

sought by Plaintiffs with regard to Counts 1, 2, 5, 6, 7 and 8 of their Complaint. Defendant Susan M. Gaffney, the Inspector General, is expected to file a separate brief.

FACTS

1. The Contracts

Plaintiffs The Hamilton Securities Group, Inc. ("HSG") and Hamilton Securities Advisory Services, Inc. ("HSAS") (collectively, "Hamilton") were contractors under two contracts with HUD. HSG began as contractor under Contract No. DU100C000018161, effective September 30, 1993 ("Contract 18161"), but the contractor's name later was changed to HSAS, which assumed the liabilities and responsibilities under that Contract. See Hancock Declaration, pars. 2-3 and Exhibit 1.

HSAS also was contractor under Contract No. DU100C000018505, effective January 24, 1996 ("Contract 18505").^{2/} A copy of Contract 18505 is attached as Exhibit A to the Affidavit of C. Austin Fitts, filed by Plaintiffs along with their TRO Brief.

Among the tasks that Hamilton was to perform under Contract 18161 and Contract 18505 was the handling of HUD's auction sales of groups of HUD-held mortgages. The mortgages previously were involved in mortgage insurance or coinsurance programs operated

^{2/} Originally, Plaintiff HSG was the contractor under Contract 18161. In or about late 1994, however, Plaintiff HSAS assumed all of the liabilities and agreed to perform all of the obligations under Contract 18161. See Hancock Declaration, par. 3. Plaintiff HSAS also is the contractor under Contract 18505. Thus, HSAS is liable for any claims by the Government under both contracts.

for HUD by its component organization, the Federal Housing Administration ("FHA"). HUD's goal in conducting the mortgage sales was to dispose of such mortgages in such a way as to "maximize" the proceeds that it would receive from those sales. See Contract 18161, Task Order #7; Contract 18505, Task Order #1, "Background" section. Hamilton was to perform various tasks to accomplish that objective.^{3/} Id.

2. The Mortgage Sales

At issue is Hamilton's performance in connection with two particular sales: (1) the September, 1995, sale of a group of mortgages known as "Non-Performing Mortgages West of Mississippi" or "WOM," under Contract 18161 (see Exhibit 1 to Hancock Declaration); and (2) the August, 1996, sale pertaining to

^{3/} Under Contract 18161, among other things, Hamilton was to "recommend alternative methods for structuring the mortgage sale and pricing options to maximize loan sale proceeds to HUD," "design the auction process," "manage and implement all phases of the bidding and auction process," "conduct all phases of the auction with responsibility for the necessary personnel, equipment, services and supplies," and to submit various reports. See Contract 18161 (Exhibit 1 to Hancock Declaration), Task Order # 7.

Under Contract 18505, Task Order #1, Hamilton's tasks included having to "[p]rovide and run an optimization model" (see Contract 18505 (Exhibit A to the Affidavit of C. Austin Fitts), Task Order #1, § 3.2); perform other tasks "to further the goals of providing bidders with adequate information and maximizing sales proceeds" (§ 4.1); "review plans for receiving bids . . . and delivering conforming bids to the optimization model" (§ 6.1); "run the optimization model in accordance with the design approved by HUD; deliver results" (§ 6.2); and to meet with HUD "and offer insights regarding consistency with stated objectives" (§ 6.3), and to provide various reports.

certain multifamily mortgages, known as "MF North Central," or "NOC," under Contract 18505 (see Exhibit A (final page) to Affidavit of C. Austin Fitts, filed by Plaintiffs with their TRO Brief.)

3. Hamilton's Defective Performance

Hamilton wrote and submitted to HUD two documents admitting that Hamilton committed serious errors in handling the WOM and NOC sales, and that this resulted in HUD's receiving (according to Hamilton's calculations) \$3,883,551 less in proceeds than it would have received otherwise.^{4/} The two documents are a December 4, 1996 "Draft" Memorandum from Hamilton to Kathy Rock, FHA Comptroller (the "Hamilton 12/4/96 Memo"), a copy of which is attached to the Hancock Declaration as Exhibit 4, and a December 20, 1996 report from Hamilton to HUD (the "Hamilton 12/20/96 Report"), a copy of which is attached to the Hancock Declaration as Exhibit 5.

With regard to the WOM and NOC sales, Hamilton was to have bids submitted by prospective purchasers analyzed according to an "optimization model" (*i.e.*, a computer model designed to analyze bids according to various criteria). The results of that analysis would be used to select winning bidders. If the optimization model were run correctly, the results would show which bids met the criteria for the auction, and would result in the maximum sales proceeds for HUD. See Hamilton 12/4/96 Memo

^{4/} The stated figure is subject to change once HUD performs an independent analysis.

(p. 1) and Hamilton 12/20/96 Memo (p. 1). According to Hamilton, "optimization has heightened competition and substantially increased proceeds from the loan sales above what they otherwise would have been." See Hamilton 12/4/96 Memo, p. 1.

