

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States ex rel. [SEALED])	
)	
vs.)	Civil Action No.
)	1:96-CV-1258 (SS)
The Hamilton Securities, Group,)	
Inc.)	
Hamilton Securities Advisory)	(Filed UNDER SEAL)
Services, Inc.,)	
et al. [SEALED])	

**OPPOSITION OF THE UNITED STATES TO THE HAMILTON SECURITIES
GROUP'S "MOTION TO UNSEAL FILE AND OPPOSITION TO THE
ATTORNEY GENERAL'S REQUEST FOR FURTHER EXTENSIONS OF TIME"**

The United States hereby files the instant Opposition to The Hamilton Securities Group, Inc.'s ("Hamilton's") "Motion to Unseal File and Opposition to the Attorney General's Request for Further Extensions of Time." As set forth herein, this is an action filed by a relator under the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b), (c), (d). Hamilton, one defendant in the action,¹ complains that the time the Court has granted the United States to determine whether to intervene and proceed with this action has been excessive, and that Hamilton has been subjected to an abusive government investigation of the allegations in the qui tam action. As relief, Hamilton seeks an order directing the United States to notify all parties within ten (10) business days whether the United States will intervene

¹ Both The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. are defendants in this action. The Motion to Unseal was filed only by The Hamilton Securities Group, Inc.

in this case, and directing the Clerk of the Court to lift the seal on this case.

Contrary to Hamilton's claims, the length of the investigation which includes the allegations in this qui tam action is fully warranted and is attributable to the complexity of the allegations under investigation, the number of potential defendants, and the obstinacy of Hamilton in failing to comply fully and timely with the administrative subpoenas issued to it by the Office of Inspector General ("OIG") of the U.S. Department of Housing and Urban Development ("HUD"). Further, the government has been diligent in pursuing the investigation of the complex allegations at issue here, and its conduct of the investigation has been proper. Accordingly, no relief is warranted at this time.

BACKGROUND

This is a qui tam action filed on June 6, 1996, by a relator on behalf of the United States, pursuant to the False Claims Act, 31 U.S.C. §§ 3729 et seq. This matter is under seal, as it has been since the filing of the complaint. See 31 U.S.C. § 3730(b)(2), (3). The seal was partially lifted by the Court in November 1997, at the request of the United States Attorney's Office, in order to permit the government to advise The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. (collectively, "Hamilton"), that they were defendants in this matter. Hamilton was not advised of the identities of the relator or the other defendants, or of the

particulars of the complaint.²

In connection with a related subpoena enforcement matter also pending before this Court (Gaffney v. Hamilton Securities Group, et al., Misc. No. 98-92 (SS)), however, Hamilton has been advised that the HUD OIG, in conjunction with both the Civil and Criminal Divisions of the United States Attorney's Office and other law enforcement entities, has been conducting an investigation of certain allegations contained in a Bivens action pending before the Honorable William B. Bryant, Ervin and Associates, Inc. v. Helen Dunlap, U.S. Department of Housing and Urban Development, et al., Civil Action No. 1:96-CV-1253, as well as of the matters alleged in the instant qui tam action, and of other allegations that have arisen in the course of the investigation, including conflicts of interest on the part of Hamilton in its dealings with HUD. The allegations involved in the Bivens action, which is not under seal, include corruption and favoritism in the procurement of financial advisory services associated with HUD's sale of defaulted mortgage notes, and an

² Hamilton apparently believes the relators to be Ervin and Associates and John Ervin. On June 4, 1999, Hamilton filed an action in D.C. Superior Court against Ervin, alleging tortious interference with contractual relations, tortious interference with prospective business advantage, and abuse of process for, among other things, filing the instant action. The Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services, Inc. v. Ervin and Associates and John Ervin, D.C. Superior Court (attached hereto as Exhibit 1). In the complaint, Hamilton alleges that "Ervin, with the apparent concurrence of the HUD Inspector General's office, prepared two lawsuits specifically designed to cause the cancellation of Hamilton's contracts, to effectuate the removal of Hamilton as a competitor, and to kill the loan sales program that was adversely affecting Ervin's financial interests." Complaint, at ¶ 17.

alleged scheme by Hamilton and others to deliver huge blocks of discounted HUD-owned notes to favored Wall Street firms. These allegations are complex and involve numerous fact scenarios and persons and entities other than Hamilton.

