

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

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In re: :

HMCA (Carolina), Inc. : BK No. 90-03402(ANV)
Debtor Chapter 11

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In re: :

HMCA (PR), Inc. : BK No. 90-03403(ANV)
Debtor Chapter 11

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CLARIFICATION AND ORDER

PREFACE

These current proceedings are not to determine whether there has been wrongdoing or sanctionable conduct. Those issues have been previously resolved, after hearings, by final, non-appealed Orders¹ which establish that agents and officials of the Commonwealth of Puerto Rico knowingly acted in defiance of Federal Bankruptcy law and this Court's injunctions, by covertly attempting to divert to the government, Medicare funds to which they clearly were not entitled. Unfortunately, since the entry of said Orders there has evolved a grotesque game of hide and seek trying to identify and hold accountable the individuals actually responsible for the contemptuous activity. To that end, this Order is to redirect and to remind Pedro Jimenez, Esq., of his duty as an

¹ See Orders dated June 24, 1991, Document No. 248; September 27, 2001, Document No. 658; and February 25, 2002, Document No. 664.

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officer of the Court, and as counsel for the Debtors since the inception of these cases, to present fully and fairly the pending sanction and contempt proceedings which are based on Mr. Jimenez's own allegations. This particular Order is necessary because at an April 2005 hearing, Mr. Jimenez unexpectedly withdrew as an advocate, and purported to stand aside as an impartial "evidence organizer." At the same time, he unilaterally referred and/or delegated to the Court the prosecution of wrongful acts committed against his clients - a maneuver which I cannot accept or approve. Hence, the following admonition and clarification.

DISCUSSION

The captioned cases have been fully administered in Chapter 11, with all creditors paid 100% and the Debtors' principal shareholder receiving a several million dollar surplus - a testament to Mr. Jimenez's skill and ability. Before either case can be closed, however, contempt and sanctions issues, *raised by Mr. Jimenez*, remain outstanding, and must be resolved.

By now these cases should be just a memory, but the tactics of the DOH and the more recent allegations of interference by Ms. Colon Carlo still leave this Court with the responsibility to deal with the specific individuals who instigated, ordered, and/or carried out the unlawful activity.

The government began its mischief in 1990 when the DOH attempted to divert, to itself, Medicare funds owed to the HMCA entities. Shortly after the Hospital was forced into Chapter 11 by the DOH,² the Debtors sought and obtained an injunction and a ruling by the Bankruptcy Court in June 1991, that DOH's actions constituted a wilful 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 agents were ordered not to interfere with the Debtors' entitlement to Medicare receivables, they were specifically enjoined from doing so in the future, and were given a clear warning that "*personal* criminal sanctions would be recommended to the District Court for further violations." *Id.* at 5 (emphasis added).

Six years later, while the cases were still pending but in the process of being closed, the DOH again sought clandestinely to divert to itself the Debtors' Medicare receivables, i.e., on April 10, 1997, DOH sent an ex parte letter to the president of Cooperativa de Seguros de Vida ("COSVI"), Medicare's fiscal intermediary in Puerto Rico, trying to stop the payment of the

² It was the DOH's arbitrary withholding of Medicare payments from the Debtors which precipitated these Chapter 11 filings.

Debtors' final Medicare payment. Within a week after the Debtors complained and brought to the Court's attention what the DOH was up to, the DOH filed a transparent "Medicare Motion" asserting a ludicrous claim to the funds in question. The Debtors, through Mr. Jimenez, filed an opposition and requested sanctions.

On September 28, 2001, after notice and hearing, and based on Mr. Jimenez's presentation, this Court found, in denying the motion, that the DOH had again violated this Court's specific injunction, as well as the Section 362 automatic stay and Fed. R. Bankr. P. 9011, and imposed sanctions in the amount of \$9,050 jointly and severally against the DOH *and its agents*. See Opinion and Order Allowing Compensatory Sanctions dated September 27, 2001. That Order was ignored, except for Jean Philippe Gauthier, Esq.,³

³ 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

a novice DOH contract attorney who filed a Motion to Reconsider, which was denied in an Order stating that:

Implicit herein is the requirement that the guilty party(ies) pay the sanction(s) personally, and that they may not apply for reimbursement from the Commonwealth. To have any meaning, these sanctions must be paid by the wrongdoers, and not simply passed on to taxpayers. ...

