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.	)	Case No. CR-03-BE-0530-S
	)	
RICHARD M. SCRUSHY,	)	
	)	
Defendant.	)	

RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO MODIFY THE COURT'S RESTRAINING ORDER DATED NOVEMBER 3, 2003

Comes now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, in opposition to the motion filed by defendant Richard M. Scrushy to modify the Court's Restraining Order of November 3, 2003. Although styled as a "motion to modify," the defendant's pleading, in essence, seeks the release of *all* assets previously restrained by this Court. For the reasons set out below, the defendant fails to present any compelling reasons for an adversary hearing and his motion is due to be denied in all respects.

PRELIMINARY STATEMENT

On March 19, 2003, the United States Securities and Exchange Commission ("the SEC") filed a civil injunctive complaint, as later amended, against HealthSouth Corporation and Richard M. Scrushy, alleging various violations of federal securities laws. *See Securities and Exchange Commission v. HealthSouth Corporation, et al.*, CV-03-J-0615-S (N.D. Ala.) (Johnson, J.). As part of the relief requested, the SEC filed a petition for emergency relief, seeking to freeze of all of Scrushy's assets in order to preserve them to satisfy a judgment in the event that the SEC prevailed

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in its civil action. Following an evidentiary hearing, Judge Johnson denied the SEC's petition, finding at that time "the SEC had failed to present sufficient evidence to warrant the issuance of a freeze of defendant Scrushy's assets." *See* Order of May 7, 2003. The case was then stayed pending resolution of any criminal charges.

On October 29, 2003, Richard M. Scrushy was indicted by a federal grand jury for this district on charges that include conspiracy to commit wire fraud, mail fraud, and securities fraud, in violation of 18 U.S.C. §§ 371, 1341, 1343, and 15 U.S.C. § 78. *See* United States v. Richard M. Scrushy, CR-03-BE-0530-S (N.D.Ala.). As part of said Indictment, the United States alleged criminal forfeiture of certain property in which the defendant holds an interest, either as proceeds of specified unlawful activities or as property involved in illegal monetary transactions.

In connection with the criminal forfeiture, the United States sought an *ex parte* post-indictment restraining order against specific properties which would, in the event of the defendant's conviction, be subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), and/or 18 U.S.C. § 982(a)(1). Upon a thorough consideration of the application of the United States and the supporting affidavit of Special Agent Charles A. Traywick, Internal Revenue Service-Criminal Investigation, this Court entered its Restraining Order of November 3, 2003 ("Restraining Order") under the provisions of 21 U.S.C. §853 (e)(1)(A),[1] finding probable cause to believe that each of the properties identified in the affidavit was subject to forfeiture to the United States of America.

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[1] *See Ex Parte* Application of the United States For Post-Indictment Restraining Order, filed under seal in the above-captioned criminal action on November 3, 2003.

Contrary to the defendant's bare assertion that the United States sought the restraint of substitute assets, a plain reading of the Indictment and the affidavit ("Traywick Affidavit")[2] shows that the United States traced criminal proceeds from the fraud alleged in the Indictment and/or to property involved in the crimes alleged therein to specific assets owned by the defendant. The simple fact is that the United States did not seek to restrain, nor did it restrain, substitute assets.

Indeed, the defendant's lengthy dissertation on the case law regarding the authority of a court to restrain substitute assets is entirely irrelevant to this proceeding. Its only purpose is to distract this Court's attention from the defendant's true objectives: to challenge the Court's finding of probable cause in support of its pre-trial restraining order without satisfying any of the threshold requirements for doing so, and to provide his attorneys with a preview of the evidence that the United States intends to introduce at trial, in contravention of the limited rules of discovery that govern criminal proceedings.

As will be discussed below, Eleventh Circuit case law does not permit a defendant to challenge the Court's finding of probable cause in support of a pre-trial restraining order at any time before the trial itself. Moreover, other courts that do permit such challenges do so *only* after the defendant has made two threshold showings: (1) that he lacks access to any other funds with which to retain counsel, and (2) that there is a reasonable basis to believe that the court erred in finding probable cause to support the issuance of the restraining order. The defendant has made neither showing. Instead, he has constructed an argument that ignores virtually all of the prevailing case law regarding challenges to pre-trial restraining orders, has failed to cite to the Court applicable and long

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[2] The United States incorporates by reference both the Indictment and the Traywick Affidavit as though fully set forth herein.

standing Eleventh Circuit case law, cited other case law which has been effectively overruled, cited a completely irrelevant *civil* Supreme Court Case, and argued that this Court is required by such overruled and irrelevant law to force the United States to prove pre-trial the likelihood of its success on the merits of the forfeiture allegations at trial in order to keep the restraining order in place.

ARGUMENT

In its scheduling order of December 1, 2003, the Court directed the United States to specifically address the issues related to collateral estoppel and the Court's authority for freezing assets not listed in the Indictment. Accordingly, the United States will address those issues first.

A. Collateral Estoppel

The defendant mistakenly argues that the doctrine of collateral estoppel bars the United States from restraining $49 million of the defendant's assets that he claims were previously found by Judge Johnson to be "untainted." The defendant claims that "the Department of Justice was fully involved in the asset freeze proceeding" and, therefore, is now bound by the district court's ruling of May 7, 2003. In fact, none of the four essential elements of collateral estoppel are present in this criminal action; accordingly, the doctrine of collateral estoppel does not apply in this case as a matter of law.

1. There is no Privity between the SEC and the United States in this Case

The SEC and the United States (who is represented in this criminal action by the U.S. Attorney's Office for the Northern District of Alabama and the U.S. Department of Justice, Criminal Division, Fraud Section) were clearly not in privity with one another in the SEC's asset freeze action before Judge Johnson. The SEC, acting through a civil proceeding brought under the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, sought civil money penalties

and injunctive relief; in the present criminal proceeding, the United States is prosecuting the defendant for various criminal violations and is seeking criminal forfeiture of proceeds and other properties based on their direct connection to those violations. These are two different actions arising under different provisions of federal law that were established by Congress to remedy different harms to society.

The SEC is one of a handful of federal agencies that handles its own litigation; the contrary positions taken by the SEC and the United States during the asset freeze hearing and the repeated requests by the United States that the civil action be stayed underscore the fact the SEC and the United States did not act a single entity in that proceeding. It is disingenuous for the defendant to assert that the SEC and the United States are the "same party" in all cases involving the defendant, HealthSouth, and former and current employees of HealthSouth, arising from the accounting fraud, banking fraud, and other violations of the law occurring there.

In support of his argument, the defendant cites *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-03 (1940), for the proposition that the SEC and the United States are one and the same in this matter. However, that case did not hold that all officers of the same United States are always in privity with one another, but rather that they *may,* under the proper circumstances, be considered in privity with one another. *See Headley v. Bacon,* 828 F.2d 1272, 1276 (8th Cir. 1987). The general rule is that United States entities or officers are not in privity under all circumstances, and that one United States entity or officer can sue another under the proper circumstances and legal provisions.

