

at Hamilton, including certain records designated by Hamilton as "trash." In carrying out their duties, by letter of April 16, 1998 (Attachment 2), the office of the Special Masters advised Hamilton's current counsel, Michael J. McManus, Esq., of the firm of Jackson & Campbell, that the Special Masters had determined that it would grant the Office of Inspector General's ("OIG's") request to review the remaining records designated as "trash" by Hamilton, unless Hamilton filed objections with the Court by April 21, 1998.

Hamilton objects to the Special Masters' determination, citing Supreme Court and other cases on the "trash search doctrine" and claiming that it never relinquished an expectation of privacy in the "trash" files. Hamilton thus argues that the records it designated as trash "should not be produced or made accessible to the OIG" for review to determine whether they should be preserved by the Special Masters. Exception, at page 4. Contrary to Hamilton's contention, the determination of the Special Masters concerning the "trash" is an appropriate exercise of the Special Masters' authority under the Court's order, and is governed entirely by an agreement made between the Special Masters and Hamilton's former counsel--an agreement which present Hamilton counsel choose to ignore. In sum, the Special Masters' determination provides Hamilton with no grounds for complaint.

A. **The Documents at Issue Were Required to Be Preserved Under the Court's Order**

The Court's order of March 6, 1998, appointing Messrs. Pollack and Storch as co-Special Masters also (1) directed

Hamilton to deposit with the Special Masters all of the records responsive to the OIG subpoenas, (2) ordered that Hamilton not destroy or dispose of any of the paper business records of Hamilton or its affiliated entities without approval of the Special Masters,¹ and (3) ordered that Hamilton not destroy or dispose of any computer or electronic data storage hard drives, discs or other storage devices unless it first delivered to the Special Masters an exact copy of any information contained in the storage devices, and so certified. The items which Hamilton had designated as "trash" and which the OIG retrieved are either directly responsive to the OIG subpoenas and never should have been discarded,² or are business records of Hamilton and its affiliated entities which may not be discarded without the

¹ The Order specifically directed

that Respondents shall not hereafter sell, destroy, discard, or otherwise dispose of any of Respondents' or their affiliated entities business paper records, including accounting, correspondence, personnel and other paper records related to Respondents and their affiliated entities' conduct of their business without prior approval of the Special Master, whose approval or disapproval may be reviewed by the Court on the request of either party[,] and nothing herein shall preclude Respondents from complying with this provision by depositing all such paper records with the Special Master
. . . .

Order of March 6, 1998 (Attachment 1), at page 4 (emphasis added).

² For example, in the locked red dumpster in the basement of the CVS building, the OIG found original financial and accounting records of Hamilton marked for destruction. These items were responsive to Item No. 19 of the OIG subpoenas of October 24, 1997. See letter of April 3, 1998, from Judith Hetherington to Michael J. McManus, at pages 1-2 (Attachment 3).

approval of the Special Masters. Indeed, Hamilton does not contend otherwise.

B. Hamilton At Review the Protocol

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Immediatel the Court's order on March 6, 1998, Special rch met with Hamilton's then attorney Mr. Frulla, Assistant United States Attorney Dan Van Horn, and HUD Counsel to the Inspector General Judith Hetherton. Two other representatives of the Special Masters' office, Michael J. Dixon and Sovaida Ma'ani, were also present. See First Report of Co-Special Masters Irving M. Pollack and Laurence Storch, filed March 23, 1998 ("First Report"), at page 1; letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at page 2. The parties discussed the initial steps that would be taken to comply with the Court's order. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at page 2.

At some time after the initial meeting, Mr. Storch arranged to meet with Mr. Frulla and representatives of Hamilton on Sunday, March 8, at Hamilton's offices at 7 Dupont Circle, N.W. Id. Present for that meeting, in addition to Mr. Storch and Hamilton attorney Mr. Frulla, were Hamilton "insolvency counsel" Stan Salus; Hamilton former employees and current "consultants" Carolyn Betts (who is herself an attorney) and Brian Dietz (former Chief Financial Officer of Hamilton); Special Masters' representatives Sovaida Ma'ani and Michael Dixon; and auctioneer,

Chris Rasmus. Id., at pages 2-3; see also First Report, at pages 1-2. The government was not asked to attend that meeting, but was informed about it afterwards by Mr. Storch on March 8 and by Ms. Ma'ani on March 9, each of whom detailed the agreement that had been reached at the meeting. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at page 3. Mr. Frulla also confirmed the agreement, both orally to the OIG on March 9 and in his letter of March 11, 1998, to the Special Masters (Attachment 4).³