Hamilton engaged Lucent/Bell Labs ("Lucent") to run the computerized optimization model, and Hamilton was to instruct Lucent on the particular data to input so as to run the model correctly. Hamilton has admitted that it gave erroneous information to Lucent, causing Lucent to run the optimization model incorrectly. See Hamilton 12/4/96 Memo, pp. 1-3; Hamilton 12/20/96 Report, p. 2 (par. 2, 4) and p. 4 (par. 18). In particular, Hamilton's erroneous instructions caused the computer run to select (incorrectly) bidders whose bids did not meet certain requirements, and whose bids offered HUD over \$3.8 million less than the bids that should have been selected. Id.

Hamilton calculated that, as a result of its having given erroneous instructions to Lucent regarding how to run the optimization model (i.e., errors regarding one of the criteria to use in the model), which in turn caused incorrect bids to be selected, HUD received (according to Hamilton) \$3,888,551.00 less in proceeds than if correct instructions had been used. See Hamilton 12/20/96 Report, p. 1. According to Hamilton, this figure consists of \$2,372,307.00 with regard to the WOM sale, and \$1,511,244.00 with regard to the NOC sale. Id.

Hamilton has admitted that, prior to award of the winning

bids on the WOM sale on September 22, 1995, it was aware that it had given erroneous instructions to Lucent for the WOM sale. See Hamilton 12/20/96 Report, p. 3 (par. 6). Yet, Hamilton did not disclose this fact to HUD before HUD approved the results and before the bidders were notified (id., p. 3, par. 10). Further, Hamilton did not ensure that its error was avoided in the NOC sale which took place almost a year later, in August, 1996 (id., pp. 4-5, pars. 17-18). In fact, Hamilton did not notify HUD of the problem until after HUD had approved the results of NOC sale and the bidders were notified of the results (id., p.5, pars. 21-22).

Plaintiffs allege that, in September and October, 1997, they submitted two invoices to HUD for about \$1.5 million that they claimed was due under Contract 18505. See TRO Brief, pp. 17-18. On October 17, 1997, HUD wrote a letter (see Exhibit L to the Affidavit of C. Austin Fitts) to Hamilton stating that, because of Hamilton's liability resulting from its admitted mishandling of the sales, HUD was withholding payment until that debt was satisfied.

4. Plaintiffs' Filing of Suit

On December 10, 1997, Hamilton submitted a claim to the HUD contracting officer, under the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 et seq. Although the CDA (41 U.S.C. § 605(c)(2)) gives HUD sixty days to respond, Plaintiffs filed this suit on or about January 8, 1998, along with their motion seeking a

temporary restraining order and preliminary injunction.^{5/}

Plaintiffs seek not only an injunction requiring HUD to pay the \$1.5 million that Plaintiffs claim under Contract 18505 (under Counts 1 and 2 of the Complaint), but they also seek a myriad of other injunctive relief.

In Counts 5 and 6 of the Complaint, Hamilton seeks to enjoin allegedly erroneous and misleading leaks of information to the media concerning an investigation being conducted by the HUD Office of Inspector General ("IG") into certain aspects of Hamilton's relationship with HUD. The relief sought on these Counts is an injunction precluding the Defendants from making any statements to the press or public concerning its dealings with Hamilton until all investigations, and all litigation, involving Hamilton are concluded.^{5/}

In Count 7 of the Complaint, Hamilton alleges that it has been de facto debarred from entering into further contracts with HUD. This claim is based on the termination for the convenience of the government of Contract 18505 and upon conclusory allegations that unnamed HUD officials have engaged in unspecified conduct aimed at precluding Hamilton from obtaining future contracts with HUD. These actions, it is alleged, violate due process, because Hamilton has not been given notice and an

^{5/} Following hearings, the Court denied Plaintiffs' Motion for a Temporary Restraining Order on January 14, 1998.

^{5/} Complaint, Prayer for Relief, ¶ J.

opportunity to be heard regarding the basis for the alleged constructive debarment. No specific injunctive relief is sought with respect to Count 7. Hamilton does not, for example, ask for reinstatement of Contract 18505, nor does it seek an order directing HUD to engage in any due process procedures. Instead, Hamilton seeks generally to enjoin actions taken without authority or with improper political motives.²⁷

In Count 8, the Complaint alleges that HUD has engaged in various actions intended to drive Hamilton out of business. The alleged actions include refusing to pay invoices for work performed under Contract 18505, issuing investigative subpoenas to Hamilton, and disseminating information concerning the IG investigation. The relief sought under Count 8 appears to overlap the relief sought under other counts of the Complaint, e.g., order HUD to pay Hamilton's invoices, enjoin enforcement of IG subpoenas.

ARGUMENT

I. Standards for Issuance of a Preliminary Injunction

To obtain a preliminary injunction, Plaintiffs have the burden of establishing that (1) they have a substantial likelihood of succeeding on the merits; (2) they will suffer irreparable harm if the injunction is not issued; (3) other interested parties will not suffer substantial harm if the

²⁷ Complaint, Prayer for Relief, ¶ I.

injunction is granted; and (4) the public interest will be furthered by the injunction. Sea Containers, Ltd. v. Stena Ab, 890 F.2d 1205, 1208 (D.C. Cir. 1989).

