

IN THE MATTER OF

HEALTHSOUTH REHABILITATION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3570. Complaint, April 12, 1995--Decision, April 12, 1995*

This consent order requires, among other things, HEALTHSOUTH, an Alabama-based corporation, to divest Nashville Rehabilitation Hospital and related assets in Nashville, TN. within twelve months to a Commission approved entity. If the divestiture is not completed on time, the Commission is permitted to appoint a trustee to complete the transaction. In addition, the consent order requires HEALTHSOUTH to terminate management contracts to operate rehabilitation units at Medical Center East in Birmingham, AL. and Roper Hospital in Charleston, S.C. Also, the consent order requires HEALTHSOUTH, for ten years, to obtain Commission approval before merging, by acquisition, lease, management contract or otherwise, any of its rehabilitation hospital facilities in any of the three areas with any competing facilities in those areas.

Appearances

For the Commission: *Oscar Voss* and *Mark Horoschak*.

For the respondent: *Jeffrey Schmidt* and *Todd Miller*, Pillsbury, Madison & Sutro, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that HEALTHSOUTH Rehabilitation Corporation (hereinafter sometimes referred to as "respondent" or "HEALTHSOUTH") has entered into an agreement whereby HEALTHSOUTH will merge with ReLife, Inc. ("ReLife"); that the merger agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

A. "*Rehabilitation hospital facility*" means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, which specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from conditions such as stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

B. To "*operate*" a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

II. THE PARTIES

PAR. 2. Respondent HEALTHSOUTH Rehabilitation Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Two Perimeter Park South, Birmingham, Alabama. HEALTHSOUTH operates more than 300 rehabilitation health care facilities, including more than 40 rehabilitation hospital facilities, in 34 states. Among the rehabilitation hospital facilities HEALTHSOUTH operates are:

A. A rehabilitation hospital facility within Medical Center East, a general acute care hospital in Birmingham, Alabama;

B. Trident Neurosciences Center, a rehabilitation hospital in Charleston, South Carolina; and

C. Vanderbilt Stallworth Rehabilitation Hospital, a rehabilitation hospital in Nashville, Tennessee.

PAR. 3. ReLife, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 813 Shades Creek Parkway, Suite 300, Birmingham, Alabama. ReLife operates more than 45 rehabilitation health care facilities, including more than 15 rehabilitation hospital facilities, in 12 states. Among the rehabilitation hospital facilities ReLife operates are:

A. Lakeshore Hospital, a rehabilitation hospital in Birmingham, Alabama, as well as rehabilitation hospital facilities within Bessemer Carraway Medical Center, Brookwood Medical Center, and Carraway Methodist Medical Center, all general acute care hospitals in Birmingham, Alabama or adjacent communities in Jefferson County, Alabama;

B. A rehabilitation hospital facility within Roper Hospital, a general acute care hospital in Charleston, South Carolina; and

C. Nashville Rehabilitation Hospital in Nashville, Tennessee, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility, as well as a rehabilitation hospital facility within Sumner Memorial Hospital, a general acute care hospital in Gallatin, Tennessee, northeast of Nashville.

III. JURISDICTION

PAR. 4. HEALTHSOUTH and ReLife are, and at all times relevant herein have been, engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of HEALTHSOUTH, ReLife, and the HEALTHSOUTH- or ReLife-operated rehabilitation hospital facilities identified in paragraphs two and three above, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE PROPOSED ACQUISITION

PAR. 5. On or about September 18, 1994, HEALTHSOUTH entered into an agreement with ReLife, under which ReLife would become a wholly-owned subsidiary of HEALTHSOUTH, through the merger of a HEALTHSOUTH subsidiary into ReLife. The value of

the consideration to be given by HEALTHSOUTH to ReLife's shareholders is approximately \$180 million.

V. NATURE OF TRADE AND COMMERCE

PAR. 6. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale by rehabilitation hospital facilities of comprehensive, acute inpatient medical rehabilitation services, and/or any narrower group of services contained therein.