To be considered in privity in the present criminal prosecution or any other future legal proceeding involving the assets in question, a court would have to find that the SEC was "so closely aligned with [the United States] as to be [its] virtual representative." *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 493-94 (4th Cir. 1981); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975). That was obviously not the case in the SEC proceeding;[3] to the contrary, the United States had to repeatedly intervene to preserve its rights as various issues arose during that proceeding. *See, e.g., SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127 (2d Cir. 2002) (case in which the United States had to intervene in SEC case to which it was not a party to protect criminal investigation).

The word "privity" designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.3d 76, 83 (D.C. Cir. 1963). However, "[t]he concept of privity is protean," *Coates v. Kelley*, 957 F. Supp. 1080, 1086 (E.D. Ark. 1997), and "[a] finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper," *First Alabama Bank of Montgomery v. Parsons Steel, Inc.*, 747 F.2d 1367, 1378 (11th Cir. 1984), *rev'd on other grounds*, 474 U.S. 518 (1986).

Applying these principles, it is clear that the United States was not in privity with the SEC during its hearing on the asset freeze. The SEC was not so identified with the United States in the

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[3] In fact, after the first few days of the SEC proceeding, Judge Johnson prohibited the SEC attorneys from having any communication with any representatives from the U.S. Attorney's Office or the Department of Justice.

civil proceeding that it represented precisely the same legal right to the assets it sought to freeze as the United States has to the specific assets identified in the Restraining Order of November 3, 2003.

2. Assuming *arguendo* that the SEC and the United States were in privity, there is no issue or claim preclusion because an SEC asset freeze and a criminal forfeiture do not present the same issues

As stated above, the United States was not in privity with the SEC during its civil proceeding. However, even if it were in privity, issue and claim preclusion would not prevent the United States from pursuing different actions involving different issues because the fact that identical parties are involved in a case "is but a threshold requirement of issue preclusion." *CSX Transportation v. Brotherhood of Maintenance Of Way Employees,* 327 F.3d 1309, 1317 (11th Cir. 2003).

In *CSX Transportation,* the Eleventh Circuit outlined what must be demonstrated before collateral estoppel or issue preclusion would prevent a subsequent prosecution:

> "Collateral estoppel or issue preclusion forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit. There are several prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding."

327 F.3d, at 1317, *citing I.A. Durbin, Inc. v. Jefferson Nat'l Bank,* 793 F.2d 1541, 1549 (11th Cir. 1986). The burden is on the moving party to demonstrate that the issue whose relitigation a party seeks to foreclose was actually decided in the first proceeding. *Dowling v. United States,* 493 U.S. 342, 350 (1990). The defendant has not demonstrated that any of those four requirements are met

here; thus, issue preclusion or collateral estoppel does not apply in the present criminal forfeiture action brought by the United States.

First, the defendant can not demonstrate that the parties in the SEC proceeding and the present criminal forfeiture action are identical. As discussed above, the SEC and the United States are clearly not the same in these two proceedings. Therefore, there is no identity of parties that would give rise to issue preclusion or collateral estoppel.

Second, the defendant has not demonstrated that the issues at stake in the asset freeze proceeding and a criminal forfeiture action would be identical. The SEC asset freeze proceeding was for the purpose of maintaining the *status quo* so that, if the SEC won its civil cases against HealthSouth and the defendant, it would be able to recover money damages to which it would be entitled.[4] The subject Restraining Order was obtained following the return of a criminal Indictment of the defendant which alleged criminal forfeiture; in contrast to the asset freeze sought by the SEC, in its civil proceeding, the Restraining Order serves to restrain only those assets for which this Court has found probable cause to believe are directly forfeitable in the event the defendant is convicted at trial of a substantive criminal offense that supports the forfeiture. The asset freeze proceeding focused on the need for the extraordinary remedy of a preliminary injunction to maintain *any* assets in Scrushy's possession to which the SEC might be entitled if it succeeded in its subsequent civil

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[4] *See, e.g., SEC v. Unifund SAL,* 910 F. 2d 1028, 1041 (2d Cir. 1990) (in an SEC asset freeze proceeding, Commission is requesting "ancillary relief to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial"); *SEC v. O'Hagen,* 901 F. Supp. 1461, 1471 (D. Minn. 1995) (the purpose of an SEC action for disgorgement is for the purpose of maintaining or restoring the status quo and prevent unjust enrichment); *SEC v. ComCoa Ltd.*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995) (an asset freeze may be ordered in an SEC action to preserve a basis for remedies such as disgorgement, restitution, and rescission).

enforcement action. Criminal forfeiture, in contrast, is a mandatory part of the defendant's sentence in a criminal case, *see* 21 U.S.C. § 853(a); 18 U.S.C. § 982(A)(1); 18 U.S.C. § 1963(a); the pre-trial restraining order is a procedural device intended to preserve property until the jury has an opportunity to determine whether or not it is subject to forfeiture so that this mandatory penalty can be imposed. The court's adverse ruling in the civil SEC action can not possibly take this issue away from the jury in the criminal case or foreclose the imposition of the mandatory penalty if the jury makes the required finding.

Third, the decision whether to freeze the defendant's assets so that they would be available was not "critical" to whether the SEC will ultimately prevail in its enforcement action against him. Judge Johnson's Order of May 7, 2003, was based on the evidence presented to her at that particular time; it is important to note that Judge Johnson gave the SEC leave "to repetition the Court for an asset freeze should it adduce sufficient evidence to justify such a freeze in the future." *See* Order of May 7, 2003, at page 64. The asset freeze determination was merely preliminary to the civil action before the Court and "not a critical and necessary part of the judgment in the action;" therefore, the defendant can not meet the third prerequisite for the application of collateral estoppel or issue preclusion. And, as a practical matter, if the SEC is not estopped from *repetitioning* the Court – upon a showing of additional evidence – for an asset freeze of *all* of defendant's assets in the civil proceeding, then certainly the United States is not barred from obtaining a restraining order against directly forfeitable assets based upon a showing of probable cause in a criminal prosecution.

Finally, the defendant can not possibly demonstrate that the United States had a full and fair opportunity to litigate the asset forfeiture issue in the SEC civil asset freeze proceeding. As previously stated, the United States had no opportunity to participate in the SEC proceeding, except

on a limited "witness-by-witness, objection-by-objection" basis. In that situation, application of issue preclusion against the United States would violate its right to due process. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 800 (1996) (applying issue preclusion against parties without an interest in the prior litigation could raise due process concerns); *Dillard v. City of Greensboro*, 213 F.3d 1347, 1355 n. 8 (11th Cir. 2000) (same). Accordingly, the defendant has wholly failed to meet the prerequisites for demonstrating collateral estoppel or issue preclusion.

