. CRAIG LAWRENCE
Assistant United States Attorney

Daniel F. Van Horn
DANIEL F. VAN HORN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of April, 1999, Appellee's Motion for Summary Affirmance was served by mailing a copy thereof, first-class postage prepaid, to the following counsel:

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her capacity as
Inspector General, U.S. Department of
Housing and Urban Development,

Petitioner,

v.

THE HAMILTON SECURITIES GROUP, INC.
and HAMILTON SECURITIES ADVISORY
SERVICES, INC.,

Respondents.

Misc. No. 98-92(SS)

FILED

DEC 8 1998

NANCY MAYER-WASHINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Petitioner having sought enforcement of certain Office of Inspector General (OIG) subpoenas, and Respondents having made various claims concerning the disposition of electronically stored data and paper records now in the custody of the Special Masters and with respect to the enforcement of the subpoenas; and

Upon consideration of the briefs filed by Petitioner and Respondents, the oral arguments of the parties, and upon consideration of the Special Masters' recommendations, it is this 18th day of December, 1998, hereby

(2)

1.6

CONCERNING ELECTRONICALLY STORED DATA

1. ORDERED AS TO THE "SOLOMON T2" COMPUTER

That the Federal Bureau of Investigation shall, within ten days of the date of this Order or within such other time as the Special Masters shall determine, create two mirror image electronic copies of the data in the "Solomon T2" removable hard drive contained within item 209 in the Special Masters' inventory, which shall be provided to the F.B.I. by the Special Masters. The F.B.I. shall not review (nor allow anyone else to review) or retain copies of the data but shall return the original hard drive and the two electronic copies to the Special Masters; and

That the Special Masters shall secure and safeguard one of the mirror images of the Solomon hard drive, which shall not be provided to any other person or used for any purpose pending further order of the Court; and

That within five business days of the entry of this Order, Respondents shall provide the Special Masters with any and all passwords or other information required to access the data on the "Solomon T2" removable hard drive, or provide a sworn statement from a knowledgeable person explaining why said passwords or other information cannot be produced; and

That the Special Masters shall cause to be made three paper copies of the data in the "Solomon T2" hard drive from the other electronic copy of the hard drive made by the F.B.I. The Special Masters shall retain two paper copies and provide one paper copy to Respondents, who shall, within ten business days of delivery or within such other time as the Special Masters

determine, designate specific documents which Respondents claim should not be provided to the Petitioner on the basis of a recognized privilege or on the grounds that they are non-responsive to the OIG subpoenas. With respect to items deemed privileged, at the time they submit such records to the Special Masters, Respondents shall provide both the Special Masters and counsel for Petitioner with an itemized privileged list, identifying the records claimed to be privileged and asserting the particular privilege(s) claimed with sufficient particularity to permit a judicial resolution of the claims. With respect to records in the "Solomon T2" hard drive claimed to be non-responsive to the OIG subpoenas, Respondents shall state the reasons the records are deemed non-responsive. Respondents' statement of reasons as to the non-responsiveness of the "Solomon T2" records shall be provided by Respondents to Petitioner. Respondents' failure to designate records and identify privileges within the period specified shall be deemed a waiver of any and all applicable privileges or claims of non-responsiveness; and

The Special Masters shall forthwith make available to Petitioners such documents for which no response has been received or no claim of privilege has been asserted; and

That the Special Masters shall, after allowing Petitioner ten business days to comment on Respondents' affirmatively asserted "claims", report to the parties the Special Masters' determinations of the legitimacy of Respondents' reasons for denying the Petitioner access to information, and the basis for such determinations. If either party disagrees with the Special Masters' determinations, it shall have ten business days to present such issues to the Court. To the extent that Respondents do not present issues to the Court within ten business days of the

Special Masters' determinations, the Special Masters shall make available to Petitioner a copy of all documents for which the Special Masters have determined there is no basis for withholding from Petitioner; and

That after the F.B.I. has copied the data on the "Solomon T2" hard drive the Special Masters shall retain the computer identified as item 209 in the Special Masters' inventory and the original hard drive for such period as the Court may direct by the "noticed" recommendation of the Special Masters; and

