

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

BEVERLY ENTERPRISES,)
BEVERLY ENTERPRISES-ALABAMA,)
INC.,)
SOUTHERN MEDICAL SERVICES, INC.,)
AMERICAN TRUST OF HAWAII, INC.)
AS TRUSTEE UNDER THE SOUTHERN)
MEDICAL SERVICES, INC. PROFIT)
SHARING PLAN,)
GEORGE A. SMITH, and)
JACK B. BRUCE,)

Defendants.)

Civil Action No. 84-70-1-MAC

Filed: February 28, 1984

Entered: June 7, 1984

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 18, 1984, and plaintiff and defendants, Beverly Enterprises and Beverly Enterprises-Alabama, Inc., by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law

herein and upon consent of the parties hereto, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and the parties hereto. The complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act (15 U.S.C. § 18).

II.

As used in this Final Judgment:

(A) "Beverly" means Beverly Enterprises, a California corporation with principal offices in Pasadena, California and Beverly Enterprises - Alabama, Inc., a California corporation with its principal offices in Pasadena, California.

(B) "SMS" means Southern Medical Services, Inc., a Georgia corporation with its principal offices in Birmingham, Alabama.

(C) "First American" means First American Health Care, Inc., an Alabama corporation with its principal offices in Huntsville, Alabama.

(D) "Department" means the United States Department of Justice, Antitrust Division, Washington, D.C.

(E) "Relevant areas" means Mobile, Madison and Montgomery counties in Alabama; Bibb, Jones, Richmond and Columbia counties in Georgia and the city of North Augusta, South Carolina.

(F) "Relevant nursing home facilities" means Southern Medical of East Macon and Southern Medical of North Macon in Macon, Georgia; Southern Medical of Augusta in Augusta,

Georgia; Lynwood Nursing Home and Southern Medical of Springhill in Mobile, Alabama; Perry Hill Health Facility and Montgomery Health Care Center in Montgomery, Alabama; and Southern Medical of Huntsville in Huntsville, Alabama.

(G) "Proposed SMS acquisition" means the purchase agreement between Beverly and SMS entered into on October 19, 1983.

(H) "First American purchase agreement" means the contract between Beverly, Beverly Enterprises - Georgia, Inc. and First American entered into on February 2, 1984, including the related promissory note, pledge agreement and instruments that restructure any mortgage indebtedness for any of the relevant nursing home facilities, which documents are referred to in the purchase agreement, a copy of which is attached as Exhibit A.

(I) "First American management agreement" means any contract between Beverly and First American to manage any of the relevant nursing home facilities.

III.

This Final Judgment applies to Beverly and to its officers, directors, agents, employees, subsidiaries, successors, and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

Beverly Enterprises shall require, as a condition of the sale or other disposition of all or substantially all of its assets involved in the provision of nursing home care, that the acquiring party agree to be bound by the provisions of this Final Judgment.

V.

Beverly shall divest itself absolutely, permanently and in good faith of all legal and equitable ownership, rights or other interests, including but not limited to rights under management contracts or leases or rights granted by the state through its certificate-of-need procedure, in the relevant nursing home facilities. This divestiture shall be accomplished in such a way as to ensure reasonably that the relevant nursing home facilities can be operated by the purchaser as a viable, ongoing business engaged in the provision of nursing home services. However, the foregoing shall not be construed to create rights in any third party or to obligate Beverly to do more than sell the relevant nursing home facilities on an "as is" basis. This divestiture shall be accomplished in accordance with the terms of the First American purchase agreement as supplemented by the provisions of this Final Judgment. The First American purchase agreement may be modified only with the Department's approval, or failing that, with the Court's approval.

VI.

(A) Beverly shall make its best efforts to complete as promptly as possible, but no later than September 1, 1984, the sale of the relevant nursing home facilities pursuant to the First American purchase agreement and shall take all steps necessary to meet its obligations under the First American purchase agreement and all reasonable steps to require performance by First American of its obligations under the purchase agreement. Beverly shall promptly notify the Department of any fact, circumstance or event that is likely to delay or prevent the closing on the First American purchase agreement. Beverly shall immediately notify the Department upon closing on the First American purchase agreement.