B. Title 21, United States Code, Section 853(e) does not require every asset subject to pre-trial restraint to be specifically enumerated in the Indictment

The defendant argues that 21 U.S.C. § 853(e), which authorizes the pre- and post- indictment restraint of assets subject to forfeiture, limits post-indictment restraint to assets that are specifically enumerated in an indictment. Defendant's Motion at p. 8. Not surprisingly, the defendant fails to cite any case law or statutory language in support of this proposition. In fact, the statute requires only that the United States allege in the indictment that the property to be restrained is forfeitable in the event of a conviction. 21 U.S.C. § 853(e)(1)(A).[5] Nowhere does the statute state that forfeitable property must be specifically enumerated in the indictment before it can be restrained.

The Indictment in this case sufficiently identifies the property to be forfeited upon the defendant's conviction. In addition to the specific assets listed therein, the indictment states that the defendant:

> shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to said offenses. Such interests include, but are not limited to the aggregate sum of $278,727,674.35 and all interest and proceeds derived therefrom... .

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[5] That section provides that a district court may enter a restraining order "upon the filing of an indictment . . . alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture. . . ."

Scrushy Indictment, Count 71, pp. 33-34.

It is beyond dispute that forfeiture allegations in an indictment need not mention every individual item subject to forfeiture, and that even general language tracking the forfeiture statute is sufficiently detailed for purposes of a criminal indictment. *See, e.g., United States v. Diaz*, 190 F.3d 1247, 1257-1258 (11th Cir. 1999) (indictment that did not specifically identify property to be forfeited, but which merely tracked the language of the forfeiture statute, was sufficient to support forfeiture of property not enumerated in the indictment); *United States v. DeFries*, 129 F.3d 1293, 1315 (D.D.C. 1997) ("government is not required to list all forfeitable interests in the indictment, provided the indictment notifies defendants that the government will seek to forfeit all property"); *United States v. Iacaboni*, 221 F. Supp.2d 104, 110 (D. Mass. 2002) (statement in indictment that "defendant shall forfeit any property subject to forfeiture" was sufficiently detailed). *See also* Advisory Committee Notes to Fed. R. Crim. P. 32.2(a) (rule requiring indictment to contain notice that government will seek forfeiture of property "is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself").

Since the purpose of section 853(e)(1)(A) is to preserve property subject to forfeiture in the event of conviction, and because a general description of property to be forfeited is adequate for purposes of the Indictment, it is absurd to propose that section 853(e)(1)(A) requires the charging instrument to be more specific than would be necessary to support the forfeiture itself.

It is a common practice for the United States to seek restraint of assets covered by general forfeiture provisions of an Indictment. Where, as in the instant case, criminal proceeds have been traced to a huge number of assets, requiring those assets to be enumerated in the Indictment would

impose an unnecessary administrative burden on the United States, the court and the grand jury.[6] Moreover, frequently the United States discovers additional forfeitable assets after a defendant has been indicted. Under the defendant's interpretation of section 853(e)(1)(A), the United States would be required to go back to the grand jury for a superseding indictment every time additional assets were uncovered or traced.

If the United States had listed all of the forfeited items in the Indictment itself, instead of identifying them for the first time in the application for the restraining order, the United States could have relied on the grand jury's finding of probable cause regarding the forfeitability of those items in seeking the restraining order. *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the United States's burden); *In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (same). In contrast, because it omitted the schedule of items from the Indictment, the United States was required to establish probable cause for the restraining order at the time it filed its *ex parte* application by submitting the Traywick Affidavit to the Court for an independent finding of probable cause. This was the only legal consequence of the omission of the actual itemized list from the Indictment itself.

The defendant's strained interpretation of section 853(e)(1)(A) is supported by neither case law, the language of the statute itself, policy, nor logic. Accordingly, this challenge to this Court's Restraining Order fails.

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[6] In the instant case, including a list of specific assets subject to forfeiture would have resulted in an approximately 70-page Indictment, half of which would constitute nothing more than a catalog of forfeitable assets.

C. The Defendant is not entitled to a post-restraint, pre-trial hearing

In arguing that this Court is required to hold a post-restraint, pre-trial hearing to assess the propriety of its Restraining Order, the defendant has ignored long-standing, controlling precedent in this Circuit which directly contradicts his argument. The United States Court of Appeals for the Eleventh Circuit in *United States v. Bissell*, 866 F. 2d 1343, 1352 (11th Cir. 1989), held that, "[t]he statutory scheme in 21 U.S.C. § 853(e)(1)(A) does not specifically provide for a hearing to challenge the merits of the government's case on forfeiture either prior to, or after, allegedly illicit assets are restrained. The only hearing provided is the trial." The district courts in this circuit have continued to apply *Bissell* even though courts in other jurisdictions permit challenges to pre-trial restraining orders in some circumstances. *See United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (following *Bissell*; defendant has ample opportunity to challenge forfeiture at trial); *In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992). Indeed, in *United States v. Register*, 182 F.3d 820 (11th Cir. 1999), the Court of Appeals noted that the Eleventh Circuit is the only court to hold that no post-restraint hearing is required even if the Sixth Amendment rights are implicated, and suggested that *Bissell* may need to be revisited in this regard. Nevertheless, *Bissell* remains the law in this circuit.

The statute authorizing district courts to issue pre-trial restraining orders in criminal forfeiture cases makes no provision for a post-restraint hearing in cases where the restraining order is issued post-indictment. In contrast, the same statute provides for a post-restraint hearing if the restraining order is issued *pre*-indictment. *Compare* 21 U.S.C. § 853(e)(1)(A) (no post-restraint hearing when the restraining order is issued post-indictment) *with* 21 U.S.C. § 853(e)(1)(B) (providing for a post-restraint hearing when the restraining order is issued pre-indictment). This

reflects a clear congressional choice to bar criminal defendants from challenging the merits of a restraining order pre-trial when they have the option of raising the same challenges at the trial itself.[7]

According to the applicable case law from other circuits, the only circumstances when this congressional choice must yield is to the due process rights of a defendant, when the circumstances so require. But as most courts hold (with the exception of *Bissell*)[8], those circumstances exist only when the defendant proves that assets have been improperly restrained, and he needs those improperly restrained funds to hire counsel of his choice in a criminal case or otherwise provide for his family. Otherwise, the due process calculus weighs in favor of the congressional choice, which reflects the United States's interest in avoiding the loss of the restrained property prior to trial, and the premature exposure of the witnesses in its criminal case to cross-examination by the defendant's counsel. It is important to note that the defendant in this case has not requested the release of any assets for payment of attorney's fees or for living expenses.

If the Court of Appeals were to revisit *Bissell*, it is highly likely that it would look to the procedure adopted by other courts in virtually all of the most recent cases dealing with pre-trial restraining orders, including the leading cases from the Tenth and Fourth Circuits. *See United States v. Jones*, 160 F.3d 641 (10th Cir. 1998); *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001).

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[7] When a restraining order is entered before any indictment is returned, a defendant has no means of recovering the use of his property other than to challenge the restraining order on the merits, thus the reason for Section 853(e)(1)(B). But once an indictment is before the court, a defendant has the remedy of contesting the forfeiture of his property at trial. *See Bissell*, 866 F.2d at 1352 ("[t]he statutory scheme in 21 U.S.C. 853(e)(1)(A) does not specifically provide for a hearing to challenge the merits of the government's case on forfeiture either prior to, or after, allegedly illicit assets are restrained. The only hearing provided is the trial.").

[8] It is the United States's position that *Bissell* holds a defendant has no right to a pre-trial hearing on forfeiture-related issues even if the Sixth Amendment right to counsel is clearly implicated. 866 F.2d at 1354.

Those cases begin with an analysis of the applicable statutory language and conclude that a challenge to the court's finding of probable cause in support of a pre-trial restraining order is permissible only if the defendant first makes a threshold showing that he has no other funds with which to hire counsel, and that there is reason to believe that the court's probable cause determination was in error.

In the leading decision on this point, the Tenth Circuit has stated:

> We think the proper balance of private and government interests requires a post-restraint, pre-trial hearing but only upon a properly supported motion by a defendant. Due process does not automatically require a hearing and a defendant may not simply ask for one. **As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family**. The need for this requirement is obvious. If a defendant fails to persuade the court on this point, then the private interest of the *Mathews* calculus drops out of the picture, tipping the balance of interests against a post-restraint hearing.

United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998) (emphasis added, internal citations omitted). Following *Jones*, the Fourth Circuit likewise held that a defendant is entitled to a post-restraint hearing only if he first demonstrates that he has no other resources available with which to hire counsel. The defendant's "private interest" in obtaining a pre-trial hearing with respect to seized assets would be entirely absent, the court said, if the defendant "possessed the means to hire an attorney independently of assets that were seized." *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001). Accordingly, the court held that the defendant is entitled to a pre-trial hearing only if he makes "a threshold showing of need to use wrongly seized assets to pay his attorneys." *Id.*, *citing United States v. Michelle's Lounge (Michelle's Lounge I)*, 39 F.3d 684, 701 (7th Cir. 1994) (requiring this threshold determination before due process entitles the defendant to a hearing), and *United*

States v. Kirschenbaum, 156 F.3d 784, 792 (7th Cir. 1988) (defendant must show a bona fide need to use seized assets to conduct his defense).

Most recently, one district court followed *Jones* in holding that the defendant "has the burden of persuading the court that he has no funds from which to retain counsel of his choosing . . . ." *United States v. Jamieson*, 189 F. Supp. 2d 754, 757 (N.D. Ohio. 2002). This burden, the court explained, applies not only to the defendant's lack of personal funds, but to the availability of other assets from friends or family members that could be used to meet the defendant's legal obligations. *Id.; see also United States v. Ziadeh*, 230 F. Supp. 2d 702 (E.D. Va. 2002) (following *Farmer*; defendant has no right to a pre-trial hearing if he has other assets available to pay counsel); *United States v. St. George*, 241 F. Supp. 2d 875, (E.D. Tenn. 2003) (the first requirement under *Jones* is to persuade the court that the defendant has no funds from which to retain counsel of her choosing).

In limiting pre-trial challenges to the forfeiture allegation in a criminal case to the Sixth Amendment context, the courts have recognized a number of important prosecutorial interests. Foremost is the United States' interest in preserving the restrained property until it has an opportunity to establish the forfeitability of the property at trial. *See Jones*, 160 F.3d at 160 (the United States' desire to preserve forfeitable assets "weighs heavily in the calculus"). Once property subject to forfeiture is released from restraint, it may be lost forever.

A hearing also imposes a burden on limited United States resources when the United States is preparing for trial. Most importantly, the United States has a manifest interest in guarding against the premature disclosure of its criminal case, and in protecting its witnesses from harassment and exposure. In other words, a defendant should not be permitted to use a pre-trial challenge to a restraining order as a springboard to an evidentiary hearing where defense counsel is able to conduct

a lengthy cross-examination of the United States' agents concerning their investigation of the case. In *Farmer*, the Fourth Circuit alluded to the prosecutorial interest in avoiding premature litigation over the forfeiture allegations when it warned against "open[ing] the floodgates to hearings on flimsy or insubstantial grounds," and held that requiring a threshold showing that the restrained funds were needed to pay attorneys fees would "protect the Government and its resources from frivolous challenges to forfeitures." *Id.* at 805, *quoting Jones*, 160 F.3d at 647.

These prosecutorial interests obviously must be balanced against the defendant's due process rights when the Sixth Amendment right to counsel is involved. Due process requires a meaningful hearing at a meaningful time. In the Sixth Amendment context, a defendant must be able to raise his challenge seeking release of his property pre-trial in time for it to do him any good. Otherwise, it is the defendant's qualified right to counsel of his choice, not the United States' right to forfeit the property, that may be lost forever. But that consideration does not apply to any other basis for challenging the forfeitability of the property pre-trial. All other arguments - factual and legal - as to why the property named in the Indictment should *not* be forfeited can be raised at trial on the merits in ample time to preserve the defendant's property interest.

For these reasons, *Farmer* held that a post-restraint hearing is required only if the defendant first makes a prima facie showing that he "is without funds to hire the attorney of his choice." 274 F.3d at 804. "If a defendant does not make such a threshold showing of need to use wrongly seized assets to pay his attorneys," the court said, the balance of interests "tip[s] against a post-restraint hearing." *Id.* Moreover, once the defendant makes such a threshold showing of indigency, and a hearing takes place, the United States has the right to present evidence that the defendant has other "substantial assets with which to hire attorneys." 274 F.3d at 805. In all events, the burden remains

on the defendant "to prove by a preponderance of the evidence that . . . he needs [the assets restrained by the United States] to hire counsel." *Id.* "In sum," the court concluded, "a defendant must show a bona fide need to utilize [restrained] assets to conduct his defense in order to be entitled to a hearing," 274 F.3d at 804 (internal quotations omitted), and then must sustain that showing by meeting his burden of proof at the hearing in order to be entitled to the release of any funds. *Accord Jones*, 160 F.3d at 647.

In the present case, the defendant has not met and can not meet the threshold burdens imposed upon him by the case law cited above. Although in his filing the defendant bandies about constitutional phrases, he has not specifically asked this Court for a hearing to use wrongly restrained[9] assets to conduct his defense or otherwise provide for his family. Based upon that omission alone, this Court is justified in denying his motion without a pre-trial hearing.

However, assuming *arguendo* that the defendant has made a Sixth Amendment claim, he has failed to meet the remaining burdens imposed upon him by the applicable case law. The defendant has not provided this Court with any evidence to support a conclusion that he is indigent; in fact, the evidence is to the contrary.

