

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity
as Inspector General, U.S. Department of
Housing and Urban Development,
451 - 7th Street, S.W.
Washington, D.C. 20410,

Petitioner,

v.

THE HAMILTON SECURITIES GROUP,
INC. and HAMILTON SECURITIES
ADVISORY SERVICES, INC.,
7 Dupont Circle, N.W.
Washington, D.C. 20036,

Respondents.

Misc. No. 98-92
(Sporkin, J.)

FILED UNDER SEAL

**RESPONDENTS' EXCEPTIONS TO THE SECOND REPORT OF CO-SPECIAL
MASTERS IRVING M. POLLACK AND LAURENCE STORCH**

In numbered paragraph four of their Second Report, the Co-Special Masters have determined that "materials which had been designated as 'trash' pursuant to arrangements with respondents prior counsel . . . should be immediately made available to the government [OIG-HUD]." Respondents respectfully request that the District Court reverse this determination of the Co-Special Masters, and instead order that the documents in question be retained in their entirety by the Special Masters, without access by the OIG pending determination of which, of any, of the documents are responsive to the OIG subpoenae served on Hamilton.

At issue are several boxes of documents from Hamilton's office which are currently in the possession, or under the control of, the Special Masters. The

documents were present at the Hamilton office on March 8, 1998, when the process of turning over its documents to the Special Masters began. It is Hamilton's position that all of these documents remain Hamilton property, and that they should be maintained and kept by the Special Master, until such time as a determination is made as to which, if any, of the documents are responsive to any OIG subpoena. At that time, those responsive documents would be made available to the OIG. The OIG has no legal right to access to the documents at this time.

It is the OIG's position that all of the documents in question be made immediately available to it, whether or not the documents are responsive to its subpoenae. In other words, it the OIG's position that it should have immediate and unfettered access to all of these Hamilton documents.

The Special Masters have based their determination to provide the OIG with immediate access to these documents on statements made by Hamilton's prior counsel in this matter, which statements are described in Tab B to the Second Report. However, while the documents in question were described as "trash," they were never out of Hamilton's possession. Indeed, this court Order of March 6 directed that Hamilton "shall not hereafter sell, destroy discard or otherwise dispose of any of Respondents; or their affiliated entities business paper records Without prior approval of the Special Master." March 6, 1998 Order, p. 4. Moreover, the documents in question were never in the possession of the OIG, as the affidavit attached to the The Second Report indicates; documents not discarded were to be stored by The Special Master, Tab B, paragraph (4) 3), Second Report, with no reference to possession by the OIG.

Current counsel for Hamilton is well-aware of the fact that he was not then-representing Hamilton on the days in question (March 8, 9, 10 and 11), and

consequently was not present during any of the discussions about the documents in question. Certainly the Special Masters were present, and are guided in large part by their recollection and participation in what occurred on those days. Hamilton's counsel respectfully submits, however, that their duties and obligations as counsel lie in the current representation of Hamilton to the best of their abilities, and therefore must look out for Hamilton's best interests under the circumstances as they currently exist.

Counsel for Hamilton has spoken with David Frulla, Esquire, who was present on behalf of Hamilton when the documents in question were discussed with the Special Masters. At that time, Mr. Frulla's overriding concern was to protect Hamilton from the accusations that it was discarding materials contrary to the Court's ruling, and therefore did agree that all of the bags of documents could and should be retained, and could be reviewed for the limited purpose of determining whether or not some of the documents could actually be determined non-responsive to any outstanding subpoenas, and therefore discarded. At that point in time, Mr. Frulla did not focus on the issue of whether or not present among those documents were documents which Hamilton contends are not responsive to the subpoenas, including proprietary material, and to which the OIG has no legal claim or right to review for any purpose.

Hamilton is now in a difficult position. It understands that the Special Masters may construe Mr. Frulla's statements as an "agreement", upon which the Special Masters have based a determination that Hamilton has waived any current argument against the immediate review access to documents by the OIG. Accepting that Mr. Frulla was acting in good faith at the time of his discussions with the Special Masters, and well-cognizant of the honor to which statements of counsel must necessarily be given, Hamilton nonetheless believes that its constitutional rights are paramount, and

under the circumstances provide a basis to withdraw any agreement which has been construed as acknowledging any OIG "right" to review the documents in question at this point in time.

While the documents in question may have been described as trash, in deciding whether or not a third party such as the government has a legal right to the documents the determinative factor is not the nature of the "trash" but its location. Applying principles set forth by the U.S. Supreme Court and the D.C. Circuit Court, the curtilage serves as a bright line, within which government officials are not free to search. The documents in question had not yet been turned over to third-parties, and therefore Hamilton's reasonable expectation of privacy had not been abandoned.

The landmark case in "trash search doctrine" is California v. Greenwood, 486 U.S. 35 (1988), in which the Supreme Court concluded that the defendants, suspects in a drug investigation, had no reasonable expectation of privacy in the garbage left on the curb outside their home. The narcotics agent instructed the trash collector to separate Greenwood's trash, which was tied in opaque plastic bags, and turn it over to her. Id. at 37. The agent searched the garbage and found evidence of narcotics use. Id. at 37-38. This information from the drug search was used to support an affidavit for a search warrant. Id. at 38.