PAR. 7. For purposes of this complaint, the relevant sections of the country are:

A. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;

B. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and

C. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

VI. MARKET STRUCTURE

PAR. 8. The relevant markets -- *i.e.*, the relevant line of commerce in the relevant sections of the country -- are highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VII. ENTRY CONDITIONS

PAR. 9. Entry into the relevant markets is difficult. Entry is difficult due to, among other things, certificate-of-need regulation of the establishment of new rehabilitation hospital facilities in the States of Alabama, South Carolina, and Tennessee.

VIII. COMPETITION

PAR. 10. In each relevant market, the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife are actual and potential competitors.

IX. EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

A. By eliminating actual and potential competition between the rehabilitation hospital facilities operated by HEALTHSOUTH and ReLife;

B. By significantly increasing the already high levels of concentration in the relevant markets;

C. By eliminating the rehabilitation hospital facilities operated by ReLife from the relevant markets as substantial, independent competitive forces;

D. By increasing the possibility of collusion or interdependent coordination by the remaining firms in the relevant markets; and

E. By denying patients, physicians, third-party payers, and other consumers of the benefits of free and open competition based on price, quality, and service.

X. VIOLATIONS CHARGED

PAR. 12. The merger agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The merger described in paragraph five above, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of ReLife, Inc. with HEALTHSOUTH Rehabilitation Corporation ("HEALTHSOUTH"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section

5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent HEALTHSOUTH is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Two Perimeter Park South, Birmingham, Alabama.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*HEALTHSOUTH*" means HEALTHSOUTH Rehabilitation Corporation, its predecessors, subsidiaries, divisions, and partnerships, joint ventures, groups, and affiliates controlled by HEALTHSOUTH; their respective directors, officers, employees,

agents, and representatives; and their respective successors and assigns.

B. The "*Acquisition*" means the merger of ReLife, Inc. with HEALTHSOUTH, pursuant to their merger agreement dated September 18, 1994.

C. "*Rehabilitation hospital facility*" means a hospital, or distinct part thereof or unit therein with beds licensed as hospital beds, that specializes in the provision of comprehensive, acute inpatient medical rehabilitation care to patients requiring intensive, multidisciplinary rehabilitation treatment programs, such as patients suffering from stroke, head injury, spinal cord injury, amputation, severe fractures, or neuromuscular diseases.

D. To "*acquire*" a rehabilitation hospital facility means to directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire the whole or any part of the stock, share capital, equity, or other interest in a person who operates the rehabilitation hospital facility; acquire any assets of the rehabilitation hospital facility; enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of the rehabilitation hospital facility or any part thereof, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace the rehabilitation hospital facility with a new rehabilitation hospital facility to be operated by respondent; or acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility.

E. To "*operate*" a rehabilitation hospital facility means to own, lease, manage, or otherwise control or direct the operations of a rehabilitation hospital facility, directly or indirectly.

F. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with whom it is affiliated.

G. "*Relevant market area*" means each of the following areas:

1. The "Birmingham metropolitan area," consisting of Blount, Jefferson, St. Clair, and Shelby counties in Alabama;
2. The "Charleston metropolitan area," consisting of Berkeley, Charleston, and Dorchester counties in South Carolina; and
3. The "Nashville metropolitan area," consisting of Cheatham, Davidson, Dickson, Robertson, Rutherford, Sumner, Williamson, and Wilson counties in Tennessee.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture, or other business or legal entity, including any governmental agency.