The United States has been willing to accommodate specific defense requests that are supported by an explanation for the need for living expenses. The United States met with the defendant's attorneys over several days in late November, 2003, and reached an agreement to release certain assets the purpose of which was to allow him to provide for his family. In accordance with the agreement and based upon specific information related to specific assets provided by the defense,

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[9] It is clear from the Supreme Court's opinion in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), that assets which are subject to forfeiture may not be used to retain counsel. *See also United States v. Farmer*, 274 F.2d 800, 802 (4th Cir. 2001).

the United States moved to modify and this Court modified its Restraining Order and released to the defendant $335,000 in cash and/or securities from one of his brokerage accounts. Additionally, 604,134 shares of HealthSouth stock were released from another Scrushy account.[10]

In May, 2003, the defendant wire transferred approximately $21 million to his attorneys.[11] It is difficult to imagine that such a massive amount of money is inadequate to support the defendant's legal defense needs through trial. Accordingly, any argument that the defendant now lacks the personal funds to meet his legal obligations or otherwise provide for his family is completely baseless; this motion should be denied.

Lastly, the defendant has not asserted to this Court that certain specific assets have been improperly restrained by the United States and provided the Court with specific evidence to support the assertion. Using a "shotgun" approach, the defendant, through an accountant, has merely asserted that all of his assets were improperly restrained.[12]

D. Federal Rule of Civil Procedure 65 does not apply to the post-Indictment, pre-trial restraint of assets in a criminal case

The defendant mistakenly argues that he is entitled to a pre-trial adversary hearing in which the United States must demonstrate a likelihood of success on the merits of its forfeiture allegations

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[10] See the United States's letter to defense counsel, dated November 25, 2003, attached hereto as *Exhibit "A"*.

[11] See the Affidavit of Special Agent Charles A. Traywick dated December 5, 2003, attached hereto as *Exhibit "B"*.

[12] Contrary to the defendant's assertions of the United States' refusal to cooperate in attempting to resolve various forfeiture/restraint issues without the need for a hearing, the United States has offered both orally and in writing to revisit the continued restraint of any asset where the defense provides the United States with evidence that the asset was untainted. See *Exhibit "A"*. The defendant refused these offers and opted to file the present motion.

in order for this Court's post-indictment restraining order to remain in effect. *See* Defendant's Motion to Modify, Section II. B. and C. In support of this legally flawed argument, the defendant relies upon 21 U.S.C. § 853 (e)(1)(B) and an opinion by the Fifth Circuit Court of Appeals in *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986), which has been effectively overruled .

Section 853 (e)(1)(B) provides no support whatsoever for the defendant's argument because in this case the Court issued its restraining order *post*-indictment. As was previously noted, when a restraining order is entered before any indictment is returned, a defendant has no means of recovering the use of his property other than to challenge the restraining order on the merits, thus the reason for Section 853(e)(1)(B). But once an indictment is before the court, as is the case here, a defendant has the remedy of contesting the forfeiture of his property at trial. *See also Bissell*, 866 F.2d at 1352.

The defendant's argument that *Thier* is applicable to this case is simply wrong. *Thier* was a criminal case in which the defendant sought post-restraint, pre-trial review of a criminal restraining order. However, *Thier* is no longer good law in light of the Supreme Court's holding in *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989). In *Thier,* the Fifth Circuit held that a pre-trial restraining order would be sustained only if the United States satisfied the four-part test governing the entry of a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. *Thier,* 801 F.2d at 1468. After *Thier* was decided, the Supreme Court held in *Monsanto* that the standard for issuance of a restraining order was probable cause. Predictably, every court that has

addressed the issue since *Monsanto* has followed the Supreme Court's ruling and held that a pre-trial restraining order need only satisfy the probable cause standard.[13]

To further bolster his legally incorrect Rule 65 argument, the defendant cited *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). This *civil* case has absolutely no application to the present matter and should be ignored by this Court. In *Grupo Mexicano de Desarrollo, S.A.*, Alliance Bond Fund, Inc. purchased $75 million in unsecured notes from Grupo Mexicano de Desarrollo, S.A.(hereinafter, "GMD"). After GMD fell into financial trouble and missed an interest payment, Alliance Bond Fund accelerated the note's principal amount and filed a civil breach of contract action in federal court. Alliance Bond Fund also requested, and the district court issued, a preliminary injunction. The issue on appeal to the United States Supreme Court was whether the district court had the authority to issue the preliminary injunction pursuant to Federal Rule of Civil Procedure 65. 527 U.S. at 318.

As noted above, in the criminal context, it has been held by a number of federal district and circuit courts that Rule 65 is overridden by Section 853(e)(1). *United States v. Jamieson*, 189 F.Supp. 2d 754, 756 (2002). *See also United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998). "While Rule 65 may apply to those pre-indictment cases covered by Section 853(e)(1)(B), that issue is not before this Court since the restraining order in this case was issued pursuant to Section 853(e)(1)(A)." *Jamieson*, 189 F.Supp.

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[13] *See, e.g., United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001)(the only issues in the pretrial hearing are whether defendant lacks any other assets to hire counsel and if so, whether there is probable cause to believe the restrained assets are subject to forfeiture); *United States v. Jamieson*, 189 F.Supp. 2d 754, 756 (N.D. Ohio 2002)(Rule 65 does not apply to post-indictment restraining orders); *United States v. St. George*, 241 F. Supp. 2d 875 (E.D. Tenn. 2003)(following *Jones* and *Jamieson*).

2d at 756. Accordingly, the arguments set out in Sections II. B. and C. of the defendant's motion are without merit.

For all of the above reasons, the defendant is not entitled to any hearing or other re-examination of the Court's finding of probable cause in support of the pre-trial Restraining Order. Nevertheless, in the interest of addressing all possible issues, the United States sets forth the following rebuttal to the defendant's claim that the information on which this Court relied in issuing the Restraining Order was insufficient to establish probable cause.

E. Both the Indictment and Affidavit of Special Agent Charles A. Traywick set forth probable cause sufficient to justify this Court's issuance of the pre-trial Restraining Order

1. The United States has established probable cause to believe that the restrained assets are derived from or traceable to proceeds of the Defendant's criminal activity

The defendant argues that when the United States seeks forfeiture of property under a proceeds theory, it is limited to forfeiting the portion of the property that is traceable to the underlying offense. This is correct. What defendant overlooks is that at this stage of the proceedings, the United States is not required to trace every fraction of every asset now under restraint to the underlying fraud and money laundering offenses by a preponderance of the evidence. To the contrary, the United States is only required to demonstrate probable cause to believe that all of the property is traceable. The United States met its burden by means of the Indictment and Traywick Affidavit.

The probable cause standard has been defined many times in forfeiture cases and elsewhere. There is no single all-purpose definition, but the rule was aptly stated in one civil forfeiture case as follows: "the probable cause standard requires courts to make a practical, common sense decision

whether, given all the circumstances, there is a fair probability that the property to be forfeited was involved in or the subject of a transaction that fits within [the statute giving rise to the forfeiture]." *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 251 (E.D. Va. 1993). The Eleventh Circuit has observed that the determination of probable cause is based on a totality of the circumstances and " a common sense view to the realities of normal life." *U.S. v. $4,255,000.00*, 762 F.2d 895, 904 (11th Cir. 1985).

