UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

In re:	:	
HMCA (Carolina), INC. Debtor	:	BK No. 90-03402 Chapter 11
In re:	:	
HMCA (PR), INC. Debtor	:	BK No. 90-03403 Chapter 11

OPINION AND ORDER: (1) GRANTING DEBTORS' COUNSEL'S REQUEST TO BE EXCUSED FROM PROSECUTING CONTEMPT ISSUES, AND (2) APPOINTING INDEPENDENT SPECIAL COUNSEL

On March 10, 2006, because of the Court's perception that he had lost the adversarial initiative to represent the Debtors and the Court's interest in this proceeding, Debtors' counsel was ordered to report and disclose his intentions regarding the prosecution and completion of this contempt proceeding which he brought in April 1997. See Doc. No. 605. The resolution of this matter, which continues to take a variety of disturbing twists and turns that delay closure, is the only unresolved issue in these very old bankruptcy cases.[1]

[1] We will not rehash the travel here, except where necessary to support our findings and conclusions. For a summary of my concerns with the conduct of many of the participants, see, inter alia, Orders dated March 10, 2006, Doc. No. 774, and Sept. 27, 2001, Doc. No. 658, and the April 21, 2004, Debtor's Draft Report in Advance of April 28, 2004 Hearing on Sanctions, Doc. No. 695.

On March 20, 2006, Debtors/Movants' counsel, Pedro Jimenez, Esq., filed a response to our March 10, 2006, Order (Doc. No. 783),[2] wherein he advanced for the first time several contentions which took the Court completely by surprise. Therefore on March 21, 2006, because we were so taken aback, the merits of the proceeding were put aside and a hearing addressing Mr. Jimenez's new positions was held instead. All known parties in interest were present or represented.

The new posture of this ten year old investigation of Mr. Jimenez's allegations of government malfeasance was: (1) that his clients are no longer operating entities, and that they are fully satisfied and are not seeking any further monetary recovery; and (2) that because of a *possibility* that sanctions *might* be imposed against *non-parties*, this *could be deemed* a criminal sanction, which he would not be authorized to prosecute. For the reasons set forth below but, ironically, not for any of the reasons argued by Mr.

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[2] In said Order his plain instructions were to:

> (1) affirm with specificity his allegations and requested relief, including additional examination of Ms. Colon Carlo, and any others, if necessary, or (2) to withdraw, also with specificity, those allegations which he does not believe have merit.

See Clarification and Order, March 10, 2006, Doc. No. 783.

Jimenez, his request to be excused from participating as counsel for the movants *in this proceeding* is GRANTED.

DISCUSSION

It was not until receiving his **March 20**, **2006**, response, filed the day before the scheduled hearing, that this Court *first learned of* Mr. Jimenez's concern that his motion "may have taken on the earmarks of one for criminal contempt," that in light of that *possibility,* he is no longer able to serve in his original adversarial capacity, and that if the proceeding is to continue, a disinterested person must be appointed in his stead to prosecute this matter. Mr. Jimenez also suggested that if a disinterested person is not appointed, then this proceeding cannot continue, and therefore it must be terminated.[3]

After long and admittedly excessive deliberation, I conclude that Mr. Jimenez's position is without merit. Nevertheless, after investing a ludicrous amount of time pondering how not to just let this matter die of inertia, as Mr. Jimenez now suggests it should, the Court has located two such disinterested persons, Jose Axtmayer, Esq., and Juan Saavedra-Castros, Esq., to complete this investigation and, in fairness to all concerned, to achieve closure.

[3] A result totally unacceptable to this Court, on the current state of the record.