Closure of this matter is long overdue, and the respondents are forewarned that further delay will likely result in the imposition of additional sanctions.

Order Denying Motion to Reconsider, February 25, 2002, Document No. 659, at 2-3 (citations omitted). No appeals were taken from that or *any* of this Court's orders.

With no compliance by anyone, another Order was issued on February 12, 2003, directing DOH's attorneys and agents to show cause why additional per diem sanctions of \$150 should not be imposed. Again, Gauthier filed the only response, again without merit, and on December 4, 2003, I issued still another order adjudging the DOH *and its agents* in contempt, and imposing additional *personal* sanctions. See Document No. 674. This December 2003 Order prompted responses from Gauthier, Mayra Maldonado Colon, Esq., and Omar Cancio Martinez, Esq., whose

the frequency of calls from Colon Carlo, only buttresses the inference that his later testimony was coerced.

BK No. 90-03402(ANV); BK No. 90-03403(ANV) answers, variously, included: motions to alter or amend, motions to reconsider, and motions for stay pending appeal.

Upon consideration of said motions, which bordered on Rule 9011 violations, all were denied on March 9, 2004. See Document No. 686. It was noted in said Order, however, that the investigation and discovery being conducted by Mr. Jimenez was finally starting to produce results, notably in flushing out who the actors were, including Gerardo Cruz Arroyo, a former Director of the DOH's Legal Division, and an evidentiary hearing was scheduled for April 28 and 29, 2004.⁴ The purpose of the hearing, and this entire inquiry, has been and continues to be to expose and to hold personally accountable the individuals responsible for the acts and conduct which have so damaged the integrity of the government and the authority of the judicial system in Puerto Rico.

Regarding the need for clarification and instructions, throughout the pendency of this case Mr. Jimenez, as counsel for

⁴ In light of said progress, and in order to afford due process all around, on March 25, 2004, I issued an Order staying the December 4, 2003 sanction Order until completion of discovery and evidentiary hearings in this matter. The Order specifically stated that: "Mrs. Mayra Maldonado, Mr. Omar Cancio and Mr. Jean Philippe Gauthier need not make payment of the sanctions covered by said Order, subject to completion of discovery and a ruling of this Court after the April 28 and 29 hearing." See Order dated March 25, 2004, Document No. 689.

the Debtors, filed and prosecuted a number of urgent requests for relief based on allegations of contempt and stay violations by Puerto Rico officials. In preparation for the April 2004 hearing, Mr. Jimenez filed a report⁵ wherein he carefully detailed, inter alia, certain facts that the Court would hear more specifically at trial:

In 1990, the then Controller of Puerto Rico Ileana Colon Carlo made public statements to the effect that debtor had defrauded the DOH in connection with the financing of hospital equipment. In response, debtor sued the Controller for defamation in federal court, and the Controller's motion to dismiss the lawsuit on the grounds of legislative and legal immunity was denied. On or about that time, DOH commenced withholding payments due debtor under the Contract, and as a result, on July 3 and 5, 1990 debtor and its parent company filed for bankruptcy. ... By the end of 1990, debtors, the DOH and/or Ms. Colon Carlo were involved in several lawsuits and adversary proceedings against each other... .

In June 1992, a global settlement agreement (the "Settlement Agreement") was reached and submitted to the Court for approval.... The fundamental concept underlying the Settlement Agreement...was the transfer of the Hospital and related assets by debtor to DOH, the use of Medicare "ownership costs" to assist in the payment of the debtor, the dropping of all lawsuits and proceedings by both sides, and debtor's retention of its pre-transfer receivables and choses in action, including ownership costs as well as all other outstanding Medicare claims or entitlements... . As part of the Settlement Agreement the government required that debtor issue a release of

⁵ Said report is part of the record in this case. See Doc. #695.

the Controller Ms. Colon Carlo from any and all personal liability on her part.

