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. THE HAMILTON SECURITIES GROUP, INC., and HAMILTON SECURITIES ADVISORY SERVICES, INC., Respondents.	:	Misc. No. 98-92 (SS) Filed UNDER SEAL

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS

Petitioner, Susan Gaffney in her official capacity as Inspector General, U.S. Department of Housing and Urban Development, hereby submits the instant Reply to the Opposition to Petition for Summary Enforcement of Administrative Subpoenas ("Opposition") filed by Respondents, The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. ("Hamilton").

Hamilton's Opposition is premised on a misunderstanding of both the limited role played by the courts in enforcing administrative subpoenas, and the history of the attempts by the Office of Inspector General ("OIG") to obtain Hamilton's compliance with the OIG subpoenas.[1] Moreover, much of Hamilton's

[1] The law firm currently representing Hamilton, Jackson & Campbell, is the fourth law firm to represent Hamilton in

Opposition is devoted to discussion of numerous "red herrings," in an apparent effort to divert attention from the basic issues, which are quite clear-cut. Despite its diversionary tactics, Hamilton cannot escape the inevitable conclusions that (1) the subpoenas are within the statutory authority of the OIG, (2) the information sought is reasonably relevant to the inquiry, and the (3) subpoenas are not unreasonably broad or burdensome. Since the subpoenas satisfy the applicable legal standards, they should be enforced.

ARGUMENT

A. The Red Herrings

Since Hamilton devotes half its Opposition to the "red herrings," we will address them here briefly, in order to clear them out of the way before focusing on the issues that are really before the Court.

Hamilton complains that the OIG's investigation has gone on for nineteen months without any formal charges or claims having been made against it, and thus Hamilton speculates that the OIG does not grasp the issues or understand the records that already have been produced. Opposition, at 4-5, 7. This is curious logic indeed. Hamilton seems to be saying that if the OIG only understood the records it had, the OIG would surely have made some claims or charges against Hamilton by now. Hamilton thus faults the government for restraint in not acting until all the

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connection with the OIG's efforts to secure compliance with the subpoenas.

evidence has been gathered and assessed. As Hamilton has been repeatedly informed, the OIG cannot conclude the aspects of its investigation relating to Hamilton without obtaining full compliance with the very focused subpoenas issued to Hamilton. Hamilton's dragging of its feet in producing records responsive to the August 1996 subpoenas over a ten-month period (August 1996 - June 1997), and its four months of repeated broken promises concerning production of records responsive to the October 1997 subpoenas (October 1997 - February 1998), have served only to prolong the OIG's investigation. Hamilton is in no position to complain about a "delay."

Another "red herring" is Hamilton's complaint that it has gone or is going out of business, and that the OIG is responsible for this. As Hamilton concedes, HUD was its only significant paying client ("HUD contracts comprised the majority of Hamilton's revenue-generating workload"). Opposition, at 8. Hamilton's contract with HUD and its "crosscutting" task order were terminated for convenience by HUD in October 1997, six months before the task order would have expired in the normal course.[2] The termination followed Hamilton's admission of "errors" it had made in its role as HUD's financial advisor, "errors" which resulted both in HUD losing money and in the wrong

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[2] In fact, Hamilton had been informed in May 1997 that its contract was likely to be terminated for the convenience of the government even before April 1998, due to an anticipated consolidated procurement of financial advisory services for HUD. See letter of May 9, 1997, from Annette E. Hancock to C. Austin Fitts (Attachment 1).

bidders winning certain of the note sales, thus subjecting HUD to potential further monetary losses.[3] Hamilton cannot blame its demise on the OIG.[4]

A third "red herring" is Hamilton's claim that it has already produced a lot of records, and thus it should not have to produce more. Opposition, at 2, 4. In this regard, Hamilton cites the volume of records currently in the possession of the Special Master as evidence of its good faith. Id., at 4. Hamilton can hardly take credit for the Special Master's efforts. Many of the records in the Special Master's custody are there only because the Special Master acted quickly, before Hamilton was able to carry out its apparent plan to destroy those records. See Petitioner's Response to Respondents' Exception to the Recommendation of the Special Masters (April 24, 1998); see also letter of April 16, 1998, from Laurence Storch to Michael J.

