**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**HAMILTON SECURITIES' SUPPLEMENTAL**
**OPPOSITION TO THE PETITION FOR SUMMARY ENFORCEMENT**

In its September 24, 1998 Status Report, the Office of the Inspector General ("OIG") placed several issues before the Court. The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton") respond herein to OIG's characterization of those issues.[1] Hamilton notes that its response could be more complete, and the Court's analysis more informed, if the Court grants Hamilton leave to conduct discovery as per Hamilton's motion filed on September 21, 1998. Additionally, Hamilton requests evidentiary hearings before the Court considers the OIG's further requests for judicial enforcement of the OIG's unreasonable demands.

[1] On October 13, 1998, Hamilton filed a separate response to the OIG's objections concerning the reasonable protection afforded by the Court for Hamilton's proprietary information.

## I. Electronic Records and Electronic Financial Records

The OIG has mischaracterized the present status of, and past activities regarding, Hamilton's production of electronic records (including electronic financial records). OIG asserts that Hamilton has refused to review the backup tapes and other electronic records for documents responsive to the OIG subpoena and has objected to the production of electronic financial records. The OIG's simplistic accusations: (a) ignore entirely the tremendous burden actually experienced by Hamilton in producing electronic materials responsive to the first two OIG subpoenae; (b) denigrate Hamilton's present financial problems, a condition which is largely due to the OIG's undisciplined and unreasonable approach to this 28-month (and counting) investigation; and (c), attempt to whitewash the OIG of its own culpability for rendering Hamilton incapable of searching its electronic media **again**. Moreover, the OIG has presented no valid basis for requiring the electronic records despite having access to more than two hundred boxes of records, plus considerable amounts of Hamilton's electronic records, for at least seven months (and much of it for more than two years).

Hamilton is the victim of an Inspector General's office that has failed to conduct its investigation in a reasonable, disciplined manner from day one. The OIG's subsequent steps to catch up with the investigation that it launched caused irreparable damage to Hamilton, a company that attempted to cooperate until it no longer had the staff, equipment or finances to respond to further demands. Now that Hamilton is financially crippled, the OIG proposes that it should have unfettered access to Hamilton's electronic records. The Court should not allow a government agency to destroy a company with the burdens of an unfocused fishing expedition.

The OIG has in the past suggested, both verbally and in its pleadings and other communications, that Hamilton is dead and therefore should not be concerned about any of its documents, much less those which are proprietary. While it is true that HUD's withholding of over $1.5 Million in contract funds owed to Hamilton, and the hundreds of thousands of dollars Hamilton had to pay out of its cashflow to respond to the OIG subpoenae have created impossible financial hardship for Hamilton and denied it access to the market, neither Hamilton nor its former principals and employees are dead. It is their capital and property, both intellectual and real, which will allow them to either rebuild their business or proceed through successor or subsequent entities. It appears, however, that the OIG is intentionally and without justification making every attempt to destroy Hamilton and deprive its former employees of access to the marketplace.

To fully appreciate the unreasonableness of OIG's present demand that Hamilton review its several electronic media again, the Court should consider background that the OIG would prefer the Court not understand. With a more accurate history of Hamilton's efforts to comply with the OIG's subpoenae **prior to** OIG's filing of the present enforcement action, the Court will understand that Hamilton is not objecting on the basis of hypothetical burden or mere recalcitrance. Hamilton already has done more to cooperate than many companies would under similar circumstances, and the never-ending burden destroyed the Company. Hamilton's office is vacant; nearly all of its electronic equipment was sold at auction; and it no longer has any staff familiar with the electronic systems (in fact, it has no staff at all). Meanwhile, the OIG has not provided a concrete reason – based on the vast paper and electronic records it has received already – for continuing to harass Hamilton.

Instead, the OIG continues to hold the threat of criminal prosecution over the heads of Hamilton and its former employees, completely without justification.

### A. Hamilton's Efforts to Comply

Hamilton submits for the Court's consideration the following facts about Hamilton's subpoena compliance before the OIG initiated the present enforcement action:

> After receipt of the original two subpoenae in August, 1996, over a period of 16 months Hamilton worked cooperatively with OIG to download documents responsive to the first two OIG subpoenae from numerous electronic sources including multiple servers, individual employee laptops and personal computers (at the office and at home), three e-mail systems and back-up tapes. An extremely small sampling of correspondence documenting these efforts appears at Tab A, attached hereto.[2]
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> Hamilton explained to the OIG the complexity of searching and producing hard copies of the responsive documents from its numerous electronic systems. Examples of correspondence regarding this point appear at Tab B.
>
> Hamilton retained on a paid consulting basis a former employee with technical knowledge of Hamilton's computer systems to facilitate production of the responsive documents.
>
> In light of the complexity of the systems, Hamilton, its counsel, and its consultant worked with OIG to clarify and prioritize OIG's requests for documents. Through this expensive and time intensive process, Hamilton was able to provide the OIG with hard copies (and computer disks) of the most centrally responsive materials in a tremendously organized manner. A small sampling of correspondence documenting this point appears at Tab C.

