

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT

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)

Respondent.)

Misc. No. 98-92

FILED UNDER SEAL

MOVANTS', THE HAMILTON SECURITIES GROUP, INC.
AND HAMILTON SECURITIES ADVISORY SERVICES, INC.,
MOTION FOR LEAVE TO CONDUCT DISCOVERY

Movants, The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively "Hamilton") respectfully request that this Court grant them leave to conduct discovery related to the multiplicitous and ever-expanding subpoenae issued by petitioner ("OIG").

I. BACKGROUND

On June 5, 1996, Ervin & Associates, a disgruntled contractor, filed a 253 page Complaint ("the Ervin Complaint") against United States Department of Housing and Urban Development ("HUD") and, *inter alia*, the HUD Secretary alleging a variety of ills arising out of operation of HUD's Office of Multifamily Housing. The Ervin Complaint also slung

sundry accusations at Hamilton, who served as financial advisor to HUD's loan sale program and was a successful competitor of Ervin. Faced with political and legal pressure in the wake of the Ervin Complaint, OIG commenced an investigation of Hamilton in July, 1996.

Over the ensuing twenty-seven months of the investigation, OIG has issued three separate subpoenae to Hamilton and one to Hamilton's founder and CEO, C. Austin Fitts. Despite Hamilton's extensive efforts to comply with the subpoenae, OIG has repeatedly sought to expand the scope of each subpoena to include voluminous amounts of irrelevant material. Moreover, OIG's third subpoena to Hamilton, issued on October 24, 1997, sought much of the same information requested in the earlier subpoenae, issued on August 6, 1996 and August 22, 1996, respectively. In addition to seeking repetitive information, OIG has insisted that Hamilton produce copies of certain documents on computer disk, even though Hamilton has already provided the OIG with hardcopy of the same documents.

By and large, Hamilton has been responsive to the subpoenae, producing in excess of one hundred boxes of materials and dozens of computer disks containing additional materials. However, the cost of this compliance has been steep. In addition to accumulating more than \$1,000,000 in costs and fees, Hamilton has been effectively forced out of business, resulting in the termination of nearly forty employees. Despite this hardship, Hamilton has continued to attempt to reach some kind of accommodation with OIG.

Now, more than two years into its seemingly limitless investigation of Hamilton, OIG seeks summary enforcement of its subpoenae, the exclusive motivation of which appears to be harassment of Hamilton.

II. DISCUSSION

It is well-established that subpoena enforcement proceedings are to be adversarial in nature and afford full opportunity for the respondent to raise all objections to the subpoenas. Federal Trade Comm. v. Atlantic Richfield Co., 567 F.2d 96, 106 (D.C. Cir. 1977). While it is true that discovery is not generally permitted in these proceedings, the D.C. Circuit Court of Appeals has recognized that there are circumstances in which the courts require further information in order to carry out their duty and, as such, subpoena enforcement proceedings may take the form of an evidentiary hearing. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (en banc), *cert. denied*, 449 U.S. 993 (1980); Atlantic Richfield, 567 F.2d at 106; United States v. Exxon Corp., 628 F.2d 70, 76 (D.C. Cir. 1980) (holding that the District Court has authority to inquire into all relevant matters in subpoena enforcement and is not limited by the scope of the agency's own inquiry). As recently as last year, the D.C. Circuit recognized that discovery in enforcement proceedings may be permitted in situations where bad faith on the part of the agency seeking enforcement of a subpoena is alleged. SEC v. Lavin, 111 F.3d 921, 926 (D.C. Cir. 1997); *see also* United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1145 (D.C. Cir. 1987) (finding that, pursuant to United States v. Powell, 379 U.S. 48 (1964), an improper purpose for issuing a subpoena may include harassment on the part of the agency).

In this case, the issuance of overbroad and duplicative subpoenae, which appear designed only to harass Hamilton, supports an allegation of bad faith. Indeed, OIG's investigation of this matter amounts to little more than a fishing expedition. At various times, OIG has demanded information concerning all of Hamilton's business relations, including

those not connected in any way with Hamilton's work for HUD.¹ In addition, despite receiving virtually all of electronic mail files sent or received by Hamilton during the months preceding the investigation, OIG demanded that Hamilton engage in the expense of reviewing all of its backup tapes, even after being informed that the back-up tape only duplicated the documents already produced to OIG.

In addition, an inference of bad faith can be drawn from evidence that OIG has not significantly advanced their understanding of Hamilton's services over the two years of their investigation. Despite having received tens of thousands of pages of documents, when officials from OIG interviewed a Hamilton at the beginning of this year, it became apparent that OIG had not taken even preliminary steps to learn about the FHA loan sales program and Hamilton's integral role in it. Indeed, OIG seems content to leave this investigation hanging, as long as Hamilton continues to incur costs in compliance with the various subpoenae.

Perhaps most significantly, OIG's bad faith is demonstrated by the squelching of the 1996 government's audit (the Denver Audit) of the loan sales program. An early version of the audit report was favorable to the program and Hamilton's role in it. However, no report has ever been issued publicly, and OIG has blocked Hamilton's attempts to gain access to the report by cloaking it in claims of privilege.

More recently, the OIG has begun to subpoena the current bank records of Hamilton's president, Catherine Austin Fitts. The most recent attempts to obtain Ms. Fitts' personal records involves a subpoena which was served on Morgan Guaranty Trust Co. of

¹ OIG's unfocused investigation of Hamilton has extended to those with even the slightest contact with Hamilton or its employees. For example, OIG needlessly subpoenaed several years of tax records from Austin Fitts' elderly uncle solely because they shared ownership of the family farm.

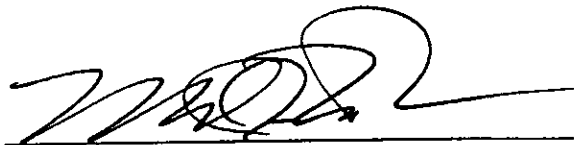
New York on August 10, 1998. Notice to Ms. Fitts was not sent by OIG's investigator, however, until September 9, 1998, and not received by Ms. Fitts until September 18, 1998.

In order to effectively combat OIG's hide-the-ball tactics, Hamilton needs to conduct discovery regarding communications between Ervin and OIG, as well as the circumstances surrounding the issuance of overbroad and repetitious subpoenae. Hamilton does not seek to depose any high ranking HUD officials, but rather, given the appearance of bad faith, seeks to ferret out the true motivation behind the OIG subpoenae.

WHEREFORE, your Movant respectfully requests that this Court permit Hamilton to conduct limited discovery related to the issuance of the subpoenae.

Respectfully submitted,

September 22, 1998



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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of September, 1998, a copy of this Motion for Leave to Conduct Discovery was sent, via first-class mail, postage prepaid, to:

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