Hamilton was provided with a description of the original allegations in the Bivens complaint in the government's Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Subpoenas, filed March 3, 1998, in Gaffney v. Hamilton, et al., Misc. No. 98-92, at pages 2-6; the accompanying Declaration of James M. Martin, at ¶¶ 3-9; the Declaration of Jack Rogers submitted in connection with Petitioner's Response in Opposition to Respondents' Motion for Leave to Conduct Discovery, filed in Gaffney v. Hamilton, Misc. No. 98-92, on September 25, 1998, at ¶¶ 3-7; and in a letter of September 30, 1998, to their current counsel, Drinker, Biddle & Reath (attached hereto as Exhibit 2). Hamilton was also advised that the investigation the government was conducting of the numerous complex allegations was "aimed at finding the truth in these matters, thereby either refuting the allegations and putting them to rest, or developing evidence for potential administrative, civil, and/or criminal actions and remedies the United States might pursue" (Exhibit 2 hereto, at page 4).

As this Court is aware, in furtherance of the investigation of this matter and the other related matters, the HUD OIG issued administrative subpoenas to Hamilton on August 6 and 22, 1996 and October 24, 1997. In the view of the government, Hamilton's

compliance with the subpoenas was deficient. In December 1997, two weeks after Hamilton was advised that it was a defendant in the instant qui tam action, Hamilton's attorneys sent a letter to the United States Attorney's Office demanding that the investigation of Hamilton be concluded within two weeks. See Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Subpoenas, filed in Misc. No. 98-92 on March 3, 1998, at page 17. Thereafter, at a meeting on December 18, 1997, Assistant U.S. Attorneys from both the Civil and Criminal Divisions advised Hamilton's lawyers that the investigation would not be terminated and that full compliance with the OIG subpoenas was required. Id., at pages 18-19.

Hamilton responded by obtaining new counsel and filing an action in this Court seeking to restrain the HUD OIG from seeking enforcement of its subpoenas to Hamilton (The Hamilton Securities Group, Inc., et al. v. U.S. Department of Housing and Urban Development, et al., Civil Action No. 98-36 (SS), filed January 8, 1998). In the ensuing litigation, Hamilton acknowledged that its production of records responsive to the October 1997 OIG subpoenas was incomplete, but claimed that, despite agreements of its previous counsel to comply, it would not do so because it was "moribund" and "winding up its affairs." Id., at page 18. Following a hearing on February 18, 1998, the Court dismissed the action as to the Inspector General by Order of March 3, 1998.

On March 3, 1998, the Inspector General filed the subpoena enforcement proceeding that is pending before this Court.

Gaffney v. Hamilton, et al., Misc. No. 98-92. The government also sought a temporary restraining order to prevent the sale and destruction of records responsive to the subpoenas, since it had learned that Hamilton planned to auction off its business equipment, including numerous computers, on March 10, 1998. In the initial months after the filing of the proceeding, the Special Masters appointed by the Court marshaled Hamilton's records and attempted to adjudicate issues between Hamilton and the government. During this period, Hamilton resisted numerous efforts of the Special Masters and the government to resolve the subpoena enforcement issues, as detailed in the pleadings in Misc. No. 98-92. For example, substantial efforts were expended as a result of Hamilton's renegeing on its agreement with the Special Masters to permit the government to review the paper files Hamilton had designated as "trash" for a determination whether the records should be preserved. A further example of Hamilton's obstinacy is its apparent withholding of documents it initially disclosed to the government, but then determined not to produce (see Exhibit 3 hereto). On December 18, 1998, after extensive briefing by the parties, this Court entered an order enforcing the subpoenas (Exhibit 4 hereto). Hamilton appealed the Order, but did not seek a stay. Gaffney v. The Hamilton Securities Group, Inc., et al., D.C. Cir. No. 99-5046, filed February 12, 1999.³