[2] Hamilton has selected just a few pieces of correspondence documenting this point as well as the points that follow. Many more examples exist. Moreover, many of the documents set forth at Tabs A through E support several of the other propositions.

> By December 1997, Hamilton had produced over 27,000 pages of paper documents and 133 computer diskettes of information. See Tab D.
>
> Hamilton calculated that the cost of these cooperative productions exceeded $1,000,000, which Hamilton incurred notwithstanding significant financial difficulties facing the Company.
>
> Hamilton repeatedly warned the OIG that the costs and disruption of responding to the administrative subpoenae and the OIG's priority issues were having a devastating impact on the Company's finances and its ability to meet the demands of its HUD contract. Examples of Hamilton's explicit warnings regarding the financial strain of complying appear at Tab E.
>
> On October 24, 1997 – 14 months after Hamilton began responding to the first two OIG subpoenae, and 16 months after the filing of the *Bivens* and *qui tam* complaints which allegedly prompted the OIG investigation – the OIG issued yet another subpoena requesting that Hamilton search its electronic records again.

Hamilton is not objecting merely to the burden of producing electronic records. Rather, it is objecting to the OIG's approach to this investigation, which would require Hamilton to search its electronic records **again** when it already searched those records at tremendous cost and injury, and when the OIG has not reviewed the materials Hamilton already produced. The OIG's proposed compromise – allowing it unfettered access to the records (with merely a token concession for attorney-client materials) – does not resolve the lack of due process occasioned by the OIG's approach to the investigation. By ruling in favor of the OIG on this issue, the Court could send a dangerous message to the OIG and other agencies about the manner with which they may conduct future investigations.

In considering the appropriate message to send, the Court should bear in mind that the OIG has had access to hundreds of thousands of Hamilton's documents for at least seven months (and has had access to the central records relating to HUD's loan sales program for more than two years), yet the government has not leveled any charges against Hamilton or its principals, and the Company has been crushed by the weight of the demands and unsubstantiated leaks to the national media. Recall, also, that OIG stated that its investigation is based on allegations in "Bivens" and qui tam complaints filed in June 1996. Those allegations center on a series of loan sales for which Hamilton served as HUD's financial advisor. The loan sales were concluded in 1994 and 1995, and the OIG was generally kept advised of the specifics of those loan sales as they were planned and occurring. Yet with all of the allegations regarding HUD's loan sales program well known by June 1996, the OIG issued a third subpoena in October 1997 – long after Hamilton had already reviewed its electronic records pursuant to the earlier subpoenae.

The debilitating significance of this third subpoena cannot be underscored, particularly with regard to the OIG's accusations and complaints relating to Hamilton's backup tapes. Assuming that the OIG investigation was launched in response to the *Bivens* and *qui tam* suits (a comparison, however, of the allegations involving Hamilton in the *Bivens* suit with the information sought by the OIG raises serious questions about what the OIG is doing), those allegations were known in full to the OIG in August of 1996, when the first two subpoenae were served on Hamilton. As described above, Hamilton undertook enormous efforts, both in time and money, to provide information to the OIG responsive to those subpoenae. It was not until that effort was **nearly complete** – with full knowledge by the OIG of

everything that Hamilton was doing to review its electronic data – that the OIG issued yet another subpoena, demanding that the electronic data be reviewed yet again. It is not merely coincidence that within a week's time of this third subpoena, HUD cancelled its contracts with Hamilton, cutting off its finances, and also refused to pay Hamilton hundreds of thousands of dollars **already owed** to Hamilton. Despite the fact that the OIG knew that a second review of the data would require new protocols and be enormously expensive, and despite the fact that Hamilton has stated that this review of the backup tapes would not likely lead to any additional information, even as it relates to the third subpoena, the OIG pushes on without offering any reasonable justification for its demands.

Indeed, the OIG, itself, objected to the costs of reviewing Hamilton's electronic records with the assistance of a neutral third party to cull responsive documents from non-responsive documents, yet, ironically, insists that it is not unreasonable to require Hamilton to undertake that task again. Petitioner's Status Report at 11.