The Court cited three factors to support its conclusion: (1) society recognizes that garbage is accessible to "animals, children, scavengers, snoops, and other members of the public"; (2) a person relinquishes control over the property when he voluntarily turns the trash over to a third-party; and (3) one could not expect the police to avert their eyes from information that is readily accessible to the public or a third-party. Id. at 40-41.

The Court employed an objective approach as to whether the Fourth Amendment applies to a particular case, looking primarily to the ease of public access to the area in which the trash is located. Id.

The Court in Greenwood favorably quoted the D.C. Circuit Court's observation in United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984), that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the curtilage [sic] thereof." In Thornton, the defendant disposed of a white plastic garbage bag in a trashcan located in an alley. The police removed the bag from the trashcan and discovered evidence of an illegal gambling operation. Id. at 41.

The court in Thornton appear to adopt a "bright line" approach, that is, that the curtilage serves as a constitutional bright line, beyond which government officials are free to search. Under this approach, location is the determinative factor. If the garbage is placed outside the curtilage of the dwelling, then no Fourth Amendment protection exists.

Here, Hamilton had not placed these documents in an area particularly suited for public inspection sufficient to defeat its claim of Fourth Amendment protection, and therefore maintained its reasonable expectation of privacy for the documents. Indeed, the documents in question were still completely within the Hamilton Office premises, and had been ordered by the court to not be discarded.

Hamilton stresses that its position does not impact on the ultimate rights of the OIG to obtain documents responsive to its subpoenae. Hamilton is not asking that the documents in question be discarded: in fact, Hamilton wants all of the documents in question to remain in the custody of the Special Masters. If there are documents among those in question which are responsive to the subpoenae, the Special Masters

will be able to ascertain that and they will be produced at the appropriate time. Indeed, allowing the OIG to review the documents now to make its determination of what is responsive to its subpoenae defeats the very purpose of the appointment of the Special Masters, and gives the OIG the opportunity to review documents they otherwise ultimately may not be permitted to see.

Although the use of the term "trash" has become the moniker for this issue, the issue's overall importance cannot be understated. The OIG has already accused Hamilton of discarding "original" financial documents and other items it claims are directly responsive to its subpoenae. The other items were not identified, but with regard to the financial information, the OIG is simply wrong. The OIG asserts as a fact that documents it has seen are "original" financial records, but they have no basis for doing so. With the exception of some paper documents, such as cancelled checks and bills of lading, etc., Hamilton's financial records were all digital which, along with the cancelled checks, etc., are currently deposited with the Special Masters.

The OIG has also repeatedly suggested that it "discovered" these documents, insinuating that the bags of documents were hidden from view. While making for colorful reading, that too is inaccurate and misleading. These are serious accusations, and Hamilton asserts that, in this climate, the fair resolution of this matter is to preserve all of the documents in question for ultimate review as to responsiveness to the subpoenae, without current review by the OIG. All of the documents in question are now preserved with the Special Masters, and the OIG will eventually be able to review responsive documents. It is hard to understand how or why this is objectionable.

Current counsel for Hamilton (who were not retained until later in March, 1998) have reviewed the contents of some of the boxes and determined that there are materials contained therein that are proprietary in nature, and not related to any of

CERTIFICATE OF SERVICE

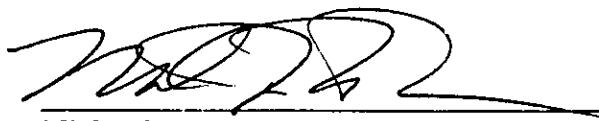
This is to certify that on this 12th day of May, 1998, a copy of the foregoing The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc.'s Reply to Petitioner's Response to Hamilton's Exception to Recommendation of the Special Masters was served, via facsimile and first-class mail, postage prepaid, on the following:

Judith Hetherton, Esquire
U.S. Department of Housing and
Urban Development
Office of Inspector General
Office of Legal Counsel
451 - 7th Street, S.W., Room 8260
Washington, D.C. 20410

Daniel F. Van Horn, Esquire
Assistant United States Attorney
555 - 4th Street, N.W.
Room 10-104
Washington, D.C. 20001

and by hand to:

Laurence Storch, Esquire
Irving Pollack, Esquire
Storch & Brenner, L.L.P.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036



Michael J. McManus

Hamilton's HUD work. Hamilton asserts that these documents, along with some documents that may be covered by the attorney-client privilege, are not responsive to the OIG's subpoenas and they should not be produced or made accessible to the OIG. Counsel for the OIG have recently advised that their investigation arises from allegation made by a disgruntled competitor in a pending "Bivens" action, and Hamilton is concerned that these documents may inappropriately find their way into the hands of that competitor.

Hamilton has no objection to a review of these documents by the Special Masters. Although not wishing to burden further the Special Masters in their task, Hamilton merely desires that the Special Masters include these documents among those for which it has already been charged with the initial determination of responsiveness to the OIG subpoenas. OIG will not be harmed by this procedure, yet Hamilton may be severely harmed if the OIG is given immediate access to these documents.

Respectfully submitted.



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