In this case, the Indictment and Traywick Affidavit evidence that the defendant has been indicted on the underlying fraud and money laundering violations that give rise to the criminal forfeiture allegations. The grand jury's finding of probable cause is dispositive with respect to the underlying crimes.[14]

Thus, based on the Indictment alone, not to mention the ample evidence placed before this Court in the Traywick Affidavit, there is probable cause to believe that the defendant committed the alleged fraud and money laundering offenses.

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[14] *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); *In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (same); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant may challenge grand jury's finding of probable cause to believe the restrained property is traceable to the offense, but he may not challenge the grand jury's finding of probable cause regarding the underlying crime); *United States v. Jamieson*, 189 F. Supp. 2d 754 (N.D. Ohio 2002) (same); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988) (the court does not look behind grand jury's finding with respect to the underlying crime); *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (defendant is not permitted to challenge grand jury's finding of probable cause as to the underlying crime); *see also* S. Rep. No. 225, 98th Cong., 2d Sess. 203 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386 ("For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the [G]overnment's case on which the forfeiture is to be based.").

The only issue with respect to the Restraining Order is whether there is probable cause to believe that the restrained property was derived from, or is traceable to, the offenses in question. The Traywick Affidavit specifically states that as a result of the criminal activity set forth in the Indictment, the defendant received $53,600,000.00 in monthly and annual target bonuses which were based upon the fraudulently inflated financial performance of HealthSouth. Traywick Affidavit, at ¶ 5. The Affidavit goes on to state that "[a]s a result of the criminal activity set forth in the indictment, the defendant and others fraudulently inflated HealthSouth's financial results in order to increase the corporation's stock prices thereby increasing the value of his (Scrushy's) HealthSouth stock and options." Traywick Affidavit, at ¶ 8; Indictment, Count 1. From 1996 through 2002, Scrushy sold stock in HealthSouth that he acquired through the exercise of stock options and realized approximately $201,129,839. Traywick Affidavit, at ¶ 8. Both the performance-based bonus money and proceeds from the sale of HealthSouth stock at inflated prices are considered "proceeds" of the fraud in this case. The Traywick Affidavit traces those proceeds into and through various bank and brokerage accounts owned or controlled by the defendant and then out to the purchase of the assets covered by the Restraining Order.

It is the United States's position that a plain reading of the Indictment and the Traywick Affidavit allowed this Court to make a practical, common sense decision that, given all the circumstances, there was a fair probability that the property covered by the Restraining Order was involved in or was the subject of a transaction that fits within the statutes giving rise to the forfeiture.

2. Defendant's Claim That He Once Possessed Millions of Dollars in Clean Funds Is Irrelevant to the Court's Determination that the Restrained Property is Traceable to Criminal Activity.

In support of his contention that the Court's Restraining Order should be set aside, the defendant asserts that he possessed millions of dollars in assets well before the fraud scheme described in the Indictment began, and that during the course of the fraud conspiracy he also managed to acquire substantial assets from legitimate sources. Defendant's Motion at pp. 17-18. From these premises, the defendant would have the Court conclude that the restrained assets must somehow be derived from his non-criminal activities.

However, the defendant's claim that he once possessed millions of "clean" dollars is irrelevant to the probable cause determination that underlies the Court's Restraining Order. As set forth in paragraphs 15 and 16 of the Traywick Affidavit, which describe the tracing methodology used by the United States to identify forfeitable assets, the United States recognized at the outset that the defendant possessed "clean" property. For purposes of tracing, clean assets and criminal proceeds were segregated, and running balances for each category were maintained. Traywick Affidavit, at ¶ 16. As the defendant transferred, invested, spent, or otherwise dissipated millions of dollars during the course of the conspiracy, the United States allocated clean funds to certain transactions, and criminal proceeds to others. *Id. See, e.g., United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986) (government is entitled to use "first in, first out" or "first in, last out" analysis in tracing tainted funds through volatile bank account, subject to the "lowest intermediate balance" rule). The forfeitable assets listed in the Traywick Affidavit all represent property that has been traced to criminal proceeds using those methods. Traywick Affidavit, at ¶¶ 4-17.

With respect to those assets purchased by the defendant prior to the time period of the conspiracy alleged in the Indictment, the United States has never contended that those properties are

forfeitable in their entirety. However, substantial amounts of criminal proceeds have been traced to those properties during the period of the conspiracy; accordingly, those properties are indeed subject to forfeiture to the United States under applicable law. Absent a performance bond or other security adequate to protect the United States's interest in those properties, they are properly subject to pre-trial restraint.[15]

While the defendant's pre-fraud conspiracy wealth is impressive, his expenditures during the course of the conspiracy are also impressive. The defendant would have the Court believe that the wealth he possessed prior to 1996 remained untouched and must therefore constitute the same property restrained by the Court's order. As clearly demonstrated in the Traywick Affidavit, however, the restrained property represents proceeds of the defendant's criminal acts, and should remain subject to pre-trial restraint.

F. The United States Has Neither Targeted Nor Restrained Substitute Assets

In his motion, the defendant repeatedly argues that the United States has improperly restrained substitute assets but fails to explain how the specific properties identified in the Indictment and the Traywick Affidavit would be considered as "substitute assets." By making this claim, the defendant has conveniently created his own "straw man" which he then goes to great lengths to knock down.

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[15] The United States has identified for the defendant the amounts of proceeds it has traced to his properties that were purchased prior to 1996, and has offered to discuss suitable security that could be posted to protect the United States's interest. *See* Exhibit "A". The defendant has chosen to ignore that offer. With respect to other assets claimed by the defendant to have been purchased after 1996 with clean funds, the United States has offered to discuss and to consider those claims, but the defendant has also rejected that offer. As discussed above, in light of the court's holding in *Bissell*, these claims should be resolved at trial.

Substitute property, by definition, is "any other property" of the defendant up to the value of any forfeited property that is unavailable. *See* 21 U.S.C. § 853(p). Whereas the pre-trial restraint of directly forfeitable property is authorized by the provisions of 21 U.S.C. § 853(e), restraint of substitute assets is not specifically referenced. For that reason, most circuits who have addressed the issue – with one exception – have held that section 853 does not permit the pre-trial restraint of substitute assets. The Eleventh Circuit has not yet addressed this issue.[16]

The defendant correctly points out that certain properties were acquired prior to the time period of the conspiracy alleged in the Indictment; but if the proceeds of illegal activity are subsequently used to improve that property, for example, that property then becomes "tainted." and may be *restrained* as being subject to forfeiture. However, the issue of what property, or what portion of that property, is *forfeitable* is determined later by the Court or the jury at trial. Fed. R. Crim. P. 32.2(b)(1).