To understand the Court's rejection of Mr. Jimenez's argument, while at the same time granting in part the relief he seeks, the following explanation might help. To begin with, I do not quarrel with Mr. Jimenez's general recitation of the law on criminal contempt, but disagree with his argument that this proceeding has somehow been transformed into one wherein he ought to be excused from validating his allegations. Also, this Court is quite familiar with the ongoing debate over whether bankruptcy courts have authority to impose criminal contempt sanctions, and is in the camp that believes that unfortunately, they do not. *See Eck v. Dodge Chemical Co.* (*In re Power Recovery Sys., Inc.*), 950 F.2d 798, 802 n.18 (1st Cir. 1991). See our Opinion and Order Allowing Compensatory Sanctions dated September 28, 2001, where Mr. Jimenez's request for punitive sanctions in the amount of $150,000 was denied. Also, our June 24, 1991, warning that "personal criminal sanctions *would be recommended to the District Court* for further violations," should make it clear that *this Court*, as far back as 1991, is on record as not being in the habit of conducting criminal contempt hearings, and that until March 20, 2006, this matter was never considered or treated as criminal in nature – not by the Court, not by Mr. Jimenez, not by anyone, including the respondents. It is

also a fact that, from the outset, it has been this Court's intent, and indeed its duty, to address with careful scrutiny each of Mr. Jimenez's allegations of misconduct and, if substantiated, to achieve compliance with any resulting orders.

In addition, when a civil contempt proceeding has been set in motion, as here, by allegations of serious wrongdoing, it is not the movant's call to determine how or when the matter should end. To the contrary, that is the Court's function, and it is the movant's obligation to either prosecute the matter to a conclusion or to formally withdraw the allegations if they turn out to have been not well founded. Said allegations cannot, as Mr. Jimenez proposes, simply be left in judicial limbo. Since in his response Mr. Jimenez unequivocally reaffirmed his belief in the good faith and the accuracy of all of his allegations and assertions, see Debtor's Counsel's Statement in Compliance with the Court's Clarification and Order of March 10, 2006, Doc. No. 783, pp. 2, 9-15, the Court is pleased to acknowledge that its "false allegations" concern is no longer an issue.

With that said, however, Mr. Jimenez now proposes as an alternative finish that if this Court were willing to stop right where we are and make findings and conclusions based on *and limited to* the present record, that said rulings would constitute the entire

record of the case, and that if the Court also agreed to *"only admonish any non-parties* involved in the misconduct and impropriety," (emphasis added), that would be okay with him,[4] and would remove this litigation from the realm of a criminal contempt proceeding. Given the totality of the circumstances in this odyssey of judicial hide and seek, that offer is rejected without analysis or comment. In addition to *why,* the Court also wonders how Mr. Jimenez can make such a proposal without the consent of the alleged contemnors – unless of course he has already had such discussions with them but failed to share that information with the Court. And finally as to this issue, the proposal itself is quite disingenuous, since Mr. Jimenez's adversarial enthusiasm began to wane before his *criminal contempt concerns* were ever expressed,[5] and more than

[4] Mr. Jimenez's puzzling advocacy in behalf of people who were the object of his most serious allegations really troubles the Court, and is fast becoming the reason the issue will not go away as long as those unresolved allegations continue to taint this proceeding.

[5] In the early stages of these cases while he was regularly seeking emergency relief, Mr. Jimenez championed his clients' causes against government abuse of power with an intensity and enthusiasm that became his trademark, all with consistently favorable results. Now, in contrast, his bewildering April 19 and 20, 2005, non-cross examination of Ileana Colon Carlo (his highest profile target, and the person with potentially the most exposure, according to Jimenez's April 2004 Report and Recommendation), more resembled a cordial social encounter than an attempt to achieve redress of her alleged misconduct.

likely coincides with the (prohibited)[6] March 31, 2003, sanctions payment made by the DOH.

For those mentioned above, as well as for the following reasons, I find Mr. Jimenez's *criminal contempt* arguments unpersuasive, and conclude that they do not legally support his request to be excused, nor his ability to unilaterally terminate this matter.[7] In *Power Recovery*, the First Circuit Court of Appeals explained criminal versus civil contempt as follows:

> Sanctions in a civil contempt proceeding are employed to coerce the defendant into compliance with the court's order or, where appropriate, to compensate the harmed party for losses sustained. These sanctions are not punitive, but purely remedial.
>
> Where the purpose of a monetary sanction is to make the defendant comply, the court has wide discretion in considering the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about compliance and the like.

