

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,
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

**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**

The Office of the Inspector General (HUD) failed to rebut the legal and constitutional principles raised by Hamilton regarding its documents, instead asserting that a so-called "trash protocol" should take precedence over Hamilton's constitutional rights regarding its own property. The OIG's argument has no legal basis, and therefore, as a matter of law, OIG is not entitled to review the Hamilton documents in question at this time.

The OIG asserts that the foundation for its argument lies with the Court's Order of March 6, 1998. As noted by the OIG, "the Order specifically directed ... that Respondent's shall not hereafter sell, destroy, discard, or otherwise dispose of any of Respondent's or their affiliated entities' business paper records, ...". OIG Response at

p. 3. As such, all of the material in each of the locations discussed by the OIG had to be kept by Hamilton, and therefore cannot be designated “trash”. Therefore, as a matter of law, the documents remain the property of Hamilton, with no legal basis vesting in the OIG to review the documents.

Citing no legal basis for current access to Hamilton’s documents, the OIG instead relies on a “right” with which it has invested itself pursuant to a “trash protocol”, suggesting that counsel for Hamilton is now “choosing” to ignore that “protocol”. 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; but neither was the OIG. Certainly the Special Masters were present, and will be 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 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 subpoenae, 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 subpoenae, including proprietary material, and to which the OIG has no 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 may base a determination that Hamilton has waived any current argument against the immediate review of these 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.

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.

Finally, the OIG’s suggestion that certain statements in Hamilton’s original pleading were “a gratuitous insult to the Special Masters” cannot pass without comment. Hamilton believes that nothing it said should, to a reasonable reader, be construed as a comment upon the Special Masters, much less an insult. To be sure, no such insult was contemplated, much less intended.

Respectfully submitted,

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Inc. and Hamilton Securities Advisory Ser-
vices, Inc.

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of April, 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 Hetheron, Esquire
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and by hand to:

Laurence Storch, Esquire
Irving Pollack, Esquire
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Michael J. McManus