

NO. ____

IN THE SUPREME COURT OF ALABAMA

EX PARTE DAVID ROBERSON AND ANNA ROBERSON, Petitioners

(In re: David Roberson and Anna Roberson
Plaintiffs

v.

Drummond Company, Inc. and Balch & Bingham, LLP
Defendants)

Case No: CV-2019-90120

In the Circuit Court of Jefferson County

PETITION FOR WRIT OF MANDAMUS
OF DAVID ROBERSON AND ANNA ROBERSON
(VOLUME 1 OF 4)

TO THE HONORABLE TAMARA HARRIS JOHNSON

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INTRODUCTION

David Roberson and Anna Roberson ("the Robersons") petition this court for a writ mandamus to compel Judge Tamara Harris Johnson to *adjudicate, decide, and rule on* all pending motions in this case, including the defendants' motions to dismiss. A motion hearing was held on May 29, 2019, but Judge Johnson has issued no ruling.

STATEMENT OF THE CASE

This case arises out of Drummond Company's ("Drummond") successful effort to prevent the Environmental Protection Agency ("EPA") from tagging it with liability for a Superfund Site in Jefferson County. David Roberson, one of the plaintiffs, was a Vice President with Drummond during the effort, but he was later fired. He filed this suit against Drummond and Balch & Bingham, LLP ("Balch") on March 15, 2019 [Exhibit 24].

Roberson summarized the facts underlying this case in his Second Amended Complaint:

4. In late 2013 the Environmental Protection Agency ("EPA") proposed placing a particular site in Jefferson County, Alabama on a National Priorities List ("NPL"); this was a prelude to designating Drummond as a Potentially Responsible Party ("PRP") for the cleanup costs at the site. The cleanup costs were estimated at over \$100 million dollars.

5. Drummond hired Balch & Bingham, LLP, to prevent the placement of the site on the National Priorities List and the designation of Drummond as a Potentially Responsible Party.

6. Balch, as Drummond's agent, devised a plan ("the Plan") to employ a seemingly-legitimate local foundation, the Oliver Robinson Foundation ("the Foundation"), to conduct a seemingly-innocent campaign directed toward the community, the State of Alabama, and the EPA. Oliver Robinson was a respected state legislator, and he controlled the Foundation.

7. Under the Plan, Oliver Robinson and the Foundation would (a) seek to prevent the State of Alabama from giving legally required assurances to the EPA that the state would cover 10% of the cleanup costs that could not be recovered from PRPs and (b) seek to convince the residents of North Birmingham not to have their property tested for toxins, such as lead and arsenic.

8. In November 2014, before implementation of the Plan, the Plaintiff asked Gilbert[, a Balch partner,] whether the Plan was legal and ethical, and Gilbert assured the Plaintiff that there was no legal problem with the Plan and that the Plan was legal and ethical.

9. At the same time, Gilbert further represented to the Plaintiff that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal.

10. On or about February 12, 2015, Gilbert and Balch prepared a contract between Balch and the Foundation. The Plaintiff did not participate in preparing the contract, and he did not see the contract until the summer of 2018 - during his criminal trial.

11. Balch thereafter made payments to the Foundation under the contract and submitted invoices to Drummond for reimbursement.

12. Blake Andrews, General Counsel for Drummond ("General Counsel"), represented to the Plaintiff that he was "confused" by having to process the Balch invoices for

the Foundation as well as other Balch invoices. Consequently, he asked and directed the Plaintiff to process Balch's invoices for payments to the Foundation.

13. The Plaintiff had been assured by Gilbert that the Plan was legal and ethical and had been reviewed by Balch's ethics attorneys, and he did not know that the payments were illegal. Consequently, he performed his duties for Drummond exactly as instructed by General Counsel, and he approved reimbursements to Balch for payments to the Foundation.

14. During Balch's implementation of the Plan, Balch employees (in addition to Gilbert) questioned the legality of the Plan and learned that Robinson had acted illegally in performing duties under the Plan. They failed to notify the Plaintiff of these facts or take any remedial or corrective action. This constituted a ratification and adoption of Gilbert's conduct.

15. On September 27, 2017, Balch attorney Gilbert and the Plaintiff were indicted for violating 18 U.S.C. §§ 371, 666(a), 1343, 1346, and 1956(h), but neither Drummond Corporation nor Balch & Bingham, LLP, was indicted.

16. The indictment charged that the payments to the Foundation were bribes, and it charged that the Plaintiff was guilty of criminal conduct because he had "caused Drummond Company to pay" Balch's invoices for payments to the Foundation - as instructed by Drummond's General Counsel [Exhibit 25].

The criminal case against Roberson and Gilbert was tried in the United States District Court in Birmingham in June and July 2018, and both Roberson and Gilbert were convicted. Roberson has appealed his conviction, and he is free on bond pending his appeal.

Roberson's Second Amended Complaint asserted nine claims. Count I alleged that Drummond assigned him the duty to process and pay Balch's invoices for payments it had made to Robinson and his Foundation, and that his conviction was based on his processing these payments. Roberson alleged that Drummond was required to indemnify him for the damages he suffered from performing the duties assigned to him [Exhibit 25, at 8-9].

Counts II-III alleged that Drummond misrepresented and concealed material facts to induce him to process the invoices described in Count I [Exhibit 25, at 9-11]. Count IV alleged that Drummond converted various items of his personal property, including personal documents and records, when it fired him [Exhibit 25, at 11].

Counts V-IX asserted claims for misrepresentation and concealment against Balch and Drummond. Roberson alleged, in separate courts, that Gilbert falsely represented to him - in November 2014 and again in June 2016 - that the Plan to pay the Foundation was "legal," "ethical," and had been reviewed and approved by Balch's in-house ethics attorneys [Exhibit 25, at 11-15].

In parallel concealment claims, Roberson alleged that Gilbert failed to disclose, in November 2014 and again in June 2016, that Balch's in-house ethics attorneys had not, in fact, reviewed or approved the Plan [Exhibit 25, at 13-16].

In a third concealment count, Roberson alleged that Gilbert asked Balch's in-house ethics counsel to review the Plan in February 2017, and that they then discovered that Robinson had used his official House of Representatives letterhead to perform work under the Plan and that such conduct was illegal. Roberson alleged that Balch had a duty to disclose this information to him, but it failed to do so [Exhibit 25, at 16-17].

Finally, Roberson alleged that he first learned of the falsity of Gilbert's representations when he was indicted on September 27, 2017, and he first learned that Balch's ethics attorneys had not initially reviewed the Plan only when those attorneys testified in his criminal trial on July 11, 2018.

On May 16, 2019, Balch and Drummond filed separate motions to dismiss the Second Amended Complaint. Although neither attached evidentiary material to its motion, both purported

to incorporate documents they had filed in support of motions to dismiss Roberson's complaint, before the second amendment [[Exhibit 2](#); [Exhibit 3](#)].

Drummond argued that Roberson's claims for indemnification, misrepresentation, and suppression were "(1) barred by the *Hinkle* Rule, (2) barred by the doctrine of collateral estoppel, and (3) [were] an impermissible collateral attack" on his criminal conviction [[Exhibit 3](#), at 1]. Drummond argued that Roberson's conversion claim was deficient because the claim did not specifically allege that Drummond's taking of his property was "wrongful" [[Exhibit 3](#), at 6].

Balch argued that Roberson was not its client, and as a result, it had no duty to him. It also argued that Roberson's claims were nevertheless legal-malpractice claims and that they were barred by section 6-5-574, the statute of limitations for such claims [[Exhibit 2](#)].

Balch filed a "Motion to Stay Discovery" with its motion to dismiss [[Exhibit 28](#)], and on May 17, 2019, Judge Johnson stayed discovery pending her ruling on the motions to dismiss [[Exhibit 29](#)]. Consequently, no discovery has been taken in this case.

On May 24, 2019, Roberson filed his response to the motions to dismiss, which included a brief [Exhibit 32], an objection to converting the motions into motions for summary judgment [Exhibit 30], a motion to strike the exhibits the defendants had earlier filed [[Exhibit 4](#)], and an affidavit under rule 56(f), together with outstanding discovery [Exhibit 31], which the defendants had been relieved from answering by the stay [Exhibit 29].

In response to Drummond, Roberson argued that a criminal conviction has no preclusive effect in a civil case - by res judicata, collateral estoppel, or any other theory, and that in any event, a criminal conviction is not admissible in a civil case until that conviction becomes final. Roberson's conviction has not become final [Exhibit 32, at 21-24].

The "Hinkle rule," Roberson argued, bars an action only when the damages claimed were a direct result of the plaintiff's "knowing and intentional" participation in a crime, and Roberson alleges that he did not knowingly or intentionally participate in a crime. In ruling on a motion to dismiss, the court must accept this allegation as true [Exhibit 32, at 34].

As to Balch's contentions, Roberson argued that anyone who undertakes to speak has a duty to tell the truth, and that Balch had a duty to tell him truth - just as any other person [Exhibit 32, at 4]. As to Balch's statute-of-limitations defense, Roberson argued that he suffered no injury or damage until he was indicted on September 27, 2017, and he filed his complaint on March 15, 2019 - within two years from the date his claim accrued [Exhibit 32, at 14-15]. Alternatively, he argued that ALSLA does not apply to his claims because he was not Balch's "client" [Exhibit 32, at 35].

