

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)
)
 v.) CR-03-BE-0530-S
)
 RICHARD M. SCRUSHY,)
)
 Defendant.)

**UNITED STATES'S CONSOLIDATED RESPONSE TO
DEFENDANT SCRUSHY'S DISCOVERY MOTIONS**

On January 26, 2004, Defendant Richard M. Scrushy filed seven motions in this Court:
(1) *Richard M. Scrushy's Motion For A Bill Of Particulars*; (2) *Richard M. Scrushy's Motion To Strike Surplusage*; (3) *Richard M. Scrushy's Motion For Disclosure Of Grand Jury Information*; (4) *Richard M. Scrushy's Request Pursuant To Rule 32.2 To Have The Jury Determine Forfeiture Nexus*; (5) *Motion of Defendant Richard M. Scrushy To Compel Compliance With Rule 16(a)(1)(E)(ii)*; (6) *Defendant Richard M. Scrushy's Motion For Discovery*; and, (7) *Defendant Richard M. Scrushy's Motion For A Hearing To Determine Whether Certain Recorded Conversations Should Be Suppressed*. On January ____, 2004, the Court ordered the United States to respond to these seven motions by February 9, 2004. In compliance with that order, the United States presents this consolidated response to the motions filed by Defendant Scrushy.

I. INTRODUCTION

On October 3, 2003, a federal grand jury in this district indicted former HealthSouth

Chief Executive Officer Richard M. Scrusby (hereinafter “Scrusby”) on 85 criminal violations.

The table below summarizes the counts in the indictment.

COUNT	STATUTE	CHARGE
1	Conspiracy - 18 U.S.C. § 371	Unlawful agreement to violate the law – multiple objects
2	Securities Fraud - 18 U.S.C. § 2, 1348 (1)	Executing or attempting to execute a scheme and artifice to defraud in connection with a security of an issuer, to wit: filing HealthSouth’s 10-Q for the period ending June 30, 2002
3	Securities Fraud - 15 U.S.C. §§ 78j(b) & 78ff 17 C.F.R. § 240.10b-5 18 U.S.C. § 2	Employing a manipulative or deceptive device in connection with the purchase or sale of a security and using interstate commerce or U.S. Mail, to wit: filing HealthSouth’s 10-K with the SEC on or about March 27, 2002
4 - 21	Wire Fraud/ Honest Services Fraud - 18 U.S.C. §§ 2, 1343, 1346	Using interstate wires to execute or attempt to execute a scheme or artifice to defraud, including intangible right to honest services, or to obtain money or property, to wit: distributing false information by interstate wire on HealthSouth’s conference calls and in press releases between April 27, 1999 to March 3, 2003
22 - 25	Mail Fraud/ Honest Services Fraud - 18 U.S.C. §§ 2, 1341, 1346	Using U.S. Mails or private carrier to execute or attempt to execute a scheme or artifice to defraud, including intangible right to honest services, or to obtain money or property, to wit: mailing of HealthSouth’s annual reports for 1998-2001
26 - 41	Mail Fraud/ Honest Services Fraud - 18 U.S.C. §§ 2, 1341, 1346	Using U.S. Mails or private carrier to execute or attempt to execute a scheme or artifice to defraud, including intangible right to honest services, or to obtain money or property, to wit: mailing of various HealthSouth corporate documents to stockholders in the year 2001
42 - 47	False Statements - 18 U.S.C. §§ 2, 1001	Making material false statements in various forms S-4 filed with the SEC between November 9, 2000 and August 22, 2002

COUNT	STATUTE	CHARGE
48	False Certification - 18 U.S.C. §§2, 1350(c)(2)	Falsely certifying the accuracy of a statement required to be filed with the SEC on or about August 14, 2002
49	False Certification - 18 U.S.C. §§2, 1350(c)(2)	Falsely certifying the accuracy of a statement required to be filed with the SEC on or about November 14, 2002
50	False Certifications, 18 U.S.C. § §2, 1350, 1349	Falsely certifying the accuracy of a statement required to be filed with the SEC on or about March 18, 2003
51 - 70	Money Laundering - 18 U.S.C. §§2, 1957	Engaging in monetary transactions through a financial institution, affecting interstate commerce, in criminally derived property, of a value of greater than \$10,000, to wit: transfer by wire of funds derived from a scheme and artifice to defraud HealthSouth's stockholders, bond holders and others
71	Criminal Forfeiture - 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 2461 (c)	
72 - 85	Criminal Forfeiture - 18 U.S.C. § 982(a)(1)	

The indictment alleges that, beginning in or about 1996 and continuing until March 2003, defendant Scrushy and at least 15 co-conspirators, who were officers and employees of HealthSouth, designed and executed a scheme to fraudulently inflate the company's operating results and financial condition, including the net income and earnings per share that HealthSouth reported to its Board of Directors, the Securities and Exchange Commission ("SEC"), bond holders, the investing public, and others. Over the course of the conspiracy, Scrushy and the conspirators made and caused to be made false and fraudulent entries in HealthSouth's books and records which added approximately \$2.7 billion in fictitious income to HealthSouth's operating results. It is alleged that, as part of the fraud, Scrushy and his co-conspirators caused

HealthSouth to confer upon them salaries, bonuses, stock options, and other benefits far in excess of what they would have received had the company's true operating results been reported to the public.

The indictment further alleges that Scrushy and his co-conspirators made and caused to be made myriad false and fraudulent material representations about HealthSouth's operating results and financial condition. Materially false and fraudulent information was distributed, among other ways, in reports that HealthSouth was required to file with the SEC, in annual reports mailed to shareholders, and on conference calls monitored by Wall Street analysts and the investing public. By distributing materially false information about the company's operating results, Scrushy was able to manipulate the price of HealthSouth's stock and fraudulently inflate the value of the shares and options which he and the other co-conspirators owned. It is alleged that, to assure success of the scheme, Scrushy also signed and caused to be signed certifications filed by HealthSouth with the SEC, as required by the Sarbanes-Oxley Act, which falsely attested to the accuracy of financial statements provided to the government.

It is also alleged that, as part of the scheme, Scrushy sought to control his co-conspirators and other HealthSouth employees by, among other ways, bestowing valuable benefits, threatening, electronic monitoring, and various other forms of psychological intimidation. Scrushy is also charged with laundering hundreds of millions of dollars in proceeds of the fraud, by engaging in monetary transactions, including the purchase of real estate, luxury automobiles, racing boats, jewelry, and fine art. The United States is seeking to have Scrushy forfeit more than \$278 million in fraudulently obtained proceeds.

II. RESPONSE TO MOTION FOR BILL OF PARTICULARS AND TO DISCLOSE NAMES OF UNINDICTED CO-CONSPIRATORS

Defendant Scrushy requests that the Court order the United States to produce a bill of particulars providing a host of specific evidentiary details about Scrushy's alleged crimes, including information about times, places, documents, overt acts, and the identity of co-conspirators. The United States does not oppose the request that it identify the co-conspirators in the case, but opposes Scrushy's motion in all other respects. His use of a bill of particulars as a discovery tool is inappropriate and his motion, which is designed merely to provide him with additional discovery, should be denied.

The United States acknowledges that “[t]he purpose of a bill of particulars 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.” *See, e.g., United States v. Warren*, 772 F.2d 827, 837 (11th Cir. 1985). Moreover, even though the decision to order a bill of particulars lies within the discretion of the court, *United States v. Draine*, 811 F.2d 1419, 1421 (11th Cir. 1987); *United States v. Colson*, 662 F.2d 1389, 1391 (11th Cir. 1981); *United States v. Burgin*, 621 F.2d 1352, 1358 (5th Cir.1980) (*citing Will v. United States*, 389 U.S. 90 (1967)), a bill of particulars is not warranted where the indictment is sufficient to apprise the defendant of the charges against which he must defend, *see, e.g., United States v. Warren*, 772 F.2d at 837; *United States v. Beebe*, 792 F.2d 1363, 1367 (5th Cir. 1986); *United States v. Mitchell*, 777 F.2d 248, 259 (5th Cir. 1985). The indictment in this case was sufficiently specific to make a bill of particulars unwarranted.

An indictment is sufficient if it: (1) contains the elements of the offense charged; (2)

fairly informs the defendant of the charges he must prepare to meet; and (3) enables him to plead an acquittal or a conviction in a bar to future prosecutions. *United States v. Poirier*, 321 F.3d 1024, 1028 (11th Cir.), *as amended in unrelated part*, No. 01-15989, 2003 WL 21211926 (11th Cir. Apr. 1, 2003); *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002). It is generally sufficient if it “includes all elements of the offense and briefly describe(s) the facts of the commission of the offense.” *United States v. Devegter*, 198 F.3d 1324, 1330 (11th Cir. 1999); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (“Constitutional requirements are fulfilled ‘by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime.’”) (citing *United States v. Yonn*, 702 F.2d 1341, 1348 (11th Cir. 1983)). An indictment requires “only that detail necessary to set forth the elements of the offense charged, as opposed to the evidentiary details establishing the commission of the crime.” *United States v. Harrell*, 737 F.2d 971, 975 n.4 (11th Cir. 1984); *accord*, *United States v. Jenkins*, 779 F.2d 606, 608 n.1 (11th Cir. 1986); *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986) (indictment need not set out the “evidentiary details by which the government plans to establish the defendant’s guilt . . .”). Moreover, “an indictment for conspiracy need not be as specific as an indictment for a substantive count.” *United States v. Harrell*, 737 F.2d at 975.