That the Special Masters may engage the services of an expert to assist in extracting, printing out, and interpreting the data contained in the "Solomon T2" hard drive. Petitioner shall reimburse the Special Masters for all fees and costs in connection with the expert. The Special Masters shall consult with the government concerning the anticipated costs and scope of the expert's engagement prior to entering into it; and it is

2. ORDERED AS TO COMPUTERS AND HARD DRIVES WHICH HAVE NOT BEEN COPIED BY THE F.B.I.

That if Respondents wish to obtain the return of computers and independent hard drives in the Special Masters' possession or which may come to be in the Special Masters' possession and which have not been copied by the FBI, they shall provide the Special Masters with a copy, certified to be exact, of the information and records contained therein, provided that if Petitioner wishes to have a copy made of any such computer or independent hard-drive at its own expense,

it shall notify the Special Masters of the particular items it wants to have copied and the proposed method of copying, which copying shall proceed under the Special Masters' supervision; and

That after electronic copies of such computers or independent hard drives have been made, the Special Masters shall return the original computers and hard drives that have been copied to Respondents; and

That any review of such copied electronic materials contemplated by this Order shall be conducted only if and when requested by Petitioner, and shall be done in accordance with the procedures set forth in Section 3 below for other electronic records; and

That within five business days of a request by the Special Masters, Respondents shall provide the Special Masters with any and all passwords or other information required to access the data on such computers or independent hard drives, or shall provide a sworn statement from a knowledgeable person explaining why the passwords or other information cannot be produced; and it is

3. ORDERED AS TO ALL OTHER ELECTRONIC MEDIA

That within five days of the entry of this Order, Respondents shall deliver to the Special Masters the backup tape for June 16-17, 1996 (referred to in the September 27, 1996, letter from Respondents' former attorney, Steven Rosenthal, and in the September 17, 1996, memorandum

from Hamilton's former employee, Kevin McMahan), or shall provide a sworn statement from a knowledgeable person explaining why the backup tape cannot be produced; and

That as to all electronically stored data on computer tapes or disks or other media now in the possession of the Special Masters or which shall come to be in the possession of the Special Masters, other than that described in Section 1 above, Petitioner shall designate to the Special Masters which tapes or disks or other media it wishes Respondents to review for responsive information. The Special Masters, pursuant to such schedule as the Special Masters may designate, shall make available the tapes, disks, or other media so designated to Petitioner or its designee, who shall cause to be made at its expense and under the Special Masters' supervision two electronic copies of the data stored on each tape, disk, or other media, which it shall certify to be exact and which shall be reflected on such media and in such format as is acceptable to the Special Masters. Petitioner or its designee shall not review or alter the information on said tapes or disks or other media and shall provide the original tape, disk, or other media along with both electronic copies to the Special Masters; and

That the Special Masters shall retain the original and one electronic copy and provide one electronic copy to Respondents, who shall, within five business days or such other time as the Special Masters shall determine, review the information, determine which records are responsive to the subpoenas, designate any records claimed to be privileged, and provide the Special Masters with a paper copy or an electronic copy employing such media and format as deemed acceptable by the Special Masters of the responsive records including records claimed to be responsive but

privileged, along with a privilege list, according to the procedures set forth in Section 1 above;
and

That the Special Masters shall forthwith make available to Petitioner such electronic media and documents deemed by Respondent to be responsive and for which no claim of privilege has been made; and

That the Special Masters shall, after allowing Petitioner an opportunity to comment on Respondents' privilege claims, report to the parties their determinations of the legitimacy of Respondents' privilege claims, and the basis for such determinations. If either party disagrees with the Special Masters' determinations, it shall have ten business days to present such issues to the Court. To the extent that Respondents do not present issues to the Court within ten business days of the Special Masters' determinations, such failure shall be deemed a waiver of any and all applicable privileges, and the Special Masters shall make available to Petitioner all electronic media and paper copies of documents for which the Special Masters have determined there is no applicable privilege justifying withholding from Petitioner; and

That within five business days of a request by the Special Masters, Respondents shall provide the Special Masters with any and all passwords or other information required to assess the data on such electronic media, or provide a sworn statement from a knowledgeable person explaining why such passwords or other information cannot be provided; and