Additionally, "a preliminary injunction should not work to give a party essentially the full relief he seeks on the merits. Thus, especially in a suit for money, a preliminary injunction generally should not require that one party turn over money to another." [citations omitted]. Dorfmann v. Boozer, 414 F.2d 1168, 1173 n. 13 (D.C. Cir. 1969).; see also Schlosser v. Commonwealth Edison Co., 250 F.2d 478, 480 (7th Cir. 1958) (where defendant disputes obligation to pay, it is improper to issue preliminary injunction requiring payment).

II. Preliminary Injunctive Relief Should Be Denied With Respect to Counts 1 and 2 of the Complaint

A. Plaintiffs' Claims in Counts 1 and 2 Do Not Have a Sufficient Chance of Succeeding on the Merits

For a variety of alternative reasons, Plaintiffs have failed to show that their claims in Counts 1 and 2 have a sufficient chance of succeeding on the merits.

1. This Court Has No Jurisdiction Over the Claim In Count 1

The HUD Defendants have filed herewith their Motion to Dismiss Counts 1 and 2, and a supporting Statement of Points and Authorities, which show that this Court has no jurisdiction over Count 1, and we incorporate the arguments and authorities stated in those papers. Because the Court has no jurisdiction over Count 1, that count has no chance of succeeding on the merits in

this Court.

Briefly, this Court has no jurisdiction over Count 1 (which seeks relief under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA")) because the APA does not apply to contract claims covered by the Tucker Act, 28 U.S.C. §§ 1346(a) and 1491, and the CDA. Under those statutes, the district courts have no jurisdiction over such claims; disputes pertaining to such contracts can be litigated only before agency boards of contract appeals or the United States Court of Federal Claims. See Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986); Megapulse, Inc. v. Lewis, 672 F.2d 959, 966-68 (D.C. Cir. 1982).

Plaintiffs' effort to disguise Count 1 as a claim for violation of government contracting regulations (the Federal Acquisition Regulations, 48 C.F.R. § 1.000 et seq.) is to no avail; under well-established D.C. Circuit precedent, the claim asserted in Count 1 is "at its essence" a contract claim subject to the jurisdictional limitations set forth in the Tucker Act and the Contract Disputes Act. Megapulse, Inc., 672 F.2d at 968; see also Ingersoll-Rand Co. v. United States, 780 F.2d 74, 77 (D.C. Cir. 1985); Spectrum Leasing Corp. v. United States, 764 F.2d 891, 893 (D.C. Cir. 1985).

Alternatively, this Court has no jurisdiction over Plaintiffs' supposed APA claims because the APA applies only to "final" agency action, and there has been no final agency action with regard to Plaintiffs' claim for payment. Plaintiff filed a claim with the HUD contracting officer, under the Contract

Disputes Act, on December 10, 1997. Plaintiffs also requested a "deferment" of collection efforts. The contracting officer has not issued final decisions. Indeed, Plaintiffs' filing of suit has precluded the issuance of final decisions because once suit is filed, the contracting officer loses jurisdiction to issue decisions on the claims in litigation. See Sharman Co. v. United States, 2 F.3d 1564, 1571 (Fed. Cir. 1993).

Nor can Plaintiffs avoid the finality requirement by arguing that the contracting officer did not issue a decision fast enough. The CDA's comprehensive dispute resolution system sufficiently addresses such concerns, for it indicates the time (sixty days) for the agency to take action (either a decision or a statement of when a decision will be made), and provides, that if no decision is made within the required time, the claim will be deemed denied and the contractor can proceed with the review process. See 41 U.S.C. § 605(c)(2) and (5).

2. Alternatively, Count 1 Must Fail Because It Fails to Show Final Agency Action and Fails to Show Improper Acts by HUD

Even if this Court had jurisdiction over Count 1, Plaintiffs have failed to make a sufficient showing that Count 1 could succeed on the merits. The only act complained of in Count 1 is HUD's "withholding" of the payment for which Plaintiffs submitted a claim on December 10, 1997. Even if the APA applied, Plaintiffs have failed to show any likelihood that they could establish that such withholding is improper under standards set

forth in the APA.^{9/}

Plaintiffs TRO Brief (p. 30) first attacks HUD's withholding of payment by arguing that it was improper under § 32.610 of the Federal Acquisition Regulations (48 C.F.R.). Plaintiffs' lengthy allegations about § 32.610 are a straw-man argument. Contrary to Plaintiffs' allegations (TRO Brief, p. 18), the HUD contracting officer did not rely upon § 32.610 as authority for withholding payment. That regulation applies merely to HUD's demands for payment, not withholding funds.^{2/}

As HUD made clear in correspondence to Hamilton,^{10/} in addition to whatever right might exist under Federal Acquisition Regulations, HUD has a common law right to withhold payment. Clear precedent upholds the government's right to withhold funds while it goes through the determination and review process to

^{9/} In appropriate cases (which, for reasons discussed above, this is not), the APA provides for remedies for agency action that is "unlawfully withheld or unreasonably delayed," or found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law"; "contrary to constitutional right . . ."; "in excess of statutory jurisdiction, authority, . . ."; or "without observance of procedure required by law."

