U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the order of the Court.

Signed September 17, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
NETWORK CANCER CARE, L.P.	§	**CASE NO. 02-39409-BJH-11**
	§	
Debtor.		

<u>Memorandum Decision and Order</u>

The issues before the Court are the extent to which Dr. Odette Campbell ("Dr. Campbell") is in contempt of Court and what sanctions, if any, are appropriate for her conduct. The Court has jurisdiction over the matters addressed in this Memorandum Decision in accordance with 28 U.S.C. §§ 1334 and 157. This Memorandum Decision contains the Court's findings of fact and conclusions of law.

Factual and Procedural Background

On October 26, 2002, Network Cancer Care, L.P. ("Network" or the "Debtor") filed a voluntary petition for relief under Chapter 11 (the "Petition Date"), thereby commencing this bankruptcy case (the "Case"). The general partner of the Debtor, holding 1% of the partnership

interest, is OCRG Management, L.L.C. ("OCRG"). Dr. Campbell is a limited partner of the Debtor, holding 94.5% of the partnership interest. Dr. Campbell is also a member and the manager of OCRG. Finally, Dr. Roger Good is a limited partner of the Debtor, holding 4.5% of the partnership interest. On the Petition Date, the Debtor owned real property located at 5948 Parker Road, Plano, Texas (the "Plano Property"), which it leased to an entity called Network Cancer Care Physicians, L.L.C. Facts surrounding the Plano Property and its disposition are at the core of this dispute.

Almost immediately, the Case revealed itself as challenging. The petition had been signed by two attorneys on behalf of the Debtor – Rosa Orenstein, Esq. ("Orenstein") and Tom Dirickson, Esq. ("Dirickson"). Within less than three weeks, both of them filed notices of non-engagement. Orenstein's notice alleged that she had assisted the Debtor on an emergency basis in the filing of the petition, but that the parties had not subsequently reached agreement as to Orenstein's employment. On November 14, 2002, Dirickson also filed a "Notice of Non-Retention." The next day, the Office of the United States Trustee ("U.S. Trustee") moved to dismiss the Case for lack of counsel.[1] In response, on November 22, the Debtor filed an application to retain Orenstein. The application recited that Orenstein had been paid $500 to assist with the emergency filing, and that Orenstein requested a $40,000 post-petition retainer subject to Court approval, without which the firm would not represent the Debtor. It further recited that the retainer "would be funded from accounts receivable to be collected by the Debtor." One of the secured creditors opposed the use of its cash collateral for that purpose, and on January 3, 2003, the Debtor filed an amended application to approve Orenstein's retention, alleging that Orenstein had agreed to take a $20,000 retainer to be

[1] This Court also issued, *sua sponte*, an order directing that the Debtor retain counsel on or before November 21, 2002.

paid by Dr. Campbell personally. That application was ultimately approved on February 10, 2003.

In the interim, a flurry of contested proceedings were filed as creditors began filing various motions with the Court. On October 29, 2002, Medical Office Buildings of Texas, L.P. filed a motion for relief from stay, which was ultimately granted by default. On November 8, 2002, MOP Las Colinas, LP ("MOP Las Colinas") filed an "Emergency Motion to Compel Debtor to Reject MOP Las Colinas LP's Lease, for Eviction of Debtor, or for Dismissal of the Debtor's Chapter 11 Case." On November 15, 2002, PNB Financial Bank ("PNB"), a creditor owed approximately $1 million on the Petition Date, the repayment of which was secured by a lien on, among other things, accounts receivable, leasehold improvements, machinery, equipment and fixtures, moved for relief from stay. As noted above, on that same date, the U.S. Trustee moved to dismiss the Case. On November 27, 2002, PNB moved to prohibit the Debtor's use of cash collateral, alleging that the Debtor intended to use $40,000 of its collateral without its permission to fund the retainer to Orenstein, and to fund an adequate protection payment of $38,000 to MOP Las Colinas. Also on November 27, 2002, Colonial Bank ("Colonial"), a creditor owed approximately $1.6 million on the Petition Date, secured by the Plano Property and by certain other collateral, moved for relief from the automatic stay. On December 12, 2002, Siemens Financial Services, Inc. moved for relief from the automatic stay. The Debtor opposed all of these motions, filed a motion for use of cash collateral, and on December 11, 2002, it filed its schedules.[2] Thus, by the time the Debtor had filed its schedules, the Court had on file four motions for relief from stay (several of them with respect to the Debtor's principal assets), two motions to dismiss the Case, a motion to prohibit the use of

[2] Upon the Debtor's motion, the Debtor was granted an extension of time to file its schedules to December 2, 2002. However, the schedules were not filed until December 11, 2002.

cash collateral, and a motion for authority to use cash collateral.

By January 16, 2003, it was increasingly clear that the major creditors had lost confidence in the Debtor and its management – *i.e.,* Dr. Campbell. Colonial filed an emergency motion to appoint an examiner, alleging, among other things, that the Debtor did not yet have court-approved counsel, its schedules were filed late, no monthly operating reports had been filed, and the Debtor was not timely providing information regarding its use of cash collateral. Colonial further alleged that during the summer of 2002, the Office of the Inspector General confiscated 47 boxes of the Debtor's records in connection with an investigation of the Debtor for Medicare fraud, and that Dr. Campbell had testified that the U.S. Government was withholding millions of dollars of the Debtor's accounts receivable in connection with that investigation. Colonial wanted an examiner appointed to determine the nature of the government's investigation, evaluate the competence and honesty of the Debtor's management, review the Debtor's books and records, investigate a potential undisclosed asset, and report to the Court as to whether either a trustee should be appointed or the Case converted to Chapter 7. On February 28, Colonial also filed an amended motion for relief from stay or, in the alternative, for conversion of the Case to Chapter 7, in part on the ground that "the Debtor is poorly managed and has not obtained adequate management since filing this case . . ." *See Amended Mot. of Colonial Bank for Relief from the Automatic Stay or to Convert Case to Chapter 7*, ¶ 6(f). In addition, Colonial objected to the Debtor's use of cash collateral.

On February 24, 2003, the Court entered an Agreed Order for Use of Cash Collateral and for Adequate Protection (the "1st PNB Cash Collateral Order"), which required the Debtor to provide PNB with copies of the Debtor's operating reports. By mid-March, the dust had settled somewhat and the Debtor had reached interim agreements with many of its creditors. On March 14, the Court

entered an agreed order (the "2nd PNB Cash Collateral Order") supplementing the 1st PNB Cash Collateral Order. While titled an agreed order, the 2nd PNB Cash Collateral Order was agreed only with PNB and was entered following a contested hearing in which Colonial and other creditors established that there were many problems with how the Case was progressing. Specifically, the operating reports on file at that time were grossly inaccurate. Dr. Campbell, who signed those reports and thereby attested to their accuracy, was incapable of explaining the information contained in the reports. Moreover, it became clear that the schedules were inaccurate and incomplete. As a result, the Court's authorization for the Debtor to use cash collateral in the 2nd PNB Cash Collateral Order required the Debtor to file amended operating reports for October 2002 through February 2003 no later than March 20, 2003, and to promptly amend its schedules and statement of financial affairs so that they would be accurate and complete. Because of the inaccuracies in the operating reports and schedules, and the Court's overall lack of confidence in Dr. Campbell's financial acumen, the Court also conditioned the Debtor's use of cash collateral upon the hiring of an accountant and a third party billing service to assist the Debtor in the billing and collection of its accounts receivable. *See generally* Opinion Letter entered June 10, 2003 (Docket No. 216).