I. "*Commission*" means the Federal Trade Commission.

J. "*Material confidential information*" means competitively sensitive or proprietary information not independently known to respondent from sources other than the rehabilitation hospital facility to which that information pertains, including but not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, all of its rights, title, and interests in and to all tangible and intangible assets, businesses, goodwill, properties, lands, licenses, and leases relating to Nashville Rehabilitation Hospital, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital facility ("assets to be divested"). Respondent shall divest the assets only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. Respondent may, but is not required to, divest to said acquirer(s) the management contract under which ReLife, Inc. operates the rehabilitation hospital facility at Sumner Memorial Hospital in Gallatin, Tennessee, or otherwise transfer operation of that facility to said acquirer(s), if Sumner Memorial consents to the transfer. The purpose of the divestiture is to ensure the continuation of the rehabilitation hospital facility of Nashville Rehabilitation Hospital as an ongoing, viable rehabilitation hospital facility, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

B. Respondent shall unconditionally terminate, absolutely and in good faith, the following management contracts, and cease operating the rehabilitation hospital facilities to which those contracts pertain:

1. By no later than October 1, 1995, the Rehabilitation Unit Management Agreement between ReLife, Inc. and Roper Hospital,

dated December 6, 1991, under which ReLife operates the rehabilitation hospital facility at Roper Hospital in Charleston, South Carolina; and

2. Within ninety (90) days of the date this order becomes final, the Consulting Services Contract between HEALTHSOUTH Rehabilitation Corp. and Medical Center East, Inc. dated January 1, 1990, as amended, under which HEALTHSOUTH operates the rehabilitation hospital facility at Medical Center East in Birmingham, Alabama.

Provided, however, that respondent may contract with Medical Center East to provide to that hospital's rehabilitation hospital facility the services of licensed physical, occupational, or speech therapists, so long as the therapists provided by respondent do not perform managerial functions at the facility, or supervise personnel except other therapists provided by respondent.

C. By no later than the termination of each contract identified in paragraph II.B. above, respondent shall enter into an agreement with the hospital whose rehabilitation hospital facility was operated under such contract (the "managed hospital"), that:

1. Prohibits respondent from using, in connection with respondent's operation of any rehabilitation hospital or other health care facility in the relevant market area where the managed hospital is located, any material confidential information of the managed hospital's rehabilitation hospital facility; and

2. Confers upon the managed hospital a legal right to enforce the prohibition set forth above in paragraph II.C.1.

D. Respondent shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement to Hold Separate shall continue in effect until such time as respondent has fulfilled the divestiture requirements of this order or until such other time as the Agreement to Hold Separate provides.

E. Pending the divestiture required by paragraph II.A. above, and the contract terminations required by paragraph II.B. above, respondent shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the assets to be divested and of the rehabilitation hospital facilities operated under the

contracts to be terminated, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of those assets, except for ordinary wear and tear.

F. A condition of approval by the Commission of the divestiture required by paragraph II.A. shall be a written agreement by the acquirer that it will not, for a period of ten (10) years from the date of divestiture, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission, sell or otherwise transfer all or substantially all of the rehabilitation hospital facility of Nashville Rehabilitation Hospital to any person who operates, or will operate immediately following such sale or transfer, any other rehabilitation hospital facility in the Nashville metropolitan area as defined in paragraph I.G.3. above.

III.

It is further ordered, That:

A. If the respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the assets to be divested identified in paragraph II.A. above, in accordance with this order, within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest such assets. In the event that the Commission or the Attorney General brings an action for any failure to comply with this order or in any way relating to the Acquisition, pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, the respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointment of a trustee pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets identified in paragraph II.A. above.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets identified in paragraph II.A. above, or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is

submitted to the Commission, subject to the respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to acquirer[s] as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of the respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets set forth in paragraph II.A. above.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative, or at the request of the trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the assets identified in paragraph II.A. above.

12. The trustee shall report in writing to the respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person who operates any rehabilitation hospital facility in any relevant market area;

B. Acquire any assets of any rehabilitation hospital facility in any relevant market area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any rehabilitation hospital facility or any part thereof in any relevant market area, including but not limited to, a lease of or management contract for any such rehabilitation hospital facility, or an agreement to replace a rehabilitation hospital facility operated by another person with a rehabilitation hospital facility to be operated by respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any rehabilitation hospital facility in any relevant market area; or

E. Permit any rehabilitation hospital facility it operates in any relevant market area to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees, or otherwise) by any person who operates, or will operate immediately following such acquisition, any other rehabilitation hospital facility in that relevant market area.