In this case, a bill of particulars is not warranted because the 37-page indictment sets forth the essential elements of the charges and provides an extraordinary amount of additional information about the alleged crimes, certainly much more detail than is required under the applicable law. The detailed indictment laboriously describes in sixteen paragraphs the manners and means of the conspiracy. Indictment at ¶¶23-38. It contains at least 41 overt acts, *not*

including the sub-parts. Indictment at ¶¶ 39-78. Although pleading only one overt act would have been legally sufficient, the multiple overt acts in this indictment provide the defendant with notice of, among other things: (1) alleged meetings he held with co-conspirators; (2) statements made in furtherance of the conspiracy; (3) many of the false statements he made to regulatory agencies and investors; (4) the dates of these statements; (5) the specific dollar amounts of allegedly fabricated earnings; (6) the specific journal accounts in which fraudulent entries were made by the conspirators; and (7) information about the plan Scrusby formulated to cover up his alleged crimes. The indictment would have been sufficient had it simply tracked the essential elements of the alleged crimes and provided a general description of Scrusby's conduct. *United States v. Devegter*, 198 F.3d at 1330; *United States v. Critzer*, 951 F.2d at 307. Because the indictment in this case provides substantially more information than legally required, a bill of particulars is not warranted.

Further, the United States has provided Scrusby with substantial discovery materials from which he can prepare his defense. A defendant is not "entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection." *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986); accord, *United States v. Martell*, 906 F.2d 555, 558 (11th Cir. 1990). In this case, the voluminous discovery already provided gives Scrusby sufficient information from which to prepare his defense and to plead double jeopardy. In addition to discovery of documents and tape recordings, information available in publicly filed court documents has provided Scrusby with an unprecedented amount of information about the conspiracy. As Scrusby well knows, 15 co-conspirators have entered guilty pleas. Each plea has been accompanied with an Information and

Factual Basis setting forth details about that co-conspirator's role in the conspiracy and his interaction with Scrushy, if any. In addition, Scrushy's own motion describes and acknowledges his receipt of the voluminous discovery which the United States has already provided. See Scrushy's Motion for a Bill of Particulars at 6. Under such circumstances, a bill of particulars is not required. *United States v. Rosenthal*, 793 F.2d at 1227; see also *United States v. Vasquez*, 867 F.2d 872, 874 (5th Cir. 1989); *United States v. Lavergne*, 805 F.2d 517, 521 (5th Cir. 1986).

Finally, Scrushy is simply not entitled to the sort of evidentiary detail he seeks. As the Eleventh Circuit noted in *United States v. Rosenthal*:

A bill of particulars may not be used to compel the government to provide the essential facts regarding the existence and formation of a conspiracy. Nor is the government required to provide defendants with all overt acts that might be proven at trial.... Nor is the defendant entitled to a bill or particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection....

793 F.2d at 1227. Moreover, "[g]eneralized discovery is not the proper function of a bill of particulars. *United States v. Warren*, 772 F.2d at 837; *United States v. Colson*, 662 F.2d at 1391 (same); see also *United States v. Anderson*, 799 F.2d 1438, 1441-42 (11th Cir. 1986)(same); *United States v. Davis*, 582 F.2d 947, 950 (5th Cir. 1978)(same); *United States v. Perez*, 489 F.2d 51, 69-71 (5th Cir. 1973)(denying bill seeking all overt acts of defendants). Based on this case law, the United States cannot be required to particularize evidentiary details sought by Scrushy such as the locations or places where overt acts occurred or provide the names of individuals described in the indictment as "others." See *United States v. Long*, 449 F.2d 288, 295 (8th Cir. 1971); *United States v. Williams*, 113 F.R.D.177, 178-79 (M.D. Fla. 1986); *United States v. Welch*, 198 F.R.D. 545, 548 (D. Utah 2001). Nor must the government provide a

description of each defendant's involvement in the charged offenses, *United States v. Fine*, 413 F. Supp. 740, 746 (W.D.Wis. 1976), or the "when, where and how" of overt acts not alleged in the indictment, *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir. 1975). Further, the details of when and how a conspiracy was formed, including when each member entered it, need not be revealed before trial. *United States v. Walker*, 922 F. Supp 732, 739 (N.D.N.Y. 1996).

Notwithstanding this authority, one request for specific information made by Scrushy may be required – the United States can be compelled to disclose the names of unindicted co-conspirators if they might testify at trial. *United States v. Hughes*, 817 F.2d 268, 272 (5th Cir.1987). Accordingly, to the extent that such individuals have not already been identified, the United States will provide such names to Scrushy in a timely fashion. Scrushy's remaining requests should be denied.

III. RESPONSE TO MOTION TO STRIKE SURPLUSAGE

Defendant Scrushy asks the Court to strike four types of allegations in the indictment as surplusage. He claims that such material should be struck because it is both unnecessary and prejudicial. Scrushy fails to note, however, that each of the allegedly surplus allegations directly relates to an essential element of one of the charges or refers to relevant and admissible evidence. He also fails to demonstrate how the allegations are prejudicial. His requests, therefore, should be denied.

An indictment sufficiently fulfills the requirements of FED. R. CRIM. P. 7(c)(1) when it is a "plain, concise and definite written statement of the essential facts constituting the offense charged." It has been routinely held that an indictment is sufficient when it fairly informs the defendant of the charge against which he must defend, and enables him to plead acquittal or

conviction in bar of future prosecutions of the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Critzer*, 951 F.2d 306, 307-08 (11th Cir. 1992). Scrushy's indictment meets this standard, and he has failed to demonstrate surplusage exists in his indictment that should be struck by the Court.

Moreover, courts have held that, if the evidence supporting the allegation is admissible as relevant to the charge, it need not also, itself, be an element of the charge, nor need it form the basis for a substantive or predicate act charged in the indictment. *See, e.g., United States v. Desantis*, 802 F. Supp. 794, 799-800 (E.D.N.Y. 1992). If an allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, the court should not strike the language. *United States v. Scarpa*, 913 F.2d 993, 1013 (2nd Cir. 1990). "A motion to strike surplusage from an indictment should not be granted 'unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial.... [T]his is a most exacting standard.'" *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992); *see also United States v. Huppert*, 917 F.2d 507, 511 (11th Cir. 1990); *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971). Scrushy has clearly not met this exacting standard.

A review of the indictment reveals that it more than sufficiently conforms with constitutional and statutory pleading requirements. Each of the allegedly surplus allegations, and the reason for its inclusion in the indictment, are discussed in turn below.

A. **Motion to Strike References to Scrushy's Fiduciary Duty and Duty of Honest Services**

Scrushy moves to strike the following bland reference from paragraph 2 of the indictment: "Richard M. Scrushy was the highest ranking corporate officer responsible for

overall management of the company, and he owed a fiduciary duty to render honest services to HealthSouth, its shareholders, and its Board of Directors.” Indictment at ¶ 2. Scrusy argues that any mention of duties that he owed to HealthSouth are not elements of the charges, and are therefore surplusage, because breach of a civil duty is a civil offense subject to a much lesser standard of proof. Scrusy is wrong.

Section 1346 of Title 18 of the United States Code provides that a scheme and artifice to defraud “includes” a scheme and artifice to deprive another of the intangible right of honest services. *See* 18 U.S.C. § 1346. The wire fraud counts (4 through 21) and the mail fraud counts (22 through 25 and 26 through 41) each charge Scrusy with executing and attempting to execute “a scheme and artifice to defraud,” in violation of 18 U.S.C. § 1346. Honest services fraud, 18 U.S.C. §1346, is also alleged in two of the objects ((a) and (b)) of the conspiracy charged in Count 1 of the indictment, the conspiracy count.¹ Therefore, the allegations concerning the duties Scrusy owed to HealthSouth are not mere surplusage as he claims; they are an integral part of the charges against him.

It is now well-settled law, pursuant to the definitions set forth in 18 U.S.C. §1346, that “a defendant’s breach of a fiduciary duty may be a predicate for a violation of the mail [or wire] fraud statute where the breach entails a violation of a duty to disclose material information.” *United States v. Hasner*, 340 F.3d 1261, 1270 (11th Cir. 2003) (*citing United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1996)). The fiduciary duty may be one owed by a public official to his constituents *or by a private citizen to a corporation*, such as where a CEO owes a state law

¹ Defendant Scrusy’s motion incorrectly states that “[n]one of the counts in the Indictment have as an element deprivation of honest services.” Scrusy’s Motion to Strike Surplusage at 3.

fiduciary duty to his Board of Directors and shareholders. *See, e.g., United States v. Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002). Thus, while a fiduciary duty may not be an essential element of an honest services fraud violation, many courts, including those in the Eleventh Circuit, have looked to see if a defendant in fact had such a duty and whether he violated that duty in deciding whether the United States had established a violation of 18 U.S.C. §1346. *Hasner*, 340 F.3d at 1270; *United States v. DeVegter*, 198 F.3d 1324, 1326-30 (11th Cir. 2000); *see also United States v. Gray*, 96 F.3d 769, 774 (5th Cir. 1997); *Caldwell*, 302 F.3d at 409.