The OIG was informed that it had been agreed that there were three categories of paper records potentially covered by the Court's order that needed to be dealt with by the Special Masters, and which had been or would be segregated by Hamilton. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at page 3; see also First Report, at page 2. First, there were certain current financial and accounting records that Hamilton needed immediate access to. It was agreed that those records would be moved to the offices of Storch & Brenner on Monday, March 9. Second, there were materials that Hamilton wanted to preserve but which it did not need immediate access to in order to conduct or conclude its business. These would be moved to a storage company by the auctioneer on March 9, but would be under the control of the Special Masters. Third,

³ While Hamilton's current counsel, Mr. McManus, did not represent Hamilton at the time the "trash protocol" was agreed to, Mr. McManus has been fully informed of the prior agreement, by the April 3, 1998 letter to him from Judith Hetherton, Counsel to the Inspector General (Attachment 3).

there were materials which Hamilton had piled up and wanted to discard--the "trash." This third category of items was to be reviewed by representatives of OIG. If OIG agreed that the items designated as "trash" could be discarded, they would be; if OIG disagreed, the Special Masters would retain the items and it would be determined by the Special Masters at a later date what should be done with them. The agreement as to this third category of items has been referred to as "the trash protocol."

Hamilton completely ignores this agreement, which controls this matter and provides the OIG with the right to review the records designated by Hamilton as "trash" in order to determine whether the records should be retained by the Special Masters for further determinations.⁴ Any independent right the OIG may have under the "trash search doctrine" to review or retain the trash that Hamilton discarded outside its office space is simply not at issue at this time. Moreover, Hamilton seems to think that the Special Masters intend to turn over to the OIG at this time all

⁴ It is not clear whether Hamilton is attempting belatedly to assert that the "trash" contained attorney-client privileged documents. Hamilton's counsel states that it has reviewed the contents of eight boxes of "trash" at the offices of Storch & Brenner, which the OIG culled from amongst many other items of "trash" and designated for preservation, and that "these documents, along with some documents that may be covered by attorney-client privilege, are not responsive to the OIG's subpoenae and they should not be produced or made accessible to the OIG." Exception, at pages 3-4 (emphasis added). It is not at all clear what documents Hamilton's counsel is saying may be privileged, but it is apparently not the ones contained in the eight boxes. In any event, as the Special Masters' letter of April 16, 1998 indicates, Hamilton waived any privilege that might have attached to the documents it designated as "trash" when it agreed that the OIG could review them.

records the OIG designates for preservation. That is not the OIG's understanding. The OIG is only seeking to review the materials it has not yet reviewed, in order to designate the records it believes should be preserved, in accord with the terms of the "trash protocol." The Special Masters will then determine whether the materials should be preserved or discarded, and either party may seek review by the Court if it is unsatisfied with the Special Masters' determination.

C. The Locations and Volume of the "Trash" and the Status of the OIG's Review

It is apparent from Hamilton's Exception that it is laboring under several misconceptions concerning the locations from which the "trash" was retrieved, the number of boxes of "trash," and the status of the OIG's review of the "trash." Hamilton apparently believes that there are only eight boxes of records at issue,⁵ that those records have not yet been reviewed by the OIG, and that all records deemed to be "trash" were located inside the office premises of Hamilton.⁶ In fact, there are a total of fifteen (15) boxes worth of files which the OIG has already culled from the many boxes, bags and dumpsters of "trash" at the CVS building in which Hamilton's office was located. Most of these records were located in the trash outside of Hamilton's

⁵ Hamilton states that "[t]he documents in question are currently located in eight boxes stored at the offices of the Special Master." Exception, at page 2.

⁶ Hamilton states that "[i]t is undisputed that, at the time the documents were identified by the OIG as documents it wished to examine, the documents were located inside the office premises of Hamilton." Exception, at page 2.

offices, as discussed in detail below. The OIG has already reviewed these records and determined that it wishes the Special Masters to preserve them. Nine (9) of the fifteen (15) boxes are currently at the offices of Storch & Brenner; the OIG believes the other six (6) boxes are at Record Masters, a storage facility selected by the auctioneer, where they were moved on March 9, 1998, pursuant to the direction of the Special Masters' representative. Furthermore, the OIG understands that there may be as many as 40 or more boxes designated as "trash" by Hamilton, which are currently in storage at Record Masters, which the OIG has not yet had an opportunity to review. These are the records currently at issue, which the OIG is requesting to review, for purposes of determining whether they should be preserved by the Special Masters.