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[3] Indeed, Hamilton's current counsel is apparently being paid for by its insurance company, under its errors and omissions policy, on the theory that the "errors" Hamilton committed with respect to its use of the optimization model in connection with HUD's note sales are at least partly responsible for its current legal difficulties.

[4] Hamilton also claims that "unsubstantiated rumors leaked to the media" are among the things that have "led Hamilton to the door of bankruptcy," seeming to suggest that the OIG is responsible for these "leaks." Opposition, at 3. Hamilton has repeatedly tried, but failed, to tarnish the OIG's investigation with the claim that the OIG is leaking information to the media. The OIG has conclusively refuted these allegations in detail every time they have been made, most recently in "Petitioner's Response to Respondents' Exception to Recommendation of the Special Masters," filed April 24, 1998, and will not repeat those refutations here.

McManus, Esq., Attachment 2 hereto.[5] In any event, Hamilton cannot justify its withholding of records responsive to certain categories in the subpoenas on the grounds that it has complied with other categories.[6]

A fourth "red herring" is that the subpoenas are repetitive, that "the OIG continues to press for materials it has already been furnished, in a manner that can only be described as harassment." Opposition, at 2; see also Opposition, at 4. This

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[5] Hamilton complains that there is an "insinuation" in the government's Petition for Summary Enforcement that "difficulties Hamilton experienced responding to the subpoenae indicate an obstructionist attitude." Opposition, at 6. The characterization is Hamilton's; the government has just permitted the facts to speak for themselves on this.

Among other things, these now include the facts that (1) the earliest complete backup tapes of Hamilton's electronic records system, which the OIG was told were in the possession of Hamilton, have apparently disappeared and, despite repeated attempts to obtain an explanation, none has been forthcoming (see letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, at 5-7 (Attachment 3); letter of April 21, 1998, from Michael J. McManus to Judith Hetherton (Attachment 4)); (2) original financial records that were the subject of the OIG subpoenas were found by the OIG on March 10, 1998, in a locked dumpster marked for destruction in the basement of the building in which Hamilton's office was located (see letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, at 1-2 (Attachment 3)); and (3) the Special Master himself has determined that Hamilton "consultants" and former employees entered Hamilton's offices after the Special Master ordered them sealed, and that at least one of those persons did so knowingly and in defiance of the Special Master's directive, and admitted to having exchanged a computer with a former Hamilton employee (see letter of April 16, 1998, from Laurence Storch to Michael J. McManus, Attachment 2).

[6] The government will not reiterate here the details of Hamilton's failures to produce records responsive to the OIG subpoenas, which are set forth in the government's Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Subpoenas Issued Pursuant to 5 U.S.C. App. 3 § 6(a)(4) ("Petitioner's Memorandum"), filed March 3, 1998, at 14-19.

is simply not true. The OIG has pressed only for the production of records it has not received. Moreover, as was stated in Petitioner's Memorandum at 14,

> [t]he categories of records sought [by the October 1997 subpoenas] were drawn, to the extent possible, to exclude all records produced in response to the previous subpoenas. To the extent some overlap in description was unavoidable, the subpoenas made clear that records already produced need not be produced again. See, e.g., Instruction No. 4, Exh. 5 to Martin Decl., at pp. 3-4.

The only exception to this is the OIG's request for originals of records Hamilton had previously produced in the form of copies. See Petitioner's Memorandum, at 37-38. The OIG subpoenas issued to Hamilton on August 6 and 22, 1996, permitted the production of copies, provided the originals were maintained for inspection. See, e.g., Definition and Instructions, No. 3, Exh. 1 to Declaration of James M. Martin ("Martin Decl."), at p. 4. When it became apparent, however, that Hamilton might go out of business, the OIG requested that the original records be produced to it. Of course, many of these original records are the actual bidding records from HUD's note sales, and should have been turned over to HUD in any event.