The court held a hearing on May 29, 2019, and the hearing lasted about ninety minutes [Exhibit 33, at 1, 69]. At the conclusion of the hearing, Judge Johnson asked the parties to submit additional briefs on various issues [Exhibit 33, at 64:13-65:2].

Balch's counsel asked Judge Johnson if she wanted a proposed order, and she said "[t]hat would be very helpful" [Exhibit 33, at 65:5-9]. Judge Johnson stated that she did not intend to dismiss the conversion claim against Drummond [Exhibit 33, at 66:22-23], but Drummond's counsel nevertheless requested permission to file a supplemental

brief on that issue. Judge Johnson responded, "Well, if you could" [Exhibit 33, at 66:25-68:1].

On May 30, 2019, Roberson submitted a proposed order denying the motions to dismiss [[Exhibit 13](#)], and on June 4, 2019, Balch submitted a proposed order granting its motion to dismiss [[Exhibit 14](#)]. Roberson also filed supplemental briefs, as directed by the court [Exhibit 34; Exhibit 35], a motion to strike Balch's proposed order [[Exhibit 6](#)], a response to Drummond's supplemental brief [Exhibit 37], and a response to Drummond's motion to strike his response [Exhibit 38]. The last post-hearing filing was made on June 18, 2019 [Exhibit 38].

No order was entered, and nothing further was filed until October 16, 2019 - when Balch filed a motion for a status Conference because Judge Johnson had not ruled [[Exhibit 15](#)].

No status conference was scheduled, and on October 23, 2019, Balch again submitted a proposed order [[Exhibit 16](#)], together with a transcript of the hearing [Exhibit 33].

No order was entered, and on November 11, 2019, Roberson filed his Third Amended Complaint, adding his wife, Anna Roberson, as a plaintiff [Exhibit 26]. Roberson also

submitted a proposed order denying the defendants' motions to dismiss and lifting the discovery stay [[Exhibit 17](#)].

The Third Amended Complaint contains twelve counts, and the first nine counts are substantially the same as Roberson's Second Amended Complaint. Roberson did, however, make some changes.

First, he specifically alleged that "Balch & Bingham never functioned as [his] attorney ..." "Nor did Drummond ever provide Roberson any legal advice." [Exhibit 26, page 3, ¶ 8]. Roberson had argued these points in his briefs [Exhibit 32, at 35; Exhibit 34], but he now memorialized this position in his complaint.

Second, Roberson specifically alleged, "The plaintiff first suffered legal injury or damage when he was indicted on September 27, 2017; he did not suffer any legal injury or damage before that date" [Exhibit 26, page 10, ¶ 8].² Again, Roberson had argued these points in his brief [Exhibit 32, at 14-15], but he now memorialized this position in his complaint.

Third, Roberson added the word "wrongfully" to his conversion claim ("Drummond ... wrongfully took and removed

²² This allegation is repeated in counts II-IX.

...") [Exhibit 26, at 13, ¶ 51]. This addressed Drummond's argument that the count was deficient because it did not specifically allege that Drummond's taking of his property was "wrongful" [Exhibit 33, at 67:8, 17-18].

Finally, Roberson added three new claims. Count X, "Concealment by Balch," alleged that Balch had improperly paid Oliver Robinson half of a \$5000 check that Roberson had issued to purchase coats for children, and that Balch had concealed the payment from him [Exhibit 26, at 21-22].

Count XI, "Concealment by Balch and Drummond," alleged the Balch and Drummond had also concealed that Drummond was paying Scott Phillips, who was on the Alabama Environmental Management Commission ("AEMC"), to lobby the Alabama Department of Environmental Management - an agency supervised by AEMC, where Phillips worked [Exhibit 26, at 23-24].

Finally, Count XII asserted a claim for promissory fraud against Drummond [Exhibit 26, at 23-25]. Roberson's wife, who was not originally a party, joined in the claim. The Robersons alleged that, after Roberson was convicted, "Drummond promised and represented to both Plaintiffs that 'they had nothing to worry about' and that Drummond would

keep David Roberson on paid administrative leave until his appeal process was completed and that Drummond would pay him his full salary, bonuses, and benefits until the matter had been fully adjudicated." The promises and representations were false, as Drummond fired Roberson on February 7, 2019, without any stated reason.

Drummond filed a Motion to Strike the Third Amended Complaint [[Exhibit 10](#)]. Although Drummond conceded that the case had not been set for trial, and that the Robersons could amend the complaint without leave of court [[Exhibit 10](#), at 4, ¶ 12], Drummond nevertheless argued that the court should strike the amendment "due to an unexplained undue delay in filing the amendment" [[Exhibit 10](#), at 6, ¶ 18].

The Robersons responded to Drummond's motion the same day. They explained that no trial date had been set, no scheduling order had been entered, and no discovery had been conducted [[Exhibit 42](#), at 2, ¶ 2].

In addition, one of the primary elements of damage they claimed - "the fire sale of their home and all of their personal possessions due to the fraud" - did not occur until October 2019, the month before the amendment was filed [[Exhibit 42](#), at 2, ¶ 3].

Balch and Drummond both filed documents titled "motions to dismiss," but they were, in reality, stealth motions for summary judgment. Although neither motion contained a statement of undisputed facts, as required by rule 56(c), Ala. R. Civ. P., both motions invited the court to consider evidentiary material in violation of rule 12. Balch filed 78 pages of evidentiary material [Exhibit 39], and Drummond filed 171 pages of evidentiary material [Exhibit 40].

The Robersons filed motions to strike the material on the grounds that the court could not consider matters outside the pleadings on a motion to dismiss and that consideration of that material - while the Robersons were enjoined from conducting discovery - would deny them due process of law [[Exhibit 9](#); [Exhibit 12](#)].

The Robersons' attorney filed an affidavit, pursuant to rule 56(f) [Exhibit 43], just as he had in response to the original motions to dismiss [Exhibit 31]. The Robersons also filed a substantive response to each motion [Exhibit 41; Exhibit 44]. Aside from proposed orders, the last filing concerning the Third Amended Complaint was made on November 27, 2019 [Exhibit 44].

On December 20, 2019, the Robersons submitted a proposed order [[Exhibit 19](#)], hoping for a decision, but Judge Johnson took no action. As 2019 ended, this case had been under submission for over seven months, but Judge Johnson did not list the case on her Semiannual Report of Matters Under Submission for Six Months or Longer [[Exhibit 1](#)].

On February 4, 2020, the Robersons submitted a different proposed order [[Exhibit 20](#)], but again Judge Johnson did nothing. Three months later, on May 4, 2020, the Robersons filed a Motion to Recuse Judge Johnson, for failing to rule. The Robersons cited a judge's duty to act "diligently," under Judicial Canon 3, and alleged that they were being prejudiced by the delay [[Exhibit 21](#)].

Judge Johnson denied the Robersons' motion the day after it was filed. She reasoned that they had waived "any timed-submission by the Court pursuant to the aforementioned May 29, 2019 Hearing date ... as a result of the additional filings to be read and considered" [[Exhibit 13](#), at 3].

On June 26, 2020, the Robersons filed a "Request for [a] Ruling" on their pending motions, or in the alternative, an order lifting the stay and allowing them to proceed with discovery. The Robersons supported the motion with their

outstanding discovery requests and the affidavit of David Roberson [[Exhibit 22](#)].

In his affidavit, Roberson testified that he is 69 years old, under a sentence of imprisonment, and suffers from high blood pressure, asthma, and uses an inhaler. Anna Roberson, also a plaintiff, "suffers from high blood pressure, depression, anemia and insulin resistance," and twice attempted suicide after his husband's conviction.

As of this filing date, Judge Johnson has not issued any further order in the case. In fact, she has issued only one order since the hearing on May 29, 2019 - the order denying the Robersons' motion to recuse her. There is nothing more.

STATEMENT OF THE FACTS

No evidentiary hearing was held in the trial court. "[T]he facts necessary to an understanding of the issues presented" are included in the Statement of the Case.

STATEMENT OF THE ISSUE

The sole issue is whether Judge Johnson has exceeded her discretion by failing to rule on the pending motions in this case, including the defendants' motions to dismiss, some of which having been under submission for almost fourteen months.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review on a Petition for a Writ of Mandamus is as follows:

Mandamus is a drastic and extraordinary writ, to be issued only where there is 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.

Ex parte Ford Motor Credit Co., 607 So. 2d 169, 170 (Ala. 1992).

STATEMENT WHY THE WRIT SHOULD ISSUE

A. The Robersons Have “Properly Invoked” the Court’s Jurisdiction.

First, mandamus is the proper remedy to compel a trial judge to rule. The Court of Civil Appeals recently explained, “The writ of mandamus will lie from a superior to an inferior or subordinate court ... to compel such inferior court to render judgment ...” *Ex parte Lamar*, 265 So. 3d 306, 307 (Ala. Civ. App. 2018).

Indeed, in recent years, this Court and the Court of Civil Appeals have issued the writ of mandamus to compel judges to rule on a wide variety of motions and issues, including motions to dismiss. *Ex parte International Paper*, 263 So. 3d 1035, 1041 (Ala. 2018) (ordering judge to rule on motion to dismiss); *Ex parte Wharfhouse Restaurant & Oyster Bar, Inc.*, 796 So. 2d 316, 321 (Ala. 2001) (ordering judge to “enter a final judgment ... [or] set the case for a pretrial conference”); *Ex parte Ford Motor Credit*, 607 So. 2d 169, 170 (Ala. 1992) (ordering judge to rule on a motion for writ of seizure); *Ex parte T.A.W.*, No. 2180682 (Ala. Civ. App. July 26, 2019) (ordering judge to rule on petition to domesticate judgment); *Ex parte Lamar*, 265 So. 3d 306 (Ala. Civ. App.