On March 24, 2003, the Debtor filed a motion for approval of an agreed order with Colonial, resolving Colonial's motion to appoint an examiner and its amended motion for relief from stay or for conversion. But, on March 28, 2003, Orenstein moved to withdraw as counsel. She alleged that despite repeated demands, her firm had not received the retainer which had been approved by the Court, and that as of the date of her motion, she had expended so much time defending all of the various motions that the retainer, even if paid, would now be insufficient to cover the fees she had earned just through December 2002. Her request for withdrawal as counsel was later withdrawn on

April 17, 2003.

On April 24, 2003, after notice and the opportunity for hearing, the Court approved the Debtor's agreement with Colonial. Essentially, Colonial withdrew its motion for the appointment of an examiner and its opposition to the use of cash collateral provided that Colonial's motion for relief from stay was granted in part. Specifically, the Debtor and Colonial agreed that: (i) Colonial's claim was allowed as a secured claim in a sum certain; (ii) the Debtor would make certain payments to Colonial for adequate protection and taxes during the pendency of the Case; (iii) the Debtor would file a plan by April 21, 2003 (which was later extended to May 12, 2003); (iv) the Debtor would provide certain reports to Colonial; and (v) the Debtor would pay, as part of Colonial's allowed secured claim, Colonial's reasonable attorney's fees and expenses as determined by the Court. In addition, the agreed order provided that the Debtor's plan must include certain provisions and treatment for Colonial. In short, under the plan, Colonial's note and deed of trust were to be amended to provide that the interest rate would remain at the non-default rate provided the note was paid by September 30, 2003; otherwise, the interest rate would increase to 10.5% until the note was paid in full. If the note was not paid by September 30, 2003, all principal, interest and fees due and owing would be immediately reamortized over the remaining term of the Note at an interest rate of 10.5%. The note would balloon on September 15, 2004 at Colonial's option on notice to the Debtor, and all sums would then be due and owing. Moreover, the deed of trust would be amended to include a due on sale clause with all sums due upon the sale or transfer of the Plano Property or of a controlling interest in the Debtor. The agreement left the automatic stay in place, but provided that it would automatically terminate upon the earlier of: (i) a failure by the Debtor to cure, upon 5 days' notice, any pre-confirmation failure by the Debtor to make a payment or deliver a report required by

the order; (ii) July 15, 2003, if the Debtor's plan was not confirmed by that date; (iii) July 31, 2003, if the Debtor's confirmed plan was not consummated with respect to Colonial's treatment by that date, or (iv) September 15, 2004, if the note was not paid in full by that date and the Case was still pending.

The Debtor filed its plan and disclosure statement on May 12, 2003, as it was required to do under various orders. The disclosure statement drew several objections and required modification; thus, it became apparent that the Debtor would not be able to confirm a plan by the July 15, 2003 deadline required by the Colonial agreed order. The Debtor requested that the Court modify that agreed order over Colonial's objection, which the Court did on a limited basis. Specifically, the Court ordered that the deadline for the Debtor to confirm its plan would be August 29, 2003, and that the date by which the debtor must consummate the plan with respect to Colonial would be October 7, 2003. Colonial was authorized to accelerate its note and do all things necessary to foreclose on the Plano Property on or after September 2, 2003. If the Debtor confirmed its plan by August 29, 2003, Colonial was not authorized to foreclose in September, but could instead re-post the Plano Property for a foreclosure on or after October 7, 2003. If the debtor consummated the plan with respect to Colonial prior to October 7, 2003, then Colonial was not authorized to foreclose except as may be provided by further order or by the documents executed in connection with consummation of the Debtor's plan.

Various creditors objected to confirmation of the Debtor's plan. Dr. Campbell's ability to manage the Debtor continued to be of grave concern to creditors. As a result, and as a consequence of further negotiations over the terms of a plan that creditors might support, it was agreed that Dr. Campbell would be replaced as the chief executive officer of the Debtor under the plan. By agreeing

to replace Dr. Campbell with a new chief executive officer, creditor's concerns about the competence and honesty of the Debtor's existing management were assuaged. These, and other, modifications were made to the Debtor's plan prior to confirmation.[3]

Thus, by agreement of all active creditor constituencies, on September 26, 2003, this Court entered an Order confirming the Debtor's Modified Second Amended Plan of Reorganization (the "Plan"). Under the Plan, the Debtor agreed to treat Colonial's secured claim (estimated in the amount of $1,648,857.47, plus interest, costs, attorneys' fees, and real estate taxes paid by Colonial in the amount of $41,847.77, less payments the Debtor made to Colonial during the Case) as described above. In addition, the Plan provided that if Reorganized Network defaulted on its Plan obligations to Fleet (described generally below), such default would also be a default with respect to Colonial, and Reorganized Network waived its right to notice of or opportunity to cure the default, and Colonial could immediately foreclose under applicable law.

Under the Plan, the secured claim of Fleet was treated as follows: Fleet's claim was allowed as a secured claim in the amount of $1.1 million, less adequate protection payments made during the Case, and as an unsecured claim in the amount of $217,000. The secured claim was to be paid in full by a wire transfer of funds on or before November 25, 2003, which period could be extended in Fleet's sole discretion. Reorganized Network was to make certain monthly payments to Fleet until either its secured claim was paid in full or it repossessed its collateral. The Plan further provided that if Fleet's claim was not paid in full by November 25, 2003, or such extensions as may be granted by Fleet, then the automatic stay would terminate as to Fleet without further order, and Reorganized Network would provide Fleet with access to Reorganized Network's facilities so that Fleet could

[3] The parties, including Colonial, also agreed to extend the deadline by which the Debtor was to confirm the Plan.

repossess its collateral.

Under Section 5.6 of the Plan, management of the Reorganized Network was to become the responsibility of the Reorganized Network chief executive officer (the "RNCEO"). The Plan provided that unless certain secured creditors reached agreement with the Debtor on who would serve as the RNCEO, the RNCEO would be chosen by the Court, and could not be terminated or otherwise relieved of his management duties for five years following the Effective Date except upon order of the Court after notice and hearing. In addition, Section 5.6 of the Plan provided that the Court retained jurisdiction to effectuate the management of Reorganized Network by the RNCEO. Under the Plan, the RNCEO was responsible for the management, control and operation of Reorganized Network. The Plan further stated that "[i]t is anticipated that the RNCEO shall have a masters degree in business administration and at least ten years experience in the healthcare and finance industry. The resumes of candidates for the RNCEO shall be submitted to the Bankruptcy Court within twenty (20) days of the Confirmation Date."

In accordance with the terms of the Plan, the Court entered an Order on November 20, 2003, stating that "Mark Rawls has been selected by the Court as the RNCEO; with all duties and responsibilities as outlined in the Confirmed Plan." *See* Docket No. 355. Notwithstanding the entry of this Order, Reorganized Network did not make any effort to contact or retain Mark Rawls ("Rawls"). In mid-December, 2003, the Court received a letter from Rawls in which he indicated that he had not been contacted by Reorganized Network with respect to acting as RNCEO. *See* Docket No. 385. Accordingly, on December 19, 2003, the Court issued an Order to Show Cause (the "1st Show Cause Order") in which it ordered Reorganized Network, Dr. Campbell (as sole limited partner of Reorganized Network and as Manager of OCRG Management, LLC, the general partner

of Reorganized Network) and their counsel to appear before the Court on January 6, 2004 to show cause why

> (i) they should not be held in contempt of this Court's order directing Reorganized Network to employ Rawls;
> (ii) this case should not be dismissed or converted to one under Chapter 7 pursuant to 11 U.S.C. § 1112(b)(8) for material default by the Debtor with respect to a confirmed plan; and/or
> (iii) the Court should not impose such other sanctions as may be appropriate under applicable law.

