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

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

IN RE HEALTHSOUTH CORP. ERISA LITIGATION	:	**CV-03-BE-1700-S**

ORDER AND FINAL JUDGMENT

This matter comes before the court on (1) Plaintiffs' Motion for Final Approval of ERISA Class Action Settlement Agreement ("Final Approval Motion" doc. 155; (2) Lead Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Award of Compensation to Class Representatives ("Compensation Motion" doc. 153); and (3) Plaintiffs' Motion and Memorandum in Support of Plan of Allocation ("Plan of Allocation Motion" doc. 154). After having reviewed all submissions in support of these motions, the court conducted a hearing on June 27, 2006. By separate Order entered this date, the court approved the Plan of Allocation. For the reasons stated on the Record and those outlined below, the court finds that the remaining motions are due to be GRANTED and this case DISMISSED with prejudice.

On May 11, 2006, the court entered Findings and Order Certifying a Class for Settlement Purposes and Preliminarily Approving Proposed Settlement ("*Preliminary Approval Order*" doc. 151); The court has received declarations attesting to the mailing of the *Class Notice* and *Bar Order Notice* and the publication of the court-approved Summary Notice and Summary *Bar Order Notice*, and the Compensation Motion in accordance with the *Preliminary Approval Order*; and the court has been advised that U.S. Trust Corporation, the *Independent Fiduciary*

retained by the *Company* to approve the *Settlement* on behalf of the *Plan*, has given its approval to the *Settlement*.

The court held a hearing on June 27, 2006 (i) to determine whether to grant the Final Approval Motion; (ii) to determine whether to grant the Plan of Allocation Motion; (iii) to determine whether to grant the Compensation Motion; and (iv) to receive any objections to the motions. No written objections to the settlement were filed and no one voiced any objections at the hearing.

Therefore, the court hereby ORDERS:

1. Except as otherwise defined, all capitalized and italicized terms used in this Order shall have the same meanings as given them in the Amended Class Action Settlement Agreement between the *Settlement Class Representatives* for themselves and on behalf of the *Settlement Class*, on the one hand, and the *Settling Defendants* and *Underwriters*, on the other, dated March 6, 2006 (the "*Amended Settlement Agreement*") and the First Addendum to the Amended Class Action Settlement Agreement ("*First Addendum*").

2. The court has jurisdiction over the subject matter of the *ERISA Action* and over all parties to the *ERISA Action*, including all members of the *Settlement Class*.

3. Pursuant to Fed. R. Civ. P. 23, the court hereby APPROVES and confirms the settlement embodied in the *Amended Settlement Agreement* and *First Addendum* as being a fair, reasonable and adequate settlement and compromise of all of the claims asserted in the *ERISA Action* against the *Settling Defendants*.

4. The court hereby ADOPTS the *Amended Settlement Agreement* and *First Addendum* and ORDERS that the *Amended Settlement Agreement* and *First Addendum* shall be consummated and implemented in accordance with its terms and conditions.

5. Accordingly, the Final Approval Motion hereby is GRANTED, and the *Settlement* hereby is APPROVED as fair, reasonable and adequate and the terms of the *Settlement* are hereby determined to be fair, reasonable and adequate, for the exclusive benefit of participants and beneficiaries of the Plan in compliance with ERISA.

6. The court, for purposes of the *Settlement,* finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable laws have been met as to the "*Settlement Class*" defined below, and further finds:

a. The *Settlement Class* is ascertainable from records kept with respect to the *Plan* and from other objective criteria, and the members of the *Settlement Class* are so numerous that their joinder before the court would be impracticable.

b. Based on allegations in the Consolidated Amended Complaint for Breach of Fiduciary Duty under ERISA, one or more questions of fact and/or law are common to the *Settlement Class*.

c. Based on allegations in the Consolidated Amended Complaint for Breach of Fiduciary Duty under ERISA that the *Settling Defendants* engaged in uniform conduct affecting members of the proposed *Settlement Class*, the claims of the *Settlement Class Representatives* are typical of the claims of the *Settlement Class*.