Having dispensed with the diversionary issues, we will proceed to discuss the real issues before the Court.

B. The Information Sought by the Subpoenas Is Reasonably Relevant to the Inspector General's Investigation

Hamilton seems to think that this subpoena enforcement proceeding is nothing more than a civil discovery dispute, arguing that the OIG should be denied access to the information

it seeks because granting such access will only "create additional burdens [for Hamilton] further down the road in the form of motions to strike or limit introduction of irrelevant information." Opposition, at 11. Thus, Hamilton contends, "[l]imiting discovery up front is the only way to adequately address the burden on Hamilton." Id. (emphasis added). Accordingly, Hamilton urges the Court "to undertake an inquiry into the propriety and reasons for which the subpoenae were issued . . . ," id., at 6, and require the OIG to share with Hamilton "the focus of the investigation and the evidence developed to date . . . ," id., at 5; see also id., at 13-14. Hamilton would apparently like an opportunity to debate with the OIG the evidence the OIG has developed to date, and litigate on the merits--before it has produced all the relevant records--such issues as whether it had a conflict of interest in its role as HUD's financial advisor. Such an examination of evidence developed in the OIG's investigation would not only be unprecedented, wholly inappropriate and damaging to the ongoing investigation, but it is totally unnecessary to a determination of the government's Petition for Summary Enforcement.

Hamilton completely misunderstands the nature of a subpoena enforcement proceeding and the governing legal standards. The legal standards are set forth in detail in Petitioner's Memorandum, at 19-24, but, given the misunderstanding, the government will reiterate them briefly here. As a general rule, "an investigative subpoena will be enforced if the 'evidence

sought . . .[is] not plainly incompetent or irrelevant to any lawful purpose' of the agency." United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1145 (D.C. Cir. 1987); see also United States v. Westinghouse Elec. Corp., 788 F.2d 164, 166 (3d Cir. 1986) (same standard applied to Inspector General subpoenas). Moreover, the broad investigative powers given by statute to an administrative agency "are not derived from the judicial function and are 'more analogous to the Grand Jury.'" United States v. Coopers & Lybrand, 550 F.2d 615, 619 (10th Cir. 1977) (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)). Thus, an Inspector General may undertake an audit, investigation, or other activity "'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd., 878 F.2d 875, 882 (5th Cir. 1989)(quoting Morton Salt Co., 338 U.S. at 642).

The Inspector General Act of 1978 grants authority to an Inspector General to require by administrative subpoena the production of records "necessary in the performance of the functions assigned by [the] Act," and provides that "in the case of contumacy or refusal to obey, [the subpoena] shall be enforceable by order of any appropriate United States district court." 5 U.S.C. App. 3 § (6)(a)(4). It has been observed in this District that "[p]erhaps the Inspector General's most important tool for ferreting out waste, fraud, and abuse is the extensive subpoena power created by Congress to aid his

investigations." United States v. Aero-Mayflower Transit Co., 646 F. Supp. 1467, 1472 (D.D.C. 1986), aff'd, 831 F.2d 1142 (D.C. Cir. 1987). Thus, "a constricted interpretation [of the subpoena authority] would be at odds with the broad powers conferred on the Inspector General by the statute." Westinghouse Elec. Corp., 788 F.2d at 170; see also United States v. Medic House, Inc., 736 F. Supp. 1531, 1535 (W.D. Mo. 1989).

In sum, there is an immense difference between the role of the court in resolving a civil discovery dispute and its role in enforcing an investigative subpoena issued by an Inspector General. The OIG is engaged in an investigation 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. By law and necessity, its subpoena power to compel production of items relevant to its investigation must be quite broad.