See Docket No. 370.

Notwithstanding the clear requirements of the 1st Show Cause Order directing Dr. Campbell to appear at the January 6, 2004 hearing, she did not appear (either in person or through counsel). Counsel for Reorganized Network, Lloyd Ward, Esq. ("Ward") appeared at the hearing, but without his file or even a copy of the Plan. Moreover, the representative of Reorganized Network who appeared with Ward, John McMenamy, was not an officer of Reorganized Network and was unfamiliar with the confirmed Plan. McMenamy had only read portions of the Plan and could not discuss the treatment required by the Plan for individual creditors or whether that treatment had, in fact, been provided on a timely basis. He did not know the status of objections to claims of unsecured creditors, or the extent to which unsecured creditors had received their first distribution in accordance with the terms of the Plan.

Based on the record made at the January 6, 2004 hearing, the Court concluded that Reorganized Network was in material default of the Plan, and that Dr. Campbell was in contempt of the 1st Show Cause Order by virtue of her failure to appear. Moreover, the testimony and representations of counsel at the hearing raised even more concerns about the status of implementation of the Plan. In response to the Court's inquiries, it became apparent that

Reorganized Network had transferred the Plano Property (with its substantial equity) post-confirmation to a newly created entity of which Dr. Campbell was a principal. At the conclusion of the hearing, the Court closed the evidence and indicated it would issue a written ruling.

The Court issued its ruling in the form of another order on January 23, 2004 (the "2nd Show Cause Order"). *See* Docket No. 405. In the 2nd Show Cause Order, the Court noted that in addition to the pendency of the 1st Show Cause Order, Orenstein had filed a "Motion to Compel Compliance with Order or to Convert Case" (the "Motion to Compel") and a "FRCP 59 Motion to Reopen Evidentiary Record on Order to Show Cause" (the "Motion to Reopen"). The U.S. Trustee also filed two motions – a "Motion for Alternative Relief: Relief from Confirmation Order and Appoint a Chapter 11 Trustee; or, Convert Case to Chapter 7; or, Appoint an RNCEO; and, Hold Dr. Odette Campbell in Contempt of Court"(the "Motion for Alternative Relief") and a "Motion to Disgorge Fees and Disqualify Lloyd Ward from Representing the Debtor and Reorganized Debtor" (collectively, the "Motions"). In its Motion for Alternative Relief, the U.S. Trustee asked the Court, among other things, to hold Dr. Campbell in contempt "under 11 U.S.C. § 1142 until she return[ed] the debtor's real estate to the debtor/RN and carrie[d] out the Plan as confirmed by Court order." *See* Docket No. 398 at ¶ 21.

In light of the transfer of the Plano Property, Dr. Campbell's failure to appear at the January 6 hearing, and the flurry of motion practice, the 2nd Show Cause Order scheduled the Motions for hearing on February 26, 2004 and directed Campbell to appear and show cause why she should not be incarcerated and/or fined as a sanction for her contempt for failing to appear at the January 6, 2004 hearing. The 2nd Show Cause Order also directed Dr. Campbell and her counsel, if any, and Reorganized Network and its counsel, to appear and show cause why the Court should not revoke

the order confirming the Plan for fraud in accordance with 11 U.S.C. § 1144.

Prior to the February 26 hearing, the Court received a letter dated January 9, 2004 and signed by McMenamy and Dr. Campell, which purported to set forth in detail each claim filed against the estate, and stated whether such claims had been paid in accordance with the Plan. *See* Docket No. 416. In addition, Orenstein withdrew the Motion to Compel.

At the February 26 hearing, the Motion to Reopen was granted without objection. Thus, the Court took further evidence with respect to the U.S. Trustee's motions. The Court heard the testimony of Drs. Campbell and Good at that time. The hearing was continued to March 1, at which time the Court heard the testimony of Bill Herzog, Paul Salzberger and Richard Gatelli. After the evidence was closed, the Court concluded that it was appropriate to revoke confirmation of the Plan for fraud. Specifically, the Court held it

> would never have confirmed a plan, nor could it have confirmed the plan but for the plan's requirement that a new chief executive officer be employed in order to ensure that the plan could be feasibly implemented. Based upon the Court's administration of this case, the Court would never have been able to find this plan feasible if it believed that Dr. Campbell would be the primary person responsible for the Reorganized Network's operations and financial affairs. Therefore, because the debtor failed to employ the Reorganized Network chief executive officer as required under the terms of the plan, the Court's previously entered finding of feasibility was inappropriate. The plan is not feasible without a new chief executive officer to run the debtor. In addition to the failure to employ the reorganized Network chief executive officer, the reorganized debtor has not paid creditors in conformity with the plan and the plan is in material default. For those reasons, the Court finds that confirmation was obtained by fraud and the confirmation order must be set aside or revoked in accordance with 11 USC Section 1144.
>
> Even more significantly, the Court finds that the property which houses the debtor's primary operation was improperly transferred from this estate post-confirmation. The debtor did not have at the time of the transfer consent of Colonial Bank to affect [sic] the transfer. So it appears to the Court that that property was transferred both in violation of the plan, and in fraud of the unsecured creditors who while they did not have a direct lien interest in that property, certainly were legally entitled to look to the equity value in that property to ensure that their claims were paid.

> As a result of the hearing record that has been made, what we now know is that the property was transferred out of the debtor's estate for no consideration to the reorganized debtor. And was put into an entity which has leased it back to the reorganized debtor. But, significantly, the equity value is now held through a series of entities, including a family trust by Dr. Campbell's two minor children.

In addition, the Court found gross mismanagement of the Debtor, and directed the U.S. Trustee to appoint a Chapter 11 trustee immediately.

Because Dr. Campbell appeared at the February 26 and March 1 hearings without counsel, the Court continued the hearing to April 1, 2004 (as to contempt and appropriate sanctions to be imposed against her, if any), reiterated the gravity of these proceedings and urged Dr. Campbell to obtain counsel, and advised her that at the April 1 hearing, irrespective of whether she obtained counsel, the Court would consider what sanctions, if any, should be imposed based upon the Court's findings from the January 6, February 26, and March 1 hearings.

On March 12, 2004, the Court entered an order approving the appointment of Diane Reed as the Chapter 11 trustee for the Debtor (the "Trustee"). *See* Docket No. 447. Once appointed, the Trustee was responsible for the Debtor's operations. *See* 11 U.S.C. § 1106.

On March 31, 2004, the U. S. Trustee filed a "Motion for an Order to Show Cause Why the Court Should Not Hold Dr. Odette Campbell in Contempt of Court and Why the Court Should Not Assess Monetary Sanctions Against Dr. Odette Campbell" (the "Motion for Contempt"). *See* Docket No. 459. In light of that filing, and by agreement of the parties at the commencement of the April 1 hearing, the hearing was continued to May 11, 2004. Prior to adjourning on April 1, the Trustee advised that Dr. Campbell had caused title to the Plano Property to be conveyed back to the Debtor.