^{2/} Plaintiffs' TRO Brief (p. 18) mischaracterizes HUD's reference to a "voluntary repayment" in its letter dated October 17, 1997 (Exhibit L to the Affidavit of C. Austin Fitts). In that letter, the contracting officer demanded payment (based upon Hamilton's seemingly clear admissions of breach and resulting loss to HUD of a specific amount) and merely stated that, if Hamilton did not respond, HUD would assume that Hamilton would not pay the obligation voluntarily.

^{10/} See the December 10, 1997 letter from HUD Deputy General Counsel Howard Glaser, Exhibit Q to the Affidavit of C. Austin Fitts, filed by Plaintiffs along with their TRO Brief.

determine how much money is owed to it, and whether to effect a final, permanent offset. See Amoco Production Co. v. Fry, 118 F.3d 812, 817-18 (D.C. Cir. 1997) (citing United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); Gratiot v. United States, 40 U.S. 336, 370 (1841); Cecile Industries v. Cheney, 995 F.2d 1052, 1056 (Fed. Cir. 1993) (recognizing government's common law right of setoff, even though the Debt Collection Act supplies a different and separate basis to setoff).

In Amoco Production Co., 118 F.3d at 817-18, plaintiff argued that the government could not withhold funds (which it had been withholding for four years) without following the formal administrative setoff procedures contained in the Debt Collection Act, 31 U.S.C. § 3701 et seq. The D.C. Circuit rejected that claim, holding that the government could withhold funds under the common law while the debts involved were finally determined, after which it could determine whether to apply the funds as a final offset. 118 F.3d at 818. The court held that withholding funds before a final determination of the payee's indebtedness is not the same as a final setoff, and in the meantime, the government need not comply with procedural requirements that might apply to a final setoff.^{11/} Id.

^{11/} Although the Amoco Production Co. court held that the payee was entitled to due process protections, that offers no help to Plaintiffs' claims in the present case. As discussed in the HUD Defendants' Memorandum in Support of their Motion to Dismiss, because Plaintiffs' claims for payment are within the scope of the Tucker Act and Contracts Disputes Act, the procedures of those statutes furnish ample due process protections, and thus Plaintiffs cannot complain of any denial of

HUD is thus well within its rights in withholding payment (which it has done only since October, 1997--far less than the four years found to be acceptable in Amoco Production Co.), pending a final determination as to the debts Plaintiffs owe. Because no final setoff has been effected, any procedures (in the Federal Acquisition Regulations or elsewhere) that might be applicable to effecting final setoff or deferment of collection efforts do not apply.

Plaintiffs also must fail in arguing (TRO Brief, p. 30) that HUD took too long to decide Plaintiffs' December 10, 1997 claim. Plaintiffs filed suit less than 30 days later; in light of the complexity of the issues involved, HUD's failure to have issued a final decision by then is not unreasonable. Moreover, the Contract Disputes Act and the contract gave HUD sixty days to respond, and provide that, if the HUD contracting officer failed to respond within sixty days, the claim would be deemed denied and the contractor could seek de novo review in the Court of Federal Claims or before a Board of Contract Appeals. 41 U.S.C. § 605(c)(2) and (5). Plaintiffs cite no authority that required HUD to issue a decision sooner. Moreover, as noted above, Plaintiffs filing of this suit has only served to prevent decisions by the contracting officer.

Plaintiffs cannot successfully challenge HUD's withholding by disputing whether they eventually will be liable to HUD. The two documents prepared by Plaintiffs themselves--the Hamilton

due process.

12/4/96 Memo and the Hamilton 12/20/96 Report--contain potent admissions that appear to indicate breaches for which they are liable. By Plaintiffs own calculation, their conduct caused a loss of over \$3.8 million to HUD (although, upon later analysis, the Government might determine that the loss is even greater).

Plaintiffs attempt to avoid liability by arguing that much of their work was good. See TRO Brief, p. 16. But even if true, that offers no defense or escape from liability for particular breaches that Plaintiffs seem to have admitted.

**3. Count 2 Fails to State a Claim
Upon Which Relief Can Be Granted**

We incorporate by reference the discussion in the HUD Defendants' Motion to Dismiss, and supporting memorandum, showing that Count 2 of the Complaint, which alleges violation of the due process clause of the Fifth Amendment, should be dismissed for failure to state a claim upon which relief can be granted. To summarize that argument, because the matters about which Count 2 complains are disputes that are subject to resolution under the Tucker Act and the CDA (see above), and because those statutes provide ample due process (notice and an opportunity to be heard de novo by the agency board of contract appeals or the U.S. Court of Federal Claims, with appeal to the U.S. Court of Appeals for the Federal Circuit), Plaintiffs have failed to show a denial of due process. The fact that Plaintiffs have not taken advantage of the procedures available is insufficient to show a denial of due process. See Rockwell Int'l Corp. v. United States, 723 F. Supp. 176, 180 (D.D.C. 1989) (motion for preliminary injunction

denied, because plaintiff could obtain sufficient due process by employing procedures of CDA).

