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**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

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UNITED STATES OF AMERICA,

v.

Case No. CR-03-BE-0530-S

RICHARD M. SCRUSHY,

Defendant.

**DEFENDANT'S SUPPLEMENTAL MOTION TO MODIFY THE COURT'S
RESTRAINING ORDER DATED NOVEMBER 3, 2003**

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81

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Defendant Richard M. Scrushy ("Defendant" or "Mr. Scrushy") respectfully submits this supplemental motion to modify the restraining order dated November 3, 2003 (the "Restraining Order") so as to release or segregate sufficient assets to bond or, in the event it is necessary, satisfy a judgment entered against Mr. Scrushy in the Court of Chancery, New Castle County, Delaware.

PROCEDURAL HISTORY

On November 26, 2003, Mr. Scrushy filed his Motion to Modify the Court's Restraining Order dated November 3, 2003 (the "Motion to Modify").¹ In the Motion to Modify, Mr. Scrushy contended that the Government sought and obtained provisional relief far in excess of what the law allows. The Motion to Modify was fully briefed as of December 9, 2003, and a hearing on that motion is set for January 22, 2004.

¹ Mr. Scrushy respectfully requests that the procedural history set forth in the Motion to Modify be incorporated herein by reference.

On December 22, 2003, the Honorable Leo E. Strine, Jr., Vice Chancellor of Chancery Court, New Castle County, Delaware issued an order and final judgment (the "Delaware Judgment") implementing that court's opinion dated November 24, 2003 (the "Delaware Opinion") which granted plaintiffs' (the "Delaware Plaintiffs") motion for summary judgment in an action captioned In re HealthSouth Corp. Shareholders Litigation, Consolidated Civil Action No. 19896-NC (the "Delaware Derivative Action"). A true and correct copy of the Delaware Judgment is attached hereto as Exhibit 1. The Delaware Derivative Action was premised on a July 2002 transaction between Mr. Scruschy and HealthSouth, pursuant to which Mr. Scruschy repaid an executive loan with HealthSouth stock that was allegedly overvalued due to accounting fraud at the company. The Delaware Judgment purports to return to HealthSouth the benefit that was, according to the Court, unjustly received by Mr. Scruschy as the result of that transaction.

The Delaware Judgment directs that Mr. Scruschy pay to HealthSouth cash or cash equivalents totaling \$26,622,391.90 (plus post-judgment interest) net of the market value of 2,506,770 shares of HealthSouth stock valued at the closing price on either January 2, 2003 or the date the Judgment is satisfied, whichever is lower. Based on the closing price of HealthSouth stock as of January 2, 2004 -- \$4.76/share -- \$14,690,166.95 plus post-judgment interest is currently needed to satisfy the Delaware Judgment.

Mr. Scruschy intends to appeal the Delaware Opinion and the Delaware Judgment and desires to obtain a stay of the Delaware Judgment pending the outcome of his appeal to the Delaware Supreme Court. The Delaware Plaintiffs have indicated that they would agree to a stay pending appeal upon the deposit of sufficient monies (approximately \$15.5 million) with the Delaware Court of Chancery as security for the

Delaware Judgment. See Letter from Ronald A. Brown dated January 8, 2004, attached hereto as Exhibit 2. Those monies would be left with the Delaware Court of Chancery until all of Mr. Scrushy's appellate rights in connection with that proceeding are exhausted. In the event Mr. Scrushy is successful in his appeal of the Delaware Judgment, the monies deposited with the Court of Chancery would be returned to Mr. Scrushy and placed back within the purview of the Restraining Order until the conclusion of the criminal proceedings before this Court. If Mr. Scrushy is unsuccessful in his appeal of the Delaware Judgment, the monies would be paid to the Delaware Plaintiffs in satisfaction of the Delaware Judgment.

Absent a stay pending appeal, the Delaware Plaintiffs would be able to enforce the Delaware Judgment against Mr. Scrushy by attaching any assets released as the result of this Court's grant, in whole or in part, of the Motion to Modify (or those already released, including attorney's fees). Thus, if sufficient monies are not segregated to bond Mr. Scrushy's appeal, any order by this Court granting the Motion to Modify could be frustrated.

ARGUMENT

I. This Court Is Authorized To Set Aside Monies For The Purpose Of Paying Restitution To Putative Victims

Although Mr. Scrushy has pled not guilty to the charges asserted against him in the Indictment and remains confident that he will ultimately be vindicated, he respectfully requests that the Restraining Order be modified so as to set aside sufficient monies to bond his appeal of the Delaware Judgment and, if necessary, to pay the Delaware Judgment. The relief sought is permissible because, if Mr. Scrushy were

convicted of the offenses alleged in the Indictment, HealthSouth (the beneficiary of the Delaware Judgment) would be construed as a victim of those crimes and would be entitled to mandatory restitution. The Government therefore has no basis to complain that it would be unjust or improper for the Restraining Order to be modified so as to segregate those monies for HealthSouth's benefit now. If Mr. Scrusby is ultimately acquitted, as he anticipates, the Government would lack standing to challenge the use of his assets to bond or satisfy the Delaware Judgment. If Mr. Scrusby is ultimately convicted, then this Court and the Government will have already satisfied their obligation to ensure that victims of crime receive restitution.

Pursuant to the Mandatory Victims Restitution Act of 1996 (the "MVRA"), 18 U.S.C. § 3663A (2000), this Court is required to award restitution to victims of certain crimes, "including any offense committed by fraud or deceit," such as securities fraud, wire fraud or mail fraud.² In enacting the MVRA, Congress modified the manner in which a district court is required to fashion restitution orders and significantly limited the court's discretion in setting the amount of such restitution. In addition to making restitution mandatory for certain crimes, the MVRA provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. §3664(f)(1)(A). As the Court of Appeals for the Ninth Circuit recently held in United States v. Bright, 2004 WL 25017 * 6 (9th Cir. Jan 5, 2004), "[a]lthough the MVRA does not mention the relationship between restitution and forfeited funds specifically, it does address the relationship between restitution and other sources of

² The Indictment in this case charges Mr. Scrusby with securities fraud, wire fraud and mail fraud. See Indictment, Counts 2 through 41.

funds in general.” The Bright court concluded that “it is clear from the plain language of the statute that the district court [is] required in the first instance to set the amount of [the defendant’s] restitution obligation based on the victim’s collective losses, and without regard to forfeited funds -- whether or not any of the funds had been turned over to the victims.” Id.

The Civil Asset Forfeiture Reform Act enacted in 2000 similarly provides that forfeited assets may be “restor[ed] to any victim of the offense giving rise to the forfeiture.” 18 U.S.C. § 981 (e)(6). See also Bright, 2004 WL 25017 at *8. Within this statutory framework, the Government cannot, in good faith, challenge Mr. Scrushy’s request, consistent with the obligations of the Government and this Court, to ensure that sufficient monies are released from the Restraining Order to provide restitution for a putative victim of the acts alleged in the Indictment.

II. The All Writs Act Authorizes This Court To Set Aside Monies To Secure The Delaware Judgment In Order To Protect This Court’s Power To Modify The Restraining Order

The All Writs Act, 28 U.S.C. §1651 (1988), provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” As the Eleventh Circuit has held, the All Writs Act “provide[s] a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute,” but only “with those writs necessary to the preservation or exercise of its subject matter jurisdiction.” Rosen v. Cascade International, 21 F.3d 1520,1527, n.13 (11th Cir. 1994) (citing ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)). See also Mitsubishi International Corporation v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1517-

18, n.17 (11th Cir. 1994). Pursuant to the All Writs Act, this Court may modify the Restraining Order to segregate sufficient assets in order to ensure that restitution can be awarded to HealthSouth, as the beneficiary of the Delaware Judgment. See United States v. Numisgroup Int'l Corp., 169 F.Supp.2d 133 (E.D.N.Y. 2001) (utilizing All Writs Act to issue restraining order in aid of restitution); United States v. Ross, 1993 WL 427415 (S.D.N.Y. Oct. 15, 1993) (same). Absent such a modification of the Restraining Order, this Court's ability to manage this case through its conclusion may be severely hampered. The Delaware Plaintiffs would be able to enforce the Delaware Judgment against any funds released by the Court, including funds needed to pay Mr. Scrusby's living expenses or to fund his legal defense. See, e.g., United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); United States v. Farmer, 274 F.3d 800 (4th Cir. 2001). The Court would be trapped in a never-ending cycle pursuant to which any monies released to Mr. Scrusby (no matter how modest) would be attached by the Delaware Plaintiffs thus engendering subsequent requests by Mr. Scrusby for the release of additional monies. By modifying the Restraining Order now in order to enable Mr. Scrusby to bond and/or satisfy the Delaware Judgment, this Court would be able to resolve the pre-trial asset issues once and for all.

CONCLUSION

For all the foregoing reasons, the Restraining Order should be modified so that \$15.5 million can be deposited with the Delaware Court of Chancery pending the outcome of Mr. Scrusby's appeal of the Delaware Judgment.

Dated: January 20, 2004

CHADBOURNE & PARKE LLP

By Abbe David Lowell by Arthur W. Leach
Abbe David Lowell with permission
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Counsel for Defendant Richard M. Scrusby

United States v. Richard M. Scrushy
CR-03-BE-0539-S

Exhibit 1



GRANTED

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

IN RE HEALTHSOUTH CORP. : Consolidated
SHAREHOLDERS LITIGATION : Civil Action No. 19896-NC

**ORDER AND FINAL JUDGMENT PURSUANT
TO COURT OF CHANCERY RULE 54(B)**

For the reasons articulated in the Court’s Opinion dated November 24, 2003 in the above captioned action (the “Opinion”), and in the on-the-record hearing in this Court regarding the form of order on December 9, 2003, IT IS HEREBY FINALLY ADJUDICATED, ADJUDGED AND DECREED as follows:

1. Richard M. Scruschy’s (“Scruschy”) Loan (as defined in the Opinion) will be treated as reinstated as of the date of the Buyback (as defined in the Opinion), July 31, 2002, and repayable with interest as of April 30, 2003.

2. On January 2, 2004 (the “Closing Date”), Scruschy, the derivative plaintiffs herein, and Healthsouth Corporation (“HealthSouth”), shall and are hereby ordered to perform the following acts at the offices of Prickett, Jones & Elliott, P.A., in Wilmington, Delaware:

- (a) Subject to paragraph 2b, below, Scruschy shall pay and transfer to HealthSouth Corporation cash or cash equivalents the sum of the following: (i) \$25,879,326.84 (the “Judgment Amount”), being

the amount of principal and interest that would have been owing to HealthSouth under the Loan on April 30, 2003; plus (ii) \$743,065.11, constituting prejudgment interest on the Judgment Amount at the contract of the Loan from April 30, 2003 until November 24, 2003 (the "Pre-Judgment Interest"); plus (iii) post-judgment interest on the Judgment Amount at the rate applicable under the Loan between November 24 and the date of receipt by HealthSouth of the sums set forth in paragraph 2a.

- (b) (i) Simultaneous with full performance under Paragraph 2a, HealthSouth shall deliver to Scrushy 2,506,770 shares of HealthSouth stock with appropriate legends and restrictions that in HealthSouth's sole opinion are required by law. (ii) At Scrushy's option, at the Closing, Scrushy may elect to forego receipt of restricted shares as provided in Paragraph (2)(b)(i), and receive instead a credit against his obligation to pay the amounts specified in Paragraph 2(a), above. The credit shall be the market value of 2,506,770 shares of HealthSouth stock, calculated at the market price at the close of trading on the Closing Date.
- (c) If Scrushy performs under Paragraph 2(b) by paying in full the amounts set forth in Paragraph 2(a), and chooses to receive and does actually receive restricted and legended stock on the

Closing Date, and within thirty (30) days after the Closing Date, HealthSouth cannot in its sole opinion tender to Scrusby 2,506,770 shares of unlegended and unrestricted HealthSouth stock, in a simultaneous exchange for the 2,506,770 shares of legended and restricted HealthSouth stock that Scrusby received pursuant to paragraph 2(b), above, then Scrusby may at his sole option surrender the restricted shares to HealthSouth in a simultaneous exchange for a cash refund from HealthSouth to Scrusby in the amount of the market value of 2,506,770 shares of HealthSouth stock, calculated at the market price at the close of trading on the Closing Date, plus 30 days interest calculated at the contract Loan rate.

3. Should Scrusby fail for any reason whatsoever to pay and transfer the sums set forth in Paragraph 2 on the Closing Date, then he shall thereupon be considered in default and non-compliance hereunder, and he shall thereafter pay the following to satisfy this Judgment:

- (a) The sum set forth in Paragraph 2 (a)(i) and (ii), above, or \$26,622,391.95, plus post-judgment interest at the Loan rate on the Judgment Amount until the date the judgment is satisfied in full, subject to a credit as set forth in Paragraph 3b.
- (b) The amount Scrusby shall be required to deliver pursuant to paragraph 3a shall be reduced by the lower of (i) the market price of

2,506,770 HealthSouth shares as of the Closing Date, or (ii) the market price of 2,506,770 HealthSouth shares as of the date that this judgment is fully satisfied through the date of receipt by HealthSouth of the sums set forth in this Paragraph 3. Nothing herein shall be construed to impair immediate execution on this Judgment in the amounts set forth in this Paragraph 3 if it is not paid in full on or before the Closing Date.

4. In further addition, Scrusby shall pay HealthSouth post-judgment interest on the Judgment Amount and the Pre-Judgment Interest at the Loan rate from the closing date until the date the judgment is satisfied in full.

5. Pursuant to Court of Chancery Rule 54(b), the Court expressly finds that there is no just reason for delaying and expressly directs the entry of this final judgment and decree upon the claims adjudicated in the Opinion and herein.

6. Without affecting the finality of this Order, the court reserves jurisdiction to consider an application by plaintiff's counsel for an award of fees and expenses to be paid by HealthSouth.

Vice Chancellor Leo E. Strine, Jr.

Dated: December ___, 2003

Court: DE Court of Chancery

Judge: Leo Strine

LexisNexis File & Serve Reviewed Filing ID: 2865632

Date: 12/22/2003

Case Number: 19896

Case Name: In Re: Healthsouth Corp Shareholders Litigation vs Healthsouth Corp
et al

/s/ Judge Leo Strine

United States v. Richard M. Scrushy
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Exhibit 2

PRICKETT, JONES & ELLIOTT

A PROFESSIONAL ASSOCIATION

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Writer's E-Mail Address: RABrown@prickett.com

January 8, 2004

BY FAX

Scott S. Balber, Esquire
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, New York 10112

RE: In re HealthSouth Corp. Shareholders Litigation
Del. Ch., C.A. No. 19896

Dear Scott:

We have given considerable additional thought to the stay issue. We have concluded that we need to back up and approach this in a different way.

First, the company will not go along with a stipulation that merely directs Scrusy to do something in the future as opposed to putting a mechanism in place that assures that the judgment will be paid. Moreover, the fact that your side blind-sided us with a motion that the Court essentially ruled was frivolous and which seems to us to have been nothing but a ploy to cause delay has shaken our confidence in your side's intentions. As a result, we no longer believe that the revised order we proposed gives us adequate protection. We need a guarantee that the judgment will be satisfied if your appeal fails.

Second, the procedure contemplated by the prior draft stipulation really makes no sense for your client either. At this point, the amount due is as low as it will ever be (approximately \$15 million). When the market eventually gets financial information and learns what it is going to cost HealthSouth to resolve all of the litigation the stock price may well crash again. Does your client really want to take that market risk when he has nothing to gain (i.e., he will not get to benefit if the price goes up)? Basically, as we see it, what your client needs is to eliminate the "lesser of" provision in the final order and lock-in the current judgment amount. Otherwise, he faces the real risk that as a result of the delay caused by the appeal the judgment could effectively increase from about \$15 million to near \$30 million.

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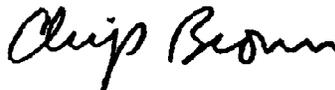
Exhibit 2

Scott S. Balber, Esquire
January 8, 2004
Page 2

The easiest way to deal with these issues is for Scrusby to pay the judgment now. Your side seems to recognize that because Mr. Sjoblom on December 6, represented to Vice Chancellor Strine on the record (Tr. at 12-13) that Mr. Scrusby had requested permission from Judge Bowdre as well as from the prosecutors to pay or secure the judgment and that these negotiations were ongoing. This is far the better course for both sides than the stipulation we have discussed. As far as the procedure for paying the judgment, we would agree that, rather than delivering the money to HealthSouth, the amount now due could be held pending the results of the appeal in an interest bearing account controlled by my firm or the Court of Chancery.

I look forward to hearing from you on this.

Very truly yours,



Ronald A. Brown, Jr.

RAB/dt

cc: Edward P. Welch, Esquire (by fax)
William D. Johnston, Esquire (by fax)

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SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

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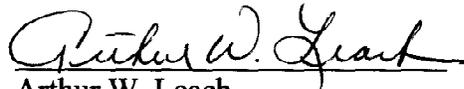
RICHARD M. SCRUSHY,

Defendant.

CERTIFICATE OF SERVICE

I certify that I have this day, January 20, 2004, served a true and correct copy of the foregoing Supplemental Motion to Modify the Court's Restraining Order, upon the United States Government and their counsel by hand delivery to the office of the United States Attorney in Birmingham, Alabama to the attention of the following government lawyers:

Alice Martin, United States Attorney
Richard C. Smith, Deputy Chief, Fraud Division
Michael Rasmussen, Assistant United States Attorney
James Ingram, Assistant United States Attorney



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