Consistent with the parties' agreement on April 1, 2004, the Court issued an Order to Dr.

Odette Campbell to Appear and Show Cause Why She Should Not be Held in Contempt of Court and Why the Court Should Not Assess Monetary and Other Sanctions Against Her" on April 9, 2004 (the "3rd Show Cause Order"). *See* Docket No. 462. The 3rd Show Cause Order incorporated the evidentiary record from the hearings held on January 6, February 26, March 1, March 17,[4] and April 1, 2004. It is the factual allegations in the 3rd Show Cause Order, and the damages alleged to have been caused by Dr. Campbell's conduct, which are the heart of the dispute presently before the Court. On May 11 and July 8, 2004, the Court held (i) an evidentiary hearing on the 3rd Show Cause Order, and (ii) continued evidentiary hearings on the 1st Show Cause Order, the 2nd Show Cause Order, and the Motion for Alternative Relief. The Court heard the testimony of Orenstein, Robert Imel, Vanessa Taylor, the Trustee, Ward, William A. MacDonald, John McMenamy, and Richard Rintala, and received various documentary exhibits into evidence. The Trustee called Dr. Campbell as an adverse witness in connection with these hearings. Dr. Campbell's counsel advised that she would avail herself of the protections afforded under the 5th Amendment to the United States Constitution. To facilitate the proceedings, the parties stipulated to the admissibility of a list of questions prepared by the Trustee's counsel, which the parties stipulated would have been asked of Dr. Campbell. The parties further stipulated that had Dr. Campbell been asked those questions, she would have refused to answer each of them.

Following the conclusion of the hearing on July 8, 2004, the Court took the matters under advisement.

The Legal Standard for Contempt

A contempt order is characterized as either civil or criminal depending on its primary

[4] The March 17, 2004 hearing was a status conference at which the newly appointed Trustee gave her initial report of her assessment of the Debtor's operations.

purpose, *FDIC v. LeGrand*, 43 F.3d 163 (5th Cir. 1995), and an order's self-characterization is not always controlling. *Thyssen, Inc. v. S/S Chuen On*, 693 F.2d 1171 (5th Cir. 1982). If the primary purpose of the order is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. If the primary purpose of the order is to coerce another party for the contemnor's violation, the order is considered purely civil. A key determinant is whether the penalty imposed is absolute or conditional on the contemnor's conduct. *LeGrand,* 43 F.3d at 168.

Bankruptcy courts have no inherent or statutory power to try, or convict and sentence for, criminal contempt. *In re Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609 (5th Cir. 1997) (holding that bankruptcy courts lack criminal contempt authority under 11 U.S.C. § 105); *In re Hipp, Inc.,* 895 F.2d 1503 (5th Cir. 1990) (holding that bankruptcy court lacked authority under 18 U.S.C. § 401). Bankruptcy courts do, however, have authority to conduct civil contempt proceedings. *Terrebonne*, 108 F.3d at 613.

In a civil contempt proceeding, the party seeking an order of contempt must establish, by clear and convincing evidence, that: (1) a court order was in effect, (2) the order required certain conduct by the contemnor, and (3) the respondent failed to comply with the court's order. *Lyn-Lea Travel Corp. v. American Airlines,* Inc., 283 F.3d 282 (5th Cir. 2002); FDIC *v. LeGrand*, 43 F.3d 163 (5th Cir. 1995). Although civil contempts are normally coercive, so that the "penalty" is automatically lifted on compliance, they may also be remedial. For example, where one party violates a court order rendered for the benefit of another party, the other party, upon successful complaint of the violation, may have a contempt order requiring that the violator reimburse the complainant his actual loss. *Thyssen, Inc. v. S/S Chuen On*, 693 F.2d 1171, 1173(5th Cir. 1982). Where the purpose of the order is to compensate a party for losses sustained as a result of the

contemnor's actions, the order is civil. *Lyn-Lea Travel Corp. v. American Airlines, Inc.,* 283 F.3d 282 (5th Cir. 2002). However, an extremely large fine indicates that the order is punitive in nature. *In re Cranford*, 75 Fed. Appx. 964 (5th Cir. 2003) ($10,000 fine found to be punitive). Even though a court is motivated to protect its own authority, a contempt order will be characterized as civil where its commands are directed at "shepherding . . . future actions, not . . . punishing . . . for past misbehavior." *Karaha Bodas Co. v. Perusahaan*, 335 F.3d 357, 375 (5th Cir. 2003).

A bankruptcy court has the power to imprison a debtor for contempt of court when the debtor fails to comply with a turnover order. *In re Lawrence,* 279 F.3d 1294 (11th Cir. 2002). Although such incarceration for civil contempt may continue indefinitely, it cannot last forever, and where the court determines that the debtor will not comply with the court's order, the judge is obligated to release the debtor because the subject incarceration would no longer serve the civil purpose of coercion, and court must reconsider the debtor's incarceration at reasonable intervals to assure that the sanction continues to serve, and is limited to, its stated purpose of coercion. *Id.* Finally, requiring a contemnor to pay attorneys' fees incurred in arguing a civil contempt motion is an appropriate sanction. *Addington v. Addington*, 77 Fed. Appx. 282, 284 (5th Cir. 2003) (affirming District Court's award of attorney's fees as a sanction). However, where there is no apparent relationship between the amount of the sanctions and the injured party's loss, that evinces an intent to punish rather than a remedial intent. *Yaquinto v. Greer*, 81 B.R. 870 (N.D. Tx. 1988).

Contempt orders and sanctions imposed under a court's inherent powers are reviewed under the abuse of discretion standard. "Because of the potency of inherent powers and the limited control of their exercise, however, they must be used with great restraint and caution. The threshold for the use of the inherent power sanction is high. Such powers may be exercised only if essential to

preserve the authority of the court and the sanction chosen must employ " 'the least possible power adequate to the end proposed.' " If there is a reasonable probability that a lesser sanction will have the desired effect, the court must try the less restrictive measure first." *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) (quoting *Spallone v. United States*, 493 U.S. 265 (1990)) (holding that imposing a $460,000 fine as a civil contempt sanction was an abuse of discretion).

Application of the Standard to the Conduct at Issue Here

In this case, the Court must be attentive to the distinction between contempt of court, for which remedial sanctions (including monetary awards to compensate parties injured by Dr. Campbell's actions) may be appropriate, and the existence of any estate causes of action which may arise from Dr. Campbell's conduct in the Case, for which money damages may be appropriate. There is no question that the same conduct may give rise to both an order adjudging a party in contempt, and a claim for damages (i) for breach of fiduciary duty, (ii) under chapter 5 of the Bankruptcy Code, (iii) for fraud, or (iv) upon some other legal theory.

The Trustee[5] concedes that there may be some overlap between the monetary sums sought in these contempt proceedings and those that the Trustee might seek to recover as damages if she chooses to sue Dr. Campbell for her alleged misconduct. While the Court may be tempted, in light of the egregious conduct of Dr. Campbell proven during these contempt hearings, to overlook that distinction and impose significant sanctions upon Dr. Campbell, the Court is mindful of its authority to impose only remedial or coercive sanctions, and of its obligation to use "great restraint and

[5] The Motion for Alternative Relief was filed by the U.S. Trustee, as was the Motion for Contempt. However, once the Trustee was appointed, she took an active role in the prosecution of both motions. Thus, the word "Trustee" shall be used in this Memorandum Decision and Order generically to refer to either of them unless otherwise stated or the context otherwise requires.

caution" and "the least possible power adequate to the end proposed." *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996).

