

this matter. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

Donald S. Clark,
Secretary.

**Concurring Statement of Commissioner
Roscoe B. Starek, III**

*In the Matter of Del Monte Foods
Company/Pacific Coast Producers, File No.
921 0071.*

In voting to accept the agreement containing consent order in this matter, I have overcome my reluctance to support an order that at first blush appeared to contain certain inordinately regulatory provisions. As a general proposition, I prefer clear, simple, easily enforceable cease-and-desist language over orders that establish complex metes and bounds for permissible conduct.

Some provisions of the present order—Paragraph VII is the extreme example—seem to prescribe the behavior of Del Monte and Pacific Coast Producers (“PCP”) with an unfortunate degree of detail. Despite the detailed nature of those provisions, however, the order is unlikely to place undue constraints on the parties’ operations. In particular, the “regulatory”-looking proviso to Paragraph VII clearly constitutes a substantial accommodation—*i.e.*, an exception to what would otherwise be a moratorium on co-pack arrangements between Del Monte and PCP—designed to allow the parties to realize efficiencies. To the extent that the parties need even more latitude than that proviso affords, Paragraph VII allows them to seek the Commission’s approval for a more extensive co-pack arrangement. Thus, if the parties wish to expand their co-pack agreement beyond what the proviso to Paragraph VII contemplates, the paragraph operates as it should: it puts on the parties the burden of establishing that a more extensive arrangement will yield net efficiencies.

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[File No. 951 0007]

**HEALTHSOUTH Rehabilitation
Corporation; Proposed Consent
Agreement With Analysis To Aid
Public Comment**

AGENCY: Federal Trade Commission.
ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, 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 would be permitted to appoint a trustee to complete the transaction. In addition, the consent agreement would require 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 agreement would require 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.

DATES: Comments must be received on or before March 28, 1995.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Mark Horoschak or Oscar Voss, FTC/S–3115, Washington, D.C. 20580. (202) 326–2756 or 326–2750.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission’s Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission’s Rules of Practice (16 CFR 4.9(b)(6)(ii)).

In the matter of HEALTHSOUTH REHABILITATION CORPORATION, a corporation,

Agreement Containing Consent Order

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed merger of ReLife, Inc. with HEALTHSOUTH Rehabilitation Corporation (“HEALTHSOUTH”), and it now appearing that HEALTHSOUTH, hereinafter sometimes referred to as “proposed respondent,” is willing to enter into an agreement containing an order to divest certain assets and to cease and desist from making certain acquisitions, and providing for other relief:

It is hereby agreed by and between the proposed respondent, by its duly

authorized officer and attorney, and counsel for the Commission that:

1. Proposed 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 35243.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint.

3. Proposed respondent waives:

- a. Any further procedural steps;
- b. The requirement that the Commission’s decision contain a statement of findings of fact and conclusions of law;
- c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- d. Any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by the proposed respondent that the law has been violated as alleged in the draft of complaint or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission’s Rules, the Commission may, without further notice to the proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint and its decision containing the following order to divest and to cease and desist in disposition of the proceeding, and (2) make information public with respect thereto. When so entered, the order shall have the same

force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

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, 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 the 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 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 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 identify 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 they 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 transactions 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 contracts 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.

In the matter of HEALTH REHABILITATION CORPORATION, a corporation File No. 951-0007.

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 35243; and the Federal Trade Commission ("Commission"), and 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 before 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 status 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 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 to 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 purpose 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 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.

Analysis of Proposed Consent Order to Aid Public Comment HEALTHSOUTH Rehabilitation Corp., File No. 951-0007

The Federal Trade Commission has accepted, subject to final approval, a proposed consent order from HEALTHSOUTH Rehabilitation Corporation ("HEALTHSOUTH"). The agreement would settle charges by the Federal Trade Commission that HEALTHSOUTH's proposed merger with ReLife Inc. ("ReLife") would violate Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or issue and serve the agreement's proposed order.

HEALTHSOUTH owns and operates rehabilitation hospital service facilities nationwide, including facilities in the Birmingham, Alabama, Charleston, South Carolina, and Nashville, Tennessee metropolitan areas. ReLife operates rehabilitation hospital facilities in these same areas, among others. The complaint accompanying the proposed consent order discusses the proposed acquisition's impact upon competition for rehabilitation hospital services in the Birmingham, Charleston, and Nashville

areas. According to the complaint, HEALTHSOUTH operates (*i.e.*, owns, leases, or manages):

- a rehabilitation unit within Medical Center East, a general acute care hospital in Birmingham, Alabama;
- Trident Neurosciences Center, a rehabilitation hospital in Charleston, South Carolina; and
- Vanderbilt Stallworth Rehabilitation Hospital, a rehabilitation hospital in Nashville, Tennessee.

ReLife operates:

- Lakeshore Hospital, a rehabilitation hospital in Birmingham, Alabama, as well as rehabilitation hospital units 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;
- a rehabilitation hospital unit within Roper Hospital, a general acute care hospital in Charleston, South Carolina; and
- Nashville Rehabilitation Hospital in Nashville, Tennessee, a general acute care hospital in Nashville, Tennessee which contains a rehabilitation hospital unit, as well as rehabilitation unit within Sumner Memorial Hospital, a general acute care hospital in Gallatin, Tennessee northeast of Nashville.

The consent order, if issued in final form by the Commission, would settle charges that the acquisition may substantially lessen competition for rehabilitation hospital services in the Birmingham, Charleston, and Nashville areas. The complaint alleges that HEALTHSOUTH and ReLife are competitors in those market areas, where, according to the complaint, concentration is already high, and entry by new competitors would be difficult. The complaint alleges that the Commission has reason to believe that the acquisition would have anticompetitive effects in the Birmingham, Charleston, and Nashville rehabilitation hospital services markets, in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, unless an effective remedy eliminates such anticompetitive effects.