**B. Plaintiffs Have Failed to Show That
They Will Suffer Irreparable Harm
From HUD's Withholding of Funds**

While Plaintiffs spin a tale of financial travails, that is insufficient to warrant issuing a mandatory preliminary injunction that would work an irreparable harm upon HUD for the reasons discussed below. See Dorfmann v. Boozer, 414 F.2d at 1173 ("It . . . does not seem consistent with equitable principles to allow the financial hardship of one party to justify so greatly shifting the risk to the other").

Moreover, Plaintiffs' allegations fail to establish that the injunction they seek will prevent financial collapse. It is not sufficient that the injunction will provide an advantage to them; they must show that denial of the injunction will itself cause irreparable harm. If all of Plaintiffs' allegations about their financial condition are true, their financial failure seems imminent regardless of whether they obtain the injunction.

Plaintiffs allege that, because HUD Contract 18505 was their exclusive source of income, and that contract was terminated for convenience, their income is virtually zero. See Complaint, par. 96. Plaintiffs allege that they already have or shortly will incur debts and expenses of over \$1.8 million. See Complaint, par. 97. Further, although they offer precious little detail, Plaintiffs allege that development of their planned new "non-HUD" business would require start up funds of about \$2 million. See

Complaint, par. 73.

If, arguendo, the above allegations are true, they indicate that payment of the \$1.5 million (and any other sums claimed by Plaintiffs^{12/}) would not even cover the debts and expenses Plaintiffs face, let alone the ongoing costs of running their businesses or developing new clients. Thus, paying them the withheld funds would not prevent them from going out of business, but rather would (at most) only temporarily delay that event.

The cases cited by Plaintiffs (see TRO Brief, pp. 26-27) are inapposite; Plaintiffs merely quote or refer to dicta or comments pertaining to facts wholly unlike those of this case. Plaintiffs cite no case in which the government withheld funds from a contractor for application to a debt arising out of contractual duties to the government, which caused serious loss to the government.^{13/}

^{12/} Plaintiffs also complain (see Complaint, par. 79) that, under some other unspecified contract, they believe they would be owed money, subject to a cost audit that needs to be completed. Plaintiffs' "estimate[]" that they would be owed "approximately" \$500,000. First, absent much more specificity, injunctive relief is inappropriate. Second, this also appears to be only a breach of contract allegation or claim, which, like the rest of Plaintiffs' contract claims, must be resolved under the Tucker Act and CDA.

^{13/} See, e.g., Foundation on Economic Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1985) (injunction against an experiment that would release genetically engineered material); Esch v. Yeutter, 876 F.2d 976, 985 (D.C. Cir. 1989) (injunction requiring a redetermination of plaintiffs' eligibility to participate in a crop support program; no funds were alleged to be owed by the government); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) (court merely upheld a stay pending appeal of an injunction; injunction actually was in favor of the government, notwithstanding

Plaintiffs place much emphasis on Bailey v. Sec'y of Labor, 810 F. Supp. 258 (D. Alaska 1992), but the case is inapposite. In Bailey, the Secretary of Labor had halted payments to a contractor because the contractor allegedly had failed to pay proper amounts to employees. The court noted that the Secretary took such action because the contractor had not paid employees enough. Yet, if payment were withheld, the employees would not be paid at all. 810 F. Supp. at 259. The court stated, "the Secretary's decision causes more harm than it avoids." Id. That analysis does not apply here; HUD withheld payment so as to have the funds available for collection by HUD, not to provide wages to Plaintiffs' employees.

Finally, Plaintiffs admit that HUD informed them in April, 1997, that Contract 18505 would be terminated for convenience. See Complaint, par. 71. Thus, Plaintiffs have known for more than eight months that the end was in sight for work under their existing contract. There is no emergency that would justify the extraordinary injunctive relief they seek.

C. The Government Will Suffer Substantial

plaintiffs's claim that it would go out of business; defendant did not lose anything by the stay); DeVito v. Rhode Island Solid Waste Mgt. Corp., 770 F. Supp. 775,777 (D.R.I. 1991) (court enjoined enforcement of a regulation; case did not involve competing claims to funds involved in a contractual dispute, nor did it involve issues of common law right to withhold funds), aff'd., 947 F.2d 1004 (1st Cir. 1991); Jacksonville Port Authority v. Adams, 556 F.2d 52, 58 (D.D.C. 1977) (injunction involving airport development funds owing under a statutory formula; the injunction merely required a grant to be held open (without actual payments yet), subject to later modification; a decision adverse to the government on the merits had been rendered already in related litigation.

Harm If Denied Its Right to Withhold Funds

By withholding the \$1.5 million, HUD, in effect, holds security in that amount towards satisfaction of its prospective claim against Hamilton. If the preliminary injunction were granted, HUD would lose that security. If, as Plaintiffs' papers suggest, Plaintiffs are insolvent and about to go into bankruptcy, HUD's loss of security for its claim would reduce to almost zero the chances of recovering even \$1.5 million towards satisfaction of HUD's claim.