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[6] On February 25, 2002, this Court emphasized that the sanction must be paid personally by the *responsible individuals*, and *not* by their employer(s). That sanction remained unpaid until March 31, 2003, and when funds finally were tendered (and accepted by Mr. Jimenez), it was the DOH, i.e., taxpayers, who funded the payment, and not the perpetrators.

[7] Although Mr. Jimenez's actions will partially achieve the result he seeks, this comment is intended to make it clear that under no circumstances should his argument be referenced or cited with approval as the law of the case in this unpublished opinion. (Belatedly, the Court agrees with Mr. Jimenez that he is no longer the person for the job.)

Id. at 802.

And as in *Power Recovery*, this proceeding is all about *and only about* exposing misconduct, discouraging similar future behavior, and requiring compliance with Court orders. With this as background, and still in awe of the impunity with which certain public officials[8] cavalierly trash the Commonwealth's judicial system and, incidentally, the people it serves, it is imperative that this matter proceed and that the stonewalling in the case be ended. The

[8] In addition to the Colon Carlo issue, also unresolved is the $150 per diem sanction issued in my Order of December 4, 2003, and stayed pending the resolution of this proceeding, i.e., the identification of and apportionment of fault among the responsible parties. The December 2003 sanction order named Mayra Maldonado, Esq., Jean Philip Gauthier, Esq., and Omar Cancio Martinez, Esq., because they were the only individuals who had been identified *as of that time*. But that was only a work in progress, and not an exclusive list.

finger pointing,[9] selective memory lapses, and total denial syndrome have reached levels previously unseen by this Court.

To further address Jimenez's criminal contempt issue,[10] as to who may be included as "parties," reference to portions of the early travel of these cases is necessary. The government's misconduct was

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[9] Just one example of the finger pointing and blame shifting is detailed in this comment in our Order dated March 10, 2006, Doc. No. 774:

> Because Mr. Gauthier's name surfaced early on (his signature appeared on several of the offending documents), other respondents piled on en masse trying to place all responsibility on him, and away from themselves. However, Gauthier's total lack of experience and his ineptness in bankruptcy practice belie his authority to make any of the decisions in question. To the contrary, Gauthier's contacts with Ms. Colon Carlo substantiate Jimenez's assertion that she participated actively in the scheme to divert the Medicare funds. Gauthier had been practicing law in Puerto Rico for less than one year and this was his first assignment as an attorney with the DOH. As soon as he was handed the file, Ms. Colon Carlo met personally with Gauthier and, according to Gauthier's initial testimony in April 2004, she called him repeatedly and often on his cell phone for updates regarding the status (i.e., the diversion) of the HMCA Medicare payment. That Mr. Gauthier later changed his testimony and recanted as to the frequency of calls from Colon Carlo, only buttresses the inference that his later testimony was coerced.

Order dated March 10, 2006, Doc. No. 774, fn3, pp.4-5.

[10] Tardiness or laches as a bar to Mr. Jimenez's recent *recusal* argument have existed since the beginning of this (contempt) proceeding, or at least since the Court ordered that any sanctions should be borne personally by the responsible individuals. Mr. Jimenez has sat on that argument for too many years to raise it now.

first brought to the attention of this Court by Mr. Jimenez in 1990, when the DOH attempted to divert to itself Medicare payments which clearly were the property of the HMCA entities. In June 1991, shortly after being forced into Chapter 11 by the DOH, Mr. Jimenez, on the Hospital's behalf, sought and obtained a ruling by this Court that the DOH's actions constituted a willful violation of the automatic stay and a "blatant attempt by the DOH to frustrate and interfere with the Debtors' reorganization efforts." Order dated June 24, 1991, at 4. Additionally, the DOH and its (then unidentified) agents and affiliates were: (1) ordered not to interfere with the Debtors' entitlement to Medicare receivables; (2) they were specifically enjoined from doing so in the future; and (3) they were warned that *personal criminal sanctions would be recommended to the District Court for further violations*.[11] *Id*. at 5 (emphasis added).

Contemporaneously, as part of their reorganization case, the Debtors were seeking damages in the millions of dollars from the DOH and others in several adversary proceedings, for alleged intentional wrongdoing, one of which this Court had fully heard and was in the final stage of issuing its Opinion and Order. Practically on the

[11] It should be noted that no criminal contempt referral to the District Court has been made in this case.

eve of the filing of our decision, the seemingly clairvoyant defendants informed the Court that they had reached a "global settlement" with the Debtors, and requested that any ruling in Adversary Proceeding No. 91-0098 be deferred so that their agreement could be included as part of the Debtors' reorganization plan.[12] Naively believing that the government shenanigans were finally ended, the Debtors filed papers addressing and resolving all pending disputes, the Settlement Agreement was attached to and made a part of the Application to Compromise, *see* Doc. No. 373, and the Debtors' plan was confirmed. The named parties in the Chapter 11 litigation were the Debtors, the DOH, and the Justice Department. At that

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[12] As noted in a Sanctions Order dated September 28, 2001:

> This well-timed overture was made only after a full evidentiary trial, with overwhelming proof of the DOH's misconduct, including damaging testimony by the prior Secretary of Health. With the Debtors seeking damages in the millions, and recognizing that it was clearly in trouble, DOH cleverly requested the "time out."

Sanctions Order, Doc. No. 658, September 28, 2001, p. 2 n2.

In hindsight, and in light of "the government's" subsequent contemptuous and lawless actions, it is now apparent that the "global settlement" was entered into ab initio with fraudulent intent, solely to avoid a disastrously adverse decision, and that the Court was one of the victims of that ruse. "The government" is a term used collectively, because the magnitude of the skulduggery, based on the record to date, involves multiple entities and individuals, including the Departments of Justice, Health, Treasury, The Office of the Comptroller, and their agents and attorneys.

time, and prominently on center stage, the highest ranking involved government official, a major player in the alleged wrongdoing, and an indispensable party to the "global settlement," was the then Comptroller of Puerto Rico, Ileana Colon Carlo, who, because of her personal involvement in related civil litigation with the Debtors, was specifically included as a party, and was a signatory to the Settlement Agreement incorporated into the Debtors' reorganization plan. In fact, as a condition of the settlement, the Debtors dismissed all claims against Ms. Colon Carlo, including a defamation action brought against her individually for libel and slander of the Debtors' principal. Clearly, Colon Carlo was a (and perhaps *the*) major single beneficiary of the settlement. Thereafter, as noted in the September 28, 2001 Sanctions order, the sending of the infamous "COSVI letter"[13] and the filing of the "Medicare Motion" were both obvious violations of the Settlement Agreement and this Court's prior injunction, matters in which Colon Carlo was clearly involved, and to which she was a party in every sense of the term.[14]

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[13] Even on the record to date in this ongoing investigation, the "COSVI letter" and the Medicare motion have Colon's fingerprints all over them. It is the completion of that picture which the Court still needs to see.

[14] A "party" is defined as: "One who takes part in a transaction." *Black's Law Dictionary* 1144 (7th ed. 1999).

