



individuals with the help of unidentified assistants to make unidentified false entries in HealthSouth's financial records. With the Indictment accusing Mr. Scrushy of such open and ambiguous allegations, he can not possibly prepare his defense when he can not know from the face of the Indictment what it is he is defending against. This is precisely the type of ambiguous pleading that Federal Rule of Criminal Procedure 7(f) is intended to rectify.

### **ARGUMENT**

#### **I. PURSUANT TO RULE 7(f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, MR. SCRUSHY IS ENTITLED TO A BILL OF PARTICULARS.**

Fed.R.Crim.P. 7(f) authorizes a court to direct the filing of a bill of particulars. The purpose of the Rule, as amended in 1966, is "to encourage a more liberal attitude by the courts toward bills of particulars." Note of Advisory Committee, Fed.R.Crim.P. 7. The purpose of a bill of particulars, as set out by the Eleventh Circuit, "is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Warren, 772 F.2d 827, 837 (11<sup>th</sup> Cir. 1985). "The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided." C. Wright, Federal Practice and Procedure: Criminal § 129 (1969). "A bill of particulars is available to any defendant who desires more information." Reid v. United States, 233 F.Supp. 314, 316 (S.D.Ala. 1964).

Although the granting or refusal of a motion for a bill of particulars rests within the sound discretion of the trial court, there is "no discretion to disregard the requirements of the Sixth Amendment that the accused shall be informed of the nature and cause of the accusations against him fully enough to enable him to prepare his defense and definite and certain enough that he

may be protected by a plea of former jeopardy against another prosecution for the same offense.” Williams v. United States, 164 F.2d 302, 304 (5<sup>th</sup> Cir. 1947).<sup>1</sup> Clearly, under the laws of our nation, a defendant has a constitutional right to “be informed of the nature and cause of the accusation.” Sutton v. United States, 157 F.2d 661, 663 (5<sup>th</sup> Cir. 1946); United States v. Jaswal, 47 F.3d 539, 543 (2<sup>nd</sup> Cir. 1995) (quoting United States Constitution, Amendment VI).

While it is not a cure for a deficient indictment, the courts have made clear that the basic principle governing a request for a bill of particulars is to identify with sufficient particularity the nature of the charge pending against him in order to enable him to prepare a defense and to prevent surprise at trial. See United States v. Gordon, 780 F.2d 1165, 1172 (5<sup>th</sup> Cir. 1986); cf. Russell v. United States, 369 U.S. 749 (1962) (invalid indictment cannot be cured by bill of particulars). A defendant’s need to know the evidentiary details establishing the facts of his alleged offense is remedied by a bill of particulars. United States v. Panzavecchia, 421 F.2d 440, 442 (5<sup>th</sup> Cir. 1970).

**A. Mr. Scrushy Is Entitled To A Bill Of Particulars Identifying Unnamed Individuals In The Indictment.**

“A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses.” United States v. Barrentine, 591 F.2d 1069, 1077 (5<sup>th</sup> Cir. 1979). It is common for a court to require the government to provide a defendant with a bill of particulars disclosing the names of some potential witnesses. Will v.

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<sup>1</sup> The Eleventh Circuit held, in Bonner v. City of Prichard that decisions of the Fifth Circuit, handed down prior to September 30, 1981, are binding as precedent in the Eleventh Circuit. 661 F.2d 1206, 1207 (11<sup>th</sup> Cir. 1981).

United States, 389 U.S. 90, 99 (1967); Barrentine, 591 F.2d at 1077. The reason for requiring this is not because they will or may be witnesses, but because the defendant needs “identification of the times, places and persons present in order to prepare his defense.” Will, 389 U.S. at 101.

The Indictment is replete with references to unnamed alleged accomplices, co-conspirators, aiders, abettors and witnesses, none of whom are identified by name and most of whom are not identifiable given the vague descriptions used by the government. The Indictment covers a time period from “in or about 1996” through “on or about March 19, 2003.”