With its obligations firmly in mind, the Court turns to the Orders and conduct at issue here. The Orders include the 1st Show Cause Order, which directed Dr. Campbell to appear on January 6 to show cause why she should not be held in contempt of the order appointing Rawls as RNCEO (which order was, in turn, based upon the Plan and the order confirming the Plan). Dr. Campbell did not, in fact, appear at that first hearing. Thus, the 2nd Show Cause Order found Dr. Campbell in contempt of the 1st Show Cause Order, and again directed her to appear to show cause what sanctions should be imposed for her contempt. Finally, the 3rd Show Cause Order incorporated the relief requested and the allegations in the Court's first two orders and in the Motion for Alternative Relief, and thereby directed Dr. Campbell to show cause why she should not be held in contempt "under 11 U.S.C. § 1142 until she return[ed] the debtor's real estate to the debtor/RN and carrie[d] out the Plan as confirmed by Court order." *See* Docket No. 398. The 3rd Show Cause Order also directed Dr. Campbell to show cause why she should not be sanctioned pursuant to the Court's inherent authority and 11 U.S.C. § 105.[6]

Dr. Campbell's Failure to Appear

This Court has previously found Dr. Campbell in contempt for her failure to appear in response to the 1st Show Cause Order. Dr. Campbell testified that she relied upon the advice of counsel, Ward, in deciding not to appear at the January 6, 2004 hearing. Ward confirmed in his testimony that he told Dr. Campbell that she did not need to attend the hearing.

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[6] The 3rd Show Cause Order also invoked 28 U.S.C. § 1927. However, that statute is applicable only to counsel. *Smith Intern., Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1998).

While good faith reliance upon advice of counsel may be considered in mitigation of any sanction, it is not a defense to contempt of court. *SEC v. First Fin'l Group of Texas, Inc.*, 659 F.2d 660 (5th Cir. 1981); *In re Kademoglou*, 199 B.R. 35 (N.D. Ill. 1996). However, Dr. Campbell has purged herself of that contempt by her subsequent appearances; thus, coercive sanctions are not necessary. But, remedial sanctions are appropriate against Dr. Campbell for her failure to appear. For the reasons explained more fully below, Dr. Campbell will be required to reimburse the estate for certain attorneys' fees (Orenstein and Baker & McKenzie) incurred during the subsequent hearings, which would not have been incurred but for her failure to appear at the January 6, 2004 hearing and/or her other conduct in the Case. *See infra* at pp. 26-29.

The Failure to Employ Rawls

The 1st Show Cause Order directed the Debtor and Dr. Campbell to show cause why the failure to employ Rawls as RNCEO was not in contempt of this Court's order appointing him. The Court concludes that an order finding Dr. Campbell in contempt and awarding sanctions is no longer necessary. There is no need to coerce the Debtor into hiring disinterested management, since the Trustee has been appointed and is in charge of the Debtor's operations. For the same reason, the creditors' concerns about the honesty and competence of the Debtor's management, which formed the basis for the Plan's requirement of the appointment of a RNCEO, have been addressed and remedial sanctions are no longer needed to address those concerns. However, as noted below, the estate should be made whole for a portion of the expenses incurred as a result of, among other things, Dr. Campbell's failure to cause the Debtor to employ the RNCEO.

The Transfer of the Plano Property

The 3rd Show Cause Order directed Dr. Campbell to show cause why she should not be held

in contempt until she caused the return of the Plano Property to the Debtor. Since she has now caused title to the Plano Property to be returned to the Debtor, any contempt arising from the improper transfer has been purged and coercive sanctions are no longer necessary. However, the Court must consider whether remedial sanctions are appropriate.

Fees and Costs associated with the Transfer

On this record, it is clear that Dr. Campbell caused the Debtor to transfer the Plano Property, which the Debtor fought to keep during the entire pendency of the Case for the benefit of its unsecured creditors, to Plano Cancer Network, L.P. ("PCN"). The general partners of PCN are Drs. Campbell and Good, and its limited partner is CF Trusts – a family trust, the beneficiaries of which are Dr. Campbell's minor children. There was significant equity in the Plano Property at the time of the transfer, and the effect of the transfer was to remove that equity from Reorganized Network and its creditors and place it in the hands of an entity for the benefit of Dr. Campbell's children.

In prior hearings, the Court found the transfer of the Plano Property to PCN to be wrongful. In fact, this and other conduct, and the failure of the Debtor to employ a RNCEO in accordance with the Plan, caused the Court to revoke confirmation of the Plan for fraud. Moreover, this and other conduct caused the Court to order the appointment of the Trustee. While title to the Plano Property has been returned to the Debtor as a result of these contempt hearings, the Trustee now argues that Dr. Campbell should reimburse the Debtor's estate for the costs associated with the transfer, including consulting fees, legal fees, loan commitment fees, and closing costs totaling some $267,252.01.[7]

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[7] The Trustee also asserted that Dr. Campbell caused the Debtor to place a second lien on the property to secure a debt owed to Dr. Chou of $750,000, yet only $609,000 was used to pay the Debtor's pre-existing debt to

In turn, Dr. Campbell argues that the Plano Property was transferred to PCN in connection with a refinance of the property made necessary by an imminent foreclosure by Colonial. While the lawyer representing Preston National Bank (the bank which bought Colonial's debt and liens and then re-financed that debt) testified that Preston National Bank would not refinance the debt unless the Plano Property was transferred to a bankruptcy-remote entity, there are problems with Dr. Campbell's argument, to which the Court now turns.

First, the Court believes that the imminent foreclosure by Colonial was a self-inflicted wound. Colonial posted the Plano Property for foreclosure because the Debtor failed to execute the Colonial New Note.[8] Ward testified that the Debtor and Colonial had a dispute about the amount that needed to be paid to Colonial under the note. The simple solution would have been for the parties to come before the Court and get their dispute resolved. Ward testified that he knew that the Court retained jurisdiction under the Plan to resolve any such dispute. Because the Debtor did not execute the Colonial New Note, Colonial declared a default and posted the Plano Property for foreclosure. The Debtor then signed the Colonial New Note (in the amount demanded by Colonial) solely to avoid the foreclosure and, to further induce Colonial to refrain from the November foreclosure, the Debtor agreed to allow Colonial to foreclose at any time on or after December 2, 2003 if its debt was not paid off through a refinancing. The Debtor could have prevented its Plan default by bringing the dispute over the proper amount of the Colonial New Note before this Court on a timely basis, or by timely executing the Colonial New Note in the amount demanded by

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Colonial. Therefore, the Trustee sought to have Dr. Campbell reimburse the estate for the difference, and also for the loss of value to the estate by virtue of the fact that Dr. Chou was granted a right of first refusal on any sale of the Plano Property. The Trustee had abandoned these requests, however, by the conclusion of the hearings.

[8] Capitalized terms not defined in the Memorandum Decision and Order shall have the meaning ascribed to them in the Plan.

Colonial (as it ultimately did), and a Colonial foreclosure on the Plano Property would not have been looming.