(B) In the event of either (1) termination of the First American purchase agreement prior to closing, (2) delay of the closing of the First American purchase agreement to a time after September 1, 1984, or (3) default after closing:

- (a) Beverly shall immediately notify the Department and the Court by registered mail; and
- (b) the Court shall, as soon as possible, determine the manner and timing of the divestiture of the relevant nursing home facilities as required by this Final Judgment, including, for example, whether the sale should be effectuated by Beverly, by a qualified agent independent of

Beverly and with no substantial financial dealings with or fiduciary responsibilities to Beverly, or otherwise, provided that (i) Beverly shall not, absent some emergency condition, assume management or control of any relevant nursing home facility; and (ii) Beverly shall not retain any legal interest in any relevant nursing home facility for a period exceeding nine (9) months from the date of the occurrence of any event specified in (B)(1), (2) or (3) above; and

(c) as to any relevant nursing home facility for which an approved management agreement is not in effect, within fifteen (15) days Beverly shall transfer the relevant nursing home facility involved to a qualified nursing home administrator independent of Beverly who shall assume its operation and control pursuant to terms substantially identical to the First American management agreement attached as Exhibit B. Such management agreements may be modified only with the Department's approval, or failing that, with the Court's approval.

VII.

(A) Beverly shall enter into the First American management agreements for the relevant nursing home facilities for the period March 1, 1984 until the closing on the First American purchase agreement. The First American management agreements shall be substantially identical to the management agreement attached as Exhibit B. These management agreements may be modified only with the Department's approval, or failing that, with the Court's approval. Beverly retains the right, however, to take actions clearly necessary to comply with federal, state and local laws and regulations.

(B) In the event of termination of any First American management agreement for any reason other than the closing on the First American purchase agreement:

- (1) Beverly shall notify the Department and the Court by registered mail immediately; and
- (2) within fifteen (15) days Beverly shall transfer the relevant nursing home facility involved to a qualified nursing home administrator independent of Beverly who shall assume its operation and control pursuant to terms substantially identical to the First American management agreement attached as Exhibit B. Such management agreements may be modified only with the Department's approval, or failing that, with the Court's approval.

VIII.

Beverly shall not, without 60 days prior written notice to the Department, acquire or otherwise obtain any equitable interest, right or title, including but not limited to rights under management contracts or leases or rights granted by the state through its certificate-of-need program, in any nursing home in the relevant areas.

IX.

Beverly shall not acquire or otherwise obtain any ownership or control over First American or in any entity that acquires or otherwise obtains any ownership or control over the relevant nursing home facilities.

X.

(A) Until the closing on the First American purchase agreement or other divestiture as required by this Final Judgment, Beverly shall take all reasonable steps necessary to ensure that the relevant nursing home facilities are operated as independent and separate nursing home facilities.

(B) Beverly shall not, except as provided under Sections VI and VII:

- (1) prior to closing on the First American purchase agreement, participate in the selection of employees or managers for any relevant nursing home facility or, for one (1) year thereafter, solicit any administrator from any relevant nursing home facility to work for Beverly;

- (2) participate in any way in the management of any relevant nursing home facility, including but not limited to the setting of rates and wages;
- (3) influence or attempt to influence, directly or indirectly, any operational or financial decisions or actions by the operators of any relevant nursing home facility; or
- (4) obtain, directly or indirectly, information about the operational or financial decisions or actions of any relevant nursing home facility, except that for the period during which any management contract is in effect, Beverly may have access to records clearly necessary to comply with federal, state or local laws and regulations or for Beverly to carry out the First American purchase agreement.

XI.

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Beverly made to its principal office, be permitted:

- (1) access during office hours of Beverly to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Beverly, who may have counsel present, relating to any matters contained in this Final Judgment; or
- (2) subject to the reasonable convenience of Beverly and without restraint or interference from it, to interview officers, employees and agents of Beverly, who may have counsel present, regarding any such matters.

(B) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to Beverly's principal office, Beverly shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

No information or documents obtained by the means provided in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(C) If at the time information or documents are furnished by Beverly to the Antitrust Division, Beverly represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Beverly marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to Beverly prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Beverly is not a party, or divulging such material under the Freedom of Information Act, 5 U.S.C. §552.

XII.

This Final Judgment will expire on the later of the following dates:

- (1) the tenth anniversary of its date of entry; or
- (2) when First American or any purchaser of the relevant nursing home facilities under the Final Judgment shall have fulfilled all of its obligations to Beverly under any such purchase agreement.

XIII.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as

may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

XIV.

Entry of this Final Judgment is in the public interest.

/s/ Chief Judge Wilbur D. Owens, Jr.
UNITED STATES DISTRICT JUDGE

Dated: June 7, 1984