Having said that, the OIG does not contend that it has no obligation to satisfy the Court that the items it seeks are relevant to a legitimate, ongoing investigation of the OIG. The OIG, however, has already provided both the Court and Hamilton with a good deal of information about the nature of its investigation. See Petitioner's Memorandum, "Background - Initiation of the OIG Investigation," at 3-6; Martin Decl. at 1-5. Moreover, the OIG has advised that it is investigating certain of the allegations contained in the 253-page original

complaint in Ervin and Associates, Inc. v. Helen Dunlap, U.S. Department of Housing and Urban Development, et al., D.D.C., Civil Action No. 1:96-CV-1253 ("Bivens complaint"). From these matters of record, Hamilton can deduce much about the nature and extent of the investigation. Further, this Court is well aware of the allegations in the related, sealed qui tam action. From these sources of information currently of record there is more than enough information to satisfy the legal standard of relevancy for enforcement of the OIG's investigative subpoenas, as we shall demonstrate below.

While the OIG believes there is already sufficient information of record to satisfy the Court that the materials sought are relevant to the OIG's investigations, the OIG nevertheless is willing to make an ex parte, in camera proffer to the Court of additional evidence, should the Court find it necessary. The OIG strenuously opposes the notion, however, that any additional evidence should be made available to Hamilton, a subject of the investigation.

Hamilton challenges on the ground of relevancy only the following records: (1) certain of the records pertaining to Hamilton's non-HUD business ventures and potential conflicts of interest in its role as financial advisor to HUD (Item Nos. 4, 5, and 7 of the October 24, 1997 subpoenas); (2) Hamilton's financial records and supporting documentation, including personnel records (Item No. 19 of the October 24, 1997 subpoenas); and (3) records pertaining to Hamilton's activities

with respect to legislative or regulatory initiatives of HUD's Federal Housing Administration (part of item No. 12 of the October 24, 1997 subpoenas). See Opposition, at 8-12. None of these challenges has any merit.

(1) Records pertaining to Hamilton's non-HUD business ventures and potential conflicts of interest in its role as financial advisor to HUD. Hamilton claims that "[t]he OIG has no authority to investigate non-HUD-related matters, and subpoenae seeking to do that are not enforceable." Opposition, at 8. In so arguing, Hamilton completely ignores the fact the OIG has advised that it seeks the records in question because it is investigating potential conflicts of interest that Hamilton had in its role as financial advisor to HUD. Hamilton would have the Court believe that the OIG is not permitted to investigate conflicts of interest of government contractors if such an investigation would require the OIG to look into the contractor's relationships with entities other than the government or other contractors. Hamilton can cite no authority for this unusual proposition because there is none.[7] Fortunately, the law is not

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[7] Hamilton's only authority for this proposition is its citation to Morton Salt. Morton Salt, however, stands for the general proposition that a request for information in connection with a governmental investigation into corporate matters does not exceed an agency's investigatory power so long as it "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 652. In so ruling, the Supreme Court rejected the notion that corporations can claim equality with individuals in the enjoyment of a right to privace, stating that "[e]ven if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent

as myopic as Hamilton would have it be.

Contrary to Hamilton's contention, the OIG is not seeking "unrestrained access to all of Hamilton's business records . . . ." Opposition, at 9. The records which the OIG seeks, and to which Hamilton objects, are detailed in Item Nos. 4, 5, and 12 of the October 24, 1997 subpoenas,[8] and are quite precise and focused on matters that raise potential conflicts of interest:

-- records concerning certain of Hamilton's non-HUD business ventures, namely its relationships or agreements with e.villages, Edgewood Technology Services, Inc., Adelson Entertainment, Inc., and ICS Communications (Item No. 4);

-- agreements between Hamilton and any bidder at any Federal Housing Administration ("FHA") note sale (Item No. 5); and

-- records pertaining to Neighborhood Networks, a HUD program advocated by Hamilton (Item No. 7).

Hamilton's former counsel, David Handzo of Jenner & Block, advised that production of records responsive to Item No. 4 above "should not be a problem." See Petitioner's Memorandum, at 36; letter of December 22, 1997, from Judith Hetherton to David A. Handzo, Exh. 19 to Martin Decl., at pp. 13-14. As to Item No. 5, we are at a loss to understand how Hamilton could possibly contend, as it does at page 9 of its Opposition, that "agreements

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with the law and the public interest." Id. Hamilton can find no support in Morton Salt for its suggestion that the OIG cannot investigate potential conflicts of interest that Hamilton may have had as a HUD contractor.