d. The *Settlement Class Representatives* will fairly and adequately protect the interest of the *Settlement Class* in that (*i*) the interests of *Settlement Class Representatives* and the nature of their alleged claims are consistent with those of the members of the *Settlement Class*, (*ii*) no conflicts appear between

or among the *Settlement Class Representatives* and the *Settlement Class*, and (*iii*) the *Settlement Class Representatives* and the members of the *Settlement Class* are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated *ERISA* class actions.

e. The prosecution of separate actions by individual members of the *Settlement Class* would create a risk of (i) inconsistent or varying adjudications as to individual class members, that would establish incompatible standards of conduct for the parties opposing the claims asserted in the *ERISA Action* or (ii) adjudications as to individual class members that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede those persons' ability to protect their interests.

7. The court finds as follows, for purposes of the Settlement:

a. the *Amended Settlement Agreement* was negotiated vigorously and at arm's-length by the *Settlement Class Representatives* and their experienced counsel on behalf of the *Settlement Class* seeking plan-wide relief for the Plan pursuant to ERISA §§ 409 and 502(a)(2) and (3);

b. at all times, the *Settlement Class Representatives* have acted independently;

c. the interests of *Settlement Class Representatives* are identical to the interests of the *Settlement Class* and the *Plan*;

d. the negotiation and consummation of the *Amended Settlement Agreement*, including the granting of releases as contemplated thereby, do not constitute "prohibited transactions" as defined in ERISA §§ 406(a) or (b).

8. The giving of the *Class Notice* and the *Bar Order Notice* having been carried out in accordance with the *Preliminary Approval Order*, the court finds as follows:

a. such notices were reasonable and constituted due, adequate and sufficient notice to all persons entitled to notice;

b. such notices included individual notice to all potential members of the *Settlement Class* who could be identified through reasonable efforts;

c. such notices provided valid, due and sufficient notice of these proceedings and of the matters set forth therein, including the settlement described in the *Amended Settlement Agreement*, and including information regarding the procedure for the making of objections by all persons to whom such notices were directed, to all person entitled to notice thereof; and

d. such notices fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process.

9. As set forth in the court's *Preliminary Approval Order*, the *Settlement Class* is defined as follows

> "(a) all *Persons* who held any *Company* stock in their *Plan* accounts at any time during the *Class Period* from January 1, 1996 to June 3, 2005, and (b) all beneficiaries, successors-in-interest, and any other payees of any *Plan* participant with respect to the *Plan* participant's *Claim* in the *ERISA Action*, except specifically excluding from the *Settlement Class* Brandon Hale, Philip Watkins, James P. Bennett, P. Daryl Brown, John S. Chamberlin, Larry D. Striplin, Jr., Charles W. Newhall, III, George H. Strong, C. Sage Givens, Joel C. Gordon, Larry R. House, Anthony J. Tanner, Raymond J. Dunn, III, Allan R. Goldstein, Robert P. May, Jan L. Jones, Jon F. Hanson, Lee S. Hillman, Richard M. Scrushy, Aaron Beam, Jr., Michael D. Martin, and William T. Owens."

The court finds that the *Settlement Class* is sufficiently well-defined and cohesive. The court hereby CERTIFIES the Settlement Class for settlement purposes under Fed. R. Civ. P. 23(b)(1) in this litigation.

10. As required by Fed. R. Civ. P. 23(g), the court has considered: (i) the work *Lead Counsel* has done in identifying or investigating potential claims in this action; (ii) *Lead Counsel*'s experience in handling class actions, other complex litigation, and claims of the type asserted in this action; (iii) *Lead Counsel*'s knowledge of the applicable law, and in particular, its knowledge of ERISA as it applies to claims of the type asserted in this action (breach of fiduciary duty claims that pertain to the Plan's investment in company stock); and (iv) the resources counsel have committed to representing the class. Based on these factors, the court finds that *Lead Counsel* have fairly and adequately represented the interests of the *Settlement Class*, and shall continue to serve as class counsel with respect to the *Settlement Class* and in this action.