...on or about June 30, 1996, the then Controller of Puerto Rico Ileana Colon Carlo issued a special audit report where she retroactively analyzed the bankruptcy negotiations concerning the Carolina and Fajardo Area Hospitals (hereafter the "Controller's 1996 Audit Report"). In the Controller's 1996 Audit Report Ms. Colon Carlo criticized the government's Settlement Agreement with debtors, as well as its separate settlement with the Fajardo Hospital Trustee. On the specific issue of debtor's Medicare "ownership costs," Ms. Colon Carlo analyzed the advice rendered by Dennis M. Barry, Esq. of the national firm of Vinson & Elkins, who had been retained by DOH to advise it on the Medicare issues. Mr. Barry had opined that although the legal issue of whether DOH qualified as a provider under Medicare law for "ownership costs" purposes was not entirely clear under Medicare law, there were "substantial difficulties with the [DOH]'S claim to the reimbursement," and detailed six areas of difficulty that made DOH's claim unlikely to succeed, apart from its involving potential liability on the DOH's part. Exhibit 3 at pp. Nos. 15-20. In her report Ms. Colon Carlo disagreed with the legal conclusions of Vinson & Elkins and suggested that DOH had been wrong in allowing debtor to retain Medicare "ownership costs" in the bankruptcy. Id. at pp. Nos. 20-23. Ms. Colon Carlo further quoted section II(g) of the Settlement Agreement, in the negotiation of which she had not participated, and which section was used by DOH some time thereafter for its claim to debtor's 1997 Medicare receivables that resulted in the imposition of sanctions. Ms. Colon Carlo indicated that she believed that the former Secretary of DOH in 1982 had intended to retain ownership costs for DOH's benefit. Exhibit 3 p. 20. Ms. Colon Carlo therefore issued a formal "Controller's Recommendation" in the Controller's 1996 Audit Report to the Secretary of DOH to "determine who is the legitimate recipient of reimbursement for ownership costs made by

the Medicare Program related to public hospitals." Exhibit 3 p. 9.⁶

Debtor's Draft Report in Advance of April 28, 2004 Hearing on Sanctions, Document No. 695, pp. 2-7.

Mr. Jimenez's report is quoted extensively to highlight the kind of evidence that the Court expected would be presented and elaborated upon at the upcoming evidentiary hearing. The report convincingly portrays Ileana Colon Carlo as the force behind the attempted diversion of funds, that she had a personal motive, the authority, and the power to orchestrate the acts complained of. The report also implicates DOH personnel who carried out Ms. Colon Carlo's marching orders. At the conclusion of the April 2004 hearings, it became apparent that other individuals may have been involved in the drafting and transmittal of the April 10, 1997, letter and the filing of the subsequent Medicare Motion, and on January 20, 2005, I issued an Order to Show Cause against: Dr. Carmen Feliciano de Melecio, Reina Colón de Rodríguez, Olga

⁶ On its face, and without more, Ms. Colon Carlo's Audit Report and Recommendation clearly exposes her unilateral decision to disregard Court Orders, and to try to circumvent the results of litigation decided contrary to what she was "recommending" in her Report. In her zeal to have it her way, Ms. Colon Carlo also elected to disregard and to proceed against the advice of highly specialized attorneys who had been retained by DOH to advise it on Medicare issues.

Rodríguez Castro, Ileana Colón Carlo, and Blanca Mera Roure to show whether they:

had any involvement or participation whatsoever in the process that culminated in the DOH's claim and pursuance of Debtor's Medicare receivables in 1997 and thereafter, and/or in the DOH's April 10, 1997 letter to COSVI with respect to Medicare receivables of the Carolina Area Hospital relating to services rendered therein during Debtor's operation thereof.