Plaintiffs argue (TRO Brief, p. 19) that HUD is adequately protected by the existence of Plaintiffs' errors and omissions insurance policy, but that policy offers no meaningful security to HUD. First, HUD is not a named insured and apparently cannot even file a claim under the policy; only Hamilton may do so, and the proceeds would flow to Hamilton, not HUD. Particularly if, as Plaintiffs predict, they are about to go into bankruptcy, any recoveries on the insurance policy would be shared among creditors, and HUD could hardly count on recovering the same amount of money that it would have to give up if the injunction were issued.

Second, the policy is subject to numerous conditions, limitations and exclusions, most of which are out of HUD's control. The insurance company refused to commit that it would pay a claim based upon Hamilton's conduct regarding the two sales, and it stated that any indemnification of Hamilton was subject to, among other things, "any applicable conditions and

limitations" of the policy. See letter dated January 13, 1998 from Lexington Insurance Company, attached as Exhibit A to the letter dated January 14, 1998 from Plaintiffs' counsel to the Court. Only time will tell whether the insurer will concede that it is required to pay on the claim.

In the telephonic hearing conducted on January 14, 1998 regarding Plaintiffs' Motion for a Temporary Restraining Order, Plaintiffs argued that the insurance company has no legal obligation to do more and that Plaintiffs had no duty to even obtain such insurance in the first place. But even if those arguments are true, they are irrelevant. The relevant point is that the insurance policy simply does not offer HUD security for its claim that is adequate or equivalent to the security that HUD now holds and that Plaintiffs seek to force HUD to surrender.

Third, the insurance policy is subject to a \$10 million limit. Even if the policy applied to HUD's claim, attorneys fees, other litigation costs, and any other claims covered under the policy could use up the available coverage. Thus, the policy offers scant assurance that HUD's claim ever would be paid.

Plaintiffs also must fail in their argument that the insurance coverage is the only recourse legally available to HUD because a provision in Contract 18505 (i.e., language incorporated from 48 C.F.R. § 52.246-25) allegedly limits contractor liability. See Exhibit C to letter dated January 14, 1998 from Plaintiffs' counsel to the Court. First, that provision does not provide Plaintiffs with the absolute immunity

from liability that they suggest. For example, that provision cannot apply where, as in this case, the defects in Plaintiffs' performance were latent and hidden from HUD until long after the damage was done. Further, the provision does not apply where the damage results from the contractor's management's "willful misconduct or lack of good faith." See subpar. (b) within § 52.246-25. As this stage, it would be premature to reach any conclusions about whether those terms apply.

Second, the "Limitation of Liability" provisions of 48 C.F.R. § 52.246-25 pertain only to one of the two sales as to which Plaintiffs misperformed. While that provision is incorporated into Contract 18505, which relates to the NOC sale (which involved \$1,511,244.00 in losses, according to Hamilton), the provision does not appear in Contract 18161. Under the latter contract, Hamilton conducted the WOM sale, which involved \$2,372,307.00 in losses, according to Hamilton. See above. Because that latter contract did not incorporate or otherwise include that Limitation of Liability provision, Plaintiffs cannot rely upon it for losses pertaining to that contract.^{14/} Thus, even if the Limitation of Liability provision precluded liability under Contract 18505, the \$2.3 million loss that is attributable to Contract 18161 itself justifies withholding the \$1.5 million

^{14/} The Limitation of Liability regulation, 48 C.F.R. § 52.246-25, merely provides language to be incorporated in certain contracts. Unlike various other provisions of the Federal Acquisition Regulations, it has no independent force. If it is not actually incorporated, it is not applicable.

that Plaintiffs seek.

**D. The Public Interest Will Be Served
Best by Denying Injunctive Relief**

Under Contract 18505, proceeds from the mortgage sales would "be returned to the Federal Treasury, reducing the Federal deficit." See Contract 18505, p. 5. If Hamilton's reports are correct, then Hamilton's mishandling of mortgage sales resulted in millions of dollars less being returned to the Treasury. HUD's withholding of the \$1.5 million payment helps assure that at least that much is available to cover the losses caused by Hamilton. The public has a substantial interest in reduction of the Federal deficit. That public interest will be harmed directly if the injunctive relief sought by Plaintiffs were granted.

Moreover, the public interest in general is best served if contractors who fail to fulfill their obligations are held financially accountable. If Plaintiffs indeed are about to go out of business, then the withholding of the payment may be the Government's only way to impose financial accountability upon Hamilton.

**III. Preliminary Injunctive Relief Should Be Denied
With Respect To Counts 5 and 6 of the Complaint**

Counts 5 and 6 of the Complaint are predicated upon the alleged leaking of information about the IG investigation to the media.^{15/} Count 5 alleges that such disclosures constitute

^{15/} Most of the allegations in Counts 5 and 6 attribute the leaks to the Office of the HUD Inspector General. Those

arbitrary and capricious action in violation of the Administrative Procedure Act, while Count 6 claims that these same disclosures violate the Privacy Act.