A detailed description of the original locations of the "trash" and of the status of the OIG's review follows.

The materials that were deemed "trash" were in four distinct locations in the CVS building where Hamilton had its office; only one of the four locations was inside Hamilton's office. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at page 3.

1. Inside Hamilton's Office: Numerous boxes marked "trash" and three trash bags were piled up inside Hamilton's office on the second floor of the CVS building; these are the only items deemed "trash" by Hamilton that were located inside Hamilton's office. The boxes marked "trash" have not yet been

reviewed by the OIG. On the morning of March 9, at the offices of Hamilton, the OIG was told by Ms. Ma'ani that it had been decided that the boxes marked "trash" and the bags piled up inside Hamilton's office that had been designated as "trash" would have to be moved to storage or Storch & Brenner's offices immediately, before the OIG had an opportunity to review them, because the auctioneer needed to clear the offices prior to the arrival of the public for the pre-auction "walk-through" at noon. Id., at page 4. The OIG was to proceed, however, with reviewing the "trash" located in the CVS building outside Hamilton's office. Id. The OIG was advised that it would be permitted at a later time to conduct its review of the items designated as "trash" by Hamilton that had been located inside Hamilton's offices. Id.

At the direction of the Special Masters' representative, the boxes marked "trash" located inside Hamilton's office were moved on the morning of March 9, 1998 to Record Masters. Special Masters' representative Michael Dixon has informed the OIG that, based on his conversation with personnel from Record Masters, he understands that as many as half of the 82 boxes located at Record Masters may have been labeled by Hamilton as "trash," thus entitling the OIG to review them pursuant to the "trash protocol." The OIG believes that six of the 82 boxes of Hamilton records currently at Record Masters contain records the OIG pulled from the trash in the basement and stairwells of the CVS building, as detailed in C.2. and C.3. below. The OIG has no

independent knowledge whether all of the remaining 76 boxes were located inside Hamilton's office at the time the Special Masters' representative directed that they be moved by the auctioneer.

The three plastic bags of material from inside Hamilton's office that had been designated as "trash" by Hamilton were moved to the offices of Storch & Brenner on March 9, also before the OIG was permitted to review them. *Id.* They appeared as Item Nos. S00033, S00034, and S00035 on the Special Masters' Inventory of March 23, 1998 accompanying their First Report to the Court. On March 24, 1998, pursuant to the "trash protocol" and under the auspices of the Special Masters, the OIG reviewed these materials and designated certain of them for preservation by the Special Masters. *Id.* The materials so designated were then placed in boxes with the same inventory control numbers on the Special Masters' inventory (Box Nos. S00033, S00034, and S00035).

2. Outside Hamilton's Office: Top of the CVS Building Stairwell. Other trash bags, boxes of trash, stacks of copies of the Federal Register, and miscellaneous discarded supplies were located at the top of the CVS building stairwell outside the main entrance to Hamilton's office. *Id.*, at page 3. The OIG selected for preservation two boxes worth of materials from this area and provided them to the Special Masters' representative on March 9, 1998. The OIG believes that these two boxes of materials were moved by the auctioneer to Record Masters, at the instruction of the Special Master.

3. Outside Hamilton's Office: Small Room in Basement of

CVS Building Adjacent to the Elevator. Other trash bags, boxes of trash, two unlocked blue trash dumpsters, and two locked red dumpsters were located in a small room in the basement of the CVS building adjacent to the elevator. Id. The OIG reviewed the materials in the trash bags, trash boxes, and unlocked blue dumpsters on March 9, and selected for preservation the equivalent of four boxes worth of material. These materials were turned over to the Special Masters' representative on March 9, 1998. The OIG believes that these four boxes were moved to Record Masters at the direction of the Special Masters' representative.

One of the locked red dumpsters was empty (the red dumpsters had slots on the top to allow the insertion of documents, and one could see through the slot that it was empty). Id., at page 3 and note 1. The OIG obtained access to the other locked red dumpster on March 10, 1998, after the Special Masters' representative authorized the cutting of the lock. Id. The OIG reviewed the materials in that dumpster and selected the equivalent of three boxes worth of material for preservation. Those boxes were turned over to the Special Masters' representative and appear as Box Nos. S00043, S00046 and S00051 on the Special Masters' inventory.