Order to Show Cause, Document No. 705, January 20, 2005. On April 6, 2005, the individuals mentioned in the Order to Show Cause, and all other respondents, were ordered to appear at an evidentiary hearing on April 19, 2005.

At that hearing, the Court expected Mr. Jimenez to advocate for findings and conclusions consistent with the allegations he had been making (and proving) about the DOH and its agents for years, and more recently, against Ms. Colon Carlo. Instead, and in a surprise turnaround, he effectively resigned, and without showing any cause or reason, Jimenez wrote:

Given that the undersigned's principal role was to muster and organize the evidence in connection with the Court's investigation, and so as to prevent allegations that the undersigned's interpretation of the evidence in his capacity as debtor's counsel may unduly influence the Court's conclusions on matters of potential personal and/or institutional consequence and of importance to the bankruptcy process, the undersigned will not argue for or against the imposition of liability against any individual or institutional respondents. The undersigned

understands that evidence (or lack thereof) speaks for itself.

Debtor's Post Trial Brief on the Issue of Sanctions, Document No. 769, p. 40.

Mr. Jimenez could not be more mistaken as to his role in these proceedings, and an explanation by him is in order. For the last 15 years, Mr. Jimenez has been alleging government misconduct⁷ and has repeatedly obtained relief for the Debtors. And while the pleadings at times appeared initially to be alarmist, all of the assertions, in hearing after hearing, *up until April 2005*, were established by the evidence and shown by Mr. Jimenez to be accurate and meritorious, and this is what makes his present stance untenable. Mr. Jimenez always reminded us that his complaints and allegations against the Commonwealth required the Court's priority attention because the Debtors operated a tertiary care hospital serving primarily indigent patients, and that the Commonwealth's actions, if permitted, would endanger sick patients and that their health and welfare would be put further at risk, i.e., no funding - no health care. Hence, the simple justice of continuing to

⁷ The initial respondents herein were "the DOH and its agents," but the discovery conducted by Mr. Jimenez has revealed the involvement of Ileana Colon Carlo, the alleged architect of a scheme and agenda that has consumed literally years of this Court's time to uncover.

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identify culpable individuals is obvious and necessary, and the difficulty encountered so far in achieving that goal is hardly a valid reason to abandon it, regardless of the resistance and failure of the perpetrators to come forward honorably and professionally.

While it is the Court's function to listen, to make findings and conclusions, and to fashion results consistent with where the facts and the law lead us, it remains Mr. Jimenez's obligation to see this matter through with the same energy he demonstrated until April 2005. Bluntly, this Court cannot accept his apparent change of heart at this late stage.

Therefore, assuming that his prior allegations, proof, and arguments were valid and advanced in good faith, and that this Court has not been repeatedly misled over these many years by bogus or hysterical allegations, Mr. Jimenez is reminded that he is not merely an "evidence organizer", but that as an officer of the Court he still owes the same level of advocacy he has always delivered on behalf of the Debtors.

In accordance with all of the foregoing, Mr. Jimenez is ORDERED to file, on or before Friday, March 17, 2006, at 12:00 noon, a statement either: (1) affirming with specificity his allegations and requesting appropriate relief, including additional

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examination of Ms. Colon Carlo, and any others, if necessary, or
(2) withdrawing, also with specificity, those allegations which he
does not believe have, or never did have, merit. A conference
regarding Mr. Jimenez's response to the within Order is scheduled
for March 21, 2006, at 12:00 noon, at the U.S. Bankruptcy Court in
Puerto Rico. If necessary, and depending upon the content of his
statement, the Court will conduct further hearings in this matter
on Thursday, March 23, 2006, at 10:00 a.m. Parties to these
proceedings are not invited or required to join in Mr. Jimenez's
response, as this is a matter between the Court and Mr. Jimenez.

Dated at Providence, Rhode Island, this 10th day of
March, 2006.



Arthur N. Votolato
U.S. Bankruptcy Court*

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