

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 HEALTHSOUTH CORPORATION 2002 DERIVATIVE LITIGATION

WADE TUCKER, ET AL.
 Plaintiff)
 v.)
 RICHARD M. SCRUSHY, ET AL.)
 GREENWICH INSURANCE CO.
 Plaintiff)
 v.)
 HEALTHSOUTH CORPORATION ET AL.,
 Defendants)
 STEVEN R. NICHOLS, ET AL.
 Plaintiffs)
 v.)
 HEALTHSOUTH CORPORATION ET AL.,
 Defendants)
 FEDERAL INSURANCE COMPANY, ET AL.
 Plaintiffs)
 v.)
 HEALTHSOUTH CORPORATION ET AL.,
 Defendants)
 DENNIS FAMILY TRUST
 Plaintiff)
 v.)
 HEALTHSOUTH CORPORATION ET AL.,
 Defendants)

CV 02-5212

Final Judgment and Order against
 Defendant Richard Scrushy and Order
 Denying Mr. Scrushy's Motion

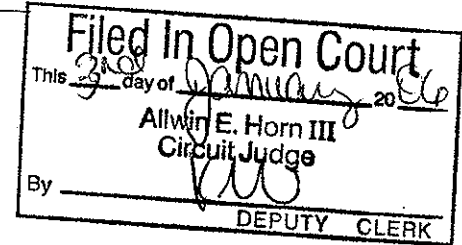
Relates to Derivative Suits Only

CV 03-3522

CV 03-2023

CV 03-2420

CV 98-6592



DISPOSITION OF CROSS-MOTIONS FOR SUMMARY JUDGMENT AS TO MR.
 SCRUSHY'S INCENTIVE BONUSES
--MEMORANDUM OPINION, ORDER DENYING SCRUSHY'S MOTION, AND
ORDER AND FINAL JUDGMENT PURSUANT TO A.R.C.P., RULE 54(b)
AGAINST DEFENDANT RICHARD M. SCRUSHY--

MEMORANDUM OPINION

I. BACKGROUND AND MATERIALS CONSIDERED

This cause came to be heard on November 9, 2005 (a) on motion by plaintiffs ("Tucker") on behalf of HealthSouth Corporation ("HealthSouth") for summary judgment against defendant Richard M. Scrushy ("Scrushy") for restitution of

incentive bonuses he received for years 1996 through 2002, and (b) on Scrusby's cross-motion for partial summary judgment seeking a ruling that he may keep the bonuses paid to him for years before 2000. This Court has considered the following:

1. Submissions and Arguments:

- (a) Tucker's Opening Brief in support of motion for summary judgment regarding Mr. Scrusby's bonuses dated December 15, 2003;
- (b) Tucker's "Revised Opening Brief Supporting Motion for Summary Judgment against . . . Scrusby [re] Executive Bonuses . . .," dated May 3, 2004;
- (c) Scrusby's "Opposition to Plaintiff's Motion . . ." dated June 9, 2004;
- (d) Tucker's "Reply Brief Supporting Motion . . ." dated June 17, 2004;
- (e) Oral Argument of June 28, 2004, regarding stay of Tucker's motion;
- (f) Tucker's "Brief Resubmitting and Supplementing Motion for Summary Judgment for Restitution of Incentive Bonuses . . ." dated July 7, 2005;
- (g) Scrusby's "Brief Opposing Summary Judgment . . .", of Aug. 19, 2005;
- (h) Tucker's "Reply Brief in His Renewed Motion for Summary Judgment for Restitution of Incentive Bonuses . . .," dated September 12, 2005;
- (i) Scrusby's "Brief for Partial Summary Judgment Regarding Bonuses He Earned," dated September 21, 2005;
- (j) Tucker's "Statement and Brief in Opposition to Defendant Scrusby's Motion for Partial Summary Judgment . . .," dated October 13, 2005;
- (k) Scrusby's "Reply Brief," filed on or about October 28, 2005; and
- (l) Oral argument of November 9, 2005.¹

2. Evidence Submitted:

- (a) All exhibits submitted with DiPrima Affidavit of September 22, 2003;²

¹ Subsequent to oral argument by letter, dated December 16, 2005 Scrusby's attorney submitted to the Court a "Memo" dated 7/19/04 and apparently prepared by a Pamela Anderson. This "Memo" contains unverified, unsworn rank hearsay and the Court has not considered the contents of this document in reaching its decision.

- (b) All exhibits submitted with DiPrima Affidavit of December 12, 2003;
- (c) Exhibits 1-5 attached to Tucker's Revised Opening Brief, May 3, 2004;
- (d) Michael M. Mulligan affidavit of June 8, 2004, submitted by Scrusy;
- (e) Benjamin R. Ogletree affidavit of June 5, 2004, submitted by Scrusy;
- (f) Ogletree Affidavit in "Support of Motion to Stay" dated June 21, 2004;
- (g) Affidavit of Richard M Scrusy dated June 8, 2004;
- (h) All exhibits attached to Tucker's "Reply Brief Supporting Motion for Summary Judgment" dated June 17, 2004 (Exhibits A and B);
- (i) All exhibits attached to Tucker's "Brief Resubmitting Motion for Summary Judgment dated July 7, 2005" (Tabs 1 through 5);
- (j) All documents submitted with DiPrima Affidavit of September 12, 2005, including Exhibits A through E appearing at Tab 3 to Tucker's Reply Brief dated September 12, 2005;
- (k) Scrusy Affidavit of August 17, 2005, with all exhibits attached; and
- (l) Affidavit of Dr. Wayne R. Guay dated August 19, 2005.

3. Criminal Activities affecting HealthSouth's Financials for the years 1996-2002.

HealthSouth, as a publicly traded company, is legally required to file accurate, audited and reliable financial information regarding its ongoing business operations. Some of this information is required to be filed on a quarterly basis and other information on an annual basis. Since March 2003 fifteen (15) senior HealthSouth executives have pled guilty to sundry and various criminal acts, including criminal fraud, specifically regarding the accuracy, reliability, falsification

² This affidavit was given in connection with a different motion for summary judgment against Mr. Scrusy challenging a different transaction, but the affidavit and attachments were referred to and incorporated by reference in Tucker's briefs in the instant motion.

and fabrication of the financial information and documentation that HealthSouth was legally required to file during the years 1996 through 2002 inclusive. Included in the fifteen pleading executives are the five (5) chief financial officers who held that position at HealthSouth prior to March 18, 2003. As of this date, the fifteen pleading executives have been sentenced regarding their criminal activities and Defendant Scrushy's criminal trial resulted in acquittal. It is with this background that the instant matter comes before the Court.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS.

Because of the nature of the evidence and the issues involved, this Court considers there are two (2) distinct and relevant time periods:

(a) Years 2000 through 2002 for which there are new audited and restated financial information as required by law; and (b) Years 1996 through 1999 where the legally required financial documentation has been subjected to a forensic audit but not a complete, restated audit. HealthSouth has publicly admitted and filed documents with the Securities and Exchange Commission that its originally filed financial documents for the years 1996 through 2002 are inaccurate, false and cannot be relied upon.

A. Material Facts As to All Periods from 1996 through 2002:

1. Scrushy was HealthSouth's Chairman and CEO from 1984 until March 18, 2003, except not CEO from August 27, 2002 to January 6, 2003. The board fired him March 19, 2003, a day after the fraudulent activities were revealed, and he has now resigned his director position.

2. Scrushy signed the SEC annual reports on Form 10K for HealthSouth for each year from 1996 through 2001, filed proxies on Form 14A in April of each year from 1996 through 2002, and ran for re-election as a director on these proxies.

3. There was a massive accounting fraud at HealthSouth that began by January 1996 and was publicly revealed on March 18, 2003. Fifteen HealthSouth executives pled guilty to the fraud, including all five CFOs ever to serve before March 18, 2003.

4. Scrushy received two kinds of Incentive Bonuses during the years 1996 through 2002, Annual Bonuses and monthly Target Bonuses. He received the following bonuses for the years shown:

FOR YEAR	ANNUAL BONUS	TARGET BONUS	TOTAL INCENTIVE BONUS	DESCRIPTION
2002	\$10,000,000	\$1,200,000	\$11,200,000	Annual Bonus in and for 2002 also paid in 2002. <i>Net income</i> was negative \$(467 million.) Approved by the Compensation Committee on April 29, 2002.
2001	\$6,500,000	\$2,400,000	\$8,900,000	<i>Net income</i> for 2001 was negative \$(191 million). Bonuses reported in the proxy filed April 12, 2002.
2000	None.	\$2,154,849	\$2,154,849	<i>Net income</i> for 2000 was a negative \$(364 million).
1999	None.	\$134,031	\$134,031	Financials fraudulent but no audited restatement.
1998	None.	\$1,577,829	\$1,577,829	Financials fraudulent but no audited restatement.
1997	\$10,000,000	\$2,400,000	\$12,400,000	Annual Bonus was reported in proxy dated April 17, 1998, as being for and earned in 1997.
1996	\$8,000,000	\$2,400,000	\$10,400,000	Annual Bonus was reported in proxy dated April 9, 1997, as being for, and earned in, 1996.
Total	\$34,500,000	\$12,266,709	\$46,766,709	Before Prejudgment Interest

5. In each annual proxy on Form 14A, HealthSouth disclosed the following criteria for Incentive Bonuses paid to its executives:

Incentive Compensation: In addition to base salary, the [Compensation] Committee recommends to the Board of Directors cash incentive compensation for HealthSouth's executives, based on each executive's success in meeting qualitative and quantitative performance goals on an annual basis. *The total incentive bonus pool available for the company's executives and management personnel is capped at the lesser of (a) the amount by which the company's annual net income exceeds the budgeted annual net income established by the Board of Directors and (b) 10% of the company's annual net income. No bonuses are payable unless annual net income exceeds budgeted net income.* Individual incentive bonuses *within such bonus pool* are not determined in a formulary manner, but are determined on a basis that takes into account each executive's success in achieving standards of performance, which may or may not be quantitative, established by the Board of Directors and an executive's superiors. Bonus determinations are made on a case-by-case basis, taking into account appropriate quantitative and qualitative factors, and there is no fixed relationship between any particular performance factor and the amount of a given executive's bonus. Historically, incentive compensation has been a major component of HEALTHSOUTH's executive compensation, and the Committee believes that placing executives at risk for such a component has been effective in motivating such executives to achieve such goals. [Emphasis is the Court's.]

This disclosure remained unaltered for each year from 1996 through 2002.

6. No bonuses were to be paid for any year to any executive, including Scrushy, except out of the bonus pool that was *capped at the lower of* (a) 10% of Net Income *or* (b) the extent to which actual Net Income exceeds budgeted Net Income. HealthSouth required a two-step process, the first to determine the amount available in a bonus pool to be paid to executives (including Scrushy) and the second to make bonus awards from that pool. HealthSouth never disclosed that any bonuses were ever paid to Scrushy outside of the pool.

7. Defendant Scrushy, in his submissions to the Court and his arguments on the pending motions, does not dispute that the originally filed financial information that HealthSouth filed as required by law was inaccurate, unreliable,

false and fabricated. To the contrary, Defendant Scrushy's position is simply that he played no part in and is not responsible for any of the criminal activities that resulted in the falsification and fabrication of said financial documents.

8. On June 27, 2005, HealthSouth filed with the SEC audited financial statements for each year from 2000 through 2003. For 2000 and 2001 these were restatements; 2002 and 2003 were original audits. The audits showed the following for the years in controversy:

HealthSouth Corporation Net Income

<u>YEAR</u>	<u>SOURCE</u>	<u>ORIGINALLY REPORTED</u>	<u>AUDITED & REPORTED NOW</u>	<u>VARIANCE FROM ORIGINALLY REPORTED</u>
2002 ³	10Q, 11/14/02 (fraud) 10K, 6/27/05 at F-5 (now)	\$135,704,000	\$(466,824,000)	\$(602,528,000)
2001	10K, 3/27/02 at 40 (fraud) 10K, 6/27/05 at F-5 (now)	\$202,387,000	\$(191,225,000)	\$(393,612,000)
2000	10K, 3/30/01 at 38 (fraud) 10K, 6/27/05 at F-5 (now)	\$278,465,000	\$(364,243,000)	\$(651,708,000)

9. As Net Income for 2002 was negative at \$(466,824,000), the executive bonus pool for 2002 was zero. As Net Income for 2001 was negative at \$(191,225,000), the executive bonus pool for 2001 was zero. As Net Income for 2000 was negative at \$(364,243,000), the executive bonus pool for 2000 was zero.

10. HealthSouth has never made a public disclosure that Incentive Bonuses were ever paid to or could properly have been paid to Scrushy outside the bonus pool.

³ The originally reported Net Income numbers from 2002 are nine month unaudited figures, as no 10K or final audited figures were released for 2002 until June 27, 2005. These numbers are established and uncontroverted in these cross-motions.

11. Before June 2005, no disclosure of any kind was ever made that a \$10 million bonus was paid to Scrushy in and for 2002. Scrushy's statement in an affidavit, that this \$10 million might have been a retention bonus is not sufficient to defeat summary judgment for numerous reasons,⁴ and does not constitute substantial evidence or raise a genuine issue of material fact.

12. Scrushy had two employment contracts with HealthSouth during the years 1996 through 2002, the first dated April, 1986 and the second dated April 1, 1998. These employment contracts provided to Defendant Scrushy the "opportunity" to earn bonuses on the same basis as other qualifying executives of HealthSouth. This Court specifically finds these employment contracts between Defendant Scrushy and HealthSouth did not guarantee the payment of any type bonus to Defendant Scrushy. To the contrary, any bonuses payable to Mr. Scrushy would come out of the same bonus pool as was available to all other qualifying executives and which has been identified in paragraph 5 above.⁵

13. HealthSouth's auditor for all periods before March 2003, Ernst & Young LLP, withdrew all previous audits in April 2003. Separately, HealthSouth declared in April 2003 that all its originally filed financial statements could not be relied upon. These declarations include all the periods from 1996 through 2002.

14. In its originally filed financial documents HealthSouth's actual net income was wrongfully reported as follows: \$189,864,000 for 1996; \$330,608,000 for

⁴ For example, Tucker has submitted evidence in the form of minutes of a meeting of the Compensation Committee held April 29, 2002, approving the \$10 million bonus for 2002. There is no mention in these minutes of a stay bonus, and Scrushy's bonus was presented and approved as part of a table that included bonuses for nine other executives.

⁵ No evidence has been presented to this Court that there existed at HealthSouth any other actual (or clandestine) bonus pool out of which executive bonuses were paid other than the bonus pool identified in paragraph 5 above.

1997; \$46,558,000 for 1998; and \$76,517,000 for 1999. The Special Audit Committee of the Board of HealthSouth, along with Price Waterhouse Coopers ("PWC"), issued a forensic audit report on June 1, 2004 (the "Report")⁶. The Report has identified several items of accounting that had the effect of wrongfully exaggerating HealthSouth's actual net income as originally reported and which would be the basis for establishing the bonus pool out of which all executive bonuses could properly be paid. This Report established the following: a) For 1996, HealthSouth's actual net income was \$88,360,000 rather than the \$189,864,000 originally reported; b) For 1997, HealthSouth's actual net income was a loss of \$65,432,000 rather than a gain of \$330,608,000 as originally reported; c) For 1998, HealthSouth's actual net income was a loss of \$556,482,000 rather than a gain of \$46,558,000 as originally reported; and d) For 1999, HealthSouth's actual net income was a loss of \$326,443,000 rather than a gain of \$76,517,000 as originally reported.

15. Based upon the evidence submitted and giving Defendant Scrushy every benefit of doubt, the Court finds the Annual Bonuses were paid to Defendant Scrushy as follows: a) \$10,000,000 on December 31, 2002; b) \$6,500,000 on December 31, 2001; c) \$10,000,000 on December 31, 1997; and d) \$8,000,000 on December 31, 1996. As to the so called Target Bonuses again, giving Defendant Scrushy every benefit of doubt, the Court finds the Target Bonuses were paid to Defendant Scrushy, at the latest, as follows: a) \$1,200,000 on December 31, 2002; b) \$2,400,000

⁶ Derivate Plaintiff Tucker and Defendant Scrushy both put the Report in evidence. The facts stated in the Report are not contradicted by any other evidence.

on December 31, 2001; c) \$2,154,849 on December 31, 2000; d) \$134,031 on December 31, 1999; e) \$1,577,829 on December 31, 1998; f) \$2,400,000 on December 31, 1997; and g) \$2,400,000 on December 31, 1996.⁷

III. CONCLUSIONS OF LAW

A. Summary Judgment Standard

The Standard for granting summary judgment under Alabama law is as follows:

If the moving party seeking summary judgment establishes there is no genuine issue of material fact regarding the dispute, then summary judgment must be granted ARCP 56(e). The non-movant may oppose such motions only with admissible evidence. *Chatham vs CSX Trans. Inc.*, 613 So2d 341 (Ala. 1993). Once the moving party presents a prima facie showing there is no genuine issue of material fact, the non movant bears the burden of presenting evidence showing the existence of a genuine issue of material fact. *Grider vs Grider*, 555 So2d 104 (Ala. 1989). The non movant must meet this burden with "substantial evidence". Alabama Code 1975 § 12-21-12. The Alabama Supreme Court has repeatedly held:

In order to defeat a properly supported motion for summary judgment the non moving party must present substantial evidence that creates a genuine issue of material fact. "Substantial evidence is of such weight and quality that fair-minded persons in the exercise of impartial judgment can

⁷ Neither party has presented evidence as to the actual date of payment of these bonuses to Defendant Scrushy. The Court has therefore determined the payments were received no later than the last day of the year reported.

reasonably infer the existence of the fact sought to be provided.” Ex Parte First Alabama Banks, 883 So2d 1236 (Ala. 2003).

By properly supporting his motion, Tucker has shifted the burden to Scrusy and, as the non moving party, Scrusy has failed to meet his burden with substantial evidence except for the bonuses paid to Scrusy in 1996 totaling \$10,400,000.

This dispute involves the rights and obligations of a CEO, Chairman and Director as against his own corporation. Accordingly, the Internal Affairs Doctrine is implicated, and Delaware law applies and governs the substance of the dispute. Massey vs Disc Manufacturing, Inc., 601 So2d 449 (Ala. 1992). Nonetheless, the result set forth herein would be the same under Alabama law.

For purposes of Tucker’s, but not Scrusy’s motion, this Court assumes that Defendant Scrusy had no actual knowledge of, played no part in and had no active participation in any of the criminal activities that resulted in the falsification and fabrication of the originally filed financial documents that are at issue. Indeed, knowledge is immaterial under the law of unjust enrichment and equitable fraud as knowledge of fraud is not an element of either theory of recovery.

The courts of Delaware rescinded a 2002 transaction wherein Scrusy repaid a \$25 million loan to HealthSouth with shares of his HealthSouth stock artificially inflated by the same accounting fraud that raged on his watch as CEO. In Re HealthSouth Shareholders Litig., 845 A.2d 1096 (Del.Ch. Nov. 2003), *affd.*, 847 A.2d 1121 (Del.2004)(TABLE, text in WESTLAW, No.22,2004), *rearg. denied* (April

30, 2004) (hereinafter the "Buyback Decision"). The Delaware Supreme Court affirmed the Buyback Decision *en banc* for all the reasons stated in the opinion of the Court of Chancery. The parties contest the effect of the Buyback Decision in these motions. This Court concludes that even if it is not given collateral estoppel effect, the Buyback Decision stands as important precedent as to the law of Delaware regarding unjust enrichment, innocent misrepresentation, and the responsibility of a CEO for his corporation's financial statements when he is enriched by their falsity at the expense of his own corporation.

The applicable definition of unjust enrichment is as follows –

Unjust enrichment is defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." To obtain restitution, the plaintiffs were required to show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit. Restitution is permitted even when the defendant retaining the benefit is not a wrongdoer. "Restitution serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, *even though he may have received those benefits honestly in the first instance*, and even though the plaintiff may have suffered no demonstrable losses.'

Schock v. Nash, 732 A.2d 217, 232-233 (Del. 1999)[citations omitted, emphasis added]; *quoted and adopted in: In Re HealthSouth.*, *supra*, 845 A.2d at 1105.

The elements of innocent misrepresentation or equitable fraud are (1) a false statement, (2) inducement, (3) reliance, and (4) injury. In re HealthSouth, *supra*, 845 A.2d at 1106. *See also*: Ala. Code 1975, §6-5-101.

The financial statements that Scrushy signed are materially false, constitute Scrushy's representation, and induced the payment of the cash Incentive Bonuses to the injury of HealthSouth. As held in the Buyback Decision –

After all, as the company's CEO, he was in a better position than the rest of the board to assess the reliability of the company's financial statements and press releases, given that it was his job to assure that management prepared those documents with care and accuracy.

Id., 845 A. 2d at 1099.

The Buyback Decision and the case at bar involve different time periods, as the Buyback required a showing that financials were fraudulent on a single day, July 31, 2002, and Tucker's motion covers seven years. Nonetheless, in both cases, Scrushy as CEO benefited, to HealthSouth's detriment, from the false financial statements. This Court has thus taken into account and applied the following rules and principles stated in the Buyback Decision:

The CEO of a major corporation like HealthSouth possesses an enormous amount of authority and therefore owes the corporation a corresponding degree of responsibility. HealthSouth's board of directors was entitled to rely upon Scrushy and his management team, particularly in the preparation of the company's financial statements, an area in which management has traditionally been preeminent. In the process of preparing and signing financial statements, Scrushy necessarily represented to the company's board, audit committee, outside auditors, and its public stockholders that the financial statements his management team had prepared were materially accurate in all respects.

Id. at 1107.

If Scrushy's subordinates blew one - or several seasons' full of pitches - past him, that still does not absolve him or render him on equal status with HealthSouth as an entity. It was Scrushy's duty to ensure the filing of accurate financial statements. Having failed to do so (for

whatever reason) and having materially benefited from that failure . . .
Scrushy cannot . . . escape liability.

Id. at 1107.

As the evidence establishes, the payment of bonuses to Scrushy was a two step process. The very first step of the process was the valid existence of a bonus pool out of which any bonus could be paid. The very existence of a bonus pool was contingent upon HealthSouth's actual "annual net income" exceeding HealthSouth's "budgeted annual net income". Stated another way, bonuses could not properly be paid to any HealthSouth executive, including Scrushy, unless annual net income exceeded budgeted net income because a bonus pool did not come into existence unless this condition was properly met.⁸

As to all bonuses paid to Defendant Scrushy for the years 1997 through 2002 inclusive, HealthSouth incurred actual losses and no bonus pool existed out of which the bonuses for these years could properly have been paid to Scrushy. Scrushy was unjustly enriched by these payments to the detriment of HealthSouth and to allow Scrushy to retain the benefit of these payments would be unconscionable. These payments must be returned and Plaintiff Tucker is entitled to summary judgment for the bonuses paid to Scrushy for the years 1997 through 2002 inclusive.

⁸ Both at oral argument and by affidavits filed by Scrushy in support of his position concerning these bonuses, Scrushy's attorneys and experts implicitly, if not explicitly, concede that bonuses could not properly have been paid to Scrushy unless a valid bonus pool existed to fund the payment of bonuses.

With regard to the bonuses paid in 1996 in the amount of \$10,400,000 the Court finds that HealthSouth did earn positive net income. Even though Tucker argues to the contrary, the Court finds issues of material fact exist regarding the 1996 bonuses which preclude summary judgment.

In addition to the actual bonus payments, pursuant to Ala. Code § 8-8-1 through 8-8-8 Plaintiff Tucker is entitled to pre judgment interest at the rate of 6% per annum from the date of each payment to the date of this judgment.

B. Collateral Issues:

Scrushy contends that Tucker lacks standing to claim bonuses paid before August 18, 1998, the date that Tucker became a HealthSouth shareholder. This Court holds that Tucker has standing to pursue his claims for all periods in contention and that any one of the following reasons supports Tucker's standing:

(a) The transactions complained of span Tucker's stock ownership. Scrushy was a director (and thus a fiduciary) at all relevant times, and the "transaction of which plaintiff complains" under Rule 23.1 is both the fraud and Scrushy's retention of his unjust benefit at HealthSouth's expense.

(b) Where, as here, there is no possibility of a purchased grievance, the shareholding requirement has been "equitably excused" in a wide variety of circumstances, and it is and should be here. *Elgin v. Alfa Corp.*, 598 So. 2d 807, 813 (Ala. 1992); *Shelton v. Thompson*, 544 So.2d 845, 849 (Ala. 1989); and *Jones v. Taylor*, 348 A.2d 188 (Del.Ch. 1975).

(c) Under the Continuing Wrong Doctrine, where the challenged transaction continues, there is no valid challenge to standing. *Palmer v. Morris*, 316 F.2d 649 (5th Cir. 1963); *Bateson v. Magna Oil Corp.*, 414 F.2d 128 (5th Cir. 1969); *Lawson v. Baltimore Paint & Chem. Corp.*, 347 F.Supp. 967 (D.C. Md. 1972);

(d) Another shareholder, the Wendell H. Cook Sr. Testamentary Trust, John P. Cook, Trustee, (the “Cook Trust”), which held its HealthSouth shares continuously since 1993, joined as plaintiff herein under A.R.C.P. Rule 20(a) on October 12, 2005, and adopted Tucker’s complaint in its entirety. No party objected. The Cook Trust is represented by the identical legal team that represents Tucker. For all purposes, the Cook Trust’s shareholding relates back to the original Tucker complaint. *In Re Maxxam, Inc./Federal Development*, 698 A.2d 949 (Del.Ch. 1996)(holding new shareholder plaintiff may be added even at a late stage to cure shareholding defect of earlier plaintiff); WRIGHT & MILLER, *Federal Practice and Procedure*, § 1501 (Westlaw Online Ed., Updated 2005).⁹

(e) These claims all arise from the fraud and criminal activities at HealthSouth, which remained concealed until March 18, 2003. In Alabama, “. . . a fraud claim accrues at the time of discovery by the aggrieved party of the fact constituting the fraud.” *Gray v. Liberty Nat’l Life Ins. Co.*, 623 So.2d 1156, 1159 (Ala. 1993).

⁹ WRIGHT & MILLER state, “As long as defendant is fully apprised of the claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense.” *Id.*

(f) A.R.C.P., Rule 9(a) requires that a party seeking to challenge another party's standing to sue in a representative capacity do so by negative averment in his pleading. Scrusy did not do so by negative averment in his pleading. Indeed, he has yet to file an answer.

**ORDER AND FINAL JUDGMENT PURSUANT TO A.R.C.P.,
RULE 54(b) AGAINST DEFENDANT RICHARD M.
SCRUSHY**

Upon motion for summary judgment brought by Plaintiff Wade C. Tucker ("Tucker") dated December 15, 2003, and renewed July 7, 2005, for and on behalf of HealthSouth Corporation, based on the undisputed material facts, and it appearing to the Court that Tucker is entitled to judgment as a matter of law for the reasons stated in the Memorandum Opinion of this date and filed herein, and based on the record herein and documents and evidence presented herein, and there appearing that there is no just reason to delay the finality of the order and judgment entered herein, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

1. This Court directs that judgment be entered against Defendant Richard M. Scrusy as set forth herein and certifies it as a final order.

2. Defendant Scrusy, having been deemed liable to make restitution to HealthSouth Corporation based on unjust enrichment and equitable fraud, is hereby directed to pay the sum of the following amounts:

(a) \$11,200,000 plus prejudgment interest of \$2,016,000, the interest on this Bonus being calculated at 6% per annum from December 31, 2002, through December 31, 2005, for a total of \$13,216,000;

(b) \$8,900,000 plus prejudgment interest of \$2,136,000, the interest on this Bonus being calculated at 6% per annum from December 31, 2001, through December 31, 2005, for a total of \$11,036,000;

(c) \$2,154,849, plus prejudgment interest of \$646,455, the interest on this Bonus being calculated at 6% per annum from December 31, 2000, through December 31, 2005, for a total of \$2,801,304;

(d) \$134,031, plus prejudgment interest of \$48,252, the interest on this Bonus being calculated at 6% per annum from December 31, 1999, through December 31, 2005, for a total of \$182,283;

(e) \$1,577,829, plus prejudgment interest of \$662,690, the interest on this Bonus being calculated at 6% per annum from December 31, 1998, through December 31, 2005, for a total of \$2,240,519;

(f) \$12,400,000, plus prejudgment interest of \$5,952,000, the interest on this Bonus being calculated at 6% per annum from December 31, 1997, through December 31, 2005, for a total of \$18,352,000; and


The total amount of the judgment hereby rendered in favor of Plaintiff Tucker and against Defendant Richard M. Scrusby, including pre-judgment interest, is \$47,828,106.00.

3. Plaintiff Tucker's motion for summary judgment regarding the 1996 bonuses is denied and Defendant Scrusby's motion for summary judgment is denied in its entirety.

4. This Judgment does not resolve other claims against defendant Scrusby which remain to be adjudicated herein. *However, this Court rules that there is no just reason for delay in the entry and finality of this judgment.*

5. Pursuant to A.R.C.P., Rule 54(b), this Court hereby certifies that there is no just reason for delay and expressly directs entry of final judgment forthwith as per the above.

IT IS SO ORDERED AND CERTIFIED THIS 3rd day of Jan, 2006.



Allwin E. Horn, III, Circuit Judge

COPIES OF THIS ORDER ARE BEING PROVIDED TO ALL STEERING COMMITTEE COUNSEL WITH DIRECTIONS THAT SAID COUNSEL FURTHER DISTRIBUTE THIS ORDER TO ALL PARTIES WITHIN THEIR RESPECTIVE GROUPS. And copy to: The Honorable Karon O. Bowdre, Judge, United States District Court, Hugo Black U.S. Courthouse, 1729 Fifth Avenue North, Birmingham, AL 35203.