In this case, it is alleged not only that Scrushy defrauded his victims of actual money and property, but of their intangible right to honest services. The United States will allege and prove that Scrushy, as CEO of HealthSouth, owed a duty of honest services to the company's Board of Directors and its shareholders. When Scrushy chose to execute a scheme to inflate the company's earnings in order to increase the value of his own shares of stock in the company, he failed to disclose material facts, placed the company under a foreseeable risk of economic harm, placed his personal interests above those of the company, and defrauded the Board and the company's shareholders of their intangible right to his honest services. Given that courts have routinely sought to determine whether a defendant owed a fiduciary duty to his victims in evaluating the sufficiency of an honest services fraud conviction, the allegations that Scrushy owed a fiduciary duty to HealthSouth, while perhaps not an element of the charges against him, are clearly relevant. Furthermore, it is hardly prejudicial to assert that Scrushy had such a duty. Thus, the allegations concerning Scrushy's fiduciary duty are not surplusage and should not be struck from the indictment. *United States v. Desantis*, 802 F. Supp. at 799-800.

B. Motion to Strike References to SEC Rules and Regulations

Scrushy next asks the Court to strike references in the indictment to certain information about the SEC, including certain general references to SEC rules and regulations. He argues that the references in paragraphs 9 through 12 of the indictment may confuse the jury and cause it to convict him of violating these civil regulations instead of the federal criminal statutes with which he has been charged. Aside from the fact that the jury will be instructed at the appropriate time on the elements of the charged crimes and how to evaluate the factual evidence presented in the context of the applicable law, and jurors are presumed to follow the court's instructions, the allegations in paragraphs 9 through 12 are in no way prejudicial, inflammatory, or immaterial and they should not, therefore, be struck from the indictment. To the contrary, they are highly relevant to the charges in this case, and the inclusion of those references in the indictment is entirely proper.

A brief recitation of the subject paragraphs' contents is helpful. Paragraph 9 alleges that the SEC was responsible for enforcing federal securities laws and regulations, which protect the investing public by requiring that companies accurately record and disclose financial information. Paragraph 10 alleges that HealthSouth was required to register with the SEC and was required to follow certain SEC regulations designed to ensure that a company's books and records accurately portrayed the company's true financial position. Paragraph 11 sets forth the specific types of documents and financial information that HealthSouth was required to provide to the SEC. Paragraph 12 merely describes the various forms that HealthSouth was required to file with the SEC.

First, this information is highly relevant to the charges in the indictment. The SEC, as an

agency of the United States and representative of the investing public, in its role as regulator of publicly traded securities, is a dual victim in this case. Far from confusing the issues, as Scrusby would have the Court find, paragraphs 9 through 12 explain the SEC's role in regulating securities trading, overseeing HealthSouth's operations, and setting forth the lawful obligations of publicly held companies. As a part of the necessary and relevant roadmap of the SEC's critical role in this case, the information in these paragraphs was appropriately included in the indictment and will be admissible evidence in this case. *See United States v. Stefan*, 784 F.2d 1093, 1097 (11th Cir. 1986) (approving introduction of evidence of civil banking regulation for purpose other than proving a violation thereof; to wit, so that the jury could get a proper understanding about the role of a regulatory scheme in place). Further, nothing in these paragraphs is prejudicial or inflammatory. Scrusby has simply failed to meet the exacting standard of demonstrating irrelevance and prejudice with regard to these allegations, *United States v. Awan*, 966 F.2d at 1426, and the SEC information should not, therefore, be struck from the indictment.

Second, the allegations about SEC rules and regulations and the evidence proving Scrusby's knowledge about those rules and regulations will be admissible at trial to establish Scrusby's motive and intent for filing false documents with the SEC. *See United States v. Harvard*, 103 F.3d 412, 422 (5th Cir. 1997). The evidence will show that Scrusby knew that he was required to file certain financial documents with the SEC and knew that such documents would need to show falsely inflated earnings numbers or his scheme to pump up the value of HealthSouth's stock would be disclosed. If "the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter

how prejudicial it may be (provided of course, it is legally relevant)." *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989) (internal quotation marks omitted). Because the SEC information is legally relevant, it is not mere surplusage and it should not be struck from the indictment.

Scrushy argues that admission of the civil regulations may confuse the jury and lead it to convict him of civil violations instead of the crimes with which he is charged.² Striking relevant language from the indictment, however, is not the proper remedy when civil regulations play a role in a criminal case. If, at the close of the evidence, the Court finds a danger from introduction of a civil regulation exists, it can give a limiting instruction, advising the jury that it may only consider the evidence for certain limited purposes and explain those purposes to the jury, but it should not strike the relevant allegations from the indictment as Scrushy requests. *Stefan*, 784 F.2d at 1098; *Harvard*, 103 F.3d at 422. Because the references to the SEC's rules and regulations are relevant to the charges against Scrushy, Scrushy's request to strike paragraphs 9 through 11 from the indictment must be denied.

C. Motion to Strike References to Accounting Terms

Scrushy also complains about language in the indictment which explains certain basic

² Scrushy cites *United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980), in support of his argument that the SEC information should be struck from his indictment, but that case is easily distinguishable from the situation here. In *Christo*, a former bank officer was charged with misapplication of funds and the United States repeatedly attempted to introduce certain Cease and Desist Orders issued by the Office of the Comptroller of the Currency to the defendant's bank at the trial. The court in that case held the evidence was not admissible, because the United States failed to demonstrate the relevance of the orders to the charges and that the evidence was highly prejudicial. Here, unlike in *Christo*, the United States has shown that the SEC regulations will be relevant to show, among other things, Scrushy's motive and intent in filing and causing the filing of false financial information with the SEC.

accounting concepts and introduces certain other unique concepts that are important in understanding the factual background of the case against him. Once again, Scrushy's request should be denied because there is nothing prejudicial, inflammatory, or immaterial about providing the jury with basic information which helps it to understand the evidence it must consider.

Paragraph 14 of the indictment simply introduces the jury to the concepts of the balance sheet and income statement. The paragraph also describes and defines the term "earning per share" or "EPS." Paragraph 15 explains the term "contractual adjustment," a phrase unique to the operations of healthcare providers such as HealthSouth. These descriptions are brief and generally bland. It is beyond dispute that this is a complex case and it will be necessary to provide the jury with a certain amount of technical and background information to assist it in understanding the charges against Scrushy. The paragraphs about which Scrushy complains contain nothing more than background information "necessary for the jury to understand the full scope of defendant's activities, and to place defendant's conduct in the appropriate context." *United States v. Watt*, 911 F.Supp 538, 553 (D.D.C. 1995); *see also United States v. Langella*, 776 F.2d 1078, 1081 (2d Cir. 1986). The allegations are, therefore, not mere surplusage and should not be struck from the indictment.

As the evidence at trial will show, the technical terms used in the indictment were the tools of Scrushy's fraud. It was within the intricacies of the balance sheet, the income statement, and contractual adjustment accounts that Scrushy and his co-conspirators were able to

manipulate HealthSouth's earnings results and hide a multibillion dollar fraud.³ It may well be that Scrushy's trial strategy will be to prevent the jury from understanding these terms and concepts that make up the mechanics of the fraud. Each of these terms and concepts, however, is highly relevant to the charges, and the United States will take great care in explaining them at trial. There is no legitimate basis under the strictures of FED. R. CRIM. P. 7(d) upon which this basic factual and explanatory information should be struck from the indictment and kept from the jury.

D. Motion to Strike the term "elsewhere"

Finally, Scrushy asks the Court to strike the term "elsewhere" from the indictment. This request should, likewise, be denied. The term is not surplus, immaterial, prejudicial, or inflammatory. The grand jury found, as it had the right to do, that Scrushy's fraud was wide-ranging and occurred in places that were not specifically described by the witnesses before it. As explained above, there is no requirement that the time, place, and detail of every overt act be listed in the indictment. Use of the term "elsewhere" merely puts Scrushy on notice that not all of the United States's evidence is described in the charging document, which is supposed to be a plain, concise, statement of essential facts. If the grand jury did not use terms like "elsewhere," Scrushy would likely complain that he was not notified that he might face evidence not specifically described in the indictment.

³ Scrushy argues that even mere mention of the term "accounting" in a heading may confuse the jury into believing that he is accused of violating Generally Accepted Accounting Principals (GAAP). He argues also that mention of the method by which HealthSouth was paid by third parties implicates a fraud on Medicare or Medicaid programs. These arguments require the Court to engage in rank speculation at best, as the indictment nowhere references "GAAP" nor the Medicare/Medicaid programs.

Because each of Scrusby's allegations fall far short of meeting the exacting standard mandated by Rule 7(d) and corresponding authority, his motion to strike surplusage should be summarily denied.