If the OIG had started its investigation intelligently and reasonably, Hamilton might have been able to survive. While that unmet objective may be insignificant to the OIG, it certainly was for Hamilton, and should be for the Court. The United States District Courts are entrusted with the power to enforce administrative subpoenae, and to deny enforcement when an agency is acting unreasonably. This Court has considered, on numerous occasions, the courts' role in enforcing, denying, modifying or conditioning administrative subpoenae. In a case involving enforcement of an administrative subpoena issued by the Office of Inspector General of the Resolution Trust Corporation, this Court stated:

> An agency invoking the aid of a court to enforce a subpoena may not tell a court it has no authority to con-

> dition or modify the subpoena to protect those whom enforcement of the subpoena may put at risk. After all, a court is not merely a "rubber-stamp" in subpoena enforcement proceedings. *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d at 974. A court may place "[s]ome limits … on an agency's use of *court* process, since … it is the court's process that compels the respondent to comply with these administrative demands…. [W]here the processes of the Court are involved, there must be opportunity for the Court to satisfy itself that the agency's power will be properly used."

Adair v. Rose Law Firm, 867 F. Supp. 1111, 1119 (D.D.C. 1994) (*quoting* RTC v. KPMG Peat Marwick, 779 F. Supp. 2, 3-4 (D.D.C. 1991)) (emphasis and omissions in original).

### B. The OIG has no Basis for Insisting on Additional Electronic Records Because it has not Reviewed the Records Already Available to it.

The OIG seemingly would have the Court believe that it has received no documents from Hamilton's electronic databases, which simply is not accurate. As detailed above, Hamilton and Hamilton's consultant painstakingly searched Hamilton's electronic records for materials responsive to the first two administrative subpoenae. Moreover, the "paper" records – which fill more than 200 boxes at the Special Master's office – are replete with documents (including financial records) from Hamilton's electronic systems which also respond to the third subpoena.[3] The OIG has not presented any reason for this Court to believe that the electronic records contain significant documentation not already contained in the paper records or other electronic records already provided to the OIG.

[3] The OIG continues to repeat a statement – "Respondents prided themselves on being to a large extent a 'paperless office'" – that it knows to be untrue, both because the OIG has seen the tremendous volume of Hamilton paper, and because Hamilton has repeatedly told the OIG that a paperless office was but a goal, clearly never yet achieved.

Of course, the OIG cannot make that representation to the Court because it has not reviewed the materials already produced by Hamilton at great cost. For example, Bryan Saddler of the OIG's counsel's office acknowledged via letter dated August 20, 1998 that the OIG had just then copied 710 electronic disks and 15 CD-ROMs produced by Hamilton many months earlier. *See* Mr. Saddler's letter attached hereto at Tab F. OIG has made no representation at all that it actually has conducted a substantive review of this recently copied electronic information. Similarly, the OIG acknowledged in its September 24, 1998 Status Report that "Petitioner has declined to sign the non-disclosure agreement and has reviewed no records since it was requested to sign the agreement, except for the exteriors of certain boxes and records of certain bank accounts." Petitioner's Status Report at 9.

This is particularly true with regard to Hamilton's financial data. Copies of a great deal of supporting records for Hamilton's financial data have been produced as part of the paper document production to the OIG. More importantly, however, Hamilton has previously provided financial information to the OIG for Hamilton Securities Group and Hamilton Securities Advisory Services, the two companies involved in providing services to HUD regarding the loan sales. That information was substantial, including all direct costs for Hamilton's HUD work, summary time records, and summary payroll records. The scope of this information previously supplied was based on discussions between Mr. Brian Dietz, Hamilton's former CFO, and Jim Martin and Jack Rogers, the two OIG investigators working on the case. A similar compilation of financial data was also prepared by Mr. Dietz for 1997, and that report will also be provided to the OIG. Thus there is no basis for the OIG's claim that they do not have the appropriate financial information from Hamilton.

What the OIG wants, however, is unfettered access to all of the electronic information stored on the same system as the financial information that Hamilton previously produced.

The basic data for the reports previously provided to the OIG was taken directly from Hamilton's Solomon system. There was non-responsive material on the system, in other words information which has not been subpoenaed, is proprietary, and is not required to be produced to the OIG. This includes information for other companies who did no business with HUD. As the OIG is unable to even acknowledge that it has received the information already produced to it, it should come as no surprise that it has provided no justification for requiring the provision of additional information to it.

Although the OIG has not reviewed many of the records made available by Hamilton at great expense and compiled by the Special Master pursuant to the Court's March 6, 1998 Order, OIG somehow feels justified in representing to the Court that (a) it has not already received the material necessary for its investigation; (b) that the electronic records should contain responsive, non-redundant information; and (c) that the significance of this allegedly responsive, non-redundant data far outweighs the additional burdens that producing it would place on Hamilton. In making this request, the OIG is asking the Court to tacitly condone the OIG's handling of this investigation to date, and to facilitate OIG's continued practice of imposing unbearable burdens on Hamilton.

## II. Hamilton's Certificate of Compliance

The OIG's objections to Hamilton's best efforts to certify its compliance with the Court's Order of March 6, 1998 ring hollow given the present condition of

Hamilton. The OIG seems particularly peeved that C. Austin Fitts based her certification on "some personal knowledge" but also relied on "reports from others, including counsel, with more direct responsibility for the retention, collection and production of documents pursuant to the three administrative subpoenas (as modified) and the March 6 Order." This particular issue and the other red herrings relating to the certification are additional examples of the unreasonable approach that the OIG has taken throughout its investigation.

First and foremost, the OIG has not provided a single reason why the certification is not reliable. The OIG is once again merely whining about insignificant form rather than substance. The Special Masters have not objected to the certification, even in the face of the OIG's complaints.

Second, Hamilton once had over 40 employees and now it has one. Ms. Fitts remains (without pay) merely to wind down the Company and, because she knows nothing illegal occurred, to clear the Company's name and her own. Given the Company's nearly non-existent status, Ms. Fitts is the most appropriate person to certify compliance (if not the sole person), and she can certify only to what she knows. To the extent that she did not personally handle every aspect of the production over the past 28 months, she had no choice but to rely on reports from those who did – and, of course, none of them work for Hamilton anymore. This conundrum, which the Special Master clearly understood, nevertheless irks the OIG. The situation is not unlike a request for a Rule 30(b)(6) corporate designee regarding an operating division that has long since been shut down or sold. The party seeking the testimony may want the Company to produce someone who had an intimate

working knowledge of that division, but there may not be any person left in the Company with that level of knowledge.

Particularly outrageous are the statements of the OIG in which it is suggested that Hamilton may have destroyed records responsive to the subpoenae. Counsel for the OIG have raised that with the Special Masters, who were unmoved to proceed further. Indeed, counsel for the OIG was challenged by the Special Master to take her claims to the appropriate authorities if she felt they were justified and had evidence to support them. Yet the OIG only continues to make unsubstantiated accusations of wrongdoing, where the only evidence of any wrongdoing indicates such on the part of counsel for the OIG. Counsel for the OIG knows full well that no original financial records of Hamilton were found in any dumpster at Hamilton. Instead, as demonstrated by the affidavit of Raul Ludert (attached at Tab G), it was counsel for the OIG who attempted to stage photographs suggesting that documents, actually placed in the dumpsters by the FBI, were placed there by Hamilton. This conduct is yet another example of the blatant unreasonableness and misbehavior of the OIG in this matter.

## III. Hamilton's Privilege Claims

As per the agreement of the parties and the Special Master, Hamilton provided the OIG and the Special Masters with a detailed privilege log on August 31, 1998. Until the OIG raised it as "an issue" in its September 24, 1998 Status Report, the OIG had never indicated to Hamilton that it had any questions about a single entry on the log. It still has not. Even in its Status Report, the OIG merely states:

> Petitioner is reviewing the log, and may request that the Special Master or the Court review certain of the records

> to determine whether they have been appropriately designated.

Hamilton does not believe that the OIG has stated any reason for placing this issue before the Court. In fact, they acknowledged that they had not finished reviewing the document as of September 24. If the OIG has questions about any privilege log entries, they should raise them with counsel for Hamilton first. If we cannot resolve the issues between the parties, the OIG then could submit their specific questions to the Special Master, and ultimately to the Court (if the OIG disagrees with the Special Master). At present, the OIG has not stated any reason for taking the Court's time with an undefined "privilege log issue".

For the reasons set forth above, Hamilton respectfully requests that the Court deny the OIG's request for judicial enforcement of the issues set forth in Petitioner's Status Report. Alternatively, if the Court feels it requires additional information to evaluate the reasonableness (or lack thereof) of the OIG's demands, Hamilton reiterates its request for leave to conduct discovery, and also urges the Court to conduct evidentiary hearings. The principals of Hamilton have suffered tremendously at the hands of the OIG for more than two years, and live testimony from the parties involved in this process should illuminate the burden felt by Hamilton and the unreasonableness displayed by the OIG.

Respectfully submitted,

By:_____

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October 14, 1998

**CERTIFICATE OF SERVICE**

This is to certify that on this _____ day of October, 1998, a copy of Hamilton Securities' Supplemental Opposition to the Petition for Summary Enforcement was sent, via first-class mail, postage prepaid, to:

The Honorable Susan Gaffney
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