³ The United States moved for summary affirmance of the Court's order on April 5, 1999. Hamilton opposed the motion, and filed a cross motion for summary reversal on April 27, 1999. The

Since late December, in addition to briefing Hamilton's appeal, the parties have been engaged in carrying out the Court's Order, with the assistance of the Special Masters. With respect to paper files (pages 8-9 of the Court's Order of December 18, 1998), Hamilton made its claims of privilege, which were challenged in certain respects by the government, and initially adjudicated by the Special Masters. Hamilton filed an exception to the Special Masters' Recommendation on May 7, 1999, and the government filed an Opposition to the exception. On May 26, 1999, the Special Masters filed with the Court their Recommendation as to the resolution of the privilege claims. On May 27, 1999, Hamilton filed a reply to the government's opposition. A hearing is scheduled on June 17, 1999, on Hamilton's objections to the Special Masters' rejection of Hamilton's privilege claims with respect to certain records pertaining to Hamilton's relationship with the law firm of Holland & Knight.

With respect to Hamilton's electronic financial records (pages 2-4 of the Court's Order), the Special Masters engaged an expert to assist in the downloading of the Solomon server and Hamilton reviewed the records for privilege and responsiveness. Hamilton objected to the release to the government of financial records pertaining to its business activities other than with HUD, and the government opposed the objection. On April 26,

government filed a reply on May 10, 1999, and Hamilton filed its final pleading on May 17, 1999. The matter is now fully briefed and awaiting a ruling.

1999, the Special Masters ruled in the government's favor. Hamilton took no appeal to this Court on that issue.

With respect to other electronic records, Hamilton's attorney filed a certification explaining why the backup tape of June 16, 1996 could not be produced (pages 5-6 of the Court's Order). The government has challenged that certification as not being from "a knowledgeable person" as required by the Court's Order, and as being in conflict with statements of Hamilton's previous attorneys (see Exhibit 5 hereto). The Special Masters have concluded that the government's challenge "raises serious questions whether the sworn certification . . . provided" by Hamilton's counsel is accurate. They are conducting an inquiry regarding "the existence and whereabouts of the back-up tape," and "the way this subpoena demand was handled by [Hamilton]," and have noted that the matter "raises troubling questions about respondents' overall diligence in providing material required by the subpoenas in this case" (see Exhibit 6 hereto; see also Exhibits 7, 8, and 9 hereto).

As to other electronic media (pages 5-8 of the Court's Order), in particular the other backup tapes, the government identified a vendor to make the exact copies of the tapes as required by the Court's Order (see Exhibit 10 hereto), but Hamilton has objected to the proposed format in which the copying would be done (see Exhibit 11 hereto). At the government's request, Hamilton submitted the name of a vendor it believed capable of copying the tapes into a format in which Hamilton

believes it would be easier for it to conduct its review. The government has requested information from the potential vendor on process and cost to determine whether it is feasible to use this vendor. It is expected that this matter will be resolved shortly (see Exhibit 12 hereto).

In sum, Hamilton's compliance with the subpoenas is still not complete.

On May 20, 1999, Hamilton's counsel was advised by Assistant United States Attorney Robert R. Chapman, Esq., that the Criminal Division had not been presented with evidence which would sustain a criminal prosecution at this time. The Criminal Division specifically informed Hamilton's counsel that should additional information develop or be presented to it that warrants further review then the Criminal Division's position may change. That is, Mr. Chapman advised Hamilton's counsel, that the assessment was based only on the evidence produced to date, and should additional information become available indicating that a crime may have taken place, then the matter would be looked at again. Meanwhile, the investigation of the allegations continues, with respect to both possible civil and criminal violations.

ARGUMENT

Hamilton seeks the unsealing of the complaint and a directive that the United States determine within ten (10) business days whether to intervene in the action, alleging that the government has been granted an excessive time period within which to make its determination whether to intervene, and that in

the meantime Hamilton has been subjected to an abusive and unduly long government investigation. Contrary to Hamilton's contention, the government has been pursuing this matter diligently, both with respect to the subpoena enforcement proceeding and with respect to the underlying investigation. Further, its conduct of the investigation has been proper. The length of the investigation is directly attributable to the complexity of the allegations and Hamilton's obstinacy in refusing to comply fully and timely with the OIG subpoenas.

At the outset, we will address the same, tired "red herrings" that Hamilton continually raises, and does so again here, in an effort to divert this Court from the issues. In support of its claim that the government's investigation has been abusive, Hamilton asserts that its service as a HUD contractor was exemplary and that it was "destroy[ed] or critically wound[ed]" by the OIG's "endless investigation." Motion to Unseal, at page 11. This allegation was fully addressed and refuted in Petitioner's Reply to Respondents' Opposition to Petition for Summary Enforcement, filed on April 27, 1998, at pages 3-4 (relevant pages attached hereto as Exhibit 13 hereto). In short, Hamilton cannot blame the government's investigation for its demise.

Hamilton has previously conceded that HUD was its only significant paying client. See Exhibit 13 hereto. Further, its contract with HUD would have expired under its terms in April 1998, and it was informed by HUD in May 1997 that its contract

was likely to be terminated for the convenience of the government BEFORE April 1998 due to an anticipated consolidated procurement by HUD of financial advisory services. Id. Its contract was ultimately terminated for the convenience of the government in October 1997, six months before it would have expired. This termination followed Hamilton's admission of "errors" it had made in its role as HUD's financial advisor which had resulted both in HUD losing money and in the wrong bidders winning certain of the note sales, thus subjecting HUD to potential further monetary losses. Id. In fact, we were previously informed that Hamilton's counsel in the subpoena enforcement proceedings was being paid for by its insurance company, under its errors and omissions policy, on the theory that the "errors" Hamilton had committed in connection with HUD's note sales are at least partly responsible for its current legal difficulties and the government's subpoena enforcement proceedings. Id.⁴

In further support of its claim of government abuse, Hamilton contends again that the government has improperly provided information to the news media concerning a sealed matter, citing once again an article that appeared in The

⁴ Hamilton has an action pending in the United States Court of Federal Claims in which it seeks \$1.5 million allegedly due under its contract with HUD that was terminated by HUD in October 1997. Hamilton Securities Advisory Services, Inc. v. United States, Case No. 98-169C (Judge Horn). The Court of Federal Claims recently denied the motion of the United States to dismiss that action for lack of subject matter jurisdiction. The United States has filed a counterclaim in that action, alleging breach of contract by Hamilton. On June 9, 1999, the parties filed a Joint Status Report in which they disagree on the posture of the matter (see Exhibit 14 hereto).

Washington Times on March 11, 1998. This claim, too, was fully addressed and refuted by the government previously, in Petitioner's Response to Respondents' Exception to Recommendation of the Special Masters, filed in Misc. No. 98-92 on April 27, 1998, at pages 13-17 (the relevant pages are attached hereto as Exhibit 15). In short, the news article is erroneous, as a transcript of the court proceeding at issue will establish, and based on conjecture, as to what occurred at a hearing before this Court on March 9, 1998 in another matter, from which the reporter had been excluded. As Hamilton well knows, there simply was no hearing on March 9, 1998, at which the government would have been arguing for permission to "move in and safeguard the [Hamilton] computer data before the equipment was auctioned." Indeed, the Court's order directing the safeguarding of Hamilton's computer records and equipment had been entered on March 6, 1998, and the safeguarding was well underway on March 9, 1998 when this Court held a hearing in an entirely separate matter. See Exhibit 15 hereto.

Hamilton again cites the supposed subpoenaing of the tax records of an elderly uncle of Ms. Fitts in support of its claim of excessive government zeal. Motion to Unseal, at page 8. This allegation was raised by Hamilton months ago, and fully addressed and refuted by the government in Petitioner's Response in Opposition to Movants', The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc., Motion for Leave to Conduct Discovery, filed in Misc. No. 98-92 on September 24,

1998, at note 3, pages 7-8, and attachments (the relevant pages are attached hereto as Exhibit 16). In short, the OIG did not subpoena the tax records of the individual involved, one Robin D. Willits. Rather, the OIG's subpoena was issued to obtain records for three payments made by Ms. Fitts to Mr. Willits for which Ms. Fitts' financial records did not include supporting information, and was expressly limited to such payments. See Exhibit 16.

A new red herring raised by Hamilton is its claim that the government has not even bothered to review many of the paper files in the possession of the Special Masters. This is not merely a convenient litigating position by Hamilton, but rather, borders on an attempt by Hamilton to mislead the Court. In support of its statement Hamilton relies on the Special Masters' sign in logs for the period of May 29, 1998 through May 11, 1999, which show that no one from the Office of Inspector General viewed the documents in the Special Masters' custody for a period of several months, between late July 1998 and January 1999.⁵ What Hamilton fails to mention, however, is that during that time period there was an unresolved issue pending before this Court concerning whether, in order to view the documents, the government was required to sign a non-disclosure agreement formulated by the Special Masters in July 1998, in response to Hamilton's claim that its "proprietary information" required

⁵ The log indicates that government representatives visited the Special Masters' document room on August 28 and September 15, 1998, but it was only to view the external markings on the boxes of records.

safeguarding. The government objected to the signing of the agreement on the grounds, among others, that the proposed non-disclosure agreement unduly interfered with its ability to conduct legitimate investigatory efforts. See Petitioner's Status Report, filed September 24, 1998, in Misc. No. 98-92, at pages 5-9.⁶ This Court resolved the controversy in the government's favor by its Order of December 18, 1998, at page 9, paragraph 5, and government representatives resumed inspection of the documents in the Special Masters' custody shortly thereafter, as needed for investigative purposes.⁷

Hamilton's own conduct has greatly contributed to the length of the investigation of the allegations in the qui tam action and related allegations. A great deal of government effort has been

⁶ See also Hamilton Securities' Response Concerning the Protection of Proprietary Information, filed in Misc. No. 98-92 on October 13, 1998; Petitioner's Reply to Hamilton Securities' Response Concerning the Protection of Proprietary Information, filed October 21, 1998; Respondents' Reply to Petitioner's Reply to Hamilton Securities' Response Concerning the Protection of Proprietary Information, filed November 5, 1998.

⁷ Of course, many of the documents in the possession of the Special Masters are the original records, copies of which were produced to the government by Hamilton before the subpoena enforcement proceeding was filed. Many others have been withheld by Hamilton from the government on the ground that they are not responsive to the subpoenas, and thus the government is not permitted to see them. Also, the government was not permitted to review certain of the records until they had first been reviewed by Hamilton for privilege and responsiveness. Furthermore, due to the security procedures adopted by the Special Masters, the government was not permitted to review records on days when Hamilton's representatives were reviewing records. Thus, on several occasions when the government sought to review records, it was unable to do so, either because Hamilton was in the process of reviewing the records, or because Hamilton had not yet reviewed the records in question.

devoted to securing Hamilton's compliance with the subpoenas, but, as demonstrated by the procedural history set forth above and in the files of the injunctive action brought by Hamilton (No. 98-36), the subpoena proceeding brought by the government (Misc. No. 98-92), and the appeal of this Court's order of December 18, 1998 (D.C. Cir. No. 99-5046), Hamilton has resisted those efforts at almost every turn. In fact, as indicated above, the Special Masters are now conducting an inquiry which, as they have indicated, "raises troubling questions about [Hamilton's] overall diligence in providing material required by the subpoenas in this case" (see Exhibit 6 hereto).

Hamilton's reliance on Baker & Taylor and the unpublished matter of SmithKline Beecham Clinical Labs. is misplaced. Neither of those cases stand for the proposition that the length of time that a qui tam complaint has been under seal alone is a sufficient basis to conclude that the seal should be lifted. Indeed, Baker & Taylor specifically recognized that the seal could be continued for the purposes of continuing an investigation if the government showed good cause for the maintenance of the seal. Id. at 1190. The court merely concluded in Baker & Taylor that the government failed to meet its good cause burden -- in that case -- under those facts.⁸ In

⁸ Hamilton's reference to one-sided discovery is misleading. In Baker & Taylor the one-sided discovery the court was referring to related to the State of California's representation that it had concluded that defendant had violated the law, but that it was merely attempting to ascertain the damages. Id. at 1191. There is no one-sided discovery in this matter under the circumstances articulated in the Baker & Taylor

Erickson v. American Institute of Bio. Sciences, 716 F. Supp. 908, 911 (E.D. Va. 1989), Judge Ellis noted that yet another goal of the seal was to prevent wrongdoers from being tipped-off, and to protect defendant's reputation from unfounded public accusation. See also United States ex rel. O'Keefe v. McDonnell Douglas Corp., 902 F. Supp. 189, 190 (E.D. Mo. 1994) (extending the seal beyond sixty days a matter of discretion for the Court). In this matter, as the Court is aware, Hamilton is not the sole defendant. Further, Hamilton cannot seek to benefit from its argument that its reputation is being harmed while the matter remains under seal, when it has ignored the seal, in principle, by filing satellite litigation in the Superior Court of the District of Columbia -- where it seeks to draw more attention upon itself.

Hamilton's argument also assumes that the criminal investigation has the same focus as the civil investigation. The investigations are clearly separate.

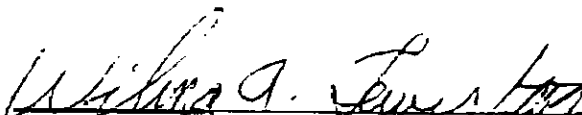
Finally, it should be noted that, as to the question of unsealing the complaint and requiring the government immediately to determine whether to intervene, the two Hamilton entities are not the only defendants in the qui tam action. While Hamilton states it wants the complaint unsealed and wishes to require the government to determine within ten (10) business days whether to intervene, such a course is not necessarily in the interest of the other defendants.

matter.


CONCLUSION

WHEREFORE, for all the above reasons, the United States submits that Hamilton's "Motion to Unseal File and Opposition to the Attorney General's Request for Further Extensions of Time" should be denied.


Respectfully submitted,



WILMA A. LEWIS, D.C. Bar #358637
United States Attorney



MARK E. NAGLE, D.C. Bar # 416364
Assistant United States Attorney



ANTHONY M. ALEXIS, D.C. Bar # 384545
Assistant United States Attorney
555 4th Street, N.W.
Room 10-919
Washington, D.C. 20001
(202) 514-7133

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition of the United States to The Hamilton Securities Group's "Motion to Unseal File and Opposition to the Attorney General's Request for Further Extensions of Time" was served by first class mail on June 14th, 1999, addressed to the following:

Counsel for Defendant The Hamilton Securities Group, Inc.:

MICHAEL J. McMANUS, ESQ.
Drinker, Biddle & Reath, LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209



ANTHONY M. ALEXIS, D.C. Bar # 384545
Assistant United States Attorney
United States Attorney's Office
555 4th Street, N.W.
Room 10-919
Washington, D.C. 20001
(202) 514-7133