But, even assuming the transfer was necessitated by imminent foreclosure and that a transfer of the Plano Property to a bankruptcy-remote entity was required by the new lender, there is no explanation for the transfer of the Plano Property to a bankruptcy-remote entity which was controlled by Dr. Campbell for the benefit of her children. Preston National Bank did not demand that Dr. Campbell's children own the remote entity. That, of course, was Dr. Campbell's requirement.

Again, even assuming the transfer of the Plano Property was necessary to protect it from an imminent foreclosure, a transfer to a bankruptcy-remote entity owned by the Reorganized Debtor would have been appropriate. In that fashion, Preston National Bank would have had its condition to a refinancing satisfied and, more importantly, the substantial equity in the Plano Property would have remained an asset of the Reorganized Network – albeit, an indirect asset held through its ownership of the remote entity. Unfortunately, however, that was not the ownership structure of the remote entity chosen by Dr. Campbell. She preferred that her children have the residual equity in the Plano Property instead of the Debtor's creditors.

Dr. Campbell concedes that the transfer looks bad and smells fishy, but asks this Court to apply its scalpel and separate the fact of the transfer from the recipient of the transfer when considering whether her conduct was contemptuous such that remedial sanctions are appropriate. As noted above, for Dr. Campbell's conduct to be contemptuous, the Trustee must show that a specific order required certain conduct by Dr. Campbell, with which she failed to comply. In this regard, the Trustee relies on the Order Confirming Modified Second Amended Plan of Reorganization, entered on September 26, 2003 (the "Confirmation Order"). Dr. Campbell argues

that the Confirmation Order does not contain any specific directive to her which she failed to do and, as a result, she should not be held in contempt (particularly since she caused title to the Plano Property to be returned to the Debtor).

The Court disagrees. While the Confirmation Order does not require Dr. Campbell to take any specific affirmative act with respect to the Plano Property (nor does it specifically direct Dr. Campbell to refrain from taking action with respect to the Plano Property), that order, when read in conjunction with the Plan which it confirmed, forms a sufficient basis upon which to find Dr. Campbell's conduct contemptuous. Specifically, section 5.1 of the Plan provides that:

> Prior to the sale or other disposition of any asset outside the ordinary course of business, Reorganized Network shall seek the written consent of the Claimant or Claimants holding liens on such asset. Any such Claimants are obligated to consent or not consent to Reorganized Network's request for consent within ten (10) days from the date Reorganized Network makes such request. If written consent is obtained, Reorganized Network shall be authorized to proceed to sell or otherwise dispose of such asset. If written consent is not obtained, Reorganized Network shall then be authorized to seek approval from the Bankruptcy Court of the sale or other disposition of such asset. Upon obtaining approval from the Bankruptcy Court, Reorganized Network shall then proceed to sell or otherwise dispose of such asset. In the alternative, Reorganized Network shall be authorized to surrender the asset affected to the Secured Creditor for a minimum credit to Reorganized Network of the sale or disposition value sought to be approved.

It is undisputed that Reorganized Network did not obtain Colonial's written consent to the transfer of the Plano Property, and it is undisputed that Reorganized Network did not obtain Court approval. It cannot seriously be argued, and no one has in fact argued, that the transfer of the Plano Property was in the ordinary course of business. Therefore, the transfer of the Plano Property without Colonial's written consent or this Court's approval was in violation of clear language in the Plan, which was given the imprimatur of the Court in the Confirmation Order. While Dr. Campbell argued at the hearing that the Confirmation Order was not a clear order directed to *her*, she was in

control of the Debtor throughout the Case, and after confirmation of the Plan because of her failure to comply with the Plan and the Court's Order appointing Rawls as RNCEO. A partnership may only act through its partners.[9]

As noted above, the Court has the authority under its contempt power and 11 U.S.C. § 105 to issue any order, including a civil contempt order, necessary to carry out the provisions of the Bankruptcy Code. *In re Terrebonne Fuel*, 108 F.3d 613 (5th Cir. 1997). The Court may also use its contempt power to enforce its Confirmation Order. *In re Musselwhite,* 270 B.R. 72 (S.D. Tx. 2000) (affirming an award of attorneys' fees as a civil contempt sanction for debtor's violation of court's post-confirmation injunction)*;* *In re Coulter*, 305 B.R. 748, 761 (Bankr. D.S.C. 2003) ("The court has an inherent authority to enforce its orders and confirmation orders under § 1327, as well as appropriate enforcement authority pursuant to § 105 and its contempt powers") (Chapter 13 case).

Because the Plano Property has been returned to the Debtor, coercive sanctions are no longer needed, but remedial sanctions are appropriate to make the estate whole for Dr. Campbell's contemptuous conduct in causing the transfer of the Plano Property to the benefit of her children and the detriment of the Debtor's creditors. Therefore, the Court will assess against her a portion of the fees and expenses incurred by the estate in effecting the transfer and in bringing the Plano Property back to the estate as explained below.

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[9] As noted previously, the general partner of the Debtor is OCRG, and Dr. Campbell is the manager of OCRG. Under Texas law, the powers of a limited liability company are exercised by or under the authority of, and the business is managed under the direction of, the manager. Tex. Rev. Civ. State. Ann. art. 1528n, Art. 2.12 (Vernon 2003). In addtion, individuals who are not named in the court order at issue may nonetheless be subject to the court's contempt powers if they have knowledge of the order and abet others in violating it. *Roe v. Operation Rescue*, 54 F.3d 133, 139 (3rd Cir. 1995); *see also American Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 581 (5th Cir. 2000) (officers of association are subject to contempt charges for their failure to cause the association to comply with a court order); *N.L.R.B. v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984) (corporate officer responsible for corporations' disobedience may be held liable for contempt); *In re Spanish River Plaza Realty Co.*, 155 B.R. 249, 252 (Bankr. S.D. Fla. 1993) (holding officer of debtor's general partner and debtor's general partner in contempt of order directed to debtor).

First, the Trustee contends that Dr. Campbell should be required to reimburse the estate for the fees paid to Ward in connection with the transfer of the Plano Property to PCN. However, those fees, and Ward's entitlement to them, are the subject of a separate proceeding before the Court. Because the Court has concluded that Ward must disgorge the fees paid to him by the Debtor, it is not necessary to cause Dr. Campbell to reimburse the estate for those fees.

The Trustee next contends that the Debtor paid $66,846.12 of costs and expenses in connection with the closing of the refinancing of the Colonial debt and the transfer of the Plano Property to PCN which were unnecessary (calculated as $111,944.60 in total settlement charges to the Debtor at closing less $45,098.48 in pro-rated real estate taxes which the Trustee concedes would have been paid regardless of the transfer). *See* Exh. 16.

In addition, the Trustee put on evidence that the Debtor paid $70,000 to Kennedy Funding, Inc. and $9,000 to Heritage Affiliated Corporate Services, LLC, for loan fees. The Debtor also paid $5,000 to Jeff Grass, Esq., $3,500 to Ken Paxton, Esq., $1,000 to Campbell & Cobbe, Esqs., $3,500 to Jon Porter for a retainer in connection with the Texas State Board of Medical Examiners, and approximately $300 in miscellaneous fees. *See* Exh. 30.[10]

The Trustee argues that these fees would not have been incurred but/for Dr. Campbell's contemptuous conduct. On this record, the Court is not prepared to make that finding. Moreover, the Trustee has other remedies available to her if the Debtor received no benefit from the payment of these costs, fees, and/or expenses, or if they were unauthorized post-petition transfers. The Trustee should use one of these other remedies to attempt to make the estate whole if she believes

[10] Exhibit 30 summarizes the evidence set forth in other exhibits. In the "Trustee's Estimate of Costs and Expenses Paid and/or Incurred by Debtor Since Plan Confirmation," the Trustee seeks not only the recovery of these fees, but also fees paid to both Ward and Baker & McKenzie. However, those fees are addressed elsewhere in this Memorandum Decision.

that is appropriate.