Indictment, 6:21. HealthSouth has approximately 1,800 locations throughout all 50 states, Puerto Rico, the United Kingdom, Australia, and Canada. Indictment, 2:1. Mr. Scrushy can not effectively prepare for trial without knowing who the government believes participated in and/or has knowledge of the alleged scheme. Given the time frame involved, the size of HealthSouth and the number of employees who have come and gone within the eight years at issue, it is of little help to know only that “certain other officers” or “some members of the corporate accounting staff” are accused of being co-conspirators and aiders and abettors.

A bill of particulars is necessary to supplement the Indictment in the instant case to ensure that some of the most fundamental rights guaranteed to a defendant in a criminal case are protected: the right to prepare and present a defense, the right to be free from surprise at trial and the right to be free from double jeopardy.

**B. Mr. Scrusby Is Entitled To A Bill Of Particulars Identifying Allegedly Fraudulent Documents.**<sup>2</sup>

The government does not “fulfill its obligations merely by providing mountains of documents to defense counsel” where defense counsel are “left unguided as to which documents would be proven falsified. . . .” United States v. Bortnovsky, 820 F.2d 572, 575 (2<sup>nd</sup> Cir. 1987). In Bortnovsky, the Court reversed the convictions of the defendants where the district court failed to compel the government to reveal crucial information, including the identity of false documents. The defendants’ filed a motion for a bill of particulars seeking information regarding which of the documents were allegedly falsified. The government contended that it fulfilled its obligation by providing an explicit indictment and by providing over 4,000 documents to defense counsel during discovery. Id. at 574. The Court rejected the government’s argument, finding that the defendants were “hindered in preparing their defense” by the district court’s failure to require the government to provide crucial information by identifying the allegedly fraudulent documents. Id.

The Indictment in the instant case spans a time frame from 1996 through March 2003. HealthSouth has approximately 1,800 locations in every state, Puerto Rico, the United Kingdom, Australia, and Canada. For the government to make allegations of “false and fraudulent entries” without identifying the specific documents and entries, is akin to looking for a needle in 1,800

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<sup>2</sup> Mr. Scrusby is filing a Motion to Compel Compliance With Rule 16(a)(E)(ii) simultaneously with this Motion for a Bill of Particulars. Mr. Scrusby’s Compliance Motion further addresses the government’s attempt to stay in the shadows of imprecision by hiding the key document needles in mounds of hay.

haystacks. Discovery in this case has already resulted in hundreds of thousands of documents, including over 700 boxes of documents, over 900 CD-Roms of documents, dozens of video and audio tapes, and over 40 hard drives. This list does not include the entire HealthSouth server from which the government spent 60 days downloading data (and of which, Mr. Scrusby does not have a copy). To suggest that Mr. Scrusby should be forced to go through such a massive amount of documents and guess as to which documents the government believes fraudulent or which financial entries the government believes false can only result in tremendous prejudice to Mr. Scrusby and the near certainty of surprise and resulting prejudice at trial.

As the Indictment is presently written, Mr. Scrusby can not adequately prepare his defense and be free from surprise at trial under the penumbra of assertions contained in the Indictment, nor is he free from the threat of double jeopardy down the road.

**C. Particulars Requested**

To assist in preparing his defense, prevent surprise at trial and protect against the potential for double jeopardy in the future, Mr. Scrusby requests a Bill of Particulars with respect to the following paragraphs of the Indictment:

**Count 1 – Conspiracy**

1. Identify “a co-conspirator and aider and abetter” who was Chief Executive Officer. p. 2, ¶ 2.
2. Identify the “small group of senior officers” that includes the President, Chief Operating Officers, Chief Financial Officers, Controllers, “certain other officers” and “some members of the corporate accounting staff” who were allegedly “co-conspirators and aiders and abettors.” p. 2, ¶ 3.

3. Identify the “valuable benefits” Mr. Scruschy allegedly received that are not already enumerated in the Indictment. p. 2, ¶ 4.
4. Identify the “other companies and ventures” that Mr. Scruschy allegedly caused HealthSouth to invest in and do business with. p. 2, ¶ 4.
5. Identify the “HealthSouth Board of Directors, employees, stockholders and bondholders, potential stockholders and bondholders, bond underwriters, market analysts, bankers, the media, and other interested parties” to whom Mr. Scruschy allegedly distributed Income Statements, Balance Sheets and other financial information. p. 5, ¶ 16.
6. Identify the parties who allegedly “relied on the information distributed by HealthSouth” and Mr. Scruschy in making their investment and other decisions. p. 5, ¶ 17.
7. Identify the “many professional securities analysts” who disseminated their estimates of the company’s expected performance. p. 5, ¶ 18.
8. Identify the “other senior officers” who received and reviewed the various reports. p. 6, ¶ 19.
9. Identify the “other senior officers” who would refer to a failure to produce sufficient net income to meet “guidance” as “not making the numbers.” p. 6, ¶ 20.
10. Identify the “elsewhere” where the acts were allegedly committed. p. 6, ¶ 21.
11. Identify the “known” “other persons” Mr. Scruschy allegedly conspired with to commit offenses against the United States as enumerated. p. 6, ¶ 21.

12. Identify the alleged “other co-conspirator HealthSouth officers and employees” who “would and did participate” in the scheme to fraudulently inflate the company’s operating results and financial condition. p. 8, ¶ 23.

13. Identify the “other co-conspirators” who allegedly “would and did cause false and fraudulent entries be made to HealthSouth’s books and records.” p. 8, ¶ 24.

14. Identify the “false and fraudulent entries” Mr. Scrusby allegedly caused to be made to HealthSouth’s books and records. p. 8, ¶ 24.

15. Identify the alleged “other co-conspirators” who “would and did fraudulently induce HealthSouth to pay salaries, bonuses, and stock options, and otherwise confer benefits upon themselves.” p. 8, ¶ 25.

16. Identify the alleged “other co-conspirators” who “would and did fraudulently inflate HealthSouth’s financial results.” p. 8, ¶ 26.

17. Identify the “fraudulently inflate[d] HealthSouth financial results.” p. 8, ¶ 26.

18. Identify the alleged “other co-conspirators” who “would and did cause HealthSouth to issue fraudulently inflated financial reports.” p. 9, ¶ 27.

19. Identify the “fraudulently inflated financial reports.” p. 9, ¶ 27.

20. Identify the alleged “other co-conspirators” who “would and did meet and discuss” “the need to falsify” financial performance results before they were publicly traded. p. 9, ¶ 28.

21. Identify the alleged “co-conspirator senior officers” who Mr. Scrusby allegedly caused to inflate HealthSouth’s reported income, operating results and financial condition. p. 9, ¶ 29.

22. Identify the “fraudulently inflated HealthSouth[] reported income, operating results and financial condition.” p. 9, ¶ 29.
23. Identify the alleged “one or more co-conspirator senior officers” who “would and did convey [Mr. Scrushy’s] orders.” p. 9, ¶ 30.
24. Identify the documents containing “fraudulently inflate[d]” operating results and financial condition. p. 9, ¶ 30.
25. Identify the alleged “other co-conspirators” who “would and did cause to be made, false entries to income statement accounts.” p. 9, ¶ 31.
26. Identify the alleged “certain co-conspirators” who “would and did refer to the false entries as filling the hole’ or ‘filling the gap.’” p. 9, ¶ 31.
27. Identify the alleged “false entries to income statement accounts.” p. 9, ¶ 31.
28. Identify the alleged “one or more co-conspirators” who “would and did make and cause to be made” false entries for the balance sheet accounts. p. 9, ¶ 32.
29. Identify the “various accounts” to which “false entries” were allegedly made to “increase income.” p. 9, ¶ 32.
30. Identify the “false entries” allegedly made to the “various accounts.” p. 9, ¶ 32.
31. Identify the “corresponding false entries to balance sheets.” p. 9, ¶ 32.
32. Identify the alleged “other co-conspirators” who “would and did publicize and disseminate the fraudulently inflated financial information.” p. 10, ¶ 33.
33. Identify the alleged “fraudulent inflated financial information.” p. 10, ¶ 33.

34. Identify the alleged “certain co-conspirators” who “would and did sign and caused to be filed with the SEC” documents containing materially false and fraudulent information. p. 10, ¶ 34.

35. Identify the “materially false and fraudulent information” allegedly contained in the materials filed with the SEC. p. 10, ¶ 34.

36. Identify the alleged “co-conspirators” who “would and did make few if any fraudulent entries to accounts” in states where separate audits were required. p. 10, ¶ 35.

37. Identify the “fraudulent entries” allegedly made by the “co-conspirators.” p. 10, ¶ 35.

38. Identify the “certain states” where state regulators required separate audits. p. 10, ¶ 35.

39. Identify the “certain accounts” that were required by states to have separate audits. p. 10, ¶ 35.

40. Identify the alleged “co-conspirators” who “would and did cover up, conceal and keep secret the fraud.” p. 10, ¶ 36.

41. Identify the “other companies” that Mr. Scruschy allegedly used the acquisition of to conceal fraudulent assets on HealthSouth’s books and in its reports. p. 10, ¶ 36.

42. Identify the “fraudulent documentation and false information” allegedly provided to HealthSouth’s auditors, the “false information” allegedly provided to Federal and State taxing authorities, and the “fraudulent assets” allegedly on HealthSouth’s books and in its reports. p. 10, ¶ 36.

43. Identify the “threats,” “intimidation,” and “various steps” Mr. Scrushy allegedly used to control the “co-conspirators.” p. 10, ¶ 37.

44. Identify the alleged “co-conspirators” whom Mr. Scrushy allegedly “would and did seek to control,” and/or for whom Mr. Scrushy obtained large compensation packages, and/or for whom Mr. Scrushy recommended the forgiveness of HealthSouth loans. p. 10, ¶ 37-38.

45. Identify the alleged “co-conspirator senior officers” whom Mr. Scrushy allegedly caused to continue to sign and file false certifications and periodic reports. p. 11, ¶ 38.

46. Identify the alleged “conspirators” who committed and caused the overt acts. p. 11, ¶ unnumbered.

47. Identify the other acts committed and caused by the conspirators. p. 11, ¶ unnumbered.

48. Identify the “elsewhere” where the acts were allegedly committed. p. 11, ¶ unnumbered.

49. Identify the “others” who reviewed internal financial statements. p. 11, ¶ 39.

50. Identify the alleged “co-conspirator senior officers” whom discussed the falsification of HealthSouth’s financial statements. p. 11, ¶ 40.

51. Identify the alleged “[c]o-conspirators” who “made and caused to be made” entries in HealthSouth’s books and records which caused fictitious income to be included in reports and filings for the years 1996 through 2001. p. 11, ¶ 41.

52. Identify the “entries” in the books and records of HealthSouth that allegedly resulted in “fictitious income” being included in the annual reports to stockholders and SEC filings. p. 11, ¶ 41.

53. Identify the alleged “[c]o-conspirator corporate accounting staff members” who allegedly added and caused to be added fictitious assets” HealthSouth’s books and records. p. 12, ¶ 42.

54. Identify the “fictitious assets” allegedly added to the books and records of HealthSouth. p. 12, ¶ 42.

55. Identify the alleged “[c]o-conspirator corporate accounting staff members” who allegedly misclassified assets for the purpose of fraudulently inflating HealthSouth’s balance sheet. p. 12, ¶ 43.

56. Identify the “misclassified assets” that are not already identified in the paragraph. p. 12, ¶ 43.

57. Identify the alleged “co-conspirators” who signed HealthSouth’s Form 10-Q and caused it to be filed. p. 14, ¶ 47.

58. Identify the alleged “co-conspirators” who caused HealthSouth to send a false 1999 Annual Report. p. 14, ¶ 51.

59. Identify the “other co-conspirators” whom Mr. Scrushy allegedly told that they could not reduce earnings projections. p. 16, ¶ 61.