[8] The OIG also seeks other categories of records pertaining to potential conflicts of interest of Hamilton (e.g., Item Nos. 2, 3, 6, and 8 of the subpoenas of October 24, 1997), but Hamilton raises no objection to these items in its Opposition.

between Hamilton and any bidder at any FHA note sale" would not be relevant to a legitimate investigation of Hamilton's possible conflicts as financial advisor on HUD's note sales. Finally, if Hamilton, in its role as financial advisor to HUD, urged HUD to adopt the Neighborhood Networks program while privately establishing business interests to take advantage of that program, it may well have had a conflict of interest. The OIG is entitled to the records concerning Hamilton's involvement in the Neighborhood Networks program, both on the advocacy side and on the private business interest side.

(2) Hamilton's financial records and supporting documentation, including personnel records. Item No. 19 of the October 24, 1997 subpoenas seeks the following records:

> -- Any and all Hamilton general ledgers, journals, and other books and records of original accounting entry (including, but not limited to, payroll journals and voucher registers), and supporting documentation, whether maintained by Hamilton or for the benefit of Hamilton, including but not limited to:
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> -- employee time sheets and labor cost distribution records;
> -- personnel records;
> -- travel vouchers, trip itineraries, meal and other expense reimbursement records;
> -- records reflecting the use of company credit cards and expense accounts.

The OIG's efforts to obtain these records, and the many promises Hamilton made to produce them, and subsequently broke, are detailed in Petitioner's Memorandum, at 32-34. In the Memorandum we concluded by saying that we had "grave concerns about the continuing integrity of the records." Petitioner's Memorandum, at 34. It turns out that the fears were well

founded. Among the records found in the locked dumpster marked for destruction in the basement of the CVS building were original Hamilton financial and accounting records responsive to this Item in the subpoena. Moreover, it appears from the "outstanding retrieval report" of the Iron Mountain storage facility, that Hamilton had retrieved many of the records from storage only recently, on January 15, 1998. See Exhibit B, Item 3, attached to Opposition. It is unknown at this time whether all of the financial and accounting records Hamilton called up from the storage facility have been recovered.

Hamilton contends that Item No. 19 is "overly intrusive" and irrelevant because, although almost all of its revenue came from HUD, "Hamilton was never obligated to devote all of its resources exclusively to the HUD contracts." Opposition, at 11. Hamilton misses the point. Hamilton's financial relationships with its subcontractors, at least one of whom -- BlackRock Capital Finance L.P.-- was also a bidder on HUD's note sales, is obviously relevant to the OIG's investigation of Hamilton's potential conflicts of interest, as are Hamilton's financial relationships with other individuals and entities with whom Hamilton may have had conflicts of interest in connection with its role as HUD's financial advisor. The OIG's interest in Hamilton's potential conflicts is legitimate, given Hamilton's role as HUD's financial advisor on the sale and restructuring of an $11 billion dollar portfolio and the allegations that have been made. One would have thought Hamilton would welcome the opportunity to show it

had no conflicts as a HUD contractor, if indeed that is the case. In any event, the relevance of the financial records sought, both to the determination of any conflicts of interest and to a determination whether HUD got what it paid for when it contracted with Hamilton, is obvious. Hamilton makes no case to the contrary.