Fees and expenses incurred by Baker & McKenzie

However, the fees incurred by Baker & McKenzie on behalf of Reorganized Network are a different matter. The evidence is clear that those fees would not have been incurred had a disinterested RNCEO been appointed in accordance with the Plan, the Confirmation Order, and the Order appointing Rawls as RNCEO. While it is possible that a disinterested RNCEO might have transferred the Plano Property to a bankruptcy-remote entity to satisfy the demands of Preston National Bank, it is unthinkable that such a disinterested person would allow the equity in that property to be lost to the Debtor's other creditors. In short, Dr. Campbell's children would not have been the ultimate beneficiaries of the substantial equity in the Plano Property.

Baker and McKenzie became involved in the Case solely as a result of the 2nd Show Cause Order and the facts which came to light as a result of the January 6 contempt hearing. Baker & McKenzie was hired to represent Reorganized Network in connection with the continued contempt hearings. While unsuccessful in persuading the Court that a lesser remedy than revocation of the Confirmation Order for fraud was appropriate, Reorganized Network was entitled to have counsel represent it in connection with those hearings. After the Confirmation Order was revoked, Baker & McKenzie filed an application to be retained as counsel for the Debtor and thereafter filed a fee application for its fees and expenses, which was approved by the Court after notice and a hearing.[11]

While Reorganized Network was entitled to have counsel represent it, and that counsel should be paid, it is not appropriate for the Debtor's estate to be diminished for fees that would not

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[11]Once the Trustee was appointed and employed her counsel, there was no need for the Debtor to have separate counsel and Baker & McKenzie performed no further services.

have been incurred if Dr. Campbell had simply complied with the Plan (she caused the Debtor to propose and have confirmed), the Confirmation Order, and the Order appointing Rawls as RNCEO. Rather, the estate should be made whole for losses it incurred as a direct result of her contempt. Accordingly, the Court will assess against Dr. Campbell, as a remedial sanction to make the estate whole, the sum of $35,233.23, which are the fees and expenses the Court allowed to Baker & McKenzie.

Fees and Expenses incurred by Orenstein

The Trustee asserts that Dr. Campbell's conduct, and the Debtor's failure to implement the terms of the Plan, was brought to the Court's attention by the Debtor's former counsel, Orenstein,[12] and that Orenstein should be compensated for her substantial contribution to the Case through a sanctions award against Dr. Campbell. By way of background, at a status conference held on March 17, 2004 in connection with these contempt proceedings, the Court requested that any creditor who sought reimbursement for the fees incurred as a result of the Debtor's failure to comply with the Plan and the order appointing Rawls as RNCEO should file a statement with the Court by the April 1, 2004 continued hearing. Orenstein filed her statement on March 29, 2004, indicating that she had expended time valued at $14,260.00 and had incurred expenses of $1,181.04 to perform work made necessary by Dr. Campbell's failure to cause the Debtor to implement the Plan in accordance with its terms.

The Debtor's unsecured creditors were substantially benefitted by Orenstein's diligence in bringing Dr. Campbell's conduct to the Court's attention. But for her diligence, it is unclear if the

[12] It appears that Orenstein was terminated by the Debtor in early October, 2003. Time entries on her final fee application show that she performed no services after October 7, 2003. *See* Docket No. 339. On November 6, 2003, an "unopposed motion" was filed by Ward on behalf of the Debtor in which Ward sought to be substituted as counsel for the Debtor in the Case. By Order entered on November 13, the Court approved the substitution.

transfer of the Plano Property out of the estate would have been discovered at all. But for Rawls's letter to the Court in Debember 2003, it is unclear if the Debtor's refusal to hire a RNCEO in accordance with the Plan would have been revealed to the Court. Because no unsecured creditors' committee had been appointed during the Case, unsecured creditors had no one acting on their collective behalf to protect their rights under the Plan, and the various secured creditors were protecting themselves after the Debtor failed to implement the Plan in accordance with its terms through self-help.

On this record, there is no question that but for Orenstein's diligence, the equity in the Plano Property would have been lost to the estate. Moreover, there is no question that had a disinterested RNCEO been employed in accordance with the Plan and the Court's order appointing him, the transfer of the Plano Property to, in effect, Dr. Campbell's children, would not have occurred. As a result of Orenstein's diligence and these contempt proceedings, the Plano Property has been returned to the estate. Since its return, and after notice and appropriate hearings, the Trustee sold the Plano Property (and certain related assets) for substantial value to the estate after payment of secured claims against that property.

Orenstein has made a substantial contribution to the Case by her conduct. The time she spent, at her normal hourly rate, is valued at $14,260.00. *See* Exh. 21. Both the amount of time expended (58.1 hours) and the hourly rates of counsel ($200/hour and $250/hour) are reasonable, as are the expenses she incurred of $1,181.04. Orenstein, as an administrative claimant (Debtor's counsel pre Plan confirmation) who went unpaid under the Plan until she brought certain facts to light in these proceedings, should be made whole for the fees she incrementally incurred as a result of Dr. Campbell's failure to cause the Debtor to perform in accordance with the Plan. Thus, the

Court concludes that an appropriate remedial sanction under its contempt power, its inherent authority, and its authority pursuant to 11 U.S.C. § 105, is to assess those attorneys' fees against Dr. Campbell.

The Alleged Violation of Cash Collateral Orders

Reimbursement for Personal Expenses allegedly paid by the Debtor[13]

The Trustee asserts that Dr. Campbell caused the Debtor to pay $59,860.02 of her personal expenses, including payment of credit card bills, meals, landscaping fees, and home equity loan payments, at no benefit to the estate during the pendency of the Case. The evidence supports this conclusion. *See* Trustee's Exh.2; testimony of Diane Reed, 7/8/04. The Trustee urges that these payments violate the various cash collateral orders entered in the Case, which provide that the Debtor was expressly prohibited from using cash collateral to pay any expense other than those provided for in attached budgets. *See, e.g.*, the 1st PNB Cash Collateral Order entered Feb. 24, 2003 (enjoining the Debtor from using cash collateral for any other purpose not defined by the order or contained in the budget). Since the attached budgets do not provide for payment of these expenses, the Trustee asserts that Dr. Campbell has violated those Court orders.