IV. RESPONSE TO MOTION TO DISCLOSE GRAND JURY INFORMATION

Without providing the Court with any information to demonstrate that possible bias exists, Defendant Scrusby requests that this Court order the disclosure of various types of information about the grand jury that indicted him so that an investigation into possible grand juror bias can be conducted by this Court or by his own attorneys. Scrusby argues that, because HealthSouth was such a pervasive force in the Alabama community, employing and treating thousands of citizens, presumably, any grand jury that heard the case must have contained individuals who were biased or prejudiced against him. Without firmly explaining why these individuals would necessarily be unable to fairly determine whether probable cause existed to indict Scrusby, Scrusby claims that his Fifth Amendment right to an unbiased grand jury requires that either he or, in the alternative, this Court, conduct an investigation into the process by which grand jurors were selected and delve into whether the capacity of the grand jury that sat in this case was adequately tested. He has asked the Court to order production, either to his legal team or to the Court, for *in camera* review, of the following information about the grand jury selection process and grand jury:

(1) A list of the names, addresses, and other information that was compiled of each person who was summoned to possibly serve as a member of the grand jury;

(2) A list of the names, addresses, and other information that was compiled of each grand juror actually selected;

(3) A list of any and all grand jurors who were released after being empaneled and the reason(s) for their release; and

(4) An explanation of whether the grand jurors actually impaneled (sic) were questioned about their personal, family and/or other relationship, including financial relationship, with HealthSouth or Mr. Scrushy.

The United States opposes this request because, in failing to make any showing of impropriety in the grand juror selection process or deficiency in the composition of the grand jury, Scrushy has not made the requisite showing of particularized need justifying the disclosure of grand jury information.

In analyzing Scrushy's motion, it is helpful to initially focus on what he is not claiming. Often, challenges to the method of selecting a grand jury pool or array arise in the context of the Equal Protection Clause of the Fourteenth Amendment. In those cases, defendants claim that a particular class of persons (usually those with similar characteristics to the defendant), e.g., African-American, Hispanic, or female, were underrepresented in the pool of available grand jurors or on the grand jury itself. *See, e.g., Cunningham v. Zant*, 928 F.2d 1006, 1013 (11th Cir. 1991). Another common challenge to the adequacy of the grand jury array is that it did not represent a fair "cross-section of the community." *See, e.g., United States v. Grisham*, 63 F.3d 1074 (11th Cir. 1995). Indeed, under the Jury Selection and Service Act ("JSSA"), 18 U.S.C. §1861, et seq., a defendant is entitled to "grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes." 18 U.S.C. §1861. Courts have held, pursuant to the provisions of section 1861, et seq., that a defendant is entitled to a master list of the array from which the grand jury was selected. *United States v. Davenport*, 824 F.2d 1511, 1515 (7th Cir. 1987); *United States v. Harvey*, 756 F.2d 636, 642-43

(8th Cir.1985); *United States v. Nichols*, 248 F. Supp. 2d 1027, 1034 (D.Kan. 2003); *United States v. Carlock*, 606 F. Supp. 491, 493 (W.D.La. 1985). This inspection is permitted though only so that the defendant may ensure that the grand jury was constitutionally selected from a “fair cross-section of the community.” But even this limited and general disclosure does not include the names and addresses of the specific jurors selected from the grand jury pool, as is requested by Scrusby. *Id.*⁴

Scrusby has not argued that any particular class of persons were underrepresented in the grand jury array in his case, nor that the Court’s jury selection process failed to produce a panel comprising a “fair cross-section of the community.” Instead, Scrusby’s argument is one of mere *potential* grand juror bias based on pure speculation. Scrusby speculates that, because he is well-known in the community and because the fraud at HealthSouth victimized many citizens, no grand jury impaneled in this community could have been impartial. This is a far cry from demonstrating that any member of the grand jury was so biased against him that he or she might have been affected, to Scrusby’s detriment, by matters not in evidence or may have presumed guilt rather than innocence as the law requires. *See United States v. Dickerson*, 248 F.3d 1036, 1045 (11th Cir. 2001) (outlining proof necessary to establish juror bias); *accord, United States v. Trujillo*, 146 F.3d 838, 842-43 (11th Cir. 1998). Successful attacks on the basis of grand jury bias are rare, and attempts to attack the grand jury are generally, like here, tenuous at best. In

⁴ Although Scrusby cites the JSSA in support of his motion, the United States does not understand Scrusby to be making a “fair cross-section” challenge. *See Scrusby’s Motion for Disclosure of Grand Jury Information* at 7. Moreover, to the extent that Scrusby’s request is based on the JSSA, he has failed to comply with 28 U.S.C. §1867(d), which requires the filing of a sworn statement of facts that, if true, would constitute a substantial failure to comply with the provisions of the law. Therefore, the United States does not believe Scrusby is entitled to a list of the individuals on the array pursuant to the Act.

fact, the United States has not found, nor has Scrushy cited, a single case where a court has granted a request to delve into the grand jury selection or deliberation process to investigate a speculative and wholly unsubstantiated claim of bias.

Federal Rule of Criminal Procedure 6(b)(1) provides that “. . . a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with the law, and may challenge an individual grand juror on the ground that the juror is not legally qualified.” Several courts have noted, however, that there is no provision in this rule for challenging the grand jury on the grounds that its members were biased or prejudiced. *See, e.g., United States v. Partin*, 320 F.Supp 275, 282 (E.D.La. 1970); *United States v. Waldbaum, Inc.*, 593 F.Supp 967, 969-70 (E.D.N.Y. 1984). These courts note that a preliminary draft of Rule 6(b)(1) would have specifically authorized a challenge of grand jurors on the grounds of bias or prejudice, but that such a provision was omitted from the final draft. *Id.* Therefore, they reason, there is no basis under the Federal Rules of Criminal Procedure to challenge the legitimacy of an indictment handed down by a legally empaneled grand jury on the ground of bias.

Even so, it is well-settled that the Fifth Amendment requires that an indictment be returned by a legally constituted and unbiased grand jury. *Costello v. United States*, 350 U.S. 359, 363 (1956). But this does not equate to an absolute right to conduct an investigation into potential grand juror bias. As Scrushy concedes, “in order for disclosure of grand jury materials to be ordered by the court and to overcome the presumption of secrecy of grand jury proceedings” a defendant must make a showing that there exists a ““particularized need”” for such disclosure. *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). To

meet the particularized need standard, a defendant must show: (1) the need for the disclosure outweighs the need for secrecy; (2) the materials are necessary to avoid injustice; and (3) the request is structured to cover only those materials that are needed. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). Scrusby has not come close to making this showing.

As this Court is aware, there is a presumption of regularity in grand jury proceedings. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300-01 (1991). Conclusory or speculative allegations about what went wrong in a grand jury proceeding are simply insufficient to give cause to question the regularity of the grand jury's functioning. *United States v. Blackwell*, 954 F. Supp. 944, 966 (D. N.J. 1997) (citing *United States v. Budzanoski*, 462 F.2d 443, 454 (3rd Cir. 1972)); see also *Lucas v. Turner*, 725 F.2d 1095, 1101 (7th Cir. 1984); *United States v. Vondette*, 248 F. Supp. 2d 149, 158 (E.D.N.Y. 2001); *Sun Dun, Inc. of Washington v. United States*, 766 F. Supp. 463, 466 (E.D.Va. 1991). The request must amount to more than “a request to engage in a fishing expedition.” *In re Grand Jury*, 118 F.3d 1433, 1437 (10th Cir. 1997); *Turner*, 725 F.2d at 1101(citation omitted). Scrusby's speculative claim of possible bias is simply an attempt to engage in just such a fishing expedition. He does not present this Court with a scintilla of evidence that either the jury selection process or any part of the grand jury's deliberation process was flawed. Nor does he present any basis on which this Court could conclude that any of the grand jurors were actually biased. Scrusby states that “[i]n Alabama, over time, [HealthSouth] employed tens of thousands of people. These individuals often had their income and savings and healthcare and retirement benefits linked to the success of

HealthSouth.” Scrushy’s Motion for Disclosure of Grand Jury Information at 1.⁵ Presumably, Scrushy’s argument implies, although never states directly, some of these individuals made it onto the grand jury, disregarded the oath they took as grand jurors, and rendered a biased finding of probable cause against him, but that’s all his argument is – implication and speculation. He has not presented this Court with anything that should compel it to delve into the grand jury process.

Based only on this rank speculation, Scrushy asks this Court to disregard the presumption of regularity in the grand jury process as well as the sanctity of grand jury secrecy, and asks it to begin an investigation into whether any of the grand jurors were biased. Based on this logic, it is fathomable that almost any defendant could conjure a reason why members of the community might be biased against him. If district courts were required to engage in a review of possible grand jury bias every time a defendant simply argued that there might be one or more jurors biased against him, the court system would grind to a halt. *See* Beale et al., *Grand Jury Law and Practice 2d*, §3.21 (2d ed. 2002) (A grand jury ordinarily hears a number of cases during its term. At the time a grand jury is empaneled, no one can say what cases will arise during its term, or who the defendants or witnesses will be. It is simply not possible to remove from the grand jury all persons who might have extrajudicial knowledge of some of the cases or parties that will eventually come before the grand jury.). Scrushy’s position as the CEO of a large company in the Birmingham, Alabama, area and the fact that some members of the community may have lost

⁵ Scrushy also states that “[c]ountless others received treatment at, or brought relatives to receive treatment at, HealthSouth’s numerous facilities throughout the state.” He does not explain, however, why an individual who received treatment at one of HealthSouth’s facilities would be biased against him.

money as a result of the fraud, without more, does not entitle him to a special investigation into the grand jurors who heard the evidence and returned the indictment in this case.