Provided, however, that prior approval shall not be required by this paragraph IV for:

1. The establishment of a new rehabilitation hospital facility (other than as a replacement for a rehabilitation hospital facility, not

operated by respondent, in any relevant area, pursuant to an agreement or understanding between respondent and the person operating the replaced facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the rehabilitation hospital facility or part thereof to be acquired does not exceed five hundred thousand dollars (\$500,000);

3. Any transaction otherwise subject to this paragraph IV of this order if the rehabilitation hospital facility in question is already operated by respondent (unless respondent is required by paragraph II of this order to cease operating the facility); or

4. The acquisition of products or services in the ordinary course of business.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission, consummate any joint venture or other arrangement with any rehabilitation hospital facility in any relevant market area not operated by respondent, for the joint establishment or operation of any new rehabilitation hospital service, facility, or part thereof in that relevant market area. Such advance notification shall be filed immediately upon respondent's issuance of a letter of intent for, or execution of an agreement to enter into, such a transaction, whichever is earlier.

Said notification required by this paragraph V of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations (as amended), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent is not required to observe any waiting period after making said notification required by this paragraph V.

Respondent shall comply with reasonable requests by the Commission staff for additional information concerning any transaction subject to this paragraph V of this order, within fifteen (15) days of receipt of such requests.

Provided, however, that no transaction shall be subject to this paragraph V of this order if:

A. The fair market value of the assets to be contributed to the joint venture or other arrangement, by rehabilitation hospital facilities not operated by respondent, does not exceed five hundred thousand dollars (\$500,000);

B. The fair market value of the assets to be contributed to the joint venture or other arrangement by respondent does not exceed five hundred thousand dollars (\$500,000);

C. The service, facility, or part thereof to be established or operated in a transaction subject to this order is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization); or

D. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been requested, pursuant to paragraph IV of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not sell or otherwise transfer to any other person all or substantially all of any rehabilitation hospital facility it operates in any relevant market area (except pursuant to a divestiture required by paragraph II of this order), unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order as applicable to the facility and the relevant market area in which the acquired facility is located, which

agreement respondent shall require as a condition precedent to the acquisition.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondent has fully complied with paragraphs II and III of this order, the respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture of the assets identified in paragraph II.A. above, the steps taken to terminate the contracts identified in paragraph II.B. above, and the identity of all parties contacted. Respondent shall also include in its compliance reports, subject to any legally recognized privilege, copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and it is complying with paragraphs IV, V, and VI of this order.

VIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, the respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Agreement") is by and between HEALTHSOUTH Rehabilitation Corporation ("respondent" or "HEALTHSOUTH"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at Two Perimeter Park South, Birmingham, Alabama; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, on or about September 18, 1994, HEALTHSOUTH agreed to merge with ReLife, Inc. ("ReLife"), and thereby acquire, *inter alia*, a majority partnership interest in Nashville Rehabilitation Hospital in Nashville, Tennessee (the "Acquisition"); and,

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order in this matter ("consent order"), which would require the divestiture of ReLife's majority partnership interest in, and certain

other assets listed in paragraph II.A. of the consent order relating to, Nashville Rehabilitation Hospital (which assets, together with the Hospital, hereinafter are referred to as the "NRH Assets"), the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the NRH Assets during the period prior to the final acceptance and issuance of the consent order by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to compel the divestiture required by paragraphs II.A. and III of the consent order and the Commission's right to have the NRH Assets continue as a viable independent rehabilitation hospital facility; and

Whereas, the purpose of this agreement and the consent order is to:

- (i) Preserve the NRH Assets as a viable independent inpatient rehabilitation hospital facility pending the divestiture required by paragraphs II.A. and III of the consent order, and
- (ii) Remedy any anticompetitive effects of the Acquisition;

Whereas, respondent's entering into this agreement shall in no way be construed as an admission by respondent that the Acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, therefore, the parties agree as follows, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from respondent with

respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the NRH Assets pursuant to the consent order:

1. Respondent agrees to execute the agreement containing consent order and be bound by the attached consent order.

2. Respondent agrees that from the date this agreement is accepted until the earliest of the times listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph 3 of this agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The time that the divestiture required by the consent order has been completed.

3. Respondent will hold the NRH Assets as they are presently constituted separate and apart, on the following terms and conditions:

a. The NRH Assets, as they are presently constituted, shall be held separate and apart and shall be operated independently of respondent (meaning here and hereinafter, HEALTHSOUTH excluding the NRH Assets), except to the extent that respondent must exercise direction and control over the NRH Assets to assure compliance with this agreement or the consent order, and except as otherwise provided in this agreement.

b. HEALTHSOUTH shall appoint a Management Committee to manage and maintain the NRH Assets on a day-to-day basis while this agreement remains in effect. The Management Committee shall have exclusive management and control of the NRH Assets, and shall manage the NRH Assets independently of HEALTHSOUTH's other businesses.

c. The Management Committee, which shall be appointed by HEALTHSOUTH, shall consist of three or five members, including a chairman who is independent of respondent and is competent to assure the continued viability and competitiveness of the NRH Assets; a person with experience in operating rehabilitation hospital

facilities; and a HEALTHSOUTH controller or other financial officer, whose responsibilities do not include any participation in HEALTHSOUTH's operations in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. No more than a minority of Management Committee members shall be directors, officers, employees, or agents of respondent ("respondent's Management Committee members"). Meetings of the Management Committee during the term of this agreement shall be audio recorded, and recordings shall be retained for two (2) years after the termination of this agreement.

d. Respondent shall not exercise direction or control over, or influence directly or indirectly, the NRH Assets, any associated operations or businesses, the Management Committee, or the independent chairman of the Management Committee; provided, however, that respondent may exercise only such direction and control over the Management Committee as is necessary to assure compliance with this agreement or the consent order.

e. Respondent shall maintain the viability, competitiveness, and marketability of the NRH Assets, and shall not sell, transfer, encumber (other than in the normal course of business, or to effect the divestitures contemplated by the consent order), or otherwise impair their viability, competitiveness, or marketability.

f. The NRH Assets shall be staffed with employees sufficient in numbers and skills to maintain the viability, competitiveness, and marketability of the Hospital and the NRH Assets, which employees shall be selected from the existing employee base of the NRH Assets, and may also be hired from other sources. To this end, respondent shall maintain at least the same ratios of full-time equivalent employees to inpatient days, for professional employee staff (such as nurses and therapists), and for other staff employees, as exist at the date of this agreement, and shall offer salaries and employee benefits sufficient to maintain such staffing levels and maintain quality of patient care at least substantially equivalent to that now provided by the employees of the NRH Assets.

g. With the exception of respondent's Management Committee members, respondent shall not change the composition of the Management Committee unless the independent chairman consents to such change. The independent chairman shall have power to remove members of the Management Committee for cause. Respondent shall not change the composition of the management of

the NRH Assets, except that the Management Committee shall have the power to remove management employees for cause.

h. If the independent chairman ceases to act or fails to act diligently, a substitute chairman shall be appointed in the same manner as provided in paragraph 3.c. of this agreement.

i. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations, defending or prosecuting litigation, negotiating agreements to divest assets, or complying with this agreement or the consent order, respondent shall not receive, have access to, use, or continue to use, any material confidential information (as that term is defined in the consent order) not in the public domain about the NRH Assets, or the activities of the Management Committee. Nor shall the NRH Assets or the Management Committee receive or have access to, or use or continue to use, any material confidential information not in the public domain about respondent that relates to rehabilitation hospital facilities operated by respondent in the Nashville metropolitan area as defined in paragraph I.G. of the consent order. Respondent may receive on a regular basis aggregate financial information relating to the NRH Assets necessary and essential to allow respondent to prepare United States consolidated financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

j. Except as permitted by this agreement, respondent's Management Committee members shall not, in their capacity as Management Committee members, receive material confidential information of the NRH Assets, and shall not disclose any such information received under this agreement to respondent, or use it to obtain any advantage for respondent. Each of respondent's Management Committee members shall enter a confidentiality agreement prohibiting disclosure of material confidential information. Respondent's Management Committee members shall participate in matters that come before the Management Committee only for the limited purposes of considering a capital investment or other transaction exceeding \$100,000, approving any proposed budget and operating plans, and carrying out respondent's responsibilities under this agreement, the consent agreement, and the consent order. Except as permitted by this agreement, respondent's Management Committee

members shall not participate in any matter, or attempt to influence the votes of the other members of the Management Committee with respect to matters, that would involve a conflict of interest if respondent and the NRH Assets were separate and independent entities.

k. Any material transaction relating to the NRH Assets that is out of the ordinary course of business must be approved by a majority vote of the Management Committee; provided that the Management Committee shall approve no transaction, material or otherwise, that is precluded by this agreement.

l. All earnings and profits of the NRH Assets shall be retained separately. If necessary, respondent shall provide the NRH Assets with sufficient working capital to maintain the current rate of operation of the NRH Assets, and to carry out any capital improvement plans which have already been approved.

m. HEALTHSOUTH shall continue to provide the same support services to the NRH Assets, which are not provided by that hospital's employees, as are being provided by ReLife to the hospital as of the date this agreement is signed. HEALTHSOUTH may charge the NRH Assets the same fees, if any, charged by ReLife for such support services as of the date of this agreement. HEALTHSOUTH personnel providing such support services must retain and maintain all material confidential information of the NRH Assets on a confidential basis, and, except as is permitted by this agreement, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of respondent's businesses, including without limitation businesses in the Nashville metropolitan area. Such personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information of the NRH Assets.

n. HEALTHSOUTH shall cause the NRH Assets to continue to expend funds for marketing and advertising at a level not lower than that expended in fiscal year 1994 or budgeted in fiscal year 1995, and shall increase such spending as deemed reasonably necessary by the Management Committee in light of competitive conditions.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the NRH Assets as provided in the consent order, or to seek any other injunctive or equitable relief

for any failure to comply with the consent order or this agreement, or in any way relating to the Acquisition, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this agreement.

5. To the extent that this agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this agreement or the consent order and shall not assert as a defense such contract requirements in a civil penalty action brought by the Commission to enforce the terms of this agreement or consent order.

6. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession, or under the control of respondent, relating to compliance with this agreement;

b. Upon five (5) days' notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding any such matters.

7. This agreement shall not be binding until approved by the Commission.

Set Aside Order

119 F.T.C.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 3 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

*Docket 3152. Modified Consent Order, June 25, 1942 --
Set Aside Order, April 18, 1995*

This order reopens a 1942 modified consent order -- which prohibited the respondent from coercing or intimidating its automobile retail dealers into purchasing accessories supplied by General Motors or from its designated source -- and sets aside the modified consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On February 6, 1995, General Motors Corporation ("GM"), as respondent and successor to General Motors Sales Corporation,¹ filed its Petition to Reopen and Vacate Modified Order ("Petition") in this matter. GM requests that the Commission set aside the 1942 modified consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, GM affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on March 27, 1995. No comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in

¹ Since the Commission issued the order in this matter General Motors Sales Corporation, a named respondent in the order, was dissolved and its assets now reside within respondent General Motors Corporation.