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[13] The Trustee also asserts that Dr. Campbell may have intentionally caused the Debtor to suffer unusually low collection of its accounts receivable during the early part of 2004. To the extent the decrease in collections were the result of Dr. Campbell's acts, the Trustee sought to have her reimburse the estate for the difference between the amounts that were collected and the amounts that would have been collected but/for her acts. The Trustee had abandoned this request by the conclusion of the hearings. In addition, the Trustee abandoned her request that Dr. Campbell reimburse the estate for $249,569 in salary payments to Dr. Good. The Trustee had asserted that Dr. Campbell permitted Dr. Good to bill for his services independently of the Debtor, while the Debtor was paying him a salary, and that the income received from his billing had been diverted from the Debtor. Lastly, in connection with the request for reimbursement for Plan payments in the sum of $24,403.91 which Dr. Campbell allegedly falsely represented had been paid, the Trustee conceded at closing argument that she was unable to point to any specific court order which had been violated. In order for Dr. Campbell to be held in civil contempt, this Court must find that she "violated a specific and definite court order and that [she] had knowledge of the order sufficient to put [her] on notice" of the proscribed conduct. *In re Norris*, 192 B.R. 863, 873 (Bankr. W.D. La. 1995). Therefore, to the extent this request for relief has not been withdrawn, it is denied.

In response, Dr. Campbell asserts that none of the Show Cause Orders put her on notice that she was alleged to have acted in contempt of the cash collateral orders. As a result, Dr. Campbell concludes that it would be inappropriate to sanction her for such a violation.

The Court agrees. *Harris v. City of Philadelphia*, 47 F.3d 1311, 1322 (3rd Cir. 1995) (due process requires notice and a hearing before a finding of civil contempt is made so that the parties 'have an opportunity to explain the conduct deemed deficient . . ." (quoting *Newton v. A.C. & S. Inc.*, 918 F.2d 1121, 1127 (3rd Cir. 1990)); *Dole v. Tony and Susan Alamo Foundation*, no. 77-2183, 1989 WL 160625 at *2 (W.D. Ark. Nov. 1, 1989) ("in a civil contempt proceeding, there should be a pleading directed to the court which sets forth the acts or conduct which allegedly constitute the contempt . . . reasonable notice to the one charged with the contempt of the acts or conduct alleged to constitute the contempt, and the one so charged should be given an opportunity to state his defense and to be heard."). By refusing to consider these alleged violations at this time, the Court does not suggest that the Trustee's complaints are inappropriate or that the Trustee is without remedy. Rather, the Court concludes that it is procedurally inappropriate to consider these issues at this time in this context.

Reimbursement for Payment of Pre-Confirmation Legal Fees Paid to Jeff Grass

The Trustee introduced evidence that Dr. Campbell caused the Debtor to pay at least $10,000 in legal fees to Jeff Grass without his proper retention and approval of his fees by the Court. *See* Transcript 5/11/04, 84:5-22. The Trustee seeks to have Dr. Campbell reimburse the estate for these payments. Once again, the Trustee contends that these payments violated the cash collateral orders in the Case and once again, the Court agrees with Dr. Campbell that she was not given notice prior to the May 14, 2004 hearing that a violation of the cash collateral orders was at issue. Thus, while

the Trustee may have claims against Dr. Campbell for which reimbursement of these fees may be an appropriate measure of damages, an order adjudging Dr. Campbell in contempt and awarding sanctions is inappropriate.

Reimbursement of Auto Expenses

The Trustee asserts that Dr. Campbell caused the Debtor to pay $45,848.83 of automobile expenses on cars titled in Dr. Campbell's name. The Trustee seeks to have her reimburse the estate for those funds. While there was testimony that the Debtor paid certain expenses on automobiles used personally by Drs. Good and Campbell, contempt is not an appropriate remedy for such allegedly improper conduct. Although those payments may have been made in violation of the cash collateral orders, as noted previously, Dr. Campbell was not on notice that she had to defend herself during these proceedings for contempt for violating those orders. Thus, while the Trustee may have a claim against Dr. Campbell, those amounts cannot be recovered as a remedial sanction in these proceedings.

Reimbursement of Salary

The Trustee asserts that Dr. Campbell testified on February 26, 2004, that she had not paid herself a salary from the Debtor, and yet the books and records show that she paid herself $178,785.97. *See* Exh. 11. The Court finds that Dr. Campbell caused the Debtor to pay her at least that amount of salary during the Case.

The Trustee asserts that Dr. Campbell should reimburse this amount to the estate as a sanction for her false statement. However, the testimony on February 26, 2004 is not as clear as the Trustee suggests, and the Court is unable to find that Dr. Campbell testified falsely with respect to her salary. Perhaps recognizing this deficiency at the hearing, the Trustee argued that Dr.

Campbell's payment of salary to herself violated the 1st and 2nd PNB Cash Collateral Orders, which only authorized payments in accordance with a budget. The budget attached to the 1st PNB Cash Collateral Order did not contain any line item for Dr. Campbell's salary. However, the 2nd PNB Cash Collateral Order contained a line item for salary of $10,000 per month for Dr. Campbell. Since that Order was in effect for 8 months, the Trustee concedes that Dr. Campbell may be entitled to $80,000. Therefore, the Trustee now seeks, as a remedial sanction for her contempt, the reimbursement to the estate of the difference between what Dr. Campbell was entitled to and what she actually took – namely, $96,311.00.

Again, Dr. Campbell asserts that none of the various orders to show cause put her on notice that a violation of the cash collateral orders was at issue. Once again, the Court agrees. Therefore, the Court concludes that while the Trustee may have claims against Dr. Campbell, it is inappropriate to consider those claims in this procedural context.

Dispute with Advanced Cancer Care

The Trustee asserts that Advanced Cancer Care ("ACC"), owned by Dr. Campbell's ex-husband and controlled by Dr. Campbell, was formed in order to bill Medicare on the Debtor's behalf because the Debtor was no longer able to bill Medicare (due to the Medicare fraud investigation that was, and is, ongoing). The evidence supports that finding. In addition, the Trustee asserts that ACC collected $1,058,506 on the Debtor's behalf, but remitted only $386,295 to the Debtor. Therefore, the Trustee seeks to have Dr. Campbell personally reimburse the estate for the difference between the amounts ACC collected and the amounts ACC remitted to the Debtor, or $673,211.00.

In response to the Court's inquiry during closing arguments, however, the Trustee conceded

that there is no specific court order which is alleged to have been violated. As such, the Court cannot hold Dr. Campbell in contempt. While the Trustee may have claims against Dr. Campbell for which reimbursement of these amounts would be an appropriate measure of damages, Dr. Campbell is not in contempt of any court order by virtue of the failure of ACC to remit payments to the Debtor. Moreover, the Trustee has now sued ACC for the amounts she believes are due and owing to the estate.

Conclusion

Dr. Campbell is in contempt of court. Coercive sanctions are not required because: (i) confirmation of the Plan has been revoked for fraud, (ii) the Trustee has been appointed and has assumed control of the Debtor and its assets, and (iii) title to the Plano Property has been returned to the Debtor. However, some remedial sanctions are required to make the estate whole for claims it must now pay as a direct result of Dr. Campbell's contemptuous conduct. The Court therefore assesses against Dr. Campbell the sum of $50,674.27, consisting of fees and expenses of Orenstein and Baker & McKenzie.

With respect to all of the other losses to the estate the Trustee alleges to have resulted from Dr. Campbell's contemptuous conduct, the Court concludes that it is inappropriate to address those losses in this procedural context. If the Trustee believes that the estate has been damaged by Dr. Campbell's conduct, the Trustee can pursue those claims through appropriate adversary proceeding(s). In this fashion, the estates' claims can be addressed while providing Dr. Campbell with all of the protections afforded to her by due process of law.

For the reasons set forth above, Dr.Campbell shall pay to the Trustee on behalf of the estate the sum of $50,674.27 within ten days of the entry of this Order.

SO ORDERED.

END OF ORDER # #