For these reasons and because the global settlement is so intertwined with this contempt proceeding, the parties to that agreement, and especially those who benefitted the most, notably Ileana Colon Carlo and the Office of the Comptroller, are also parties here for all purposes.[15]

The complete record in this proceeding belies Mr. Jimenez's request to be excused, as well as his authority to unilaterally terminate this contempt proceeding. *See In re Haddad*, 68 B.R. 944, 952 (Bankr. D. Mass. 1987) (the effect of a contempt order is to make an injured party whole and/or to have a court's order obeyed, essentially restoring the matter to the state in which it existed prior to the contemptor's disobedience). *See also In re Clark*, 91 B.R. 324 (Bankr. E.D. Pa. 1988) (*quoting In re Skinner*, 90 B.R. 470, 475 (Bankr. D. Utah 1988)(the contempt power is necessary to protect the "due and orderly administration of justice and in maintaining the authority . . . of the court"). Essentially, this Court, until now, has been obstructed from performing an important judicial function, and the movants' proposal(s), if accepted, would surely assist responsible participants in their endeavor to remain

[15] This ruling is included in case an appellate court or panel determines that this Court's determinations regarding criminal contempt were erroneous.

anonymous and/or to shift blame to their co-conspirators. Fundamentally, there is something very wrong with the notion of a party repeatedly seeking and obtaining emergency relief based on allegations made (presumably) in good faith, and then after the requested relief is obtained, to back off and to hinder the Court from hearing and assessing underlying sanctions issues.

Given what is and what has been going on in this case for years, if this Court's civil contempt powers were applied to their fullest, it could well involve the unwinding of the entire Chapter 11 case, including the confirmation order, the "global settlement," and many other orders entered herein. Because of the enormity of its consequences, that is an option the Court has preferred not to exercise to date. So for the time being we will follow a more temperate approach and rule that an independent investigator be appointed.[16] *See Young v.* U.S. 481 U.S. 787, 793-94 (1987)("courts possess inherent authority to initiate contempt proceedings for disobedience of their order, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt."); *see also McCann v. New York Stock Exchange*, 80 F.2d

[16] This was the only option left for the Court, when on or about November 8, 2006, the United States Trustee, without reason, outright rejected and refused the Court's request that it act as an independent investigator in these contempt proceedings.

211, 214-15 (2nd Cir. 1935), *cert. denied*, 299 U.S. 603(1936); 11 U.S.C. §105(a).

Accordingly, Jose Axtmayer, Esq., and Juan Saavedra-Castros, Esq., are appointed as Special Co-Counsel, who shall file affidavits of disinterestedness, pursuant to Fed. R. Bankr. P. 2014, within 7 days. As Special Co-Counsel, they are authorized to proceed forthwith to investigate and to present the results of their initial inquiry in a brief written report within 60 days. Mr. Jimenez is ORDERED to immediately disgorge $9,050 (plus any accrued interest) to Attorneys Axtmayer and Saavedra-Castros, who shall hold said funds as a security retainer for services to be performed by them. Said Special Counsel shall submit invoices for review by the Court prior to receiving authorization to draw down on the present or any future retainer funds. Mr. Jimenez is also reminded of his obligation to cooperate with Special Co-Counsel in their activities herein.[17] Finally, the Federal Rules of Bankruptcy Procedure

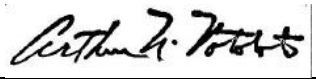
[17] In his March 10, 2006, response, Mr. Jimenez stated:

> The undersigned understands that under the applicable case law set forth above, debtor's counsel may assist the Court through the U.S. Trustee or other disinterested counsel as may be appointed for further proceedings if the Court so requires, as independently requested by that counsel, in an adversary capacity. If such counsel deems that further discovery is required, the undersigned will cooperate in that regard.

See Debtor's Counsel's Statement in Compliance with the Court's

regarding discovery are applicable herein, *see* Fed. R. Bankr. P. 9020 & 9014, and Special Counsel are reminded that this Court is and will be available at all times, upon appropriate notice, regarding the issuance of subpoenas, orders, expedited hearings, or any other tools they may require in carrying out their assignment. The same Court access, of course, is available to all persons who may be involved in this investigation.

Dated at Providence, Rhode Island, this 15th day of June, 2007.



Arthur N. Votolato
U.S. Bankruptcy Judge*

*Of the District of Rhode Island, sitting by designation.

Clarification and Order of March 10, 2006, Doc. No. 783, p. 22.