

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

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

**RESPONDENTS' REPLY REGARDING
CERTAIN PRIVILEGED DOCUMENTS**

The Hamilton Securities Group Inc. and Hamilton Securities Advisory Services Inc. (collectively "Hamilton") hereby reply to Petitioner's Opposition Brief. The OIG's reliance on *Cherry v. Hungarian Foreign Trade Bank*, 136 F.R.D. 369 (S.D.N.Y. 1991) for the proposition that no confidential attorney client privilege could exist between Hamilton and Holland & Knight is flawed, and misses the crucial point that Holland & Knight was not advising Hamilton about substantive work that Hamilton *or Holland & Knight* were doing for HUD.

**Holland & Knight's advice to Hamilton did not involve
a fiduciary relationship between Hamilton and HUD**

The OIG attempts to avoid the compelling logic and authority of *Eureka Investment Corp. v. Chicago Title Insurance Co.*, 743 F.2d 932 (D.C. Cir. 1984) by espousing a limited exception for fiduciary relationships laid out in *Cherry*. The present dispute is fundamentally distinguishable

from *Cherry* because Holland & Knight's work for Hamilton did not involve issues pertaining to any alleged fiduciary duty between Hamilton and HUD.

The fiduciary duty at issue in *Cherry* was the unmistakable fiduciary relationship between an attorney (Cherry) and his client (the Hungarian Foreign Trade Bank). According to the Court, that fiduciary duty precluded Cherry from later forming a confidential attorney-client relationship with another attorney (Beale) who had worked with Cherry on the earlier assignment for the bank. In contrast, the advice provided to Hamilton by Holland & Knight pertained merely to basic government contracting issues faced by any company providing any type of services to the federal government. The advice focused on Hamilton's own business interests, and not on the substantive contractual obligations of either Hamilton's or Holland & Knight's work for HUD. Hence, it did not relate to any alleged fiduciary duty between Hamilton and HUD. A reading of the documents at issue reveals that Hamilton was not seeking advice from Holland & Knight about its handling of substantive work for HUD; therefore, the fiduciary relationship argument is inapplicable.

The fiduciary exception theory espoused by the OIG regarding Holland & Knight's advice to Hamilton about Hamilton's government contracting questions makes as little sense as attempting to apply that rationale to Holland & Knight's advice to Hamilton regarding lease negotiations with a landlord. Nevertheless, the OIG extended the argument to documents concerning Hamilton's negotiations and disputes with its landlord. *See* Document Nos. 107 and 111, attached under seal within Exhibit B to Respondents' Exception.

Even if Holland & Knight's work for Hamilton involved Hamilton's substantive work for HUD – and it did not – Hamilton's relationship to HUD does not compare to the clear fiduciary

relationship existing between an attorney and his/her client. Moreover, the OIG did not present any facts to establish that there was any fiduciary relationship at issue.

The privileged communications occurred after Hamilton's and HUD's interests diverged

The OIG also attempts to distance this case from the compelling precedent in *Eureka* by arguing that Hamilton's privilege claims are dissimilar to those at issue in *Eureka* because the subject communications occurred "before the interest of HUD and Hamilton diverged with HUD's October 17, 1997 Stop Order" See Petitioner's Opposition at 7. The OIG's argument assumes that there was no divergence of interest between Hamilton and HUD until October 17, 1997 when HUD terminated Hamilton's contract, which ignores the reality of contract negotiations.

When two parties sit down to negotiate terms of a contract, their interests are divergent. Holland & Knight provided Hamilton with basic advice about negotiating terms of a government contract (including such issues as pricing, modifications and transferring rights). Whether the negotiations are amicable or confrontational, it is generally recognized that two parties negotiating terms of a contract are in an adversarial position. A reading of the documents demonstrates unequivocally that the advice pertained to contract negotiation issues that involved Hamilton's contracting interests versus HUD's interests. Hence, as was the case in *Eureka*, "the communications . . . were made not only after the interests [of the two parties] diverged but after their common attorney knew they diverged and undertook separate representation of " Hamilton. 743 F.2d at 937.

Hamilton did not waive its privilege

The OIG's arguments about waivers are inapplicable and its presentation of facts to support that argument is intentionally disingenuous. The OIG states that "Hamilton produced to Petitioner at least five communications with Mr. Moorhouse or an attorney whom Hamilton alleges worked under his direction." *See* Petitioner's Opposition at 12. The OIG then referred in more detail to a document identified as item number 64, which may be a document that Hamilton produced inadvertently at an earlier stage. The intended implication is that the other four "Moorhouse" documents also were privileged documents produced inadvertently; however, that is not true. Hamilton produced some documents concerning Holland & Knight's personal work for Hamilton specifically because Hamilton could not assert a privilege claim as to those documents for various reasons. For example, some of the documents pertaining to Mr. Moorhouse's work on subcontracting issues for Hamilton are communications directly to opposing counsel for Coopers & Lybrand as part of contract negotiations. No basis exists for the OIG to insinuate that Hamilton engaged in wholesale waiver of its attorney-client privilege.

In conclusion, Hamilton respectfully requests that the Court reverse the Special Masters' findings as to the 17 "Holland & Knight documents" and reinstate the Special Masters' Preliminary Findings, which acknowledged the patently privileged nature of the documents. Hamilton requests a hearing to present these issues to the Court and address any questions.

Respectfully submitted,

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Dated: May 27, 1999

CERTIFICATE OF SERVICE

On this 27th day of May, 1999, a copy of the foregoing Respondents' Reply Regarding Certain Privileged Documents was sent, via first-class mail, postage prepaid, to:

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