Contrary to the defendant's claim, the United States's theory in restraining the assets listed in *Attachment 1* of the Restraining Order is that each of those assets is *directly* forfeitable to the

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[16] In his zeal to promote this particular argument, the defendant has again attempted to misrepresent the status of the law to this Court. Although the Eleventh Circuit has not addressed the issue of pre-trial restraint of substitute assets, several other circuits have done so. In his motion, at page 21, the defendant cites a Fifth Circuit opinion, rendered in 1993, in which that court declined to hold that 21 U.S.C. § 853 permitted pre-trial restraint of substitute assets. The problem arises in footnote 8 on page 21, where the defendant states that "[b]ecause of their common history, the Eleventh Circuit has held that it can look to the precedents within the Fifth Circuit for guidance. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)."

However, as this Court is well aware, the standard footnote used by the Eleventh Circuit states that "[d]ecisions issued by the former Fifth Circuit before October 1, 1981 are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)(en banc)." A decision rendered by the Fifth Circuit in 1993 which *rejected* pre-trial restraint of substitute assets is of no more persuasive authority for this circuit and this Court than is the decision rendered by the Fourth Circuit in 1990 which *approved* pre-trial restraint of substitute assets. *See In re Billman*, 915 F.2d 916 (4th Cir. 1990).

United States as proceeds of illegal activity or as property involved in illegal monetary transactions. This Court, having considered the detailed financial analysis in the Traywick affidavit, found probable cause to believe that each of those properties constituted or were derived, in whole or part, from proceeds of the defendant's illegal activities, as alleged in the Indictment.. Accordingly, each "tainted" property identified in *Attachment 1* is properly subject to restraint pending trial.

There is simply no merit to the defendant's claim that the United States has targeted or restrained any real or personal properties as substitute assets in this case, or that the United States has restrained assets to satisfy a potential money judgment.

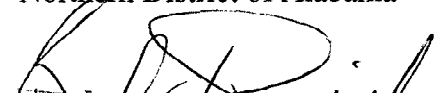
CONCLUSION

The defendant has presented a number of legally flawed arguments in his effort to set aside the Court's Restraining Order. The doctrine of collateral estoppel does not bar the United States from restraining assets in this criminal forfeiture, as the issues and circumstances herein are far different from the SEC proceeding. Furthermore, the United States was clearly not in privity with the SEC in its attempt to secure an asset freeze in its civil proceeding. The defendant would like nothing more than to be granted another evidentiary "fishing trip" and force the United States to lay out its evidence and witnesses before trial. However, he not entitled to a post-restraint hearing under the controlling law of this circuit, and he has failed to offer any legally sufficient reason why he would be entitled to such a hearing otherwise. Finally, the defendant has offered no explanation why the properties identified in the Restraining Order are substitute assets or have been restrained to satisfy a money judgment.

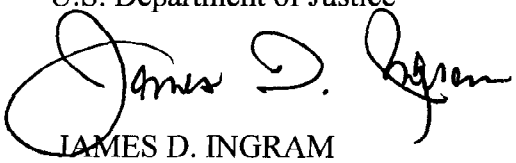
Wherefore, for the foregoing reasons the defendant's motion to modify the Restraining Order of November 3, 2003 and his request for a hearing are without merit and are due to be denied.

Respectfully submitted,

ALICE H. MARTIN
United States Attorney
Northern District of Alabama



RICHARD C. SMITH
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by hand delivery on this 5th day of December, 2003:

Arthur W. Leach, Esquire
2310 Marin Drive
Birmingham, Alabama 34243

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November 25, 2003

Arthur W. Leach, Esquire
2310 Marin Drive
Birmingham, Alabama 35243

Thomas V. Sjoblom, Esquire
Chadbourne & Parke, LLP

Abbe David Lowell, Esquire
Chadbourne & Parke, LLP

RE: United States v. Richard M. Scrushy, CR-03-BE-0530-S (N.D. Ala.)

Dear Counsel:

We are writing in response to Mr. Sjoblom's urgent letter of November 21, 2003 (a copy of which is attached hereto), in which he stated that Mr. and Mrs. Scrushy, as well as Marin, Inc., have outstanding bills which need immediate attention. In response to your request, the government will file an appropriate motion with the Court requesting the release of $335,000.00 in cash and/or securities from Mr. Scrushy's A.G. Edwards account number [redacted].[1]

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[1] This document has been provided to the defense in the above-captioned matter pursuant to Federal Rules of Evidence 408 and 410. The United States of America reserves all privileges, rights and protections afforded by those rules, as well as all other applicable privileges including, but not limited to the attorney-client privilege and the attorney work product doctrine. This document is provided as part of a negotiation on assets only and does not constitute an admission of any nature. This is particularly true with regard to the government's position on restrained assets. It is the position of the United States that all assets listed in Attachment 1 to the Restraining Order issued by the district court in this case as well as all assets specifically listed in the Indictment were properly and legally restrained. No statement or representation contained herein shall be considered, or is intended to be, an admission, stipulation or concession by the United States.

During our recent discussions, the defense has questioned the restraint of certain real properties listed below. To date, the government has traced the following approximate amounts of criminal proceeds into the following real properties[2] subsequent to January 1, 1996:

Willow Point:	$4,044,068
Longleaf:	$2,440,000
Longleaf (Marin Bldg.):	$1,130,000
Ono Island:	$160,000
Wilcox County (393-acre parcel)	$98,000

Accordingly, probable cause exists to restrain these properties. Provided Mr. Scrushy agrees to protect the government's interests up to the amount of criminal proceeds traced into the above-referenced properties in the above approximate amounts (and any applicable appreciation to which the government would be entitled), the government will consider any reasonable defense proposals concerning his access to the remaining equity in each of these properties.

The defense has also stated that it believes that the 1992 92-foot Tarrab yacht, *Chez Soiree*, Hull No. XED09219D102, was improperly restrained. You have advised us that at the time of the purchase of this asset there appeared to have been sufficient "clean" funds from the sale of Caremark stock in the account to cover the purchase price of the yacht. It is the government's position, however, that there were sufficient criminal proceeds in the account to cover the purchase; accordingly, there was probable cause to restrain this asset. If you wish to provide us with additional financial information in further support of your position, we would certainly take it into consideration.

You have also contended that approximately 50% of the purchase of the defendant's Palm Beach property was financed with "clean" funds. Based on our review of the evidence, we conclude that the "clean" money you are referring to is the large loan Mr. Scrushy received from HealthSouth to help finance the purchase. Because that loan was repaid with criminal proceeds shortly thereafter, we believe the property was purchased entirely with forfeitable proceeds; accordingly, there was probable cause to restrain this asset. Again, if you wish to provide us with additional financial information in further support of your position, we would certainly take it into consideration.