The order accepted for public comment contains provisions requiring the divestiture by HEALTHSOUTH of Nashville Rehabilitation hospital and related assets in Nashville, Tennessee. The order also requires the termination by HEALTHSOUTH of management contracts pertaining to the rehabilitation hospital facilities at Roper Hospital in

Charleston, South Carolina, and Medical Center East in Birmingham, Alabama. The purpose of the divestiture and contract terminations is to ensure the continuation of these designated facilities as ongoing, viable rehabilitation facilities independent of HEALTHSOUTH, and to remedy the lessening of competition resulting from the acquisition in the Birmingham, Charleston, and Nashville areas.

The proposed order requires HEALTHSOUTH to divest Nashville Rehabilitation Hospital to an acquirer, and in a manner, approved by the Commission. Under the terms of the order, the required divestiture must be completed within twelve months of the date the order becomes final. If the required divestiture is not completed within the twelve-month period, HEALTHSOUTH will consent to the appointment of a trustee, who would have twelve additional months to effect the divestiture. The acquirer of Nashville Rehabilitation Hospital would be required to agree that, for ten years from the date of the order, it will not transfer Nashville Rehabilitation Hospital, without the prior approval of the Commission, to any person already operating a rehabilitation hospital facility in the Nashville area. In addition, the hold separate agreement executed in conjunction with the consent agreement requires HEALTHSOUTH, until the completion of the divestiture or as otherwise specified, to maintain Nashville Rehabilitation separate from HEALTHSOUTH's other operations.

The provisions of the order relating to Roper Hospital and Medical Center East require HEALTHSOUTH to terminate the management contracts for the operation of those hospitals' rehabilitation units, and cease operation of those rehabilitation facilities, within 90 days after the order becomes final (for Medical Center East) or by October 1, 1995 (for Roper Hospital). HEALTHSOUTH may, however, continue to supply therapy personnel to the Medical Center East rehabilitation unit. In addition, HEALTHSOUTH would be required to enter into agreements with Roper Hospital and Medical Center East to protect any competitively-sensitive information about those hospitals which HEALTHSOUTH has obtained, so that HEALTHSOUTH rehabilitation facilities which compete with those hospitals will not be able to use that information to their competitive advantage.

The order would prohibit HEALTHSOUTH from acquiring any rehabilitation hospital facilities in the Birmingham, Charleston, and Nashville

areas without the prior approval of the Federal Trade Commission. It would also prohibit HEALTHSOUTH from transferring, without prior Commission approval, any rehabilitation hospital facility it operates in any of those areas to another person operating (or in the process of acquiring) another rehabilitation hospital facility in that area. These provisions, in combination, would give the Commission authority to prohibit any substantial combination of the rehabilitation hospital operations of HEALTHSOUTH with those of any other rehabilitation hospital facility in the Birmingham, Charleston, and Nashville areas, unless HEALTHSOUTH convinced the Commission that a particular transaction would not endanger competition in those areas. The provisions would not apply to transaction where the value of the transferred assets does not exceed \$500,000, or to certain transactions between HEALTHSOUTH and the rehabilitation hospital facilities it already operates. They would expire ten years after the order becomes final.

The order would also require HEALTHSOUTH to provide advance notice to the commission before carrying out certain joint ventures with competing rehabilitation hospital facilities in the Birmingham, Charleston, and Nashville areas, for which the order does not otherwise require prior approval. This requirement is subject to limitation similar to those applicable to the prior approval provision, does not require notice of certain specified support services joint ventures, and also does not require additional notice for transactions which HEALTHSOUTH provides notice under the premerger notification requirements of the Clayton Act.

For ten years, the order would prohibit HEALTHSOUTH from transferring any of its rehabilitation hospital facilities in the Birmingham, Charleston, or Nashville areas to another person without first filing with the Commission an agreement by the transferee to be bound by the order provisions that apply to the facility and the market area in which it is located.

The purpose of this analysis is to invite public comment concerning the proposed order, to assist the Commission in its determination whether to make the order final. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify their terms in any way.

The agreement is for settlement purposes only and does not constitute an admission by HEALTHSOUTH that its proposed acquisition would have

violated the law, as alleged in the Commission's complaint.

Donald S. Clark,

Secretary.

[FR Doc. 95-2059 Filed 1-26-95; 8:45 am]

BILLING CODE 6750-01-M

[File No. 951 0005]

**Lockheed Corporation, et al.;
Proposed Consent Agreement With
Analysis To Aid Public Comment**

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would allow, among other things, the completion of the merger between Lockheed Corporation and Martin Marietta Corporation, to form Lockheed Martin Corporation, but would prohibit the respondents from enforcing exclusivity provisions contained in teaming arrangements that each individual firm now has with infrared sensor producers. The consent agreement also would prohibit certain divisions of the merged firm from gaining access through other divisions to nonpublic information that the respondents' electronics division receives from competing military aircraft manufacturers when providing a navigation and targeting system known as "LANTIRN" to competing aircraft producers; or that the respondents' satellite divisions receive from competing expendable launch vehicle suppliers when those competing suppliers launch the respondents' satellites.

DATES: Comments must be received on or before March 28, 1995.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Mary Lou Steptoe, Ann Malester, or Laura Wilkinson, FTC/H-374 or S-2224, Washington, DC 20580 (202) 326-2584, 326-2820 or 326-2830.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period