The motion for preliminary injunction as to Counts 5 and 6 should be denied on the ground that Hamilton has no probability of success on the merits of either count. The Defendants' motion to dismiss and supporting memorandum demonstrate that neither Count 5 nor Count 6 states a claim upon which relief can be granted and, therefore, should be dismissed. Accordingly, those arguments need only be briefly summarized here.

The Complaint fails to allege any facts indicating that any particular alleged leak is attributable to any identifiable HUD employee. Furthermore, disclosures of the type alleged by Hamilton would contravene government-wide ethical standards. Such disclosures, would, therefore, constitute the unauthorized acts of individual employees and not the institutional acts of HUD itself. Such ultra vires actions are not regarded as remediable agency action within the meaning of the Administrative Procedure Act. Accordingly, Count 5 is subject to dismissal for failure to state a claim on which relief can be granted under the Administrative Procedure Act.

allegations are being addressed in the separate memorandum of law being submitted on behalf of the HUD Inspector General. Counts 5 and 6 are addressed herein only to the extent that they might be construed to allege improper disclosures by HUD employees other than employees of the Office of Inspector General.

Count 6 is based exclusively upon alleged violations of the Privacy Act. That statute, however, protects persons, not corporations such as the plaintiffs. See, e.g., Committee on Solidarity v. Sessions, 738 F. Supp. 544, 547 (D.D.C. 1990), aff'd on other grounds, 929 F.2d 742 (D.C. Cir. 1991). Accordingly, Count 6 also fails to state a claim on which relief can be granted.

Since neither Count 5 nor Count 6 can withstand a motion to dismiss, there is no probability of Hamilton's success on the merits of the those counts.

Further, in light of government restrictions on disclosures of information by HUD employees, see 5 C.F.R. § 2635.101, as well as HUD regulations governing employee conduct, see 5 C.F.R. part 2635, the alleged "leaks" by anonymous or otherwise unidentified HUD employees about which plaintiffs complain are clearly unauthorized, beyond the scope of any HUD employee's employment duties and therefore ultra vires. As a result, the preliminary relief the Plaintiffs seek will not remedy whatever harm they have allegedly suffered from "leaks"; similarly, the injunctive relief sought likely will not prevent future unauthorized and ultra vires "leaks." Cf. Avco Fin. Corp. v. CFTC, 929 F. Supp. 714, 718 (S.D.N.Y. 1996) (denying preliminary injunction to halt agency investigation of business where an alleged "leak" of information about the investigation had been made by an agency employee - concluding that the agency was not responsible for the

disclosure of information, and that "any harm from the past disclosure will not be stopped by a preliminary injunction").

Therefore, it would be unfair to hold Defendants liable for the actions of any rogue employees. If Plaintiffs do indeed have specific evidence that confidential information about them has been disclosed by a federal employee, that claim can be referred to the appropriate law enforcement authorities for investigation. See 18 U.S.C. § 1905.

Plaintiffs cite two cases, United States v. Hunton & Williams, 952 F. Supp. 843 (D.D.C. 1997) and Adair v. Rose law Firm, 867 F. Supp. 1111 (D.D.C. 1994) as supporting preliminary injunctive relief. See generally, TRO Brief, p. 40. But these cases are inapposite and do not support the granting of preliminary relief to these Plaintiffs.

First, as noted supra, both Hunton & Williams and Adair arose in the context of judicial enforcement of administrative subpoenas issued by the Inspector General's Office of the Resolution Trust Corporation. See Hunton & Williams, 952 F. Supp. at 847; Adair, 867 F. Supp. at 1114. The RTC had separately retained both Hunton & Williams and the Rose Law Firm to provide legal services to the RTC in connection with various failed savings and loan institutions. At the time of the cases, the RTC was conducting an audit of the services provided by Hunton & Williams and an investigation into whether the Rose Law Firm had failed to investigate and report any conflicts of

interest before the firm began work for the RTC. The RTC subpoenas sought records identifying the firms' clients, as well as attorney billing records that would indicate the identity of clients for whom specific law firm attorneys performed services. Hunton & Williams, 952 F. Supp. at 848; Adair, 867 F. Supp. at 1114.

In enforcing administrative subpoenas issued by RTC to two firms, both courts took steps to safeguard information about the law firms' clients. But the concerns expressed over protection of information thus arose in the context of protecting innocent third parties (i.e., the clients), rather than protecting the subjects of the RTC investigations, the two law firms. See Adair, 867 F. Supp. at 1122 (ordering law firms' client list to be produced as demanded by the administrative subpoena; requiring RTC to take certain steps to protect documents, "which reveal the identity of [the firms'] clients"); Hunton & Williams, 952 F. Supp. at 856 (law firms clients have a protectable privacy interest). Given their acknowledgment to the Court that a mistake did occur in the optimization model used in certain mortgage loan sales, these Plaintiffs can scarcely be viewed as "innocent" third parties.

Moreover, while the courts in both Adair and Hunton & Williams protected the identities of the law firms' clients, they did so because of publicly acknowledged "leaks" by the RTC. Indeed, both courts cited congressional testimony by the RTC's

Deputy Chief Executive Officer that "the RTC does leak. . . . It's almost a certainty around the RTC that any matter that has any kind of public interest at all is leaked to the press prematurely." Adair, 867 F. Supp. at 1119; Hunton & Williams, 952 F. Supp. at 857 & n. 36.

Here, there is no competent evidence before this Court to suggest that HUD or other defendants have engaged in any improper "leaks" or disclosures of information, notwithstanding Plaintiffs' innuendo. In the absence of such evidence that HUD has already leaked information about the plaintiffs, or will do so in the future, there is no reason for the Court to presume that leaks have occurred, or will occur, and no basis for the injunctive relief sought by the plaintiffs. See Adair, 867 F. Supp. at 1119 n.5 (notwithstanding "allegations of the prevalence of 'leaks,' the Court will not presume that improper disclosure will occur in the absence of specific evidence of 'an immediate threat of illegal disclosure,'" citing Exxon Corp. v. FTC, 589 F.2d 582, 591 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979)).

For these reasons, preliminary injunctive relief should be denied as to the HUD Defendants with regard to the alleged improper disclosure of information to the media.

**IV. Preliminary Injunctive Relief
Should Be Denied As To Counts 7 and 8**

Count 7 of the Complaint alleges that Hamilton has been de

facto debarred from doing business with HUD. Count 8 asserts that HUD has engaged in a course of improper conduct aimed at driving Hamilton out of business. As discussed in detail in the memorandum in support of the HUD Defendant's motion to dismiss, neither Count 7 nor Count 8 alleges facts sufficient to state a claim upon which relief can be granted. Here again, the arguments supporting dismissal of Counts 7 and 8 need only be briefly summarized.

De facto debarment occurs when a contractor is excluded from consideration for the award of a government contract without being given notice of, and an opportunity to rebut, the reasons for the exclusion. An essential element of a de facto debarment claim is that the plaintiff contractor has applied for, but has failed to win, a particular contract. The Complaint in this case makes no such allegation. Here, the debarment claim is based upon the termination of Contract 18505. However, the termination of a single contract, without more, is insufficient to demonstrate that the contractor has been precluded from doing any business with the government.

Count 8 of the Complaint asserts that HUD has engaged in efforts use its regulatory powers for the improper purpose of driving Hamilton out of business. However, the case authority cited by Hamilton in support of this claim involve the abuse of police power or regulatory authority in a manner which precludes an establishment from doing business with the public generally,

e.g., revoking a license needed to operate the business, harassing the customers of a business, or seizure of all of the assets needed for the operation of a business. No such abuse of power or authority is alleged here. Hamilton's claims are, instead, predicated upon HUD's decision to terminate contract 18505 and upon the issuance of investigative subpoenas to Hamilton in connection with pending IG investigation. Such actions do not in any way interfere with Hamilton's ability to sell its services to the public at large or, for that matter, to any government agency. While Hamilton clearly has a right to sell its services in the marketplace, it has no right to insist that HUD purchase those services. Moreover, complying with investigative subpoenas is no more than Hamilton's public duty. Accordingly, Count 8 fails to state a claim upon which relief can be granted.

Since Counts 7 and 8 are subject to dismissal, Hamilton cannot demonstrate the requisite probability of success on the merits to obtain preliminary injunctive relief on those counts. Injunctive relief should be denied for the additional reason that Hamilton has failed to seek relief as to Counts 7 and 8 that is sufficiently specific to satisfy the requirements of Rule 65, F.R.Civ.P. All injunctions and restraining orders must "describe in reasonable detail . . . the acts sought to be restrained." Rule 65(d), F.R.Civ.P. With respect to Count 7 alleging de facto debarment, the Plaintiffs have failed to specify the relief

sought in sufficient detail. Hamilton does not, for example, seek reinstatement of Contract 18505, nor does Hamilton specify any specific action to be taken in connection with the pending procurement for the new financial advisory contract. Instead, Hamilton asks only that HUD be enjoined from engaging in any improper acts. See Complaint, Prayer for Relief, ¶ I. An injunctive order that lacks any operative command, and that merely directs the defendant to obey the law, is inconsistent with the requirements of Rule 65(d). Hughey v. JMS Development Corp., 78 F.3d 1523, 1531 (11th Cir. 1996).

(continued on next page)

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction, with regard to Counts 1, 2, 5, 6, 7 and 8 of their Complaint, should be denied.

Respectfully submitted,

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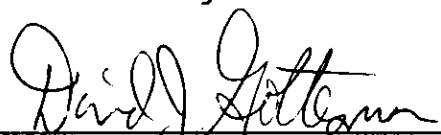
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above HUD DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION was served upon the following counsel of record by sending a copy thereof by first-class U.S. mail on this 27th day of January, 1998:

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