60. Identify “the officer” who prepared the report containing HealthSouth’s “true pre-tax income and EPS to HealthSouth’s reported and projected” figures and to whom Mr. Scrushy allegedly told that the officer could not tell Mr. Scrushy how to run the company. p. 16, ¶ 62.

61. Identify the alleged “co-conspirator accounting staff members” who advised their supervisors that they would no longer make false entries. p. 16, ¶ 67.

62. Identify the “supervisors” who were told by the “co-conspirator accounting staff members” that they would no longer make false entries. p. 16, ¶ 67.

63. Identify “one of the senior officers” who “balked” at signing a report that contained false information and to whom Mr. Scrusy allegedly “agreed to, and helped devise a plan” and to whom Mr. Scrusy allegedly offered the position of CFO of a spin-off company. p. 16, ¶ 67.

64. Identify the “materially false information” allegedly contained in the SEC filings. p. 16, ¶ 67.

65. Identify the “other co-conspirators” with whom Mr. Scrusy allegedly caused a false statement to be filed with the SEC. p. 17, ¶ 70.

66. Identify the alleged “two co-conspirator senior officers” with whom Mr. Scrusy allegedly discussed “that HealthSouth’s balance sheet overstated cash by hundreds of millions of dollars.” p. 18, ¶ 71.

67. Identify the alleged “co-conspirator” who Mr. Scrusy allegedly asked “how long it would take to fix the cash on the balance sheet.” p. 18, ¶ 72.

68. Identify the “investment bank” and “company” that Mr. Scrusy allegedly requested to propose a plan that did not include use of cash. p. 18, ¶ 73.

69. Identify the alleged “co-conspirator” who Mr. Scrusy allegedly ordered to request a plan that did not require the use of \$249.6 million in cash. p. 18, ¶ 73.

70. Identify the alleged “co-conspirator” to whom Mr. Scrusby allegedly offered to take care of his family if he “would take the blame for the overstatement.” p. 18, ¶ 74.

71. Identify the alleged “co-conspirator senior officer” to whom Mr. Scrusby allegedly told that a federal investigation of insider trading did not include an investigation of the accounting fraud. p. 18, ¶ 75.

72. Identify the “person with the initials JB” who sent an e-mail requesting HealthSouth’s annual report and 10-K. p. 18, ¶ 77.

73. Identify the persons with the initials “JB,” “RC,” “MS,” and “MK” who sent e-mails requesting HealthSouth’s reports and proxies. pp. 18-19, ¶ 77.

74. Identify the alleged “other co-conspirators” who committed overt acts in furtherance of the alleged conspiracy. p. 19, ¶ 78.

### **Count 2 – Securities Fraud**

75. Identify “others” whom the alleged scheme was intended to defraud. p. 19, ¶ 2.

76. Identify the “others known” who knowingly executed and attempted to execute the alleged scheme and artifice. p. 20, ¶ 3.

77. Identify the “elsewhere” where the acts allegedly occurred. p. 20, ¶ 3.

78. Identify the “others” who filed and caused to be filed with the SEC documents containing fraudulently inflated financial statements. p. 20, ¶ 4.

79. Identify the “elsewhere” where the acts were allegedly committed. p. 20, ¶ 4.

**Count 3 – Securities Fraud**

80. Identify the “others” who allegedly used and employed “manipulative and deceptive devices and contrivances in contravention of Title 17, Code of Federal Regulations, Section 240.10b-5. p. 20, ¶ 2.

81. Identify the “elsewhere” where the acts were allegedly committed. p. 20, ¶ 3.

82. Identify “others known” and “others” who committed the alleged acts in violation of 15 U.S.C. §§ 78j(b) and 78ff; 17 CFR § 240.10b-5; and, 18 U.S.C. § 2. p. 21, ¶ 3.

83. Identify the “false financial information” Mr. Scrusby and others allegedly caused to be disseminated into the marketplace. p. 21, ¶ 3.

**Counts 4 through 21 – Wire Fraud**

84. Identify “others” whom the alleged scheme to defraud was intended to defraud. p. 21, ¶ 2.

85. Identify the “elsewhere” where the acts were allegedly committed. p. 22, ¶ 3.

86. Identify “others known” and “others” who devised and intended to devise the alleged scheme and artifice. p. 22, ¶ unnumbered.

87. Identify the “elsewhere” where the acts were allegedly committed. p. 22, ¶ 4.

88. Identify “others” who allegedly “aided and abetted” Mr. Scrusby in the alleged scheme. p. 22, ¶ 4.

89. Identify “an individual” who hosted a phone call on October 1, 2002 to discuss HealthSouth’s performance. p. 24, ¶ 5.

**Counts 22 through 25 – Mail Fraud**

90. Identify “others” whom the alleged scheme to defraud was intended to defraud. p. 24, ¶ 2.

91. Identify the “elsewhere” where the alleged scheme and artifice were devised and intended to be devised. p. 24, ¶ 3.

92. Identify “others known” who devised and intended to devise the alleged scheme and artifice. p. 25, ¶ 3.

93. Identify the “elsewhere” where the acts were allegedly committed. p. 25, ¶ 4.

94. Identify the “others” who “aided and abetted” Mr. Scrusby in the alleged scheme. p. 25, ¶ 4.

**Counts 26 through 41 – Mail Fraud**

95. Identify “others” whom the alleged scheme to defraud was intended to defraud. p. 26, ¶ 2.

96. Identify the “elsewhere” where the alleged scheme and artifice were devised and intended to be devised. p. 26, ¶ 3.

97. Identify “others known” who devised and intended to devise the alleged scheme and artifice. p. 26, ¶ 3.

98. Identify the “elsewhere” where the acts were allegedly committed. p. 26, ¶ 4.

99. Identify the “others” who “aided and abetted” Mr. Scrushy in the alleged scheme. p. 26, ¶ 4.

100. Identify the individuals with initials “WDH,” “MAD,” “LDH,” “JGH,” “ARB,” “GHT,” “SLP,” “DRP,” “TRB,” “NAH,” “CFH,” “MGH,” “CRK,” “OEV,” “MPM,” and “ALT.” p. 27, ¶ 5.

**Counts 42 through 47 – False Statements**

101. Identify the “elsewhere” where the acts were allegedly committed. p. 27, ¶ 2.

102. Identify the “certain periods of time” during which the amount reported for net income and the value of assets at the end of those periods were falsely stated. p. 28, ¶ 2.

**Count 48 – False Certification**

103. Identify the “elsewhere” where the acts were allegedly committed. p. 29, ¶ 2 of Count 48.

**Count 49 – False Certification**

104. Identify the “elsewhere” where the acts were allegedly committed. p. 29, ¶ 2 of Count 49.

**Count 50 – False Certification (Attempt)**

105. Identify the “elsewhere” where the acts were allegedly committed. p. 30, ¶ 2.

**Counts 51 through 70 – Money Laundering**

106. Identify the “elsewhere” where the acts were allegedly committed. p. 31, ¶ 1.

**All Counts**

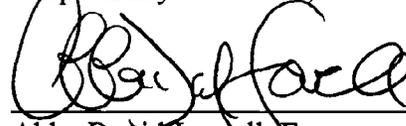
107. Identify by name and address all unindicted “co-conspirators.”
108. Identify by name and address all unindicted “aiders and abettors.”

**CONCLUSION**

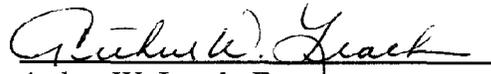
Defendant Richard M. Scrushy respectfully requests that this Motion for a Bill of Particulars be granted and the Court order the government to respond accordingly.

Dated: January 26, 2004

Respectfully submitted,



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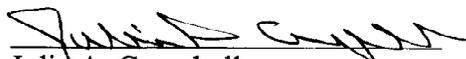
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion for a Bill of Particulars was served by facsimile and overnight mail to:

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