(3) Records pertaining to Hamilton's activities with respect to legislative or regulatory initiatives of HUD's Federal Housing Administration. Hamilton objects that records sought by part of Item No. 12 of the October 24, 1997 subpoenas are irrelevant. That Item seeks "records constituting or pertaining to communications with any official or employee of the Office of Management and Budget (OMB) concerning any and all FHA mortgage sales, credit subsidy, and/or any FHA legislative or regulatory initiative." Hamilton apparently objects to this item only insofar as it seeks communications with OMB concerning "any FHA legislative or regulatory initiative," suggesting that it seeks information relating to Hamilton's "proprietary business activities not directly associated with Hamilton's contracts with HUD . . . ." Opposition, at 12. As noted at page 5 of Petitioner's Memorandum, however, the Ervin Bivens complaint alleged that Dunlap and other HUD employees were using Hamilton and other contractors to perform personal services, including conducting negotiations with the Office of Management and Budget, in violation of the Federal Acquisition Regulation. The OIG has a right to inquire into Hamilton's contacts with the Office of

Management and Budget to determine whether they were appropriate, and whether those contacts evidence any conflicts of interest with its role as HUD's financial advisor.

C. The Subpoenas Are Not Unreasonably Broad or Burdensome

Hamilton's argument on overbreadth and burdensomeness is premised largely on its contention that the subpoenas are repetitive. We have addressed that contention above, at pages 5-6, but will address here the specific argument Hamilton makes with respect to production of its computer and other electronic records.

Hamilton contends that "the OIG's continued request for the computer information . . . . [d]espite repeatedly being told by Hamilton counsel that information sought in the subpoenae has been produced" is evidence of harassment. Opposition, at 13. Despite Hamilton's claims, the computer and other electronic records the OIG seeks have not already been produced, as detailed at length in Petitioner's Memorandum, at 8-11, 14-19. As we described there in some detail, Hamilton's searches of its computer and other electronic records for records responsive to the OIG's August 1996 subpoenas were admittedly incomplete, did not include numerous "drives" on the employees' computers and the network servers, employed undefined "search criteria," and did not include any of the backup tapes of Hamilton's computer and electronic records systems. Given the instruction to Hamilton employees to delete electronic mail messages they maintained in their personal archives, issued shortly after Ervin & Associates

notified HUD of its intention to file suit, the failure to search the backup tapes and other Hamilton archives of electronic records is particularly significant. See Petitioner's Memorandum, at 11, and notes 6 and 7.

Further, it is conceded that Hamilton conducted no searches of its computer and electronic records systems in order to locate records responsive to the OIG's October 24, 1997 subpoenas. See letter of February 5, 1998, from David A. Handzo to Judith Hetherton, Exh. 25 to Martin Decl., at 5 ("With respect to electronic files [responsive to the October 24, 1997 subpoenas], Hamilton simply has not been able to conduct a search . . . ."); Petitioner's Memorandum, at 14-19. In sum, the computer and electronic records for which the OIG is pressing have not previously been produced.

Hamilton seems to think that its "alleged failure to produce all computer database material is largely moot in light of Hamilton's agreement to allow agents from the Federal Bureau of Investigation to download all information on the computers including backup tapes." Opposition, at 13. This statement is based on a misunderstanding of Hamilton's computer and electronic record retention systems; of the procedures that were employed by the Special Master in order to preserve any data that might have been on the Hamilton computers, laptops, and network servers as of March 9, 1998; and of the OIG's Petition for Summary Enforcement. The Special Master's efforts to preserve the data on Hamilton's computers, servers, and laptops, began on March 9,

1998, when the FBI, at the request of the Special Master, began its attempted retrieval process. The FBI's backup of the data on Hamilton's systems as of March 9, 1998, has not remotely rendered "moot" the previous failure of Hamilton either to search all its computer and electronic records for items responsive to the OIG subpoenas, or to produce the original backup tapes of its electronic records systems, going back as far as 1996.

It is unknown at this time what, if any, information was actually still on Hamilton's servers, computers, and laptops when the FBI retrieval process began. The OIG's latest subpoenas were issued on October 24, 1997; there is no reason to believe that the data on Hamilton's computers, network servers, and laptops as of October 24, 1997, was still on them as of March 9, 1998. In fact, there is ample reason to believe the contrary. Hamilton has stated that it regularly deleted electronic messages and other electronic records, although its deletion policy was not always followed consistently. See Petitioner's Memorandum, at 26-27; Exh. 34 to Martin Decl. Moreover, Hamilton has stated that after it received the OIG's October 24, 1997 subpoenas, it called in from its employees the laptops it had issued to them, and "wiped" them of all data. See letter of March 24, 1998, from Michael J. McManus to Laurence Storch, Attachment 6, at 2. Hamilton has advised that it made a backup tape of the data that was on those laptops, but whether that backup tape is in the possession of the Special Master is not yet known. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus,

Attachment 3, at 4-5.