The general rule is that, unless a defendant makes a factual showing that the grand jury was actually biased, the indictment will not be invalidated. *United States v. Fuentes*, 432 F.2d 405, 407 (5th Cir. 1970). In *Fuentes*, the defendant argued that his former membership on the grand jury that indicted him created so great a potential for bias that dismissal of the indictment was warranted as a matter of law. *Id.* at 407. The Fifth Circuit held that, because the defendant had made no factual showing of actual bias, the district court's denial of defendant's motion to dismiss was proper. *Id.*

Other courts have also rejected speculative claims that, because the victims of defendants' alleged crimes *may* have been in the juror array, the grand jury was biased and the indictment should have been dismissed. *See, e.g., Waldbaum, Inc.*, 593 F. Supp. at 970 ("Unable to demonstrate actual grand jury bias and prejudice, defendants maintain that the grand jury was presumably biased since, in their words, the grand jury was comprised of the very people who were victims of the alleged crime they were investigating.").

Another defendant who made a speculative claim of grand juror bias was convicted Oklahoma City bomber Timothy McVeigh. *United States v. McVeigh*, 896 F. Supp. 1549 (W.D.Okla. 1995). In objecting to a motion to compel compliance with a grand jury subpoena for a handwriting exemplar, McVeigh argued that, because the entire venire was composed of residents of the Western District of Oklahoma who, he claimed, were all "victims" of the crime which was the subject of the grand jury's investigation, the grand jury could not independently examine the evidence to make a determination of probable cause. *McVeigh*, 896 F. Supp. at

1558. Although the district court in that case had multiple reasons for rejecting this claim, it noted that McVeigh's argument failed because, under 28 U.S.C. §1861, the grand jurors were " 'required to be selected at random from a fair cross-section of the community in the district or division wherein the court convenes.' " *Id.*

Although Scrusy has failed to meet the burden of showing the particularized need requisite to obtain release of grand jury information, the United States recognizes that "a prosecutor who presents a case to a grand jury has an obligation of preserving the fairness, impartiality, and lack of bias of this important governmental body." *United States v. Gold*, 470 F. Supp. 1336, 1346 (N.D. Ill. 1979). Consistent with the policies of the United States Attorney's Office for the Northern District of Alabama in all criminal cases, appropriate inquiries were made with the grand jury to ensure compliance with the law.⁶

In sum, Scrusy has cited no basis under which he is entitled to the names or addresses of any of the grand jurors who issued the indictment or any of the other information he has asked the Court to disclose. Because he has failed to make the requisite showing of particularized need to justify disclosure of grand jury information, Scrusy's motion should be denied.

V. RESPONSE TO REQUEST PURSUANT TO RULE 32.2 TO HAVE THE JURY DETERMINE FORFEITURE NEXUS

The United States has no opposition to defendant Scrusy's *Request Pursuant To Rule 32.2 To Have The Jury Determine Forfeiture Nexus*. The United States notes that the correct authority for this request is found at Federal Rule of Criminal Procedure 32.2(b)(4) – not (b)(2) –

⁶ In an abundance of caution, the government is willing to make available to the Court *in camera* the relevant inquiry made of grand jurors in this case. Scrusy has not made any showing that he is entitled to disclosure of such information.

as cited in defendant Scrushy's pleadings.

VI. RESPONSE TO MOTION TO COMPEL COMPLIANCE WITH RULE 16(a)(1)(E)(ii)

Among Scrushy's motions filed with the Court is a motion requesting that the Court compel the United States to comply with its obligations under Rule 16(a)(1)(E)(ii) by requiring it to identify which documents, among the numerous documents it has produced for him pursuant to its discovery obligations, that it intends to use in its case-in-chief at trial. In other words, Scrushy would like this Court to compel the United States to tell him, at this juncture, exactly what constitutes its case against him. Aside from the fact that the United States has and is continuing to meet its obligations under Rule 16(a)(1)(E)(ii), Scrushy is not otherwise entitled to the information he seeks under applicable discovery rules, the case law, or under general principles of fairness. This Court should, therefore, deny the motion.

A. Scrushy Is Not Entitled To The Discovery He Seeks.

Rule 16(a)(1)(E) of the *Federal Rules of Criminal Procedure* provides as follows:

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody or control, and:

- (i) the item is material to preparing the defense;
- (ii) **the government intends to use the item in its case-in-chief at trial;** or
- (iii) the item was obtained from or belongs to the defendant.

(Emphasis supplied.) The United States has complied with its obligations under this Rule, that is, it has and will continue to produce the materials required to be produced under the Rule.

Specifically, the United States has produced actual copies of the documents, etc., that are material to the defense, that it intends to use in its case-in-chief at trial, and that belong to Scrushy, Scrushy has copies of the documents within his possession; he may analyze those copies at his leisure. Contrary to Scrushy's assertions, the Rule does not require, and he does not have a right, to have the United States identify which provided evidence is the evidence is the evidence that the United States intends to use in its case-in-chief at trial or in what manner it intends to use it.

As an initial matter, it should be noted that Scrushy's motion to compel is unwarranted and unnecessary, because paragraph (4)(b) of the Court's December 30, 2003 *Order* already directs that, by July 19, 2004, the United States is to provide Scrushy copies of all exhibits it anticipates "using at trial." At that time, Scrushy will be given the information he seeks: the specific identity of the documents the United States will use against him in its case-in-chief. Scrushy and the United States agreed to this *Order*. While Scrushy may argue that the *Order* is limited to trial "exhibits," as a practical matter, almost all – if not all – material covered by Rule 16(a)(1)(E)(ii) will be identified by July 19, 2004 pursuant to the Court's *Order*. It is common for parties in complex cases to be expansive in identifying relevant documents as exhibits, even if they do not intend to actually introduce them. This case will be no different.

Furthermore, Scrushy is not entitled to the discovery he seeks. It is beyond dispute that there is no general right to discovery in a criminal case. *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *United States v. Agurs*, 427 U.S. 97, 106, 109 (1976); *Moore v. Illinois*, 408 U.S. 786, 795 (1972); *United States v. Quinn*, 123 F.3d 1415, 1421 (11th Cir. 1997). Other than the obligations imposed on the United States by Rule

16(a)(1), the Jencks Act, and the *Brady/Giglio* line of cases, Scrusy has no further right to discovery, and none of those provisions of law include a right to have the United States identify what documents among those it has produced for a defendant it actually intends to use at trial.

In support of his argument to the contrary, Scrusy has cited certain district court cases from other federal districts, primarily from district courts in New York and the District of Columbia, that seem to require the government to identify which documents among the many produced it intends to use in its case against the defendant. Aside from the fact that these cases have no precedential value in any court, including this Court, they were wrongly decided and based on factors other than what the law requires, and more recent authority undermines the cases cited by Scrusy. In *United States v. Nachamie*, 91 F. Supp. 2d 565 (S.D.N.Y. 2000), the Southern District of New York provided a good analysis of most of those cases on which Scrusy relies, correctly finding that no such right to have documents identified exists under Rule 16(a)(1)(E).

In *United States v. Nachamie*, the defendants, who were charged with Medicare fraud, filed a motion requesting an order directing the government to specifically identify which of the items that were produced in discovery were items required to be produced under Rule 16(a)(1)(E)(ii). 91 F. Supp. at 568-70. In *Nachamie*, the court found that the cases now being relied on by Scrusy had no basis in either the text of Rule 16(a) or in any binding case law. *Id.* It noted the difficulty faced by a defendant in circumstances in which a mass of paper is produced during discovery, but went on to hold:

Defendants correctly identify the difficult problem that arises when the Government amasses a large number of documents “material to the preparation of the defendant’s defense,” and produces those documents at the same time it

produces the documents it intends to use in its case-in-chief. Because the Government must produce documents meeting any of the three categories listed in Rule 16(a)(1)(C)⁷, a defendant cannot determine which documents fall into each category. But a court has no license to rewrite the Federal Rules of Criminal Procedure. While it might be wise for the Advisory Committee on Criminal Rules to consider an amendment that would require a party to *identify* those documents it intends to use in its case-in-chief, no such requirement now exists in the plain language of the Rule.