That upon request of Petitioner, the Special Masters shall review the electronic media and, through a sampling technique, verify that the records that have not been produced are truly non-responsive to the subpoenas; and

CONCERNING PAPER RECORDS

4. **ORDERED** that within ten business days of this Order, or, in the case of additional paper records which may come into the possession of the Special Masters, the Special Masters' receipt of additional documents, or such other time as the Special Masters shall determine, Respondents shall designate specific paper records not previously provided to Petitioner which Respondents claim should not be provided to the Petitioner on the basis of a recognized privilege or on the grounds that they are non-responsive to the OIG subpoenas; and

The Special Masters shall forthwith make available to Petitioner such documents for which no response has been received or no claim of privilege has been asserted; and

With respect to items claimed by Respondents to be privileged, Respondents shall provide both the Special Masters and counsel for Petitioner with an itemized privileged list, specifically identifying the records claimed to be privileged and asserting the particular privilege(s) claimed with sufficient particularity to permit a judicial resolution of the claims. Respondents' failure to designate records and identify privileges within the period specified shall be deemed a waiver of any and all applicable privileges; and

The Special Masters shall, after allowing Petitioner ten business days to comment on Respondents' privilege claims, report to the parties the Special Masters' determinations of the legitimacy of Respondents' privilege claims, and the basis for such determinations. If either party disagrees with the Special Masters' determinations, it shall have ten business days to present such issues to the Court. To the extent that Respondents do not present issues to the Court within ten business days of the Special Masters' determinations, the Special Masters shall make available to Petitioner all documents for which the Special Masters have determined there is no basis for withholding from Petitioner; and it is

CONFIDENTIALITY

5. This Order is predicated upon Petitioner's representation to this Court through counsel that she is cognizant of and understands her and her office's obligations with respect to the confidentiality of investigations conducted by the OIG, and that she and her office have complied with and will continue to comply with these obligations. And, from this day forward the OIG and her office without the prior approval of the Special Master or the Court shall not allow any non-governmental personnel to keep or copy any, or any portion, of Respondents' documents, except as may be necessary in the course of legitimate investigatory functions, provided that Petitioner shall keep a record of each and every instance in which non-governmental personnel have been allowed to keep or copy any, or any portion, of Respondents' documents and Petitioner shall provide the Special Masters with a contemporaneous copy of the record; and it is

6. **ORDERED** that Petitioner and Respondents shall pay in equal shares the fees and expenses of the Special Masters and all those working under the Special Masters' authority for reviewing Respondents' assertions of privilege and "non-responsiveness". Petitioner shall pay for all other work performed by the Special Masters pursuant to this Order; and it is further

7. **ORDERED** that the Court's Order of April 29, 1998, is hereby vacated; and

8. **IT IS FURTHER ORDERED** that the Special Masters shall have full authority to ensure compliance with this Order.

SO ORDERED.


UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official
capacity as Inspector General,
U.S. Department of Housing
and Urban Development,

Petitioner,

v.

THE HAMILTON SECURITIES
GROUP, INC., and HAMILTON
SECURITIES ADVISORY
SERVICES, INC.,

Respondents.

Misc. No. 98-92 (SS)

FILED

JAN - 5 1999

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

UPON CONSIDERATION of Respondents' Motion to Quash Subpoena or, in the Alternative, Motion for a Protective Order, Petitioner's Motion to Strike Respondents' Motion, the memoranda submitted in support of and in opposition to those motions, applicable legal authorities, and the entire record herein, it is

ORDERED, that Petitioner's Motion to Strike Respondents' Motion to Quash Subpoena or, in the Alternative, Motion for a Protective Order should be, and hereby is, GRANTED; and it is

FURTHER ORDERED, that Respondents' Motion to Quash Subpoena or, in the Alternative, Motion for a Protective Order should be, and hereby, is stricken from the record in this case on the ground that said motion is redundant, the Court having previously

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considered and found to be without merit the argument Respondents seek to raise therein.

IT IS SO ORDERED on this 7 day of July, 1999.


UNITED STATES DISTRICT JUDGE

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