Hamilton also advised that, upon receiving the OIG's October 24, 1997 subpoenas, it had preserved the latest backup tapes, both full and differential, that then existed of its entire computer systems--the full backup tape for October 19-20, 1997, and the differential backup tapes for October 21, 22, 23, 24, and 25, 1997. When those tapes were turned over to the Special Master, however, parts of them were missing. Hamilton's former attorney, David Frulla of Brand, Lowell & Ryan, advised at a court hearing on March 6, 1998, that Hamilton then had only "Part I" of both the full backup tape for October 19-20, 1997, and the differential backup tape for October 21, 1997. See also letter of March 10, 1998, from Judith Hetherton to Irving Pollack and Laurence Storch, Attachment 5, at 4-6.

Further, Hamilton has still failed to explain what became of the earliest known complete backup tape of its computer and electronic records systems, the June 16-17, 1996 backup tape. As detailed in Petitioner's Memorandum, at 28-29, Hamilton's attorneys and Kevin McMahan, the former Hamilton employee and "consultant" who was in charge of producing records responsive to the OIG subpoenas, have both previously gone on record as stating that this tape had been preserved. The tape was not turned over to the Special Master by Jenner & Block. The OIG's repeated efforts to obtain answers from Hamilton's various attorneys to the questions as to what became of the missing backup tapes; whether the Hamilton computers and servers were "wiped" prior to

March 9, 1998, and if so when; and what if any backup tapes were created before such "wiping," have been unavailing. See letter of April 3, 1998, from Judith Hetherton to Michael J. McManus, Attachment 3, at 4-7. Thus, whether there was any data to back up on Hamilton's computers as of March 9, 1998, the day before the auction, is unknown.[9] It is possible that all the FBI backed up was software that was reinstalled on Hamilton's computers after they were "wiped."[10]

In sum, the OIG's efforts to obtain the relevant Hamilton computer and electronic records are neither repetitive nor moot, and the production of the responsive records, under the procedures proposed by the OIG, and previously agreed to in part by Hamilton's former attorneys and Ms. Fitts, see Petitioner's Memorandum at 29-31, will not constitute an undue burden on Hamilton.

D. Procedures to Be Followed in Resolving the Petition for Summary Enforcement

The government submitted a proposed order when it filed its Petition for Summary Enforcement on March 3, 1998. The

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[9] Given the unauthorized entries into Hamilton's offices on March 6 and 7, 1998, by Elliot Cook, a long-time Hamilton computer consultant, following the Special Master's directive that the offices be sealed, the OIG has no confidence that any information that had been on the computers and servers as of March 6 was still on them as of March 9, 1998.

[10] The OIG has been advised that when the auctioneer's engineer was called upon in April 1998 to make sure that the Hamilton computers and laptops contained no data files on them before they were delivered to the purchasers, he found no data files to purge. The OIG does not know whether the same is true of the Hamilton servers, since Hamilton itself indicated it would purge those before delivery to the purchasers.

government will be submitting a revised proposed order, in order to take into account certain developments since the Special Masters began the process of gathering and preserving the records subject to the Court's order.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Petition For Summary Enforcement be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Reply to Respondents' Opposition to Petition for Summary Enforcement of Administrative Subpoenas was served on April 27, 1998 by mailing a copy thereof to the Special Masters and to respondents' counsel:

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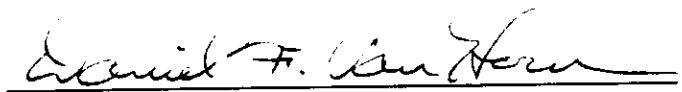

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