4. Outside Hamilton's Office: Bottom of Stairwell in Basement of CVS Building. Finally, numerous bags and several boxes of trash were discovered by OIG on March 10 at the bottom of the CVS building stairwell, adjacent to the room containing

the dumpsters. *Id.*, at page 3. The OIG selected for preservation from these trash bags and boxes the equivalent of three boxes worth of material. Those boxes were turned over to the representative of the Special Masters and appear as Box Nos. S00044, S00045, and S00049 on the Special Masters' inventory.

D. The Current Scope of the Special Masters' Authority

Hamilton seems to be laboring under a misconception concerning the current scope of authority of the Special Masters under the Court's order of March 6, 1998. Thus, Hamilton states that the Special Masters have "already been charged with the initial determination of responsiveness to the OIG subpoenae." *Exception*, at page 4. In fact, the Court has not yet requested the Special Masters to perform such a function. The Court's order of March 6, 1998, charges the Special Masters with the duties of gathering, safeguarding and preserving records possibly responsive to the subpoenas, as well as records pertaining to the business of Hamilton or any of its affiliated entities, pending further order of the Court following the filing of pleadings relating to the government's Petition for Summary Enforcement of Administrative Subpoenas. That Petition has not yet been finally briefed, as the government has not yet filed its reply to Hamilton's opposition. Once the matter has been fully briefed, the Court will be called upon to make certain determinations and, following those determinations, may issue further directives to the Special Masters. At this point, however, any additional duties the Court may wish the Special Masters to undertake have

not been defined.

E. Hamilton's Concern that Documents in the Possession of the Special Masters Will Be Inappropriately Disclosed to Others Is Groundless

Hamilton's expressed concern that the documents retrieved by the OIG from the "trash" and designated for preservation, which are currently in the possession of the Special Masters, may "inappropriately find their way into the hands of a competitor," Exception, at page 4, is groundless. Hamilton states that it

is currently a defendant in a sealed lawsuit brought against it by a disgruntled competitor, and Hamilton is concerned that these documents may inappropriately find their way into the hands of that competitor.^[7] This grave concern is not unfounded, as Hamilton has already seen a vivid description in a newspaper article of sealed Court proceedings before this very Court. See [Washington Times article of March 11, 1998]. Those proceedings involved the overall issues to which this motion is related, and the article describes those proceedings even though the press and public had been excluded.

Id. (emphasis in original). This allegation is a gratuitous insult to the Special Masters, in whose custody the documents reside. Moreover, the portion of the article on which Hamilton relies is totally erroneous and obviously based on pure speculation, as this Court knows, as Hamilton knows, and as court records will establish.

⁷ Hamilton's counsel has advised that he is referring to the relator in the sealed qui tam action, which is before this Court. Of course, that action is filed on behalf of the government, and alleges false claims against the government. At this time, the action has been stayed to permit the government to investigate and determine whether it will pursue the action itself. Thus, there is no reason to believe any documents are about to be turned over to the relator, much less documents that have no bearing on the relator's allegations.

The article in question (Attachment 5), authored by George Archibald, appeared in The Washington Times on Wednesday, March 11, 1998. The previous day, March 10, 1998, this Court held an open hearing in this matter, and entered an order (Attachment 6) modifying its order of March 6, 1998, to permit Hamilton to sell certain of its computer equipment at the auction that was then under way. That hearing was attended by the public, including members of the press, and there was considerable discussion at that hearing of matters that had previously occurred concerning the government's Petition for Summary Enforcement of Administrative Subpoenas. Much of Mr. Archibald's article of March 11, 1998, concerns that hearing of March 10. In alleging that information about a sealed matter was apparently leaked to the press, Hamilton appears to be referring to the following account by Mr. Archibald of a proceeding that occurred on Monday, March 9, 1998, before this Court:

Judge Sporkin held a sealed court hearing Monday [March 9, 1998], barring reporters and the general public, to hear arguments by federal criminal investigators who wanted to move in and safeguard the computer data before the equipment was auctioned.

Bryan Saddler, a lawyer representing HUD Inspector General Susan M. Gaffney, who is leading the criminal probe, argued that the equipment scheduled to be sold could still hold crucial HUD note-sale data and other evidence that investigators have unsuccessfully sought since last year, according to law enforcement sources.⁸

⁸ Mr. Archibald's attribution to "law enforcement sources" apparently refers to the immediately preceding phrase, which advised that investigators had "unsuccessfully sought since last year . . ." "crucial HUD note-sale data and other evidence" Hamilton itself put the "law enforcement sources" for this

There was a hearing before this Court on March 9, 1998, at which the press was originally present. The hearing, however, was not in this matter, but rather in the case of United States v. Streuby L. Drumm, Jr., et al., consolidated with Streuby L. Drumm, Jr., et al. v. Secretary of HUD and Beal Bank, S.S.B., Case No. 1:98:-ms-00066 ("Streuby Drumm"), which is not under seal.⁹ That matter concerns a motion by Mr. Drumm and others to compel Hamilton to produce certain documents pursuant to a subpoena duces tecum served upon Hamilton on January 17, 1998. At the outset of the March 9, 1998, hearing in that matter, which was attended by Justice Department attorneys David Gottesman and Robert Hollis and HUD OIG attorney Bryan Saddler, the government requested that the hearing be closed because it anticipated that there would be references to the order this Court had entered in this matter on March 6, 1998, which at that time was under seal.¹⁰ The Court will recall that it raised a question whether

information in the public record, when, on January 8, 1998, it filed its Motion for a Temporary Restraining Order and a Preliminary Injunction in The Hamilton Securities Group, Inc., et al. v. U.S. Department of Housing and Urban Development, et al., Civil Action No. 98-36-SS, and attached correspondence from the OIG detailing its efforts to obtain production by Hamilton of the records responsive to the OIG subpoenas.

⁹ The government does not have a transcript of the March 9, 1998 hearing in Streuby Drumm. This account is based on the recollection of HUD OIG attorney Bryan Saddler, who attended the hearing.

¹⁰ This matter is being treated as sealed pursuant to the government's motion, to which Hamilton has never responded. The government's motion to seal is premised on the fact that there are references in the government's Petition for Summary Enforcement of Administrative Subpoenas to the qui tam action, which is under seal while the government determines whether to intervene.

this matter should be sealed, much less the Streuby Drumm hearing, but nevertheless acquiesced in the government's request and ordered the courtroom sealed for the Streuby Drumm hearing. Accordingly, Mr. Archibald, who was present in the courtroom, was required to leave.

At the ensuing hearing in Streuby Drumm, the Court decided to unseal its order of March 6, 1998 in this matter on the grounds that it did not reveal information pertinent to the nature and scope of the qui tam complaint. The Court obviously believed it was necessary to reveal its order of March 6, 1998 to Mr. Drumm's attorneys in connection with their motion to compel Hamilton to produce documents. Thus, the order of March 6, 1998 became public on March 9, 1998. At no time was there any argument at the Streuby Drumm hearing on March 9, 1998, by "federal criminal investigators who wanted to move in and safeguard the computer data before the equipment was auctioned," as reported by Mr. Archibald. Indeed, the Court's order directing the safeguarding of Hamilton's records and computer equipment had been issued on Friday, March 6, following arguments by Mr. Van Horn and Ms. Hetherton, and the securing of Hamilton's computer data was already well underway during the March 9 hearing in Streuby Drumm.

It is apparent that Mr. Archibald, having been excluded from the March 9, 1998 hearing, and having learned at the hearing on March 10 of details concerning Hamilton's auction and the Court's orders, simply speculated as to what he thought must have gone on

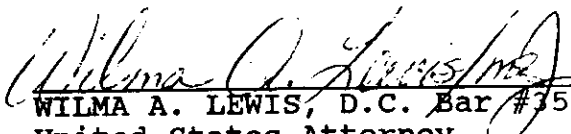
at the hearing on Monday, March 9. He was totally wrong, however. He did not even know what case the March 9 hearing concerned. Moreover, Hamilton should be aware that Mr. Archibald's account is wrong since it knows there was no hearing on March 9 at which the government would have been arguing for permission to "move in and safeguard the [Hamilton] computer data before the equipment was auctioned."


In sum, the erroneous newspaper report provides no basis for concern that the government is leaking confidential or sealed matters, or that documents in the possession of the Special Master will be inappropriately provided to persons who are not authorized to have them.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that Respondents' Exception to Recommendation of the Special Masters is without merit.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Response to Respondents' Exception to Recommendation of the Special Master was served on April 24, 1998 by hand delivery of a copy thereof to the Special Masters and to respondents' counsel:

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