Id. at 570 (emphasis in original). Other courts faced with the issue presented by Scrusby have also refused to read a requirement into Rule 16 that does not exist from a reading of the text of the rule. *See, e.g., United States v. Alvarado*, NO. 01 CR. 156(RPP), 2001 WL 1631396, at *5 (S.D.N.Y. Dec. 19, 2001) (citing *Nachamie* and finding the plain language of Rule 16(a)(1) does not require the government to identify which documents it intends to use in its case-in-chief); *United States v. Reddy*, 190 F. Supp. 2d 558, 571 (S.D.N.Y. 2002) (“It is clear that Rule 16(a)(1)(C) does not require the Government to identify specifically which documents it intends to use as evidence. It merely requires that the Government produce documents falling into the three enumerated categories.”); *United States v. Carrington*, NO. 02 CR. 897(LTS), 2002 WL 31496199, at *2 (S.D.N.Y. Nov. 7, 2002) (“It is clear that Rule 16(a)(1)(C) does not require the Government to identify specifically which documents it intends to use as evidence or for impeachment. It merely requires that the Government produce documents falling into the three enumerated categories.”). While the Eleventh Circuit has not specifically addressed the issue presented here – whether the United States must not only produce documents it intends to use at trial in its case-in-chief, but also identify for the defendant which documents those are – it is highly probable that it would agree with these courts that have found no right to such

⁷The portions of FED. R. CRIM. P. 16(a)(1)(E) that are at issue here previously appeared in FED. R. CRIM. P. 16(a)(1)(C).

information, because it has repeatedly held that the question of statutory interpretation always begin with an examination of the text of the statute or rule. *See, e.g., United States v. Zheng*, 306 F.3d 1080, 1085 (11th Cir. 2002); *Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197, 1199 (11th Cir. 2002); *United States v. Manella*, 86 F.3d 201, 203 (11th Cir. 1996). As already noted, while the text of Rule 16(a)(1)(E) requires the United States's production of the tangible items of evidence it intends to use at trial in its case-in-chief, it says nothing about identifying those documents for the defendant.

Although the United States volunteers the guidance below, Scrusy is not entitled to it, nor to any relief not contained in the December 30, 2003 *Order* referenced above. The material provided to date can be described as massive, but so can Scrusy's resources. Scrusy has paid over \$20 million to his attorneys. He will no doubt vastly outspend the United States in this case and, by the time of his trial, his review and analysis of the documents will likely be at least as thorough as the United States's review and analysis. As noted in section II, above, the indictment is a good guide to the charged crimes, as are the documents filed in other litigation involving the fraud at HealthSouth. Moreover, during the discovery production to date, the United States has identified for Scrusy the sources of a great majority of the material provided to him. For example, documents taken from the offices of particular co-conspirators have been so identified. This is sufficient to guide Scrusy to much, if not all, of the materials he desires, and well before the July 19, 2004, deadline.

B. Even Though Scrusy Is Not Entitled To The Discovery He Seeks, The United States Provides Him The Following Guidance.

Even though he is not entitled to any assistance in identifying documents produced to

date, to assist Scrusby in identifying materials produced under 16(a)(1)(E)(ii), and to help him make reciprocal discovery, the United States asserts it will use some or all of the following materials at trial:

- a. All 10Ks, 10Qs, S-3s, S-4s, S-8s, and 8-Ks filed by HealthSouth since 1986 (most of which are available on the internet);
- b. All HealthSouth annual reports published since 1986;
- c. All HealthSouth press releases issued since 1996 (*see* Attachment A);
- d. All available recordings and transcripts of HealthSouth earnings calls (*see* Attachment B);
- e. All HealthSouth PowerPoint presentations;
- f. Lists of HealthSouth stockholders and institutional investors (*see* Bates ranges 1B063-HSW-1347 to 1357, and HEA-216-0001 to 0256, and HEA-54-0001 to 00479);
- g. HealthSouth stock price history reports (*See* Bates ranges 1C059-09V-2246 to 2357);
- h. Letters to HealthSouth auditors (*see* Attachment C);
- i. All audio and visual tapes of Scrusby performances during company meetings, investor meetings, television shows, and radio shows, including the “60 Minutes” tape;
- j. Documents taken from the Scrusby’s office and outer office (*See* Bates ranges beginning with the prefixes 1B122-HSW, 1B123-HSW, 1B124-HSW, 1B125-HSW, and 1B126-HSW, 1B096-HSW, 1B098-HSW, 1B102-HSW, 1B133-HSW);
- k. Scrusby’s testimony at the SEC hearing;
- l. All HealthSouth Board of Directors minutes;
- m. All consensual tape recordings;
- n. The drafted Amended 10-Q for HealthSouth to be signed March, 2003 (*see* Bates

ranges 1B108-HSW-0060 to 0094);

- o. Mailing/interstate carrier records for HealthSouth (separately provided)
- p. The United States is in the long-term process of evaluating documents taken from the offices of co-conspirators and almost certainly will use many of them. That evaluation, however, will not be complete for some time. The United States suggests that Scrushy should devote resources to doing the same. Many of the documents from this source which have been identified as possibly relevant, as well as other documents from other sources which we have identified as possibly relevant, are listed by Bates numbers in Attachment D. The United States will certainly use many of these documents at trial. They include weekly revenue reports, monthly, quarterly, and annual income reports and statements, PeopleSoft printouts, asset lists, handwritten notes, lists of investors, loan documents for employees, loan documents for financing, analyst reports, stock purchase agreements, and e-mails;
- q. All of Scrushy's bank account records;
- r. All of Scrushy's trading account records;
- s. Transaction records; and
- t. The photographs of Scrushy's assets.

The foregoing is not intended to limit the United States in any way. Moreover, the United States does not warrant that the Bates ranges are exhaustive. And finally, the defense is cautioned that the breadth, complexity, and duration of Scrushy's crimes were of historically enormous proportions, and it is conceivable that almost anything provided to the defense might be used for some purpose at some phase at trial.

VII. RESPONSE TO MOTION FOR DISCOVERY

Defendant Scrushy also has filed a Motion For Discovery that he describes as a "protective motion" that he "filed to insure the completion of all discovery." *Defendant Richard M. Scrushy's Motion For Discovery* at 2. As Scrushy points out in his motion, the United States

has already provided him with a great deal of discovery in this case, and the process of providing him with the documents and information to which he is entitled continues. The United States is aware of its discovery obligations under Federal Rule of Criminal Procedure 16(a)(1), the Jencks Act, 18 U.S.C. § 3500, et. seq., and the *Brady/Giglio*⁸ line of cases, and it will continue to supply Scrushy with the information and documents in accordance with its obligations under those cases and provisions.

VIII. RESPONSE TO MOTION FOR HEARING TO DETERMINE WHETHER CERTAIN RECORDED CONVERSATIONS SHOULD BE SUPPRESSED

A. Introduction

Defendant Scrushy's argument that the Owens-Scrushy recordings were obtained in violation of Alabama Rules of Professional Conduct 4.2 and should therefore be suppressed is wrong in every regard. First, Scrushy's argument is based on a single decision which, as he knows, was vacated by the court that wrote that decision. Second, the recordings at issue were made consistent with the United States's professional responsibility obligations. Finally, even if the Court were to find that the United States's attorneys erred with regard to their professional responsibility obligations, any such violation fails to state an adequate rationale for suppression of the resulting evidence.

B. Facts

1. The insider trading investigation

The SEC began an investigation into the allegations of insider trading by officers and directors at HealthSouth Corporation as early as 2002. In conjunction with that investigation, in

⁸*Brady v. Maryland*, 373 U.S.83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

February of 2003, the SEC issued subpoenas for testimony. It took the deposition of employees and stockholders who had sold stock just prior to HealthSouth's August 27, 2002 announcement that Transmittal 1753 would have a significant negative impact on the financial condition of HealthSouth. The focus of the SEC investigation was whether any of these sellers had advance knowledge of the particulars in the August 27, 2002 announcement. At that time, the SEC was not investigating allegations of accounting fraud at HealthSouth; it was investigating allegations of insider trading. Subsequently, the FBI and the United States Attorney's Office had also opened investigations into the insider trading allegations on October 16, 2002 and October 29, 2002, respectively. The focus of all of these investigations was insider trading.

On Friday, March 14, 2003, the SEC questioned Scrusby about insider trading, specifically about when he became aware of the supposed effects of Transmittal 1753. While Scrusby was also asked some general questions about the accuracy of the financial statements, SEC investigators did not press on details, because this was not the purpose of the SEC's investigation.⁹ Scrusby had retained private counsel in connection with the insider trading allegations.¹⁰

⁹ In an effort to keep the two investigations separate, when the United States learned that the SEC was going to interview Scrusby under oath about the insider trading allegations, it specifically asked that it not question him about the cash on hand and the manipulation of fixed assets at HealthSouth.

¹⁰ In Defendant's Motion For Protective Order filed by Scrusby in connection with the SEC's civil investigation, Scrusby, through counsel states that on March 14, 2003, when he was interviewed by the SEC, "[n]o mention was made at that time that he was a target of a criminal investigation by the Justice Department into alleged accounting fraud or alleged insider trading." He further states that it was not until "March 20, 2003, counsel for Defendant was advised by the United States Attorney that Defendant was the target of a criminal investigation into alleged accounting fraud and alleged insider trading." It is inconsistent for Scrusby to claim that he was represented by counsel on allegations he did not even know about.

2. The accounting fraud investigation

Earlier that week, however, on March 11, 2003, Weston Smith had met with the FBI and revealed to agents the accounting fraud that had been occurring at HealthSouth. He was followed by Bill Owens, who did the same, on Friday March 12, 2003. Owens agreed to cooperate in investigating the accounting fraud.

HealthSouth was due to file an amendment to an earlier 10-Q on March 18, 2003. This amendment, which Owens and Scrusby intended to sign, required a 1350 certification. The amendment would have reaffirmed prior 10-Qs and prior 10-Ks, which had falsely reported HealthSouth's inflated income, and also had overstated income on the balance sheet. Owens reported that he and Scrusby were to sign an amended 10-Q and 10-K the next week.

3. The tapes at issue

Owens was instructed by the FBI to wear a recording device and engage Scrusby in conversations that would reveal Scrusby's knowledge that the numbers in HealthSouth's financial statements had been inflated and that the historical and balance sheet numbers in the upcoming 10-Q would also be inflated. Owens would tell Scrusby that Owens's wife knew about the fraud, had become angry, had said that she did not want Owens to go to jail, and had said that, if he signed any more false reports, she would divorce him.

On the resulting tapes, that Scrusby now seeks to suppress, he makes a spate of damning admissions demonstrating his knowledge of the massive accounting fraud and showcasing the techniques he employed in manipulating so many others to participate in the scheme. He also urges co-conspirator Owens take affirmative steps to further the accounting fraud. For example, on one of the very first taped conversations, made shortly after Owens met with the government

and disclosed the accounting fraud, Scrushy jubilantly brags to Owens about how the SEC, in his March 14, 2003 interview, asked him nothing about the fraudulent “numbers.” Scrushy then directs Owens to “come up with something creative” in order to hide millions in fictitious cash on HealthSouth’s books which Scrushy feared would be discovered by a potential suitor in a leveraged buyout of HealthSouth.

In another incriminating conversation, after Owens tells Scrushy that he has informed his wife about previously filed false financial statements, Scrushy quizzes Owens whether his wife is now “going to be a problem.” Scrushy then chides Owens to continue the fraud by signing an additional false Sarbanes-Oxley certification with the SEC. On the tape, Scrushy brazenly uses various manipulative techniques to convince Owens to move forward with the fraud, including threatening Owens that he would “take them all down” if he did not sign and submit the additional false certification. On more than one occasion during the conversations, Scrushy attempts to persuade Owens to move forward with the ongoing fraud by reminding him he has already signed false certifications and promises that now, the conspirators would try to “get clean.” In yet another tact, Scrushy argues to Owens that the false financial statements are insignificant because “[n]obody is looking at these numbers.” He goes on to try to convince Owens that the accounting fraud is justified, because “every company in [America] has a bunch of shit on their balance sheet.” Scrushy laments to Owens, we “have got to, get out of this, we got to get out of this somehow.” Scrushy finally tells Owens that he is relying on him to make sure that they are not caught, because Owens is smart enough to get them out of “this mess.”

These are only some of the statements made by Scrushy showing his knowledge of the accounting fraud.

C. Argument

1. Scrushy's argument relies entirely on a vacated order.

Scrushy's motion to suppress the tape-recorded conversations that he had with Bill Owens relies entirely on a single case, *United States v. Bowman*, 277 F. Supp. 2d 1239 (N.D. Ala. 2003). The *Bowman* decision, however, was vacated by order signed on September 9, 2003. Counsel for the United States telephoned Scrushy's attorney to advise him of the vacated status of this decision and faxed him a copy of the September 9, 2003, order. Defense counsel declined the opportunity to withdraw or modify its motion. A copy of that order vacating the decision is attached to this response at Attachment E.

It is beyond doubt that a vacated decision has "no precedential value." *Sellfors v. United States*, 697 F.2d 1362, 1366 (11th Cir. 1983). *See also O'Connor v. Donaldson*, 422 U.S. 563, 577 n.11 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect"). The fact that Scrushy chose to proceed entirely on the basis of a vacated decision is reason enough to deny the motion, particularly where that decision is factually distinguishable from the present matter and, to the extent it is not distinguishable, is countered by decades of consistent federal precedent to the contrary.

2. Rule 4.2 does not apply to the Owens-Scrushy communications because The communications concerned a matter on which Scrushy was not represented.

At the time of the Owens-Scrushy taped conversations, the United States was conducting two separate investigations regarding HealthSouth and Scrushy. One investigation involved insider trading – a matter also being investigated by the SEC and as to which Scrushy was represented by counsel. The other investigation concerned accounting fraud. It was in the

context of the latter investigation – accounting fraud – that the undercover communications at issue occurred.

The rule of professional responsibility that governs contact by a lawyer with a person represented by counsel is set forth in Rule 4.2 of the Alabama Rules of Professional Conduct.¹¹ The Rule provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” As is made clear in the Comment to Rule 4.2, the Rule prohibits *ex parte* communications only as to “the subject of the representation” and does not prohibit a lawyer from communicating with a represented person about a new or different matter outside the scope of the representation. Accordingly, the Rule does not apply to the Owens-Scrushy communications at issue because Scrushy was not represented by counsel in the accounting fraud matter.

The United States finds no definitive guidance in the text of Rule 4.2, or precedent from Alabama or elsewhere, regarding what constitutes a new or different matter in the context of the Rule.¹² Certainly, however, the Rule does not require that there be absolutely no overlap between the matters. Indeed, in the law enforcement context, prosecutors “have a duty to investigate new

¹¹ The United States takes no issue with Scrushy’s argument that Rule 4.2 generally applies to federal prosecutors per 28 U.S.C. § 530B. Rather, the point is that the Rule does not apply in the circumstances presented here, or that if it does apply, the actions or the prosecution were consistent with the Rule.

¹² As the various matters at issue in the vacated *Bowman* decision were all forfeiture actions concerning the same parcels of land, the court was not presented with a circumstance in which it had to consider at length the parameters of what constitutes a separate subject matter for purposes of Rule 4.2. Rather, the *Bowman* court was concerned with the “authorized by law” exception to the Rule, a topic addressed in the next section of this brief.

or additional crimes that an indicted and represented defendant may have committed” and may contact a represented suspect even where the additional crimes are not entirely distinct from the crimes on which the suspect is represented. *United States v. Ford*, 176 F.3d 376, 379 (6th Cir. 1999). In *Ford*, the defendant, convicted for money laundering and gambling offenses, was subsequently arrested for jury tampering in connection with the money laundering and gambling trial. While he was in custody on the jury tampering charge, the government sent a wired informant into the defendant’s cell for the purpose of engaging him in conversation about information the government had obtained regarding alleged efforts by the defendant to harm the prosecutors and others involved in the money laundering and gambling trial and the jury tampering charges. Although obviously factually intertwined with the matters (money laundering and gambling and jury tampering) on which the defendant was represented, the Sixth Circuit concluded that Rule 4.2 was not violated as the contact with the defendant concerned a separate matter. Indeed, not only was the Rule not violated, but important public policy considerations supported the court’s decision: “[E]thical rules should not be construed to conflict with the public’s vital interest in ensuring that law enforcement officers investigate uncharged criminal activity.” *Id.* at 382. *See also People v. Hyun Soo Son*, 723 P.2d 1337, 1341-42 (Colo. 1986) (government may communicate with defendant regarding defendant’s bribery in connection with pending misdemeanor charge even though defendant was represented on misdemeanor charge).

Here, the insider trading and accounting fraud allegations were similarly separate and distinct. The insider trading investigation sought to determine whether Scrushy or others at HealthSouth had unloaded stock with advanced knowledge the Transmittal 1753 would hurt the value of the stock. The accounting fraud allegations did not even come to the United States’s

attention until Scrusby's co-conspirators Smith and Owens disclosed the fraud in the second week of March 2003. It is significant that one of the forces motivating Smith and Owens to disclose the fraud was that Scrusby was encouraging them to further the fraud and commit additional crimes by filing additional false documents with the SEC and find a way to cover-up the fraud by engaging in a leveraged buyout transaction. In fact, in many of the taped conversations at issue, Scrusby and Owens discuss the possibility of committing additional crimes and finding ways to cover up the accounting fraud. Thus, it is clear even from the taped conversations that the accounting fraud, which the United States began to investigate in March 2003, was separate and distinct from the insider trading investigation which existed before disclosures by Smith and Owens.

3. Rule 4.2 does not apply to the Owens-Scrusby communications because The communications concerned were "authorized by law."

Even if the Court determines that the accounting fraud and insider trading matters constitute the same subject matter for Rule 4.2 purposes, the Owens-Scrusby conversations do not violate the Rule as they are pre-indictment and pre-complaint communications made in the context of a legitimate law enforcement investigation. While some courts conclude that such investigatory contacts fall within the "authorized by law" exception to the Rule and others hold that the Rule simply was not intended to cover such communications, such investigatory contacts have been consistently upheld in federal courts throughout the country.

At the time of the communications, Scrusby was represented on the insider trading allegations, but those investigations -- both by the Department of Justice and by the SEC -- had not yet resulted in a complaint or indictment. While the Eleventh Circuit does not appear to have

addressed the issue, the federal Circuit Courts that have done so have concluded that covert preindictment, noncustodial contacts with represented persons during criminal investigations do not violate the contact rule. *See, e.g., United States v. Plumley*, 207 F.3d 1086, 1094-95 (8th Cir. 2000); *United States v. Ford*, 176 F.3d 376 (6th Cir. 1999); *United States v. Balter*, 91 F.3d 427, 435-436 (3d Cir. 1996); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *United States v. DeVillio*, 983 F.2d 1185, 1190-91 (2d Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 739-740 (10th Cir. 1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986). This position has also been embraced by the American Bar Association which made the point explicit in its 2002 revision to Model Rule 4.2: “Communications authorized by law may . . . include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.” ABA Model Rule 4.2, Comment [5].

The rationale for this position is clear: any holding to the contrary “would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals.” *Balter*, 91 F.3d at 436. Or, as put by the Second Circuit, prohibiting such contacts “would simply enable criminal suspects, by retaining counsel, to hamper the government’s conduct of legitimate investigations.” *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982). Most recently, a Pennsylvania District Court explained that prohibiting investigatory contacts by law enforcement officers “will insulate from undercover investigation any defendant with enough financial resources to permanently obtain private counsel. Such a rule would dramatically impugn the integrity of the judiciary, not to mention the crippling effect it would have on the

Government's ability to investigate on-going criminal activity. *United States v. Grass*, 239 F. Supp. 2d 535, 546 (M.D. Pa. 2003).

In arguing that the Owens-Scrushy recordings are not within the “authorized by law” exception, Scrusy relies upon one case – the vacated *Bowman* decision. *Bowman*, in turn, discussed none of the “authorized by law” cases cited above with the exception of *Grass*. In *Grass*, the defendant was being investigated separately but simultaneously by the SEC and the FBI, he knew about the investigations, and he was represented on the subject matter of the investigations. The *Grass* court found that the government’s use of an informant to tape-record pre-indictment conversations with the defendant fell within the Rule 4.2 “authorized by law” exception for undercover investigatory contacts with represented persons as established by decades of federal precedent on point. *Grass*, 239 F. Supp. 2d at 539-546. The *Bowman* court distinguished *Grass* on the basis that “unlike the *Bowmans*, the *Grass* defendants were not litigating the identical matter in a contemporaneous civil proceeding initiated by the Government.” *Bowman*, 277 F. Supp. 2d at 1243.¹³ In the instant matter, Scrusy, like Defendant *Grass*, knew about, and was represented on, the pending SEC investigation, but there was no indictment returned or complaint filed against him and the law enforcement agents involved were simply investigating the alleged criminal conduct. In other words, the Owens-

¹³ The *Bowman* decision also relies on the proposition that the 1998 passage of 28 U.S.C. § 530B (the “McDade Amendment”) “was principally designed to dismantle” the Department of Justice regulations regarding ex parte contacts with represented persons. 277 F. Supp.2d at 1243. Clearly section 530B did indeed “dismantle” internal Department regulations on this subject and stated that Department attorneys would be subject to the same state rules, including Rule 4.2, as other attorneys. What section 530B did not do is nullify the “authorized by law” exception nor negate established Rule 4.2 jurisprudence. See, e.g., *Grass*, 239 F. Supp. 2d at 545 (“the McDade Amendment made the entire Rule 4.2, including the “authorized by law” exception, applicable to the conduct of Government attorneys”).

Scrushy conversations present precisely the type of legitimate law enforcement investigatory tactic contemplated by the “authorized by law” exception.

4. The United States was authorized to make the contact under Rule 3.8(2)(a) of the Rules of Professional Conduct.

Even if Scrushy was a represented party on the accounting fraud charges at the time of the taped conversations with Owens, which is clearly not the case, Rule 3.8(2)(a) of the Alabama Rules of Professional Conduct authorized the contact. Rule 3.8(2)(a) provides: “The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except ... (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above.... In this case, agents of the FBI, at the encouragement of this Office, had Owens tape conversations with Scrushy. These actions by the prosecutors were authorized.

5. Suppression of the evidence is an inappropriate remedy under these circumstances.

As demonstrated above, Scrushy has utterly failed to make out a Rule 4.2 violation in the present matter. However, even if this Court were to find such a violation, the remedy sought by Scrushy -- suppression of the evidence -- is wholly unwarranted. The Eleventh Circuit could not be clearer on this subject: “State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence [citation omitted]” and so if it is otherwise admissible, evidence that violates a state professional responsibility rule “cannot be excluded” on that basis. *United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999). Moreover, the fact

that a federal District Court has adopted state rules of professional responsibility “does not affect our analysis or result.” *Id.* See also *Weider Sports Equipment Co, v. Icon Health and Fitness, Inc.*, 912 F. Supp. 502, 511 (D. Utah 1996) (“An exclusionary rule is an indirect sanction that sacrifices truth on the alter of advocacy rather than a more functional approach of imposing a direct sanction on the errant attorneys. It leads to excessive quibbling, tactical maneuvering and possible frustration of justice.”).

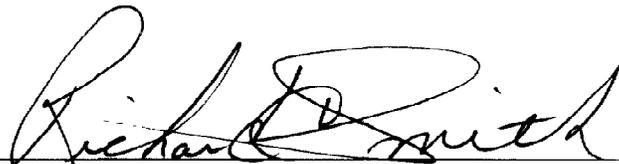
Finally, if the Court finds a violation of Rule 4.2 in this case, the violation was unintentional and certainly understandable in light of the complete absence of any authority suggesting that such conduct would be considered unethical and the abundance of authority upholding undercover communications with represented persons in the course of law enforcement investigations. Where, as here, there was no intentional violation of the Rule, “suppression . . . would do little to deter illegal or improper conduct on the part of Government attorneys.” *Grass*, 239 F. Supp. 2d at 548.

D. Conclusion

Based on the foregoing arguments and authority, the United States respectfully requests that this Court deny Scrushy’s motion

Respectfully submitted,


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United States Attorney



RICHARD C. SMITH
Deputy Chief, Fraud Section
Criminal Division
United States Department Of Justice



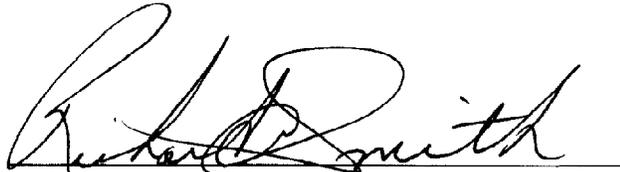
MIKE RASMUSSEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2004, a copy of the foregoing has been served upon the following counsel by facsimile and United States first class mail to:

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Criminal Division
United States Department Of Justice

ATTACHMENT A

PRESS RELEASES

BATES RANGE	Document Number
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1B016-HSW	1604-1614
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1B017-HSW	0499-0506
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1B019-HSW	4362-4365
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1B057-HSW	1100-1151
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1B058-HSW	0958-0959
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1B060-HSW	1079-1081
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1B091-HSW	1031-1038
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1B094-HSW	1313-1320
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1C066-08V	1479-1483
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1C066-HSW	1079-1081
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ATTACHMENT B

DATE	BATES #
February 18, 1997	HEA 238-001 through HEA 238-0081
February 24, 1997	HEA 238-082 through HEA 238-0129
April 24, 1997	HEA 238-130 through HEA 238-0188
July 17, 1997	HEA 238-0189 through HEA 238-250
October 30, 1997	HEA 238-251 through HEA 238-331
January 20, 1998	HEA 238-332 through HEA 238-410
February 25, 1998	HEA 238-411 through HEA 238-472
July 21, 1998	HEA 238-473 through HEA 238-537
October 27, 1998	HEA 238-538 through HEA 238-629
April 27, 1999	HEA 238-705 through HEA 238-779
June 15, 1999	HEA 238-780 through HEA 238-841
August 3, 1999	HEA 238-842 through HEA 238-913
April 25, 2000	HEA 238-914 through HEA 238-979
July 18, 2000	HEA 238-980 through HEA 238-1064
October 31, 2000	HEA 238-1065 through HEA 238-1133
March 26, 2001	HEA 238-1183 through HEA 238-1227
April 26, 2001	HEA 238-1228 through HEA 238-1302
July 31, 2001	HEA 238-1303 through HEA 238-1354
October 25, 2001	HEA 238-1355 through HEA 238-1420
March 12, 2002	HEA 238-1421 through HEA 238-1481
May 2, 2002	HEA 238-1483 through HEA 238-1562
August 7, 2002	HEA 238-1563 through HEA 238-1604
August 27, 2002	HEA 238-1605 through HEA 238-1629
September 19, 2002	HEA 238-1630 through HEA 238-1700
November 5, 2002	HEA 238-1701 through HEA 238-1701
March 3, 2003	HEA 238-1772 through HEA 238-1827

ATTACHMENT C

LETTERS TO AUDITORS

BATES RANGE	Document Numbers
EY 96	000299-000304 004950-004951 006182-006183 006178-006179 006176-006177
EY 97	001183-001188
EY 98	000264-000271
EY 99	000884-000892
EY 00	007467-007469 001185-001192
EY 01	001690-001698
EY 02	007432-007434 007688-007690

ATTACHMENT D

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