The defense has also stated that the 2001 Cessna Citation 525 aircraft, FAA Reg. No. N525BR or N525WS, was improperly restrained solely because it was financed through a loan. Our review indicates that your client financed his portion of the purchase price of this aircraft, in part, from a Salomon Smith Barney Portfolio Credit Line which was collateralized by the securities in the account. Since it is the government's position that the Smith Barney account was tainted with a

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[2] The list does not include the real estate lots being developed by Marin Properties LLC.

substantial amount of criminal proceeds, any loan or advance obtained therefrom also constitutes criminal proceeds.

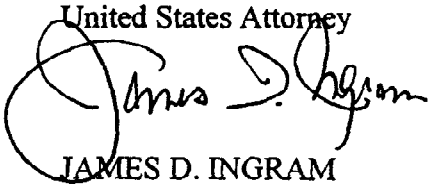
During our conference call on November 24, 2003, Mr. Leach advised us that a "huge chunk" of HealthSouth shares in the defendant's Birmingham Salomon Smith Barney account was there prior to 1996. Upon review of the documents, we have determined that SSB Account No. [redacted] contains 3,141,293 shares of HealthSouth stock, of which 604,134 shares were acquired pre-1996 and 2,537,159 shares were acquired thereafter. Accordingly, the government will move the Court to amend the restraining order to release the 604,134 shares of HealthSouth stock acquired by your client prior to1996.

The government is unable to comment on any of the remaining items on the list which we received via e-mail from Mr. Leach on November 21, 2003, because we were not provided with the basis upon which the defense contends the assets were improperly restrained. It is the position of the United States that probable cause exists for the restraint of such assets. Again, if you wish to provide us with additional financial information in further support of your position on any of these assets, we will gladly review it. Since at a hearing (assuming your client is entitled to one) the case law places the burden upon Mr. Scrushy to prove that the government wrongly restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity before the government would be required to prove anything, we believe our request for additional information is certainly reasonable.

We remain committed to continue working toward an amicable resolution of this matter.

Sincerely,

ALICE H. MARTIN
United States Attorney



JAMES D. INGRAM
Assistant United States Attorney

AFFIDAVIT OF CHARLES A. TRAYWICK

I, Charles A. Traywick, being duly sworn, depose and say:

1. I am a Special Agent with the Internal Revenue Service, Criminal Investigation (IRS/CI), and have been so employed for approximately twenty (20) years. Prior to becoming a special agent, I was employed by the IRS as a Revenue Agent for approximately eight (8) years. Prior to my employment with the IRS, I attended the University of Alabama in Birmingham, where I received a Bachelor of Science degree in business administration with a concentration in accounting. During my employment with the IRS/CI, I have received specialized training in the investigation of money laundering and other financial crimes. In May, 2003, I was assigned to a grand jury investigation in the Northern District of Alabama involving financial fraud connected with the HealthSouth Corporation ("HealthSouth") and the involvement of Richard M. Scrushy in those crimes. Prior to that, I was assigned to the Birmingham Field Office of the IRS/CI, where I conducted numerous criminal investigations that have included the tracing of money stemming from criminal activity to assets purchased by the individuals involved in the criminal activity. Such criminal investigations involved tax fraud, narcotics trafficking, money laundering, bankruptcy fraud and securities fraud.

2. The information set forth in this affidavit is based upon my personal examination and investigation of all of the financial accounts identified in this affidavit, information which has been provided to me by other federal law enforcement agents, including other IRS special agents, Federal Bureau of Investigation (FBI) special agents and contractors working with the FBI, as well as information and analysis of defendant Richard M. Scrushy's financial accounts provided by Clifton Gunderson, LLP, Certified Public Accountants and Consultants. Clifton Gunderson LLP, a national accounting firm, was retained by the U.S. Department of Justice to analyze the financial accounts of defendant Scrushy and to trace criminal proceeds which Scrushy received as a result of the criminal acts he has allegedly committed as set forth in the Indictment in United States v. Richard M. Scrushy, Criminal Case No. CR-03-BE-0530-S (N.D. Ala.).

3. In preparing this affidavit, I have reviewed payroll and other records from HealthSouth, which document compensation received by defendant Scrushy, including bonuses, loans, and stock options paid to the defendant during the periods of time covered by the Indictment. I have reviewed and analyzed the defendant's bank and brokerage account records for the same period of time, in order to trace the aforesaid funds to specific assets. I have concluded that Scrushy received a total of approximately $278,727,624 in criminal proceeds, defined as property obtained directly or indirectly from commission of the offenses charged in the Indictment, and consisting of monthly and annual bonuses, stock options, and other benefits.

4. The following disbursements have been identified as having been made by defendant Scrushy from accounts containing substantial deposits of proceeds from crimes charged in the Indictment: *

		PAID FROM		
DATE	PAID TO	Institution	Amount	TOTALS
5/13/03	Donald V. Watkins, PC	Smith Barney	$1,000,000.00	
5/14/03	Donald V. Watkins, PC	UBS Paine Webber	1,000,000.00	
5/15/03	Donald V. Watkins, PC	Morgan Stanley	2,000,000.00	$5,500,000.00
5/16/03	Donald V. Watkins, PC	Smith Barney	1,000,000.00	
8/13/03	Donald V. Watkins, PC	n/a	500,000.00	
5/13/03	Thomas, Means, Gillis & Seay, PC	Smith Barney	1,200,000.00	
5/15/03	Thomas, Means, Gillis & Seay, PC	Smith Barney	1,500,000.00	
5/15/03	Thomas, Means, Gillis & Seay, PC	Morgan Stanley	1,000,000.00	$5,700,000.00
5/20/03	Thomas, Means, Gillis & Seay, PC	UBS Paine Webber	500,000.00	
5/20/03	Thomas, Means, Gillis & Seay, PC	1st Commercial Bank	500,000.00	
5/20/03	Thomas, Means, Gillis & Seay, PC	1st Commercial Bank	1,000,000.00	
5/13/03	Jones Day	Smith Barney	1,000,000.00	
5/14/03	Jones Day	UBS Paine Webber	1,000,000.00	$5,000,000.00
5/15/03	Jones Day	Morgan Stanley	2,000,000.00	
5/16/03	Jones Day	Smith Barney	1,000,000.00	
5/13/03	Chadbourne and Parke, LLP	Smith Barney	1,350,000.00	
5/14/03	Chadbourne and Parke, LLP	UBS Paine Webber	1,000,000.00	$4,850,000.00
5/15/03	Chadbourne and Parke, LLP	Morgan Stanley	3,000,000.00	
8/13/03	Chadbourne and Parke, LLP	n/a	(500,000.00)	
	TOTALS		$21,050,000.00	$21,050,000.00

* On 8/13/03 $500,000.00 was wire transferred from Chadbourne and Parke, LLP to Donald V. Watkins, PC and noted as reallocation of pre-paid attorney's fees per the wire transfer document.

I declare under penalty of perjury as provided by 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on the 5th day of December, 2003.

CHARLES A. TRAYWICK
Special Agent
Internal Revenue Service