11. By operation of the *Amended Settlement Agreement* and this order, the members of the *Settlement Class*, on their own behalves and on behalf of their respective heirs, executors, administrators, past and present partners, officers, directors, agents, attorneys, predecessors, and assigns, and the *Plan*, finally and forever release the *Releasees* from all *Released Claims*.

12. Except as provided in paragraph 15, all *Released Claims* brought by any *Person* (except the *DOL*) against the *Settling Defendants* or the *Underwriters* are hereby permanently barred, including but not limited to any *Claim* for contribution or indemnification (whether contractual or otherwise), and any *Person* receiving notice of the *Class Notice* or the *Bar Order Notice*, or having actual knowledge of the *Class Notice* or the *Bar Order Notice*, or having actual knowledge of sufficient facts that would cause such *Person* to be charged with constructive notice of the *Class Notice* or the *Bar Order Notice* (except the *DOL*) is hereby permanently enjoined from bringing, either derivatively or on behalf of themselves, or through any *Person* purporting to act on their behalf or purporting to assert a *Claim* under or through them, any

Released Claims against the *Settling Defendants* or the *Underwriters* in any forum, action or proceeding of any kind. For purposes of this order, *Barred Persons* shall be defined as any *Person* who is barred and/or enjoined by this paragraph, including, but not limited to, *Settlement Class Representatives*, the *Settlement Class*, the *Plan*, and the other *Settling Parties*, but not including the *DOL*.

13. All *Claims* by any *Barred Person* or any *Settling Party* against the *Underwriters*, and each of them, (i) under or in any way involving the *Insurance Policies*, or (ii) upon any *Released Claim* or for coverage under the *Insurance Policies* for any *Released Claim* are hereby permanently barred and enjoined; provided, however, that nothing in the *Amended Settlement Agreement* or this order in any way bars or enjoins the *Settling Defendants* from asserting any rights they may have under any insurance policies other than the *Insurance Policies*, or from bringing or maintaining any *Claims*, whether direct or indirect, to the extent that such *Claims* are not based on the *Insurance Policies* and are based upon, arise from, are in consequence of or relate to litigation other than the *ERISA Action*, including, but not limited to, the *Securities Litigation* and the *Derivative Litigation*, irrespective of the extent, if any, to which such rights and *Claims* may be related to the *Released Claims* and/or the *ERISA Action.*

14. Except as provided in paragraph 15, the *Settling Defendants* are hereby permanently barred and enjoined from bringing against the *Barred Persons* or other *Settling Defendants*, either derivatively or on behalf of themselves, or through any *Person* purporting to act on their behalf or purporting to assert a *Claim* under or through them, any of the *Released Claims* in any forum, action or proceeding of any kind; provided, however, that a *Settling Defendant* is not barred or enjoined from bringing *Released Claims* against a *Barred Person* if for any reason such *Barred Person* asserts, or is legally not barred by this order from bringing

Released Claims against such *Settling Defendant*; and further provided that nothing in the *Amended Settlement Agreement* or this order in any way bars or enjoins the *Settling Defendants* from asserting any rights they may have under any insurance policies other than the *Insurance Policies*, or from bringing or maintaining any *Claims*, whether direct or indirect, to the extent that such *Claims* are not based on the *Insurance Policies* and are based upon, arise from, are in consequence of or relate to litigation other than the *ERISA Action*, including, but not limited to, the *Securities Litigation* and the *Derivative Litigation*, irrespective of the extent, if any, to which such rights and *Claims* may be related to the *Released Claims* and/or the *ERISA Action*.

15. Nothing in the *Amended Settlement Agreement* shall be construed to bar, waive, release, or limit in any way contractual or statutory indemnity claims, if any, of Defendant Scrushy against the *Company* based on or arising out of the *ERISA Action* or the *Settlement.* The Company shall not be deemed to have waived any defense thereto, nor shall anything in the *Amended Settlement Agreement* be deemed a presumption, concession, or admission by the Company of any breach of duty, liability, default, or wrongdoing.

16. The *Underwriters* are hereby permanently barred and enjoined from bringing any *Released Claim* against any *Settling Party* or *Barred Person*, either derivatively or on behalf of themselves, or through any *Person* purporting to act on their behalf or purporting to assert a *Released Claim* under or through them, in any forum, action or proceeding of any kind; provided, however, that an *Underwriter* is not barred or enjoined from bringing *Released Claims* against a *Barred Person* if for any reason such *Barred Person* asserts, or is legally not barred by this order from bringing *Released Claims* against such *Underwriter*; and further provided that nothing in the Amended Settlement Agreement or this order in any way bars or enjoins the *Underwriters* from asserting any rights they may have under any insurance policies other than

the *Insurance Policies*, or from bringing or maintaining any *Claims*, whether direct or indirect, to the extent that such *Claims* are not based on the *Insurance Policies* and are based upon, arise from, are in consequence of or relate to litigation other than the *ERISA Action*, including, but not limited to, the *Securities Litigation* and the *Derivative Litigation*, irrespective of the extent, if any, to which such rights and *Claims* may be related to the *Released Claims* and/or the *ERISA Action*.

17. Because the *Barred Persons* are barred from asserting any *Released Claims* against the *Releasees*, any judgments entered against *Barred Persons* in the *ERISA Action* will be reduced by the *Judgment Reduction Amount* as that term is set forth in the *Amended Settlement Agreement* and herein as follows:

a. "*Judgment Reduction Amount*" shall mean, with respect to any *Barred Person*, an amount determined by the court at the time of entry of any judgment against such *Barred Person*, equal to the greater of (a) the "*Settlement Credit,*" and (b) the "*Contribution Credit*," with such terms having the following meanings;

b. The "*Settlement Credit*" shall mean (a) the Settlement Amount ($29,850,000, or $28,850,000 as per the *Amended Settlement Agreement*) -- constituting the maximum possible aggregate of the *Settlement Amount*, *Supplemental Settlement Amount*, and *Martin Supplemental Settlement Amount;* unless the court shall determine when assessing liability against the *Barred Person* that some portion of the damages claimed which were settled by the *Settlement*, are different from those for which the *Barred Person* is liable, then (b) the Settlement Amount ($29,850,000, or $28,850,000 as per the *Amended*

Settlement Agreement) minus the portion of the *Combined Settlement Amount* determined by the court to have been paid with respect to such different damages claimed; provided that the *Settlement Credit* shall not reduce the total amount of the *Settlement Class*' recovery against all *Barred Persons* by more than the *Settlement Amount*; and further provided that nothing in this paragraph shall permit the *Settlement Class* to recover more than their total amount of damages for the *Claims* asserted in the *ERISA Action*;

c. To the extent the court finds that a right of contribution or equitable indemnity exists under *ERISA*, the "*Contribution Credit*" shall mean an amount equal to the value of the contribution or equitable indemnification *Claim*, if any, that the court determines such *Barred Person* would be entitled to assert against one or more *Settling Defendants* but for operation of the *Bar Order*, which shall be equal to the aggregate proportionate shares of liability, if any, of the *Settling Defendants* as determined by the court at the time of entry of any judgment against any *Barred Person*, adjusted to reflect any limitation on the financial capability of any *Settling Defendants* to pay their respective proportionate shares of liability to the *Barred Person* had the *Barred Person* obtained a contribution or equitable indemnification judgment against them in such amount, or in the absence of the *Settlement*, had a judgment been entered against any or all *Settling Defendants* in this case.

18. The entry of the bars, injunctions and related provisions set forth in paragraphs 12 through 17 above are fair to the *Settling Parties*, the *Settlement Class*, and the *Barred Persons*.

19. Nothing in the *Amended Settlement Agreement* or in this Order shall be deemed to create or acknowledge the existence or validity of any *Claim* of the *Barred Persons* or limit any defense to any such *Claim*.

20. In the event that the *Amended Settlement Agreement* is terminated in accordance with its terms, this judgment shall be rendered null and void and shall be vacated *nunc pro tunc*, and the *ERISA Action* shall proceed in the manner provided in the *Amended Settlement Agreement*.

21. The court further finds as follows:

a. The *Settlement* settles all claims asserted in the *ERISA Action* against the *Settling Defendants*;

b. Entry of final judgment with respect to the *Settlement* will facilitate the *Settlement* becoming *Final* and the expeditious payment of the proceeds of the *Settlement* for the benefit of the *Settlement Class*.

c. The intent of the *Settling Parties* is that the *Net Settlement Amount* shall constitute "restorative payments" within the meaning set forth in Internal Revenue Service Revenue Ruling 2002-45 and shall not be subject to the annual limits on contributions under Section 415 of the Internal Revenue Code.

22. The attorneys' fees sought by *Lead Counsel* for themselves and other counsel for the *Settlement Class Representatives* in the amount of twenty-five percent of the $28.875 million settlement, plus interest earned thereon (the "Common Fund") are reasonable in light of the efforts of *Lead Counsel*, the benefits obtained in this case, the risks associated with the case, *Lead Counsel*'s skill and experience in class action litigation of this type, and the fee awards in

comparable cases. Accordingly, the Compensation Motion is GRANTED, and *Lead Counsel* are awarded twenty-five percent of the Common Fund, plus interest earned thereon from the date of the Order until paid at the same rate as that earned on the *Settlement Fund*.

23. Based on the entire record, including the evidence presented in support of the Motion, and specifically including the declarations of Lead Counsel Lynn Lincoln Sarko, Class counsel's requested fee award of twenty-five percent is reasonable when evaluated in light of each of the twelve factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Further, the award is reasonable in light of the additional factors courts in the Eleventh Circuit may consider in awarding a percentage fee award: (1) the time required to reach a settlement; (2) whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel; (3) any non-monetary benefits conferred upon the class by the settlement; and (4) the economics involved in prosecuting a class action. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991). The court finds that each of these factors supports the fee award requested here. Further, the court finds that the fee is reasonable when compared with fees awarded in similar cases.

24. The costs and expenses sought by *Lead Counsel* for themselves and other counsel for the *Settlement Class Representatives* in the course of prosecuting this case against the *Settling Defendants* are reasonable. Accordingly, *Lead Counsel* are awarded costs in the amount of $230,018.59, to be paid from the *Settlement Fund*, together with interest earned thereon from the date of the Order until paid at the same rate as that earned on the *Settlement Fund*.

25. The court finds that the payment of $5,000 to each of the three *Settlement Class Representatives* is reasonable and appropriate in order to compensate such persons for their time and efforts in this case, and, therefore, orders that such payments be made from the *Settlement Fund* to the *Settlement Class Representatives*.

26. The awarded attorneys' fees, costs and expenses and *Settlement Class Representative* compensation are to be paid out of the *Settlement Fund* to *Lead Counsel* no later than fifteen days after the *Approval Order* is *Final*. *Lead Counsel* shall allocate the awarded attorneys' fees, costs and expenses, among themselves and Steering Committee Counsel.

27. By separate order the *Plan of Allocation* Motion has been granted, and the *Plan of Allocation* was approved as fair, adequate, and reasonable. *Lead Counsel* and the *Settlement Administrator* or its designee are directed to administer the Distribution Amount in accordance with the Plan, and to distribute the *Net Settlement Amount* to all eligible members of the *Settlement Class* (who include current and former Plan participants and their beneficiaries, but exclude the individual named defendants in this action and other individuals specified in section 2 of the Order Approving *Plan of Allocation*) in accordance with the *Amended Settlement Agreement* and the *Plan of Allocation*, and to do so without the necessity of obtaining further order of the court.

28. The *ERISA Action and its member cases* are hereby DISMISSED WITH PREJUDICE, each party to bear his, her or its own costs, except as provided herein. The court shall retain exclusive jurisdiction to resolve any disputes or challenges that may arise as to the performance of the *Amended Settlement Agreement* or any challenges as to the scope, performance, validity, interpretation, administration, enforcement or enforceability of the *Class Notice*, the *Bar Order* or the *Amended Settlement Agreement* or the termination of the *Amended Settlement Agreement*, except as otherwise directed by the court or by separate agreement of the *Settling Parties*.

DONE and ORDERED this 28th day of June 2006.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE