

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U. S. D. C. Atlanta

DEC 21 2005

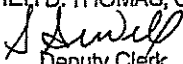
UNITED STATES OF AMERICA *ex rel*
Bobbi Chadwick, Doris Jodice,
Erika Kern,

Plaintiffs,

vs.

Forrest L. Preston, Life Care
Centers of America, Inc.,
Gwinnett Medical Investors
Limited Partnership,
Developers Investment Company, Inc.
and Scott C. Keiser,

Defendants.

LUTHER D. THOMAS, Clerk
By: 
Deputy Clerk

CIVIL ACTION

NO. 1:02-CV-3177-TWT

STIPULATED CONSENT ORDER

I. Parties

This Stipulated Consent Order is entered into by and between the United States of America, acting through the United States Department of Justice (“DOJ”) and on behalf of the Office of Inspector General (“OIG”) of the Department of Health and Human Services (“HHS”) (collectively the “United States”); the State of Georgia; defendants Forrest L. Preston, Life Care Centers of America, Inc. (Life Care), Gwinnett Medical Investors Limited Partnership (GMI), now d/b/a Gwinnett Operations, a TN LLC, successor to GMI (GO), and Developers Investment Co., Inc. (DIC) (collectively referred to as the Settling Defendants). The United States, State of Georgia and the Settling Defendants are hereinafter referred to collectively as “the Parties.”

II. Preamble

A. Life Care is a Tennessee corporation that owns or operates nursing homes located

throughout the United States. Life Care's headquarters are located at 3570 Keith Street, N.W., Cleveland, Tennessee.

B. Life Care Center of Lawrenceville ("Lawrenceville") is a 125 bed skilled nursing facility located in Lawrenceville, Georgia that is owned by Gwinnett Operations, a TN LLC, as successor to Gwinnett Medical Investors ("GO"). The general partners of GO are defendants Forrest L. Preston and DIC, Inc. Lawrenceville is operated by Life Care.

C. Relators Bobbi Chadwick, Doris Jodice, and Erika Kern ("the Relators") filed a *qui tam* action in the United States District Court for the Northern District of Georgia captioned United States ex rel. Bobbi Chadwick, et al. v. Forrest Preston, et al., Civil Action No. 1:02-CV-3177 (N.D. Ga.) (hereinafter the "Civil Action") under seal with this Court on November 22, 2002.

D. The United States intervened in the Civil Action on October 3, 2005.

E. The United States contends that the Settling Defendants submitted or caused to be submitted claims for reimbursement to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg, and/or the Medical Assistance Program, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v ("Medicare and Medicaid programs").

F. The United States contends that it has certain civil claims against the Settling Defendants for the submission of claims to the Medicare and Medicaid programs for nursing and other health care services and treatment provided at Lawrenceville during the period from January 1, 1998 through November 30, 2005, that failed to meet the needs of the residents at Lawrenceville in one or more of the following areas: (1) care and treatment of residents with diabetes, (2) resident nutrition and hydration, (3) assessments and evaluations of residents' needs, (4) care planning and nursing interventions, (5) medication management, (6) fall prevention and management; and (7) pressure ulcer care, including the prevention and treatment of wounds.

G. The State of Georgia contends that the Settling Defendants submitted or caused to be submitted claims for reimbursement to the Georgia Medical Assistance Program, established in

accordance with Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v.

H. The State of Georgia contends that it has certain civil claims against the Settling Defendants, for the submission of claims to the Georgia Medicaid program, a Federal health care program, for nursing and other health care services and treatment provided at Lawrenceville during the period from January 1, 1998 through November 30, 2005, that failed to meet the needs of the patients at Lawrenceville in one or more of the following areas: (1) care and treatment of residents with diabetes, (2) resident nutrition and hydration, (3) assessments and evaluations of residents' needs, (4) care planning and nursing interventions, (5) medication management, (6) fall prevention and management; and (7) pressure ulcer care, including the prevention and treatment of wounds.

I. The foregoing conduct described in Paragraphs F and H above is hereinafter referred to as the "Covered Conduct."

J. The Settling Defendants deny the contentions of the United States and the State of Georgia as set forth above and, to the contrary, contend that their conduct was at all times lawful and appropriate.

K. Nonetheless, in order to avoid the delay, uncertainty, inconvenience and expense of protracted investigation and litigation of these claims, and in the interest of assuring that Lawrenceville residents receive the highest quality of care, the Parties reach a full and final settlement as set forth below.

III. Terms and Conditions

NOW, THEREFORE, in consideration of the mutual promises, covenants and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

A. Settlement Amount

The Settling Defendants agree, as part of their settlement of this matter that Life Care will pay two million five hundred thousand dollars (\$2,500,000.00)("the Settlement Amount"). Life

Care agrees to make payment of the Settlement Amount by electronic funds transfer pursuant to written instructions to be provided by the United States within five (5) business days of the Effective Date of this Stipulated Consent Order. The "Effective Date" is the date this Stipulated Consent Order is signed and entered by the District Court.

B. Release of Claims

Subject to the exceptions in Paragraph III.C below, in satisfaction of the obligations of the Settling Defendants set forth in this Stipulated Consent Order and the Corporate Integrity Agreement (CIA) attached hereto and incorporated herein by reference to the Stipulated Consent Order, *conditioned upon Life Care's full payment of the Settlement Amount, and subject to Paragraph V.K (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Stipulated Consent Order or any payment under this Stipulated Consent Order)*, the United States (on behalf of itself, its officers, agents, agencies and departments) agrees to release the Settling Defendants together with their current owners, officers, and directors from any civil or administrative monetary claim the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud, for the Covered Conduct.

Furthermore, in consideration of the obligations of Life Care and Lawrenceville set forth in this Stipulated Consent Order and the CIA, and conditioned upon Life Care's payment in full of the Settlement Amount, and subject to Paragraph V.K (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Stipulated Consent Order or any payment under this Stipulated Consent Order), the State of Georgia (on behalf of itself, its officers, agents, agencies and departments) agrees to release the Settling Defendants together with their current owners, officers, and directors from any civil or administrative claim the State of Georgia has or may have under the Georgia Medical Assistance Act, Ga. Code Ann. § 49-4-146.1; or common law theories of payment by mistake, unjust enrichment, and fraud, for the Covered Conduct.

In consideration of the obligations of the Settling Defendants set forth in this Stipulated Consent Order and the Corporate Integrity Agreement and conditioned upon Life Care's payment in full of the Settlement Amount, and subject to Paragraph V.K. (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Stipulated Consent Order or any payment under this Stipulated Consent Order), the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative action seeking exclusion from the Medicare, Medicaid or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Lawrenceville (including GO) under 42 U.S.C. §§ 1320a-7a (Civil Monetary Penalties Law) or 1320a-7 (b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph C below, and as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Lawrenceville from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a)(mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against (i) any individuals, or (2) for conduct and practices for which claims have been reserved in Paragraph III.C below.

C. Specifically Excluded Conduct

Notwithstanding any term of this Stipulated Consent Order, specifically reserved and excluded from the scope and terms of this Stipulated Consent Order as to any entity or person are any and all of the following:

1. Any civil, criminal or administrative liability arising under Title 26, United States Code (Internal Revenue Code);
2. Any criminal liability;
3. Except as explicitly stated in this Stipulated Consent Order, any administrative liability, including mandatory exclusion from Federal health care programs;
4. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

5. Any liability based upon such obligations as are created by this Stipulated Consent Order;
6. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
7. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.
8. Any liability based on a failure to deliver items or services due, except as set forth in the Covered Conduct;
9. Any civil or administrative liability of individuals (including current or former directors, officers, employees, agents or owners of Life Care) who are criminally convicted or who enter into a criminal plea agreement related to the Covered Conduct; and
10. Any liability to the United States or the State of Georgia (or their agencies) for any conduct other than the Covered Conduct.

D. CIA Obligations

On this same date, the Settling Defendants have entered into a CIA with OIG-HHS, attached hereto and incorporated by reference into this Stipulated Consent Order. Immediately upon the Effective Date, the Settling Defendants shall implement their obligations under the CIA.

IV. Judicial Enforcement of Consent Order

In the event that the Settling Defendants fail to comply in good faith with any of the terms of this Stipulated Consent Order, including the CIA attached hereto and incorporated herein by reference, or should any of the Settling Defendant's representations or warrants be materially false, the United States may, at its sole discretion, exercise one or more of the following rights:

- A. seek contempt of court and the prevailing party shall be entitled to an award of reasonable attorneys fees and costs in its favor. The United States, and the Settling Defendants agree that, after a finding of civil contempt, a penalty of ten thousand dollars (\$10,000) per day may be assessed, beginning upon the finding of contempt and lasting until all defaults are cured.

After curing all defaults, the Settling Defendants may petition the Court to lift its contempt order and to withdraw the imposition of any penalties; or

B. seek specific performance of this Stipulated Consent Order and the prevailing party shall be entitled to an award of reasonable attorneys fees and costs in its favor; or

C. exercise any other right granted by law, including injunctive relief and imposition of a temporary manager to manage Lawrenceville.

If the exercise of judicial enforcement remedies is based on an alleged breach of the CIA, the United States shall exercise such judicial enforcement remedies set forth only upon notice by the OIG-HHS that the Settling Defendants have breached the CIA and only upon request by the OIG-HHS. The OIG-HHS may exercise any of its rights under the CIA (including the breach and default provisions) independent from any enforcement action under this Stipulated Consent Order. The contractual remedies set forth in the CIA need not be exhausted prior to the United States' exercise of its judicial enforcement remedies set forth herein.

V. Miscellaneous Provisions

The Settling Defendants, the United States and the State of Georgia agree as follows:

A. Neither this Stipulated Consent Order, nor any exhibit, document or instrument delivered hereunder, nor any statement, transaction or proceeding in connection with the negotiation, execution or implementation of this Stipulated Consent Order is intended to be or shall be construed as or deemed to be an admission or concession by the Settling Defendants of any liability or wrongdoing.

B. In accordance with 31 U.S.C. § 3730(c)(2), DOJ shall notify the Relators of this Stipulated Consent Order within three (3) days of its filing with the Court.

C. Upon entry of this Stipulated Consent Order, the claims against the Settling Defendants shall be dismissed with prejudice, and the claims against defendant Scott C. Keiser shall be dismissed without prejudice. A proposed order to this effect is attached as Exhibit A to this Stipulated Consent Order.

D. This Stipulated Consent Order and the CIA, which is attached hereto and incorporated herein, constitute the complete agreement between the Parties. This Stipulated Consent Order may not be amended except by written consent of the Parties and the Court, except that only Life Care, Lawrenceville and the OIG-HHS need consent to an amendment to the CIA pursuant to the provisions set forth in the CIA.

E. This Stipulated Consent Order is for the exclusive benefit of the Parties and creates no rights or remedies beyond those expressly created herein. Nothing within this Stipulated Consent Order is intended to confer any benefits or rights on any person or entity not expressly referenced in this Stipulated Consent Order.

F. This Stipulated Consent Order is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Stipulated Consent Order shall be the United States District Court for the Northern District of Georgia and this Court shall retain continuing jurisdiction to enforce the terms of this Stipulated Consent Order, except that disputes arising under the CIA may be resolved exclusively pursuant to the dispute resolution provisions set forth in the CIA.

G. The Settling Defendants waive and shall not assert any defenses that they may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulated Consent Order bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of this Stipulated Consent Order constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue Laws, Title 26 of the United States Code.

H. Except as expressly provided herein, each Party to this Stipulated Consent Order will bear its own legal and other costs incurred in connection with this matter, including the

preparation and performance of this Stipulated Consent Order.

I. The Settling Defendants agree to the following:

1. Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47, and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of the Settling Defendants, their present or former officers, directors, employees, shareholders, and agents in connection with the following shall be "unallowable costs" on government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP):

- (a) the matters covered by this Stipulated Consent Order,
- (b) the United States' audit(s) and civil and any criminal investigations of the matters covered by this Stipulated Consent Order,
- (c) the Settling Defendant's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and criminal investigations in connection with the matters covered by this Stipulated Consent Order (including attorney's fees),
- (d) the negotiation and performance of this Stipulated Consent Order,
- (e) the payment the Settling Defendants make to the United States pursuant to this Stipulated Consent Order and any payments that the Settling Defendants may make to Relators, including costs and attorneys fees, and
- (f) the negotiation of, and obligations undertaken pursuant to the CIA to:
 - (i) Retain an independent monitor to perform the functions set forth in the CIA; and
 - (ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph V.I.1.(f) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority

applicable to the Settling Defendants. (All costs described or set forth in this Paragraph V.I.a. are hereafter, "unallowable costs").

2. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for by the Settling Defendants, and the Settling Defendants shall not charge such unallowable costs directly or indirectly to any contracts with the United States or any state Medicaid program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by the Settling Defendants or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

3. Treatment of Unallowable Costs Previously Submitted for Payment: The Settling Defendants further agree that within 90 days of the Effective Date of this Agreement they shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph V.I.) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by the Settling Defendants or any of their subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. The Settling Defendants agree that the United States, at a minimum, shall be entitled to recoup from the Settling Defendants any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice, and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by the Settling Defendants or

any of their subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph V.I.) on the Settling Defendants or any of their subsidiaries or affiliates' cost reports, cost statements, or information reports.

4. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine the Settling Defendants' books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph V.I.

J. The Settling Defendants expressly warrant that they have reviewed their financial situation and that they are currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and will remain solvent following payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Stipulated Consent Order, they (a) have intended that the mutual promises, covenants and obligations set forth constitute a contemporaneous exchange for new value given to the Settling Defendants, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value which is not intended to hinder, delay or defraud any entity to which the Settling Defendants was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

K. If within 91 days of the Effective Date of this Agreement or of any payment made hereunder, Life Care commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, (a) seeking to have any order for relief of Life Care's debts, or seeking to adjudicate Life Care as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Life Care or for all or any substantial part of Life Care's assets, Life Care agrees as follows:

1. Life Care's obligations under this Stipulated Consent Order may not be avoided pursuant to 11 U.S.C. Section 547, and Life Care will not argue or otherwise take the position in any such case, proceeding, or action that: (i) Life Care's obligations under this Stipulated Consent Order may be avoided under 11 U.S.C. §547; (ii) Life Care was insolvent at the time this Stipulated Consent Order was entered into, or became insolvent as a result of the payment made to the United States; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulated Consent Order do not constitute a contemporaneous exchange for new value given to Life Care.

2. If Life Care's obligations under this Stipulated Consent Order are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Stipulated Consent Order, and bring any civil and/or administrative claim, action, or proceeding against Life Care for the claims that would otherwise be covered by the releases provided in Paragraph III.B above. Life Care agrees that (i) any such claims, actions, or proceedings brought by the United States (including any proceedings to exclude Life Care from participation in Medicare, Medicaid, or other Federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. §362(a) as a result of the action, case, or proceeding described in the first clause of this Paragraph V.K., and that Life Care will not argue or otherwise contend that the United States' claims, actions, or proceedings are subject to an automatic stay; (ii) Life Care will not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding brought by the United States within thirty (30) calendar days of written notification to Life Care that the releases have been rescinded pursuant to this Paragraph V.K., except to the extent such defenses were available on the Effective Date of the Stipulated Consent Order; and (iii) the United States has a valid claim against the Settling Defendants in the amount of \$3,600,000.00, and the United States may pursue its claim in the case, action, or proceeding

referenced in the first clause of this Paragraph V.K., as well as in any other case, action, or proceeding.

3. Life Care acknowledges that its agreements in this Paragraph V.K. are provided in exchange for valuable consideration provided in this Stipulated Consent Order.

L. The Settling Defendants agree to cooperate fully and truthfully with any United States' investigation of any person not released in this Agreement, for the Covered Conduct. Upon reasonable notice, The Settling Defendants will make reasonable efforts to facilitate access to, and encourage the cooperation of, its directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals, and will furnish to the United States, upon reasonable request, all nonprivileged documents and records in its possession, custody, or control relating to the Covered Conduct.

M. The Parties agree that this settlement is fair, adequate and reasonable under all the circumstances and is in the public interest.

N. The undersigned signatories for the Settling Defendants represent and warrant that they are authorized to execute this Stipulated Consent Order. The undersigned DOJ, OIG and State of Georgia signatories represent that they are signing this Stipulated Consent Order in their official capacity and that they are authorized to execute this Stipulated Consent Order.

O. This Stipulated Consent Order may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same Stipulated Consent Order. Facsimiles of signatures shall constitute acceptable binding signatures for purposes of this Stipulated Consent Order.

P. The Settling Defendants represent that this Stipulated Consent Order is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

Q. This Stipulated Consent Order is binding on the Settling Defendants' successors, transferees, heirs, and assigns.

R. All Parties consent to the United States' disclosure of this Stipulated Consent

Order, and information about this Stipulated Consent Order, to the public.

THE UNITED STATES OF AMERICA

DAVID E. NAHMIAS
United States Attorney
Northern District of Georgia

DATED: 12/21/05

BY: Amy Berne

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DATED: 12/20/05

BY: L Morris

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THE STATE OF GEORGIA

DATED: 12/16/05

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DATED: 12/16/05

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Life Care Centers of America, Inc.

DATED: December 20, 2005 BY: Forrest L. Preston
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Telephone: 423.473.5001
Facsimile: 423.339.8328

DATED: December 20, 2005 BY: Forrest L. Preston
FORREST L. PRESTON
Life Care Centers of Lawrenceville

DATED: 12/20/05 BY: O. Michael Carter
O. MICHAEL CARTER
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SO ORDERED, this 21 day of December, 2005.

BY: Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge