BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

IN THE MATTER OF:	)	
	)	
TENNESSEE SECURITIES DIVISION,	)	
Petitioner	)	
	)	
vs.	)	**No. 12.06-009224J**
	)	
SENIOR CARE PLUS, INC., et al,	)	
Respondents	)	
	)	

FINAL ORDER

THIS CAUSE came before the Commissioner of Commerce and Insurance upon the appeal of Respondent Wm. Page and Associates, Inc. ("Page") from the Order Granting Judgment for Petitioner Against Specified Respondents, entered November 6, 2001, and from the Order Denying Petition for Reconsideration, entered December 10, 2001 (both Orders entered by Administrative Judge J. Randall LaFevor). The Respondent Page filed its appeal on December 27, 2001.

Upon careful review of the record in this matter and due consideration of the briefs filed by the parties, the Commissioner hereby affirms the Order Granting Judgment for Petitioner Against Specified Respondents and the Order Denying Petition for Reconsideration.

WHEREFORE, it is hereby **ORDERED AND ADJUDGED** that the Order Granting Judgment for Petitioner Against Specified Respondents and the Order Denying Petition for Reconsideration are hereby **AFFIRMED** and expressly incorporated herein

by reference. This Final Order is made pursuant to Tenn. Code Ann. Section 4-5-315 and marks the disposition of this matter.

This Final Order shall take effect upon filing with the Administrative Procedures Division, Secretary of State's Office.

REVIEW OF THE FINAL ORDER

Within fifteen (15) days after the effective date of the Final Order any party may petition the Commissioner for reconsideration of the Final Order. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied.

Any party may seek judicial review of the Final Order by filing a petition for review in Chancery Court having jurisdiction within sixty (60) days after the effective date of the Final Order. A petition for reconsideration does not act to extend this sixty (60) days period; however, if the petition is granted, then this sixty (60) day period commences from the effective date of the Final Order disposing of the petition.

Any petition relative to a review of the Final Order or petition to stay the judgment of a Final Order is to be filed with the Administrative Procedures Division, Office of the Secretary of State and the Commissioner

This Final Order shall be effective upon filing with the Administrative Procedures Division, Secretary of State's Office.

ENTERED this 17th day of January, 2003.

Anne B. Pope by OW

Anne B. Pope, Commissioner
Department of Commerce and Insurance

APPROVED:

Thaddeus E. Watkins, III
Counsel to the Commissioner
BPR #9846
Department of Commerce and Insurance
312 Eighth Avenue, North
William R. Snodgrass Tennessee Tower
Twenty-fifth Floor
Nashville, Tennessee 37243
(615) 741-3388

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 21st day of January, 2003.

Charles C. Sullivan, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served upon all parties, by delivering same to them, or to their counsel, at their address of record, or by placing a true and correct copy of same in the United States Mail, postage prepaid.

This 21st day of January, 2003.

Thaddeus E. Watkins, III

BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

IN THE MATTER OF:	)	
	)	
TENNESSEE SECURITIES DIVISION	)	**DOCKET NO. 12.06-009224J**
Petitioner	)	
	)	
v.	)	
	)	
SENIOR CARE PLUS, INC., et al	)	
	)	
	)	

ORDER

THIS ORDER IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. PARTY FILES A WRITTEN APPEAL OR PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **November 21, 2001.**

OR

2. THE AGENCY FILES A WRITTEN NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **November 21, 2001.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION OR NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
312 EIGHTH AVENUE NORTH
8TH FLOOR, WILLIAM R. SNODGRASS TOWER
NASHVILLE, TN 37243

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, 615/741-7008 OR 741-2078 OR FAX 741-4472. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

BEFORE THE COMMISSIONER OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

TENNESSEE SECURITIES DIVISION, *Petitioner,*	]	
	]	**DOCKET # 12.06-009224J**
v.	]	
	]	**AGENCY # 00-0004**
SENIOR CARE PLUS, INC., ET AL, *Respondents.*	]	

ORDER GRANTING JUDGMENT FOR PETITIONER AGAINST SPECIFIED RESPONDENTS

This matter was heard by J. Randall LaFevor, Administrative Judge appointed by the Secretary of State, sitting for the Commissioner of Commerce and Insurance, upon written motions filed by the Petitioner and Respondent Wm. Page & Associates ("Page"). The Petitioner's motion was filed by Ms. Maliaka Bass EssamelDin and Mr. John F. Morris, legal counsel for the Tennessee Securities Division, Department of Commerce and Insurance. The motion on behalf of Respondent Page was filed by its legal counsel, Mr. Quitman R. Ledyard, of Memphis, Tennessee. No response to the motions was filed on behalf of the remaining Respondents who were affected by this Order, including: Senior Care Plus, Inc.; American Benefit Services, Inc.; National Viatical Trust, Inc.; Explore Financial Group, Inc.; Larry J. Sullivan; Nancy Thayer; Eric Reynolds; and Beverly A. Sullivan. The rights of Respondents Michael D. Sullivan and James A. Torchia are not affected by this Order.

The Tennessee Securities Division ("Division") filed a *Petition* with the Commissioner of Commerce and Insurance ("Commissioner"), seeking an order directing the Respondents to cease and desist certain specific business activities related to the offering and sale of viaticals in the state of Tennessee. Upon consideration of the Division's Petition and supporting documents, the Commissioner issued the requested

Order to Cease and Desist[1] (dated April 24, 2000), which was then served on the Respondents. The *Notice* attached to the order informed the Respondents of their "right to a hearing as to all matters raised in (the) order;" both the *Order* and the *Notice* further informed them that "If no request for a hearing is made within 30 days of the date of entry of the order, the order shall become a Final Order of the Commissioner of Commerce and Insurance."

On May 2, 2000, within the time designated for responses, Respondents Senior Care Plus, Inc.; American Benefit Services, Inc.; National Viatical Trust, Inc.; Explore Financial Group, Inc.; Larry J. Sullivan; Nancy Thayer; Eric Reynolds; Beverly A. Sullivan; Michael D. Sullivan and James A. Torchia[2] filed their request for a hearing,[3] and the matter was referred to the Administrative Procedures Division to conduct a contested administrative hearing on the issues presented. Page, through counsel,[4] submitted a letter[5] dated May 30, 2000, reciting its legal position, and requesting that Page "be removed from the scope of the Order." Respondent, American Benefit Services, Inc., filed no response to the Commissioner's *Order to Cease and Desist.*

On December 13, 2000, following rulings on several pre-hearing motions, Baker, Donelson, Bearman & Caldwell filed a *Motion to Withdraw* as legal counsel for the group of Respondents represented by their law firm. Without opposition, that motion was granted with an instruction that substitute counsel was required to enter an appearance by February 23, 2001. On May 18, 2001, when no further contact had been

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[1] The order was issued *ex parte*, as is permitted by TENN. CODE ANN. Sec. 48-2-116(e)(2)(A), when the Commissioner finds that "prior notice would not be in the public interest and would be detrimental to the protection of investors."

[2] Initially, all of these Respondents were represented by the law firm of Baker, Donelson, Bearman & Caldwell, which filed the request for a hearing on their behalf.

[3] Pursuant to TENN. CODE ANN. Sec. 48-2-116(e)(3), such hearings are "contested matters," conducted in accordance with the Uniform Administrative Procedures Act, TENN. CODE ANN. Sec. 4-5-101, *et seq.*

[4] The first letter sent on behalf of Page was prepared by the law firm of Holland & Knight, LLP. Although nothing in the file reflects a subsequent substitution of counsel, Page now appears to be represented by Mr. Quitman R. Ledyard of Borod & Kramer, P.C.

[5] This document was not filed in the Administrative Procedures Division until September 21, 2001, when it was attached as an Exhibit to the Respondent's motion. The record contains no indication of what response, if any, was provided to the letter when it was initially received by the Petitioner.

initiated by any of the Respondents, or legal counsel on their behalf, the Administrative Judge entered and distributed an *Order Scheduling Pre-Hearing Conference*. That order directed all parties to appear, either in person or through legal counsel, for a pre-hearing conference on June 15, 2001, for the purpose of scheduling the hearing, establishing a discovery schedule, and resolving any pre-hearing issues raised by the parties.

At the time designated for the pre-hearing conference, the Staff Attorneys for the Tennessee Securities Division appeared on behalf of the Petitioner. By pre-arrangement, Respondents Michael D. Sullivan and James A. Torchia were represented by attorneys from Memphis who appeared by telephone conference call. No other Respondents appeared at the pre-hearing conference, either in person, or through legal counsel. On June 25, 2001, the Administrative Judge issued a *Second Pre-Hearing Conference Order* formalizing certain deadlines that were discussed during the June 15 conference.[6]

Pursuant to that order, the Petitioner filed its *Motion for Summary Judgment* on September 24, 2001 (seeking judgment in its favor against all Respondents except Michael D. Sullivan and James A. Torchia). On September 21, 2001, Respondent Page filed its *Motion for Leave to Participate in Hearing and to Renew Request to be Removed from Scope of Order to Cease and Desist*. These are the two motions that are presently under consideration.

(1) Respondent Page's *Motion for Leave to Participate in Hearing and to Renew Request to be Removed from Scope of Order to Cease and Desist:*

Respondent Page filed this motion seeking (1) permission to participate in the contested administrative hearing on the Commissioner's cease and desist order; and, (2) a declaration that the terms of the cease and desist order do not apply to Page. Because Page failed to respond to the Commissioner's *Order to Cease and Desist* in a timely manner, both requests must be denied.

[6] The motion-filing deadline established during that conference was subsequently extended by an Order dated August 21, 2001.

The Commissioner's order was properly issued, and contained all the necessary elements prescribed by law. It was issued pursuant to proper authority [*See*, TCA 48-2-116(a); and *Wolcotts Financial Services, Inc. v. McReynolds*, 807 S.W.2d 708 (Tenn. App. 1990)], sets out written findings of fact and conclusions of law, and provides notice to the affected parties and an opportunity for a hearing before the Commissioner. [*See*, TCA 48-2-116(e)(2).] The *Notice* that was attached to the order and provided to the parties as a part of the order, advises the parties in clear and specific terms, of the deadline for filing a request for a hearing, and the consequences of failing to request a hearing within the time allowed. The exact language of the *Notice* is:

> IF NO REQUEST FOR A HEARING IS MADE WITHIN 30 DAYS OF THE DATE OF ENTRY OF THE ORDER, THE ORDER SHALL BECOME A FINAL ORDER OF THE COMMISSIONER OF COMMERCE AND INSURANCE.

The "date of entry of the order" was April 24, 2000. According to the language of the *Notice*, the Commissioner's *Order to Cease and Desist* became a Final Order thirty (30) days after entry, on May 24, 2000. Page's letter to the Commissioner was dated May 30, 2000, and presumably received by the Commissioner's office at some date thereafter. The inescapable conclusion then, is that Page's letter was not received until <u>after</u> the order had become final, and was not, therefore timely filed. Furthermore, Page's letter did not request a hearing on the contents of the order, but merely argued that it should be "removed from the scope of the order." Without such a specific request, the Commissioner was not required to schedule a hearing for the Respondent. Having failed to perfect its request for a hearing before the May 24, 2000 deadline, the Respondent's September 21, 2001 motion clearly cannot now entitle Page to participate in a hearing scheduled for those Respondents who properly responded to the order and *Notice* in a timely manner.

Accordingly, it is hereby concluded that the Commissioner's *Order to Cease and Desist* became final as to Respondent Page on May 24, 2000, and that such order cannot

now be disturbed by currently pending proceedings related to other named Respondents. Because it seeks a change to a Final Order of the Commissioner, the motion of Wm. Page & Associates, Inc. cannot be granted.

(2) Petitioner's *Motion for Summary Judgment:*

The Petitioner's motion seeks judgment in its favor against all of the Respondents originally named in its *Petition* and the Commissioner's order, except Michael D. Sullivan and James A. Torchia. That motion is determined to be appropriate and well-founded, and will be granted.

(a) Re: Wm. Page & Associates, Inc.:

As discussed above, Respondent Page failed to properly request a hearing on the *Order* to *Cease and Desist* during the time allowed. That order became final, and resolved all pending issues with respect to Page's rights on May 24, 2000. As there remain no genuine issues of material fact to be determined at this time, the Petitioner is entitled to judgment in its favor, as requested in its motion. *Taylor v. Nashville Banner Publishing Company*, 573 S.W.2d 476 (Tenn. App. 1978), cert. Denied, 441 U.S. 923 (1979).

(b) Re: American Benefit Services, Inc.:

By failing to file a response within thirty (30) days of the *Order to Cease and Desist*, and by failing to respond to any of the notices sent since that time, it is determined that the order became final with respect to the rights of Respondent American Benefit Services, Inc., on May 24, 2000, resolving all issues related to the content of the order. There being no other issues pending at this time, the Petitioner is entitled to judgment in its favor, as requested in its motion. *Taylor v. Nashville Banner Publishing Company*, 573 S.W.2d 476 (Tenn. App. 1978), cert. Denied, 441 U.S. 923 (1979).

(c) Re: Senior Care Plus, Inc., National Viatical Trust, Inc., Explore Financial Group, Inc., Larry J. Sullivan, Nancy Thayer, Eric Reynolds, and Beverly A. Sullivan:

As previously indicated, Respondents Senior Care Plus, Inc., National Viatical Trust, Inc., Explore Financial Group, Inc., Larry J. Sullivan, Nancy Thayer, Eric Reynolds, and Beverly A. Sullivan, **and** Michael D. Sullivan and James A. Torchia, all requested a hearing on the *Order to Cease and Desist* on May 2, 2000, within the time limit set out in the *Notice*. They subsequently challenged certain aspects of the order through pre-hearing motions.[7] Following entry of orders disposing of those motions, their legal counsel withdrew from further representation of these Respondents on January 23, 2001; the order allowing counsel's withdrawal also directed substitute counsel to enter an appearance by February 23, 2001. When that did not occur, a pre-hearing conference was scheduled for June 15, 2001. All parties were notified of the conference by mailing a copy of the scheduling order to their addresses of record; all parties were ordered to appear, either in person, or through counsel. Respondents Michael D. Sullivan and James A. Torchia appeared through counsel. The remaining Respondents failed to attend the conference, either in person or through counsel.

State law governing contested administrative hearings provides that a party may be held in default for failing to attend a pre-hearing conference.

> The failure of a party to attend or participate in a pre-hearing conference, hearing or other stage of contested case proceedings after due notice thereof is cause for holding such party in default pursuant to TCA 4-5-309. Failure to comply with any lawful order of the administrative judge or agency, necessary to maintain the orderly conduct of the hearing may be deemed a failure to participate in a stage of a contested case and thereby be cause for a holding of default.

Rule 1360-4-1-.15(1)(a), TENN. COMP. R. & REGS., *Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies.*

[7] On June 1, 2000, Respondents' counsel filed the following motions: (1) Motion to Dismiss the Tennessee Securities Division's Petition or, in the Alternative, Motion for More Definite Statement; and, (2) Motion to Strike Certain Portions of Affidavits on Grounds of Inadmissibility. After considering the extensive legal memoranda filed by the parties, and oral argument by their attorneys, the motions were disposed of by Orders entered on September 7, 2000.

> If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge or hearing officer, hearing the case alone, or agency, sitting with the administrative judge or hearing officer, may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having regard for the interest of justice and the orderly and prompt conduct of the proceedings.

TCA 4-5-309(a).

The purpose for these provisions is obvious: A party cannot be allowed to delay or otherwise interfere with the orderly progression of a case to its ultimate resolution simply by failing or refusing to participate in scheduled pre-hearing proceedings, or in the hearing itself. In the instant case, these Respondents were informed in January 2001, when their attorney withdrew, that they would be required to have new legal representation by February. When they failed to do so, they were ordered to attend a pre-hearing conference in June to schedule the hearing that they had requested, and to make additional preparations for that hearing. Their failure to attend the June 15, 2001 pre-hearing conference prompted the Petitioner to seek an order declaring them to be in default, pursuant to the provisions cited above. None of these Respondents filed a response to the Petitioner's motion.

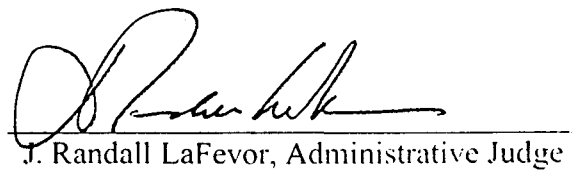
The Petitioner's motion is proper, and is sufficiently supported by the law. Based on the Respondents' failure to attend and participate in pre-hearing proceedings after due notice, the Petitioner is entitled to a determination that they are in default, and to judgment in its favor against Respondents Senior Care Plus, Inc., National Viatical Trust, Inc., Explore Financial Group, Inc., Larry J. Sullivan, Nancy Thayer, Eric Reynolds, and Beverly A. Sullivan.

Accordingly, it is hereby Ordered that Respondent Page's *Motion for Leave to Participate in Hearing and to Renew Request to be Removed from Scope of Order to Cease and Desist*, is respectfully Denied.

It is further Ordered that the Commissioner's *Order to Cease and Desist* became final with respect to the rights of Respondents Wm. Page & Associates, Inc., and American Benefit Services, Inc., on May 24, 2000.

It is finally Ordered that Respondents Senior Care Plus, Inc., National Viatical Trust, Inc., Explore Financial Group, Inc., Larry J. Sullivan, Nancy Thayer, Eric Reynolds, and Beverly A. Sullivan are held in default for their failure to participate in pre-hearing proceedings, and that their request for a hearing on the Commissioner's *Order to Cease and Desist* is hereby dismissed.

Entered and effective this _____ day of November, 2001.



J. Randall LaFevor, Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State this _____ day of _____, 2001.

_____
Charles C. Sullivan II, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been served upon all parties, by delivering same to them, or to their counsel, at their address of record, or by placing a true and correct copy of same in the United States Mail, postage prepaid.

This _____ day of _____, 2001.

_____
Administrative Procedures Division
Office of the Secretary of State