IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN GAFFNEY, in her official capacity As Inspector General, U.S. Department of Housing and Urban Development,	)	
Petitioner,	)	
v.	)	**Misc. No. 98-92 (SS)**
THE HAMILTON SECURITIES GROUP, INC. and HAMILTON SECURITIES ADVISORY SERVICES, INC.,	)	
Respondent.	)	

RESPONDENTS' OPPOSITION TO
PETITIONER'S MOTION TO STRIKE

INTRODUCTION

On December 9, 1998, The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton" or "Respondents") filed Respondents' Motion to Quash Subpoenae or, in the Alternative, Motion for a Protective Order ("Motion to Quash"). In the Motion to Quash, Hamilton asserts that the Department of Housing and Urban Development ("HUD") Office of Inspector General's ("OIG" or "Petitioner") subpoenae are unenforceable in light of certain provisions of the *qui tam* Civil Investigative Demands section of the False Claims Act, 31 U.S.C. § 3733, as that statute relates to the Inspector General Act of 1978,

5 U.S.C. App. 3.[1] OIG filed a motion to strike Hamilton's Motion to Quash pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. The Court should deny Petitioner's motion to strike on the grounds that Hamilton's Motion to Quash is not a pleading; hence, a motion to strike pursuant to Rule 12(f) is not a proper method for the OIG to oppose Hamilton's Motion to Quash. Additionally, Petitioner's assertion that the Court (The Honorable Judge Stanley Sporkin) implicitly rejected Hamilton's legal argument at the December 3rd hearing and with its December 18, 1998 Order is inaccurate. At the December 3rd hearing, the Court specifically decided not to address the legal argument described above. Consequently, Hamilton raised the issue anew in its Motion to Quash.

ARGUMENT

A. Petitioner May Not Use a Rule 12(f) Motion to Challenge Hamilton's Motion to Quash

Petitioner's motion to strike is procedurally flawed because Rule 12(f) of the Federal Rules of Civil Procedure applies only to pleadings, and a motion to quash is not a pleading. Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A vast majority of courts has held that a motion to strike another motion or other non-pleadings goes beyond the authority of Rule 12(f).

The District Court for the Southern District of New York stated the principal succinctly in a case in which plaintiffs attempted to use a Rule 12(f) motion to

[1] A copy of Section 3733 of the statute is attached hereto at Tab A.

strike several motions to dismiss filed by defendants. The District Court stated that:

> Plaintiffs have attempted to use a 12(f) motion to strike ... Defendants' motion(s) to dismiss. A motion to dismiss, however, is not a pleading. See Fed.R.Civ.P. 7(a) (defining pleadings as complaints, answers, replies to counter-claims, third party complaints and third party answers). Rule 12(f) does not authorize this Court to strike documents other than pleadings. ... Thus the filing of a motion to strike, as Municipal Defendants correctly assert, is not a proper way to challenge a motion to dismiss.

Sierra v. United States of America, 1998 U.S. Dist. LEXIS 14135 at 28 (S.D.N.Y. Sept. 9, 1998) (citations omitted).[2] *See also* Binder v. Washington Gas-District of Columbia Division, 1995 U.S. Dist. LEXIS 21386 (E.D.Va. 1995) (neither a motion to dismiss nor a rebuttal are pleadings); Resolution Trust Corp. v. Blasdell, 154 F.R.D. 675, 683 (D. Ariz. 1993) (Court denied a motion to strike a response to a motion to dismiss because Rule 12(f) does not authorize the Court to strike documents other than pleadings); Weiss v. PPG Indus., Inc., 148 F.R.D. 289, 291-92 (M.D. Fla. 1993) (a motion is not a pleading, and thus a motion to strike a motion is not proper under Rule 12(f)); EEOC v. Admiral Maintenance Serv., 174 F.R.D. 643, 645-46 (N.D. Ill. 1997) (The "pivotal question is whether a statement of facts and an affidavit in support of a motion for summary judgment constitute pleadings. The Court agrees with the overwhelming weight of authority within and outside of this jurisdiction that the answer is no."); Jones v. City of Topeka, 764 F. Supp. 1423, 1425 (D. Kan. 1991) (motions to strike are directed at pleadings;

[2] A copy of the Sierra decision and any other cases not appearing in an official reporter are attached hereto at Tab B.

therefore, such a motion could not be used to strike plaintiff's motion for partial summary judgment).[3]

In reaching similar results, certain courts have noted that Rule 7 of the Federal Rules of Civil Procedure distinguishes motions from pleadings. Rule 7(a) deals with pleadings which are defined as including complaints, answers, replies to counterclaims, answers to cross-claims, third-party complaints, and third-party answers. Motions, as distinguished from pleadings, are discussed in Rule 7(b). *See e.g.* Sierra, *supra*; Knight v. United States, 845 F. Supp. 1372, 1374 (D. Ariz. 1993), *aff'd*, 77 F.3d 489 (9th Cir.), *cert. denied* 117 S.Ct. 238 (1996) (mem.); Jones v. City of Topeka, 764 F. Supp. at 1425.

The above cases, and many more not mentioned herein, unequivocally hold that a motion to strike pursuant to Rule 12(f) is not a proper method to challenge anything other than a pleading or a portion thereof. Accordingly, Petitioner's motion to strike Hamilton's Motion to Quash must be denied.

B. Petitioner's Motion to Strike Also Should Fail Because the Court Did Not Rule Previously on the Issue Raised in Hamilton's Motion to Quash

Petitioner's assertion that the legal issue raised in Hamilton's Motion to Quash was before the Court on December 3, 1998, and that the Court implicitly rejected the argument in its December 18, 1998 Order is not completely accurate. Hamilton's Motion to Quash presents a compelling legal argument as to why the OIG's subpoenae are not authorized, and therefore are unenforceable. The OIG,

undoubtedly wishing to avoid the compelling legal argument presented by Hamilton, attempts to argue in its procedurally-flawed motion to strike that the issue had been fully briefed, presented and decided by the Court. This simply is not true.

While the Court ruled on issues relating to the OIG's administrative subpoenae at the December 3rd hearing (as reflected in the December 18th Order), Judge Sporkin clearly indicated at the hearing that he would not rule on that particular legal argument at that time. Moreover, as stated in the December 9 letter from Michael J. McManus, Esquire to The Honorable Stanley Sporkin (which is attached as an exhibit to OIG's motion to strike), Hamilton presented the legal issue raised in the Motion to Quash – whether or not the subpoenae served on the Respondent by the HUD Office of Inspector General were legally issued – specifically because it appeared that Judge Sporkin did not have an opportunity to review Hamilton's previous brief on that issue at the time of the December 3rd hearing. In short, Hamilton reformatted into a streamlined motion a legal argument that the Court had not addressed. By reformatting the argument into a motion to quash, and with Mr. McManus' December 9th cover letter, Hamilton made it clear that it was not attempting to reargue issues decided by the Court at the December 3rd hearing.

Hamilton admittedly briefed the present issue in its Second Supplemental Opposition to Petition for Summary Enforcement which was filed on December 1, 1998, just two days before the December 3rd hearing. Hamilton expressly

[3] Hamilton refrained from providing additional case citations on this point; however, we note that the number

acknowledged that in its subsequent Motion to Quash. As indicated in Mr. McManus' December 9th letter to Judge Sporkin, however, we learned at the December 3rd hearing that Judge Sporkin did not receive a courtesy copy of Respondents' Second Supplemental Opposition to Petition for Summary Enforcement, which was included in a white binder that Hamilton attempted to provide to the Court on December 1st. *See* Transcript of Proceedings of December 3, 1998 hearing at pp. 91-93. Counsel for Hamilton subsequently learned that the notebook somehow was delivered instead to the Court of Appeals, and was not available to Judge Sporkin at the time of the hearing. Mr. McManus explained that situation in his December 9th letter.

The OIG belittles this point by stating that "[t]he Court had the official court file; it just did not have the incomplete copy of the record assembled by Respondents' counsel." *See* Petitioner's Motion to Strike at pp. 4-5. While it is true that Hamilton's papers had been filed on December 1st, it also is true – based on the discussion on the record – that Judge Sporkin had not seen a copy of Respondents' Second Supplemental Opposition to Petition for Summary Enforcement; hence, he had not seen Hamilton's written materials on the legal issue subsequently re-presented in the Motion to Quash. Additionally, Judge Sporkin did not see OIG's written position either because the OIG did not file a specific response to Respondents' Second Supplemental Opposition to Petition for Summary Enforcement before the hearing (or ever).[4]

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of cases supporting Hamilton's position is quite large.

[4] Hamilton does not intend to imply that the OIG should have responded in writing within two days to Respondents' Second Supplemental Opposition.

Moreover, when Mr. McManus attempted to present the issue orally (*see* Transcript of Proceedings of December 3rd Hearing at pp. 2-17), Judge Sporkin indicated that he was not prepared to address the issue at the time, stating, "that is going to have to be something that somebody else is going to decide." Transcript of Proceedings at 13.

OIG would like everyone to believe that a ruling on the significant legal issue raised in Hamilton's Motion to Quash is subsumed within the December 18th Order; however, the Court specifically did not do that. Hence, presenting the distinct legal argument anew in the Motion to Quash was an appropriate and efficient way to address this unresolved issue. The motion raises significant and important statutory issues which require the Court's usual close and careful review of the arguments presented and the statutes involved.

For all of the reasons set forth above, Petitioner's motion to strike should be denied. Moreover, the Petitioner waited until the last possible day to respond to Hamilton's motion, filing only a flawed and invalid procedural motion rather than

a substantive response. Based on both its merits and the lack of a response, Hamilton's Motion to Quash must be granted.

Respectfully submitted,

Michael J. McManus (D.C. Bar #262832)
Kenneth E. Ryan (D.C. Bar #419558)
Brian A. Coleman (D.C. Bar #459201)
DRINKER BIDDLE & REATH LLP
901 – 15th Street, N.W., Suite 900
Washington, D.C. 20005-2333
202/842-8800

January 6, 1999

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of January, 1999, a copy of Respondents' Opposition to Petitioner's Motion to Strike and a proposed form of Order were sent, via first-class mail, postage prepaid, to:

The Honorable Susan Gaffney
Inspector General
U.S. Department of Housing and
Urban Development
451 - 7th Street, S.W.
Washington, D.C. 20410

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

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Michael J. McManus