2018) (ordering judge to rule on divorce and custody dispute); *Muellen v. Ritter*, 96 So. 3d 863 (Ala. Civ. App. 2012) (ordering judge to rule on rule 60(b) motion).

Second, this petition is filed in the proper court. The complaint seeks “compensatory and punitive damages of \$75,000,000, plus costs” [Exhibit 26, at 25]. This exceeds the jurisdictional limit for the Court of Civil Appeals and falls within this Court’s general jurisdiction. Ala. Code §§ 12-2-7(2); 12-3-10 (1975).

Finally, this petition is timely. There is no set time for a judge to rule on a motion to dismiss, or related motions. As a result, there is no trigger event for computing the time to file a petition for mandamus. *Ex parte T.A.W.*, No. 2180682, slip op. at 7-9 (Ala. Civ. App. July 26, 2019).

In this case, the Robersons filed a formal “Request for [a] Ruling” on June 26, 2020 [[Exhibit 22](#)]. Judge Johnson has issued no order since that request. The Robersons now seek a writ of mandamus, compelling her to rule. The Robersons have followed the same procedure as the petitioner in *Ex parte T.A.W.*, *supra*; consequently, their petition is timely.

B. Judge Johnson Has "An Imperative Duty" to Rule.

Under Alabama law, a delay of more than six months in deciding a matter is presumptively unreasonable. Indeed, every judge must file a report, twice yearly, listing all "matters which have been under submission or advisement for a period of six months or longer." Ala. Canons Jud. Ethics 3(A)(5). For any "matter or case" listed, "the report shall give ... the reasons for the failure of the judge to decide such matters or cases."³

In the last two years, the Court of Civil Appeals has twice ordered judges to rule on matters that had been under submission for six months or less.

In *Ex parte Lamar*, 265 So. 3d 306 (Ala. Civ. App. 2018), the court issued a writ of mandamus, directing a judge to decide a divorce and custody case, which had been under submission "for nearly six months" [265 So. 3d at 308].

Similarly, in *Ex parte T.A.W.*, No. 2180682 (Ala. Civ. App. July 26, 2019), the court issued a writ of mandamus, directing

³ Notably, Judge Johnson did not list this case on her December 2019 report [[Exhibit 1](#)]. The undersigned has been advised that Judge Johnson has not yet filed her report for the period ending July 1, 2020. *Cf. Powers v. Board of Control of the Judicial Retirement Fund*, 434 So. 2d 745, 748 (Ala. 1983) (disciplining judge for failing to report cases "pending before him for more than six months").

a judge to rule on a motion to domesticate a custody order, which had been pending for "some 6 months" [Slip op. at 4, 10].

Here, there are two, separate groups of motions before Judge Johnson, and both groups have been under submission for well over six months. The first motions - those concerning the Second Amended Complaint - were filed in May and June 2019. This group includes each defendant's motion to dismiss [[Exhibit 2](#); [Exhibit 3](#)], Roberson's motions to strike the defendants' evidentiary material [[Exhibit 4](#); [Exhibit 5](#)], Roberson's motion to strike Balch's proposed order [[Exhibit 6](#)], and Drummond's motion to strike Roberson's response to its supplemental brief [[Exhibit 7](#)].

The second motions - those concerning the Third Amended Complaint - were filed in November 2019. This group includes each defendant's motion to dismiss [[Exhibit 8](#); [Exhibit 11](#)], Drummond's motion to strike the Robersons' amendment [[Exhibit 10](#)], and the Robersons' motions to strike the defendants' evidentiary material [[Exhibit 9](#); [Exhibit 12](#)].

It is important to notice the effect of the Robersons' Third Amended Complaint. "An amended complaint supersedes the previously filed complaint," and it renders any motion to

dismiss the prior complaint moot. *Ex parte Puccio*, 923 So. 2d 1069, 1072-73 & n. 4 (Ala. 2005).

Consequently, unless Judge Johnson grants Drummond's Motion to Strike the Third Amended Complaint, the "first motions" are all moot.⁴ The only motions for decision are the "second motions" - those filed after the Third Amended Complaint (between November 11, 2019, and November 27, 2019). These motions have been under submission for almost eight months, which exceeds a reasonable time. Consequently, Judge Johnson has an "imperative duty" to rule on the motions.

C. The Robersons Have a "Clear Legal Right" to an Order Compelling Judge Johnson to Rule.

Under the Alabama Constitution, "justice shall be administered without ... delay." Ala. Const. § 13. The Rules of Civil Procedure secure the right to a "speedy ... determination," Ala. R. Civ. P. 1(c), and the Canons of Judicial Ethics require a judge to act "promptly." Ala. Canon Jud. Ethics 3(A)(5).

⁴ If Judge Johnson grants Drummond's Motion to Strike the Third Amended Complaint, then the motions filed in May and June 2019 (directed to the Second Amended Complaint) must be decided. These motions have been under submission for thirteen to fourteen months, which clearly exceeds a reasonable time.

Judge Johnson has not acted promptly; she has not acted at all. Aside from denying the Robersons' motion to recuse her, she has not ruled on any motion since May 17, 2019 - when she stayed discovery [Exhibit 29].

This delay is abhorrent to the Alabama Constitution and the administration of justice. The Robersons have a "clear legal right" to a decision in their case, and Judge Johnson has "an imperative duty" to render one.

In *Ex parte Wharfhouse Restaurant & Oyster Bar, Inc.*, 796 So. 2d 316, 321 (Ala. 2001), this court held,

Wharfhouse is entitled to have the trial court either enter a final judgment disposing of Wharfhouse's claims, and thereby allowing it to have an appealable order on the merits of its claims, or to have the trial court set the case for a pretrial conference.

Similarly, in *Ex parte Lamar*, 265 So. 3d 306, 308 (Ala. Civ. App. 2018), the Court of Civil Appeals held,

Nothing in the materials before us indicates that the trial court has a reason for delaying the entry of the divorce judgment in this case for nearly six months. Based on the petition and the materials presented in support of the petition, we conclude that the husband is entitled to the writ he seeks directing the trial court to enter a divorce judgment resolving the issues between the parties.

In denying the Robersons' motion to recuse on May 5, 2020, Judge Johnson suggested that the Robersons had somehow waived the right to a timely decision:

The court file reflects that it is the Plaintiff, who within four days of the aforementioned Hearing, initiated supplemental filings continuing through 11/27/2019, to be considered by this Court in rendering its decision regarding the pending Motions to Dismiss ... and, in the Court's opinion have not hamstrung the Court to render a rushed opinion without a full consideration of all filings.... Therefore, any timed-submission by the Court pursuant to the aforementioned May 29, 2019, Hearing date has been waived as result of the additional filings [[Exhibit 23](#), at 3].

Judge Johnson is mistaken.

First, the plaintiff did not "initiate[]" the post-hearing filings; Judge Johnson ordered the post-hearing filings:

THE COURT: [U]nder the theory of respondeat superior, if the agent is not liable, how do you get to the principal, even though Drummond is not a legal service provider? So I will allow you all to give me something on that....

I'm going to take [sic] under advisement and allow two weeks for the parties to brief me as to why Counts 1, 2 and 3 should not be dismissed, because those counts allege that there was some act or failure to act or omission that was done by Drummond's general counsel, who is a legal service provider.... I need to be briefed on how we can have Drummond liable when the only access or the only vehicle by which Drummond would be liable is as the employer....

MR. BADDLEY: Do you want a proposed order on -

THE COURT: That would be very helpful, since I have no law clerk and I have to do everything myself [[Exhibit 33](#), at 61:17-22; 64:13-65:9].

Roberson filed post-judgment briefs as directed [[Exhibits 34-35](#)], and he filed a proposed order as permitted [[Exhibit 13](#)]. His other post-hearing filings were limited to

responding to filings by other parties [Exhibits 37-38]. One cannot fault a litigant for filing documents the court orders or permits.

Second, Judge Johnson implies that Roberson filed documents from "four days of the aforementioned Hearing ... continuing though 11/27/19." Although Roberson filed documents shortly after the hearing, and then again on November 11, 2019, there was no "continuing" filing. Roberson's last post-hearing filing was on June 18, 2019 - a response to a motion to strike [Exhibit 38]. And after that, he filed only one document in the five months until November 11, 2019, when he filed the Third Amended Complaint [Exhibit 26]. (That one filing was a response to Balch's motion for a status conference.)

Third, Roberson had a perfect right to file his Third Amended Complaint when he did; he was not required to wait for a decision on the pending motions to dismiss. See *McCall v. Household Finance Corp.*, 22 So. 3d 832, 835 (Ala. Civ. App. 2013) ("Mr. McCall could have filed the amended complaint rather than filing a motion to amend even though a motion to dismiss the original complaint was pending.")

Finally, although a party may fairly expect that *additional filings* require *additional time*, a party does not waive his right to a timely decision by filing pleadings ordered or permitted by court, as Roberson did here. Nor can a party discharge a judge's duty to act "diligently" and "promptly," as required by Canon 3.

In summary, almost fourteen months have elapsed since the "first motions" were filed, and Judge Johnson has not ruled on any of those motions. Almost eight months have elapsed since the "second motions" were filed, and again, Judge Johnson has not ruled on any of those motions. The Robersons have a "clear legal right" to a decision from Judge Johnson.

D. The Robersons Have No Remedy to Secure a Ruling Other Than a Writ of Mandamus.

The Robersons have taken every possible action to obtain a ruling without filing this petition. They submitted proposed orders on May 30, 2019 [[Exhibit 13](#)], November 11, 2019 [[Exhibit 17](#)], December 20, 2019 [[Exhibit 19](#)], and February 4, 2020 [[Exhibit 20](#)].⁵

⁵Balch submitted proposed orders on June 4, 2019 [[Exhibit 14](#)], October 23, 2019 [[Exhibit 16](#)], and November 22, 2019 [[Exhibit 18](#)], and requested a status conference on October 16, 2019 [[Exhibit 15](#)] - all in an attempt to obtain a ruling.

They then filed a motion to recuse on May 4, 2020, based on Judge Johnson's failure to rule [[Exhibit 21](#)]. And after another six weeks, they filed a request for a ruling [[Exhibit 22](#)]. There is no remedy available to the Robersons other than a writ of mandamus - directing Judge Johnson to rule.

CONCLUSION

WHEREFORE, David Roberson and Anna Roberson petition this court to take jurisdiction of this matter, and after review, to issue a writ or order to the Honorable Tamara Harris Johnson compelling her *to adjudicate, decide, and rule* on all pending motions in this case withing fourteen (14) days from the date of this Court's order.

Respectfully submitted this the 16th day of July 2020.

/s/ G. Houston Howard II
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CERTIFICATE OF SERVICE

I hereby certify that I have served this petition, consisting of four volumes and forty-five exhibits, on the following:

Honorable Tamara Harris Johnson
Circuit Judge
Room 640, Jefferson County Courthouse
716 Richard Arrington, Jr. Blvd N.
Birmingham, AL 35203
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/s/ G. Houston Howard II
G. Houston Howard II

APPENDIX TO PETITION FOR MANDAMUS

VOLUME 1 (THIS VOLUME)

1) 12.31.19. Judge Johnson's Semiannual Report of Cases Under Submission for Longer than Six Months.

Pending Motions

2) 05.16.19. Balch's Motion to Dismiss Plaintiff's Second Amended Complaint [Doc. # 76].

3) 05.16.19. Drummond's Motion to Dismiss Plaintiff's Second Amended Complaint [Doc. # 79].

4) 05.24.19. Plaintiff's Motion to Strike Exhibits [Doc. # 92].

5) 05.29.19. Plaintiff's Motion to Strike Balch's Supplement to Motion [Doc. # 102].

6) 06.05.19. Plaintiff's Motion to Strike Balch's Proposed Order [Doc. # 110].

7) 06.14.19. Drummond's Motion to Strike "Plaintiff's Response to Drummond's Supplemental Brief" [Doc. # 120].

8) 11.22.19. Balch's Motion to Dismiss Plaintiffs' Third Amended Complaint (without exhibits, which are in Exhibit 39) [Doc. # 141].

9) 11.25.19. Plaintiffs' Motion to Strike Balch's Supplement to Motion to Dismiss [Doc. # 146].

10) 11.26.19. Drummond's Motion to Strike Third Amended Complaint [Doc. # 152].

11) 11.26.19. Drummond's Motion to Dismiss Plaintiffs' Third Amended Complaint (without exhibits, which are in Exhibit 40) [Doc. # 155].

12) 11.26.19. Plaintiff's Motion to Strike Drummond's Supplement to Motion to Dismiss [Doc. # 160].

Proposed Orders & Requests for Rulings

- 13) [05.30.19. Plaintiff's Proposed Order](#) [Doc. # 105].
- 14) [06.04.19. Balch's Proposed Order](#) [Doc. # 107].
- 15) [10.16.19. Balch's Motion for Status Conference](#) [Doc. #126].
- 16) [10.23.19. Balch's Proposed Order](#) [Doc. ## 130-131].
- 17) [11.11.19. Plaintiffs' Proposed Order](#) [Doc. # 139].
- 18) [11.22.19. Balch's Proposed Order](#) [Doc. # 144].
- 19) [12.20.19. Plaintiffs' Proposed Order](#) [Doc. # 169].
- 20) [02.04.20. Plaintiffs' Proposed Order](#) [Doc. # 171].
- 21) [05.04.20. Plaintiffs' Motion to Recuse Trial Judge for Failure to Rule](#) [Doc. # 174].
- 22) [06.26.20. Plaintiffs' Request for Ruling \(without discovery exhibits, which are in Exhibit 27\)](#) [Doc. # 179].

Orders Issued Since Hearing on May 29, 2019

- 23) [05.05.20. Order Denying Plaintiffs' Motion to Recuse](#) [Doc. # 176].

VOLUME 2:

Complaints

- 24) **03.15.19.** Complaint [Doc. # 2].
- 25) **05.06.19.** Second Amended Complaint [Doc. # 67].
- 26) **11.11.19.** Third Amended Complaint [Doc. # 137].

Motion to Stay Discovery

- 27) **05.03.19.** Plaintiff's Discovery [Doc. # 60].
- 28) **05.16.19.** Balch Motion to Stay Discovery [Doc. # 85].
- 29) **05.17.19.** Order Staying Discovery and Setting Motion Hearing [Doc. # 87].

Plaintiff's Response To Motions to Dismiss Second Amended Complaint (Other than Pending Motions to Strike)

- 30) **05.24.19.** Plaintiff's Objection to Conversion of Defendants' Motions to Dismiss [Doc. # 94].
- 31) **05.24.19.** Affidavit Pursuant to Rule 56(f) [Doc. # 94].
- 32) **05.24.19.** Plaintiff's Brief in Opposition to Defendants' Motions to Dismiss [Doc. # 96].

Hearing on May 29, 2019

- 33) **10.23.19.** Transcript of Hearing on May 29, 2019 [Doc. # 132].

VOLUME 3

Post-Hearing Documents (Other than Pending Motions and Proposed Orders)

- 34) **05.30.19.** Plaintiff's Supplement to Plaintiff's Brief. [Doc. # 104].
- 35) **06.05.19.** Plaintiff's Supplemental Brief [Doc. # 111].
- 36) **06.12.19.** Drummond's Supplemental Brief [Doc. # 114].
- 37) **06.13.19.** Plaintiff's Response to Drummond's Supplemental Brief [Doc. #117].
- 38) **06.18.19.** Plaintiff's Response to Drummond's Motion to Strike [Doc. #122].

**Defendants' Motions to Dismiss
Third Amended Complaint with Defendants' Exhibits**

39) **11.22.19.** Balch's Motion to Dismiss Plaintiffs' Third Amended Complaint with Exhibits [Doc. # 141].

VOLUME 4

40) **11.26.19.** Drummond's Motion to Dismiss Plaintiffs' Third Amended Complaint with Exhibits [Doc. # 155].

**Plaintiffs' Response to Motions
to Strike/Dismiss Third Amended Complaint
(Other than Pending Motions to Strike)**

41) **11.25.19.** Plaintiffs' Response to Balch's Motion to Dismiss [Doc. # 149].

42) **11.26.19.** Plaintiffs' Objection to Drummond's Motion to Strike [Doc. # 162].

43) **11.26.19.** Affidavit Pursuant to Rule 56(f) [Doc. # 165].

44) **11.27.19.** Plaintiffs' Response to Drummond's Motion to Dismiss [Doc. # 167].

Docket Sheet

45) Electronic Docket Sheet.

EXHIBIT 1

| | | |
|---|--|-----------------|
| State of Alabama Unified Judicial System | SEMIANNUAL REPORT Cases/Matters Taken Under Submission or Advisement For Six Months or Longer | Date of Report: |
| Form AOC-1 Rev. 1/2005 | | 12/31/2019 |

SECTION A

This original Semiannual Report must be completed by all trial judges and filed at the end of the reporting period specified in Section B below to the following:

Judge Assignment Administrator
Administrative Office of Courts
300 Dexter Avenue
Montgomery, AL 36104-3741

This Report is for the purpose of complying with Canon 3A.(5) of the Alabama Canons of Judicial Ethics, which provides that on January 1st AND on July 1st of each year, each judge must file a report which shall show the cases and/or matters under submission or advisement for a period of six months or longer. Where a matter and/or case has been under submission or advisement for six months or longer, this Report shall contain a list of such matters and/or cases, with the styles of the cases and the case numbers, the dates the matters and/or cases were taken under submission or advisement, and the reasons for the failure of the judge to decide such matters and/or cases. If a judge has not taken a case and/or matter under submission or advisement for six months or longer, the judge must check the box provided under Section B(1) below. Trial judges must file their lists with the Administrative Office of Courts, and appellate judges must file their lists with the clerk or their appellate court.

SECTION B Reporting Period From: July 1, 2019 through December 31, 2019.

(1) I have had no cases and/or matters under submission or advisement for a period of six months or more during the reporting period.

(2) I have had ____ (number) cases and/or matters under submission or advisement for a period of six months or more during the reporting period. (Detailed information is provided in Section C below.)

Court: Circuit Court
 District Court
County: _____

 Retired/Supernumerary assigned to active duty

TAMARA HARRIS JOHNSON
Printed Name of Judge
716 Richard Arrington Jr. Blvd. N. Auburn
Mailing Address
Birmingham, AL 35203
City State Zip Code
Signature of Judge

SECTION C (Continue on separate sheet if necessary)

EXHIBIT 2

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|------------------------------------|---|--|
| DAVID ROBERSON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. CV-2019-901210 |
| |) | |
| DRUMMOND COMPANY, INC.; AND |) | ORAL ARGUMENT RESPECTFULLY |
| BALCH & BINGHAM, LLP, |) | REQUESTED |
| |) | |
| Defendants. |) | |

MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT

Defendant Balch & Bingham, LLP (“Balch”) respectfully requests this Honorable Court to enter an Order dismissing all claims against Balch in Plaintiff’s Second Amended Complaint, for each of the reasons set forth in previously filed motions to dismiss (Docs. 28, 37, 48, and 55, which Balch adopts and incorporates herein), and also because:

- (a) The crux of Plaintiff David Roberson’s (“Roberson”) amended complaint continues to be that he relied on the same November 2014 legal advice provided by Balch to his employer, Drummond Company, Inc. (“Drummond”), and therefore Roberson’s claims are time-barred;
- (b) Roberson’s allegation that he did not timely receive notice of any alleged fraud or suppression is contradicted by his receipt, in January 2017, of a subpoena in the underlying criminal investigation;
- (c) Roberson’s allegation that he received additional advice in June 2016 regarding his status as a lobbyist is time-barred because of his discovery in January 2017 via the federal grand jury subpoena; and
- (d) Roberson is collaterally estopped from arguing that he relied upon advice of counsel, as that issue has already been fully litigated and decided against him beyond a reasonable doubt in the underlying criminal matter.

In further support of this Motion, Balch respectfully states as follows:

1. On March 15, 2019, Roberson initially filed this lawsuit against Balch, and former Balch client Drummond. (Doc. 2.) Drummond's liability was based solely on *respondeat superior* liability for actions taken by Balch.

2. After receiving Balch's First Motion to Dismiss, Roberson then amended his complaint on April 19, 2019. (Doc. 41.) The First Amended Complaint, which did not change Roberson's fundamental allegations against Balch, added a conspiracy claim. (Doc. 41.)

The ALSLA Bars Roberson's Claim

3. After receiving Balch's Second Motion to Dismiss, on May 6, 2019, Roberson amended yet again, filing his Second Amended Complaint. (Doc. 67.) Despite the addition of more words and separately-enumerated causes of action, the amended complaint still relies upon the same November 2014 legal advice provided to Roberson's employer Drummond by then-Balch partner Joel Gilbert. (Doc. 67.) In the Second Amended Complaint, Roberson alleges that Gilbert reaffirmed, on subsequent dates, the same November 2014 advice that the Oliver Robinson "scheme" was legal. (Doc. 67 pp. ¶¶ 56, 57, 63, 70, 71, 77, 86.) However, the crux of Roberson's claim remains that in reliance on Gilbert's legal advice, Roberson was criminally convicted.

4. The Alabama Legal Services Liability Act ("ALSLA"), ALA. CODE § 6-5-570, *et seq.*, is the sole and exclusive cause of action against legal service providers where the cause of action is based on the performance of legal services. ALA. CODE § 6-5-573. Claims under the ALSLA must be filed within two years of the alleged wrongdoing. Although there is a six-month discovery rule for the statute of limitations under the ALSLA, in no event may a claim (whether discovered or not) be asserted more than four years after the alleged wrongdoing

(ALSLA statute of repose). The November 2014 legal advice occurred more than four years before Roberson filed this lawsuit.

5. Roberson claims that he did not know about Gilbert’s alleged misrepresentations and suppressions until later (during the criminal trial itself), but in fact this Court can take judicial notice that Roberson was on reasonable notice of the alleged fraud/suppression as early as January 2017, when he received and responded to a subpoena from federal officials in connection with a criminal investigation of the Oliver Robinson matter. (*See* Doc. 28 p. 6 Exh. A.)

6. Roberson suggests in a footnote to the Second Amended Complaint that the ALSLA “applies only to claims by ‘clients’ against their attorneys.” (Doc. 67 p. 6 n.1.) The text of the ALSLA and this Court’s interpretations of that text, however, provide a two-step analysis:

- (a) The ALSLA applies if the claim is based on the deficient performance of legal services and is against an attorney; and
- (b) Once the ALSLA applies, a plaintiff must show the elements of an ALSLA claim: duty to the plaintiff, breach, proximately caused injury, and damages.

Section 6-5-572(1) defines a “Legal Services Liability Action” as “[a]ny action against a legal service provider (i.e., a lawyer or law firm) in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider’s violation of the standard of care applicable to a legal service provider.” Section 6-5-572(3) defines the “standard of care applicable to a legal service provider” as “such reasonable care, skill, and diligence as other similarly situated legal service provider in the same general line of practice in the same general locality ordinarily have and exercise in a like case.” “The language of the ALSLA makes it clear that that Act refers to actions against ‘legal service providers’ alleging breaches of their duties **in providing legal services.**” *Cunningham v. Langston, Frazer, Sweet & Freese, P.A.*, 727 So. 2d

800, 803 (Ala. 1999) (emphasis by the Court). See *Fogarty v. Parker, Poe, Adams and Bernstein, L.L.P.*, 961 So. 2d 784, 788-89 (Ala. 2006) (“The ALSLA applies only to allegations of legal malpractice, i.e., **claims against legal-service providers that arise from the performance of legal services**, and only to allegations against attorneys licensed to practice law in the State of Alabama.”) (Emphasis added.)

7. These definitions have been applied in practice. For example, in *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), the ALSLA applied to action brought by beneficiary of decedent’s estate even though he was not a client of the decedent’s attorney. The beneficiary sued the decedent’s attorney for not following decedent’s instructions to destroy her will (i.e., performing legal services without meeting the standard of care). Not performing the requested legal service -- destroying the will -- resulted in beneficiary receiving less under will than he would have under intestate laws. While ALSA applied, the beneficiary had to prove the duty element of the claim:

In order to recover damages for **legal malpractice**, a plaintiff must prove the same **elements** that must be proven in a negligence action:

“To recover, the [plaintiff] must prove a **duty**, a **breach** of the duty, that the breach was the **proximate cause** of the injury, and **damages**.” *Herston v. Whitesell*, 348 So.2d 1054, 1057 (Ala.1977). (Citations omitted.) “A claim for malpractice requires a showing that **in the absence of the alleged negligence the outcome of the case would have been different**.” *Hall v. Thomas*, 456 So.2d 67, 68 (Ala.1984). (Citations omitted.)

Id. at 634-35 (citing *Moseley v. Lewis & Brackin*, 533 So.2d 513 (Ala.1988)) (some quotation marks omitted) (emphases added).

8. The Supreme Court concluded that “an intended beneficiary has no standing to bring a legal-malpractice action against an attorney because there is no privity between the

beneficiary and the attorney, and in the absences of private, the attorney owes no duty to the beneficiary [i.e., Robinson].” *Id.* at 634.

9. Indeed, Alabama courts have applied the ALSLA in cases where a non-client sought recovery for common law tort claims. *See San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1178-79 (N.D. Ala. 2012) (granting summary judgment on claims by a non-client against real estate closing attorneys because the ALSLA was the sole and exclusive remedy, where the claims arise from the alleged negligent provision of legal services). As the Court observed in *Baswell-Guthrie*:

It is not disputed that [the defendant attorneys acted] as closing attorneys for the transactions at issue, or that they held and eventually disbursed plaintiffs’ escrow funds. Thus, there is no question that those defendants were providing “legal services” when they committed the acts alleged by plaintiffs . . . **Plaintiffs’ claims against those attorneys – regardless of whether the claims are framed under the Alabama Legal Services Liability Act, or as a common-law negligence claim, or as “escrow agent liability” – are claims that arose out of the provision of legal services by Alabama legal-services-providers. And in this State, it is the strong public policy that all such actions should be brought under, and governed by, the [ALSLA].**

Baswell-Guthrie, 897 F. Supp. 2d at 1179 (emphasis added). *See Shows v. NCNB National Bank of North Carolina*, 585 So. 2d 880 (Ala. 1991) (applying the ALSLA to a case by defaulted debtors who alleged that attorney negligently drafted a deed between a bank and purchasers of their property at a foreclosure sale, and holding as a matter of law that no ALSLA claim was alleged because the attorney who drafted the foreclosure deed for bank and purchasers did not represent the defaulted debtor); *Petersen v. Anderson*, 719 So. 2d 216 (Ala. Civ. App. 1997) (residual beneficiary of will sued decedent’s attorney for breach of fiduciary duty in performing legal services related to her estate, court applied ALSLA and agreed with attorney’s argument that “he owed no duty to the plaintiffs because he did not represent them at any time”). *Cf.*

Mississippi Valley Title Ins. Co. v. Thompson, 754 F.3d 1330, 1332–33 (11th Cir. 2014) (“As the Alabama Supreme Court has clarified, an action against a legal service provider is not a ‘legal service liability action’ unless it involves a claim ‘originating from [the] receipt of legal services.’”).

10. The ALSLA does not require that the Plaintiff be a “client.” *See Robinson*, 842 So. 2d at 634-35; *Shows*, 585 So. 2d 880; *Petersen*, 719 So. 2d 216. Roberson alleges that he received and relied upon the very legal advice provided by Balch to his employer, Drummond, and Roberson alleges that he always believed that the plan (to pay the Oliver Robinson Foundation and have Robinson assist in community relations efforts in the North Birmingham matter) was legal. (Doc. 67 ¶ 8.) Roberson’s claim is fundamentally grounded in a lawyer providing legal services.

11. On the one hand, Roberson alleges that he relied upon, and was damaged by, Gilbert’s legal advice. (Doc. 67 ¶ 13, 54, 61, 68, 75, 84.) On the other hand, Roberson alleges that the ALSLA does not apply to his claims because he was not Balch’s client. (Doc. 67 p. 6 n.1.) Roberson cannot have it both ways—either (a) he relied on the allegedly bad legal advice, the ALSLA applies, and his claims are time-barred; or (b) non-client Roberson did not, and could not, rely on the advice, and his claims fail to state a claim against Balch (both because Balch owes no duty to non-clients, and because reliance is a necessary element of Roberson’s fraud and suppression claims).

12. Roberson’s allegations against Balch focus on acts or omissions by Gilbert at two points in time. First, in November 2014, Gilbert is alleged to have given deficient legal advice leading to Roberson’s subpoena, indictment, and conviction:

“COUNT V: MISREPRESENTATIONS BY BALCH (November 2014)

“51. In **November 2014**, before implementation of the Plan, the Plaintiff asked attorney Gilbert whether the Plan to employ Oliver Robinson and his Foundation to defeat the EPA was legal, and Gilbert represented to the Plaintiff that there was no legal problem with the Plan and that the Plan was legal and ethical.

“COUNT VI: CONCEALMENT BY BALCH (November 2014)

“59. Gilbert and Balch withheld, concealed, and failed to disclose to the Plaintiff that its ethics attorneys had not reviewed the Plan or determined that it was legal in **November 2014.**”

(Doc. 67.) (emphases added).

13. Roberson’s claims are barred by the ALSLA’s 2-year statute of limitations. *See* Ala. Code § 6-5-574(a) (“All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards”). Even if the 6-month extender applied to Roberson’s discovery of the alleged November 2014 act or omission by Gilbert such that he did not reasonably discover that act or omission until the date of his subpoena (January 2017), the date of his indictment (September 27, 2017) , or the date of his conviction (July 20, 2018), 6 months from all of these dates expired before Roberson filed his complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from

the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . .”).

14. In any event, the ALSLA’s 6-month discovery extension period does not apply to the 4-year statute of repose. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure . . .”) (Emphasis added.) These claims are barred by the ALSLA’s 4-year statute of repose because the act or omission complained occurred in “November 2014” and Roberson did not file his complaint until March 15, 2019—more than four years after the alleged act or omission. *See* Ala. Code § 6-5-574(a) (“[I]n no event may the action be commenced more than four years after such act or omission or failure. . .”).

15. Second, in June 2016, Roberson alleges that Gilbert assured him that his lobbyists status did not change the advice that he had given in November 2014 that their plan was legal and ethical:

“COUNT VII: MISREPRESENTATIONS BY BALCH (June 2016)

“65. **In June 2016**, after the conviction of State Representative Hubbard for ethics violations, the Plaintiff again asked Gilbert whether there was any ‘problem’ with the Plan or his association with it.

“66. Gilbert represented to the Plaintiff that he had checked with Greg Butrus and Chad Pilcher and there was no problem with what they were doing.”

“COUNT VIII: CONCEALMENT BY BALCH (June 2016)

“73. Gilbert and Balch withheld, concealed, and failed to disclose to the Plaintiff that Butrus and Pilcher had not reviewed the Plan or determined that it was legal at or near the time of Gilbert’s misrepresentations.”

(Doc. 67.) (emphases added).

16. A reconfirmation in June 2016 of the same advice given in November 2014, does not create a new act or omission. Roberson’s claims are barred for the reasons stated above. Alabama law is settled that the provision of legal services does not provide a claimant a continuing tort opportunity when the claim is grounded on initial legal advice given at the outset. *See Mississippi Valley Title Insurance Co. v. Hooper*, 707 So. 2d 209, 213 (Ala. 1997) (“the cause of action . . . accrued when the [title] policies were issued, and not when Mississippi Valley later settled the lawsuits filed against it based on the policies.”)

17. Even if there had been different advice on a different legal issue – a separate act or omission – in June 2016, Roberson’s claims would still be time-barred. The ALSLA’s two-year statute of limitations for a June 2016 act or omission would expire in June 2018, but Roberson did not file his complaint until March 15, 2019. *See* Ala. Code § 6-5-574(a) (“All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards . . .”). Even if the 6-month extender applied to Roberson’s discovery of the alleged November 2014 act or omission by Gilbert such that he did not reasonably discover that act or omission until the date of his subpoena (January 2017), the date of his indictment (September 27, 2017), or the date of his conviction (July 20, 2018), 6 months from all of these dates expired before Roberson filed his complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action

is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier”).

**Roberson Is Collaterally Estopped From Arguing That
He Relied Upon Advice of Counsel**

18. Because this exact issue was fully litigated and decided against him in the criminal trial, Roberson is collaterally estopped from arguing in this case that he relied on bad legal advice. In his federal criminal case, Roberson repeatedly argued that he relied on the advice of counsel (*i.e.*, then-Balch partner Joel Gilbert), and Gilbert even testified that he still believed the advice he gave Drummond in November 2014 was good advice. (*See U.S. v. Gilbert, et al.*, July 2, 2018, Trial Tr. 1395, 1399, 1401-1404, 1446-49 (Tracy Test.); July 16, 2018, Trial Tr. 3868-69, 3930-36 (Gilbert Test.); 4523-27 (Asbill Closing Arg. for Roberson)). Roberson went so far as to insist that the jury be instructed on his “advice of counsel” defense, and the District Court so instructed the jury. (*U.S. v. Gilbert, et al.*, July 18, Trial Tr. 4384 (“Evidence that a defendant in good faith followed the advice of counsel would be inconsistent with the unlawful intent required for each charge in this case.”)). The jury then rejected Roberson’s “advice of counsel” defense, and found Roberson guilty of bribery, of conspiring with Gilbert to bribe Oliver Robinson, three counts of honest services wire fraud, and conspiracy to money launder. (*U.S. v. Gilbert, et al.* Doc. 1; Roberson Verdict Form.)

19. In Roberson’s federal criminal case, the Court further instructed, “finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.” (*U.S. v. Gilbert, et al* Doc. 249 p. 27.) The Court cautioned the jury that “simply being present at the scene of an event

or merely associating with certain people and discussing common goals and interest doesn't establish proof of a conspiracy." (*U.S. v. Gilbert, et al* Doc. 249 p. 31.)

20. Roberson's arguments to the jury, and the instructions ultimately adopted by the District Court and presented to the jury, demonstrate that Roberson already has fully litigated the issue of advice of counsel, and his theory of the defense was rejected by the jury beyond a reasonable doubt. The reasonable doubt standard is much more certain and requires substantially greater evidence than the preponderance of the evidence standard applied in civil cases. *See United States v. Stitzer*, 785 F.2d 1506, 1519 (11th Cir. 1986).

21. The District Court's judgment of criminal convictions, finding Roberson guilty on all counts, means that the jury absolutely rejected his advice-of-counsel defense. Roberson had the opportunity to, and did, fully litigate that he relied on the advice of counsel in the criminal case (although notably Roberson invoked his 5th Amendment rights and refused to testify). As a result, Roberson is collaterally estopped from re-litigating in this Honorable Court his supposed reliance on advice of counsel in pursuing this civil damages malpractice case. *See Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 726 (Ala. 1990); *Ex parte Flexible Prod. Co.*, 915 So. 2d 34, 48 (Ala. 2005); *Fid.-Phenix Fire Ins. Co. of New York v. Murphy*, 146 So. 387, 392 (Ala. 1933); *Wolfson v. Baker*, 623 F.2d 1074, 1080-81 (5th Cir. 1980) (holding prior criminal conviction established complete defense in civil case under collateral estoppel).

Balch Is Entitled to Dismissal Because It Owed No Duty To Roberson, and Roberson's Claims Are Barred By the Doctrine of *In Pari Delicto* and the Hinkle Rule

22. Even assuming Roberson's Complaint was timely filed, his claims are due to be dismissed because Balch owed no duty to a non-client. (*See* Doc. 28 pp. 16-17.)

23. Roberson's claims also are barred by the doctrine of *in pari delicto* and the *Hinkle* Rule, because of Roberson's criminal conviction for his actions in the underlying criminal matter. (*See* Doc. 28 pp. 17-18.)

Roberson's Conspiracy Claim Fails

24. As set forth in Balch's previously filed motion to dismiss the First Amended Complaint, Roberson's conspiracy claim fails because the underlying causes of action are not viable.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Defendant Balch respectfully requests that this Honorable Court enter an Order dismissing all claims against Balch with prejudice as a matter of law.

ORAL ARGUMENT RESPECTFULLY REQUESTED

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CERTIFICATE OF SERVICE

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EXHIBIT 3

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|-----------------------------------|---|--|
| DAVID ROBERSON, |) | |
| |) | |
| Plaintiff, |) | CIVIL ACTION NO. 01-CV-2019-901210 |
| |) | |
| vs. |) | |
| |) | |
| DRUMMOND COMPANY, INC. and |) | <u>ORAL ARGUMENT REQUESTED</u> ¹ |
| BALCH & BINGHAM, LLP, |) | |
| |) | |
| Defendants. |) | |

**DRUMMOND COMPANY, INC.’S MOTION TO DISMISS
 PLAINTIFF’S SECOND AMENDED COMPLAINT**

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¹ Drummond requests that this Court maintain the current hearing date of May 29, 2019 at 10:00 a.m. *See* Doc. 51 (Apr. 30, 2019 Order). As explained herein, the legal issues implicated by the 2nd Amended Complaint are largely the same as the issues implicated by both the Original Complaint and 1st Amended Complaint. Accordingly, Plaintiff has been fully apprised of Defendants’ principal arguments since April 18, 2019, when both Defendants moved to dismiss the Original Complaint. *See* Docs. 28 & 37.

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COMES NOW Drummond Company, Inc. (“Drummond”) and, pursuant to Rule 12(b) of the Alabama Rules of Civil Procedure, requests that Plaintiff’s Second Amended Complaint be dismissed in its entirety.

SUMMARY OF THE ARGUMENT

The 2nd Amended Complaint represents Plaintiff’s third attempt to state a claim for relief against Drummond. Like the first two attempts, this third attempt fails to clear this hurdle.

Counts I, II, and III allege “Indemnity,” “Misrepresentation,” and “Concealment” against Drummond. All these claims fail as a matter of law for the reasons Drummond previously set forth in its prior motions to dismiss, as they all require this Court to find that Plaintiff was wrongfully convicted in his federal criminal trial. Accordingly, they are (1) barred by the *Hinkle* Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama. *See* Doc. 48 (Drummond’s Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond’s Mtn. to Dismiss) 4-16.

Count IV is a new claim for “conversion” relating to documents and records allegedly located in Plaintiff’s office at Drummond’s corporate headquarters. Doc. 67 (2nd Am. Compl.) at ¶ 50. There is no allegation of any wrongful act by Drummond to acquire these documents and records, and also no allegation that Plaintiff demanded their return or that Drummond refused. Accordingly, Count IV fails to state a claim for conversion.

Plaintiff’s allegation that Drummond is secondarily liable for Balch’s acts under “respondeat superior, ratification and/or adoption” is inapposite because all of the underlying claims against Balch also fail as a matter of law. In the absence of any underlying tort, all of these theories of secondary liability fail as a matter of law.

For all of these reasons, as well as the reasons set forth by Drummond in its prior briefing, all of the claims against Drummond in the 2nd Amended Complaint are due to be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent allegations remain the same.² Plaintiff is a former Drummond employee. Doc. 67 (2nd Am. Compl.) at ¶ 3. While Plaintiff was a Drummond employee, Drummond hired Balch to represent Drummond in relation to an EPA investigation of a site located in Jefferson County, Alabama. *Id.* at ¶¶ 4 & 5. During the course of its legal representation of Drummond, “Balch, as Drummond’s agent, devised a plan (‘the Plan’) to employ a seemingly legitimate local foundation, the Oliver Robinson Foundation (‘Foundation’), to conduct a seemingly-innocent campaign directed toward the community, the State of Alabama, and the EPA.” *Id.* at ¶ 6.

“In November 2014, before implementation of the Plan, the Plaintiff asked Gilbert whether the Plan was legal and ethical, and Gilbert assured the Plaintiff that there was no legal problem with the Plan and that the Plan was legal and ethical. At the same time, Gilbert further represented to the Plaintiff that Balch’s in-house ethics attorneys had reviewed the Plan and determined that it was legal.” *Id.* at ¶¶ 8 & 9. Plaintiff alleges that “he believed and reasonably relied on Gilbert’s

² Because this is a motion to dismiss, Drummond’s arguments are premised on the assumption that the allegations of the 2nd Amended Complaint are true. *Ex parte Walker*, 97 So. 3d 747, 749 (Ala. 2012). The statements of fact in this section of Drummond’s motion are drawn from the 2nd Amended Complaint, Doc. 67, or from sources that are subject to judicial notice, or from material referenced in the 2nd Amended Complaint. *See J.J. v. J.B.*, 30 So. 3d 453, 457 n.2 (Ala. Civ. App. 2009) (trial court properly took notice of related proceedings); *Garrett v. Gilley*, 488 So. 2d 1360, 1362 (Ala. 1986) (quoting *Butler v. Olshan*, 191 So. 2d 7, 13 (Ala. 1966)) (“With respect to judicial notice by a court of its own records, the rule in Alabama is not that in all cases the court may notice the record of other proceedings therein, even between the same parties and involving the same subject matter; *but, where a party refers to such other proceeding or judgment in his pleading for any purpose, the court, on demurrer by the other party, may and should take judicial notice of the entire proceeding insofar as it is relevant to the question of law presented.*”) (emphasis supplied by *Garrett*); *Snider v. Morgan*, 113 So. 3d 643, 648 (Ala. 2012) (“[T]he motions to dismiss were not converted to motions for a summary judgment, because the exhibits set out above were specifically referenced in Jeff’s complaint and, thus, were not matters outside the pleading); *Lewis v. First Tuskegee Bank*, 964 So. 2d 36, 39 n.1 (Ala. Civ. App. 2007) (quoting *Banks, Finley, White & Co. v. Wright*, 864 So. 2d 324, 327 (Ala. Civ. App. 2001)) (“[D]ocuments attached to a motion to dismiss are considered a part of the pleadings if those documents were specifically referred to in the plaintiff’s complaint and are central to the claim being brought.”).

misrepresentations to his detriment by refraining from objecting to the Plan and approving Balch's invoices seeking reimbursement for what the prosecution charged and the jury determined were 'bribes' to Oliver Robinson." *Id.* at ¶ 54. *See also id.* at ¶ 68.

The 2nd Amended Complaint also alleges that Drummond "asked and directed the Plaintiff to process Balch's invoices for payments to the Foundation." *Id.* at ¶ 12. Plaintiff agreed to do so because he "had been assured by Gilbert that the Plan was legal and ethical and had been reviewed by Balch's ethics attorneys, and he did not know that the payments were illegal. Consequently, he performed his duties for Drummond exactly as instructed by General Counsel, and he approved reimbursements to Balch for payments to the Foundation." *Id.* at ¶ 13.

On September 27, 2017, Plaintiff and Joel Gilbert—the Balch attorney who allegedly made the representation "that there was no legal problem with the Plan and that the Plan was legal and ethical"—were both indicted on federal criminal charges under 18 U.S.C. §§ 371, 666(a), 1343, 1346 and 1956(h) relating to the payments made to the Oliver Robinson Foundation. *Id.* at ¶ 15. "On July 20, 2018, the jury convicted the Plaintiff and Gilbert on all counts." *Id.* at ¶ 21. Both the Balch attorney and Plaintiff appealed their convictions to the Eleventh Circuit, and those appeals are pending. *Id.* at ¶ 24.

On March 15, 2019, Plaintiff filed this civil lawsuit against Drummond and Balch. One day after the Defendants filed motions to dismiss the original Complaint, *see* Docs. 27 & 37, Plaintiff filed the 1st Amended Complaint. Doc. 41. Within a week of Defendants filing motions to dismiss the 1st Amended Complaint, *see* Docs. 47 & 54, Plaintiff filed the operative 2nd Amended Complaint, which contains nine Counts. Counts I-IV are against Drummond for "Indemnification," "Misrepresentation," "Concealment," and "Conversion." Counts V-IX are against Balch and for "Misrepresentation" and "Concealment." The *ad damnum* clause of the 2nd

Amended Complaint “demands judgment against Drummond Company, Inc. and Balch & Bingham, LLP for compensatory and punitive damages of \$50,000,000, plus costs.” *Id.* at 18.

LEGAL ARGUMENT

I. COUNTS I, II, AND III FAIL TO STATE A CLAIM FOR RELIEF.

Counts I, II, and III are premised on the theory that Drummond either innocently or wrongfully directed Plaintiff to approve the invoices for payments to the Oliver Robinson Foundation, which he alleges were “bribes.” *See* Doc. 67 (2nd Am. Compl.) at ¶¶ 30-49. Plaintiff alleges that he agreed to approve these invoices because he “had been assured by Gilbert that the Plan was legal and ethical and had been reviewed by Balch’s ethics attorneys, and he did not know that the payments were illegal. Consequently, he performed his duties for Drummond exactly as instructed by General Counsel, and he approved reimbursements to Balch for payments to the Foundation.” *Id.* at ¶ 13; *see also id.* at ¶ 31 (“Plaintiff did not know that the payments were bribes, and he acted in good faith, not knowing that the payments were illegal.”). As a result, Plaintiff “was indicted and suffered the other damages.” *Id.* at ¶ 32.

Counts I, II, and III are therefore premised on the same theory that has permeated every version of his Complaint filed to date, *i.e.*, that Plaintiff did not knowingly or intentionally engage in the crimes for which he was convicted by a jury in the Northern District of Alabama in *United States v. David Lynn Roberson*, 2:17-cr-00419-AKK (N.D. Ala.) because he relied in good faith on Balch’s representations regarding the legality of the payments to the Oliver Robinson Foundation. As stated by Judge Kallon:

There’s no doubt that the crimes in this case are serious crimes. And although, obviously, the defendant has every right to disagree with my position on it and will have every right to make that argument to the court of Appeals, the advice of counsel defense was presented to the jury. And in convicting Mr. Roberson, the jury, based on the facts before them, rejected that defense.

Doc. 49 (Oct. 23, 2018 Sentencing Hearing Transcript Excerpt) at 159:15-21.

Whether Plaintiff claims he was wrongfully convicted because he was relying on Balch's advice, or following instructions of Drummond's General Counsel, or any other reason, the result is the same. A party convicted of a crime that believes that conviction was wrongful has an avenue for challenging that conviction through appeal (an avenue Plaintiff is currently pursuing). Such a party **cannot**, however, sue others in civil court based on a theory that would require the civil court to find the criminal court's conviction was erroneous.

Counts I, II, and III therefore fail as a matter of law for the reasons Drummond previously set forth. More specifically, these claims are (1) barred by the *Hinkle* Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama. Doc. 48 (Drummond's Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond's Mtn. to Dismiss) 4-16. *See also* Doc. 37 at § II and Doc. 48 at § II (explaining why Plaintiff's indemnity claim fails as a matter of law). Rather than repeat those arguments for a third time, Drummond adopts and incorporates those arguments herein. Again, the proper avenue for Plaintiff to challenge his conviction is an appeal to the Eleventh Circuit Court of Appeals, not this ancillary proceeding in Jefferson County Circuit Court.³

³ Plaintiff's reference to Drummond's public statement following his criminal conviction is inapposite. *See* Doc. 67 (2nd Am. Compl.) at ¶ 22. As an initial matter, Drummond's subjective belief regarding Plaintiff's integrity has no relevance to Drummond's legal arguments for dismissal. Those legal arguments do not rely on Drummond's past or present beliefs regarding Plaintiff's character, but instead rely on a final judgment entered by the Northern District of Alabama. Drummond's statement did not change the fact that Plaintiff was convicted for knowingly violating 18 U.S.C. §§ 371, 666(a), 1343, 1346 and 1956(h). Moreover, and as a matter of law, an extrajudicial statement does not "estop[]" Drummond from taking any position in this litigation, Doc. 67 (2nd Am. Compl.) at ¶ 22, and it certainly does not preclude Drummond from making its legal arguments related to the *Hinkle* Rule, the doctrine of collateral estoppel, or the prohibition on using ancillary lawsuits to collaterally attack prior judgments. *CVS/Caremark Corp. v. Washington*, 121 So. 3d 391, 403 (Ala. Civ. App. 2013) (a party's extrajudicial statement cannot be used to establish a "judicial estoppel" argument). *See also Stella v. Graham-Paige Motors Corp.*, 259 F.2d 476, 481-82 (2d Cir. 1958) (extrajudicial statements made by a corporation to governmental agencies could not form the basis of an estoppel argument because it "would extend estoppel beyond all reasonable bounds").

II. PLAINTIFF’S “CONVERSION” COUNT FAILS TO STATE A CLAIM.

Count IV of the 2nd Amended Complaint is styled “Conversion” and alleges that unidentified Drummond “agents, servants, or employees” purportedly “took and removed from Plaintiff’s office” certain documents and records. Doc. 67 (2nd Am. Compl.) at ¶ 50. There is no allegation that Drummond sold, destroyed, or misused any of these documents and records. *Id.* There is no allegation that Plaintiff made any demand that Drummond return these items. *Id.* Nor is there any allegation that Drummond refused to do so. *Id.* As the allegations of the 2nd Amended Complaint make clear, all of the documents and records at issue are allegedly in Drummond’s possession solely by virtue of the fact that Plaintiff was a Drummond employee with an office on Drummond’s property. *Id.* In other words, Drummond is not alleged to have obtained possession of these documents and records through some wrongful or illegal act.

It is well settled that “[t]he bare possession of property without some wrongful act in the acquisition of possession, or its detention, and without illegal assumption of ownership or illegal user or misuser, is not conversion.” *Clardy v. Capital City Asphalt Co.*, 477 So. 2d 350, 352 (Ala. 1985) (citing *Bolling v. Kirby*, 90 Ala. 215, 7 So. 914, 24 Am.St.Rep. 789 (1890)) (reversing a trial court’s judgment for the plaintiff on a conversion claim where the plaintiff simply “left sand on land formerly leased by it from Clardy and that the sand was removed by someone. There is not a scintilla of evidence that Clardy converted this sand[.]”); *Smith v. Cahill*, 182 So. 3d 557, 564 (Ala. Civ. App. 2014) (“Because the former husband had rightfully come into possession of the equity account during the marriage, his retaining possession of it after the divorce did not constitute a conversion.” Only when the husband wrongfully sold his wife’s half of their equity account following their divorce did a claim arise for conversion.). *See also Phillips v. Publishing Co., Inc.*, Civil Action No. CV213-069, 2015 WL 5821501, at *25 (S.D. Ga. Sept. 14, 2015)

(applying Alabama law and dismissing plaintiff's conversion claim where the defendant did not "wrongfully or illegally possess[] that information," but rather "came across this information lawfully, in documents provided by [plaintiff's cousin] and in the public court record"); 2 Ala. Pers. Inj. & Torts § 10:19 (2018 ed.) ("[T]he bare possession of personal property without the existence of some wrongful act in acquiring it, or its intention, and without an illegal assumption of ownership, use or misuse, does not amount to a tortious [sic] conversion."). Because the 2nd Amended Complaint does not allege that Drummond perpetrated any "wrongful act in the acquisition of possession, or its detention" of the items at issue, *Clardy*, 477 So. 2d at 352, Plaintiff's conversion claim fails as a matter of law.

Moreover, where a defendant did not acquire possession of a plaintiff's personal property through wrongful or illegal means, that plaintiff must demand the return of his or her personal property—and the defendant must unreasonably refuse to do so—before a conversion claim arises:

"A claim for common law conversion can take one of four forms: (1) by a wrongful taking, (2) by an illegal assumption, (3) by an illegal user or misuser, (4) by a wrong detention. In the first three classes, there is no necessity for a demand and refusal. ***In the latter class, a demand and refusal is required as the detention of a chattel furnishes no evidence of a disposition to convert to the holder's own use, or to divest the true owner of his property.***"

Smith, 182 So. 3d at 563–64 (quoting *White v. Drivas*, 954 So. 2d 1119 (Ala. Civ. App. 2006), quoting in turn *Scott Paper Co. v. Novay Cherry Barge Serv., Inc.*, 265 So. 2d 150, 153 (Ala. Civ. App. 1972)) (emphasis added). *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 15, at 99 (5th ed. 1984) ("Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of [conversion]."); 2 Ala. Pers. Inj. & Torts § 10:19 (2018 ed.) ("A demand is necessary where the one in possession rightfully obtained possession of the personal property and has neither asserted title to himself, nor exercised

dominion over it in a manner inconsistent with the rights of the owner.”). Here, there is no allegation that Plaintiff demanded that these documents and records be returned, much less any allegation that Drummond refused to do so. *See* Doc. 67 (2nd Am. Compl.) *generally*. For this additional reason, Plaintiff’s “conversion” claim is due to be dismissed.

III. PLAINTIFF’S ALLEGATION THAT DRUMMOND PURPORTEDLY “RATIFIED” OR “ADOPTED” BALCH’S ACTS IS INAPPOSITE.

Plaintiff previously alleged that Drummond was liable for Balch’s acts solely under a theory of respondeat superior. Doc. 1 (Compl.) at ¶ 1 (“Drummond is liable for the torts committed by its agent in this matter, Balch & Bingham, LLP, under respondeat superior.”); Doc. 41 (1st Am. Compl.) at ¶ 1 (same). In response, Drummond argued that its “alleged liability depends entirely on the acts or omissions of Balch, its alleged agent. Accordingly, to the extent this Court accepts any of Balch’s arguments for dismissal, Drummond is also due to be dismissed as a matter of law.” Doc. 37 (Drummond’s Mtn. to Dismiss) at 17; *see also* Doc. 48 (Drummond’s Mtn. to Dismiss the 1st Am. Compl.) at 18 (same).

The 2nd Amended Complaint now alleges that “Drummond is liable for the torts committed by its agent, Balch & Bingham, LLP, under respondeat superior, ratification, and/or adoption.” Doc. 67 (2nd Am. Compl.) at ¶ 2.⁴ The alleged basis for Plaintiff’s new “ratification” or “adoption” theory of liability⁵ is that Drummond “retained [Plaintiff] as an employee for six months and eighteen days after his conviction. The purpose of this six-month retention was to make Plaintiff think his job was secure and to dissuade him from filing any action against Balch or Drummond

⁴ Counts V through IX of the 2nd Amended Complaint are asserted only against “Balch” and are for “misrepresentation” and “concealment.” *See* Doc. 67 (2nd Am. Compl.) at ¶¶ 51-87. Construed generously in Plaintiff’s favor, Paragraph 2 of the 2nd Amended Complaint appears to allege that Drummond is vicariously liable for all of these acts.

⁵ Ratification and adoption are two terms for the same doctrine of vicarious liability: “Ratification is defined simply as the adoption of the acts of an unauthorized agent.” *Farmers & Merchants Bank v. Jordan*, 532 So. 2d 1249, 1251 (Ala. Civ. App. 1987), *rev’d sub nom. Ex parte Jordan*, 532 So. 2d 1252 (Ala. 1988).

within what Drummond thought was the applicable statute of limitations (the six-months discovery rule in the Alabama Legal Services Liability Act). This conduct by Drummond constituted a ratification and adoption of the conduct of Balch and Gilbert.” *Id.* at ¶ 25.

As a threshold matter, the 2nd Amended Complaint does not allege that Drummond knew that Balch’s alleged misrepresentations and concealment that form the basis of Counts V through IX were false. 1 Ala. Pers. Inj. & Torts § 2:9 (2018 ed.) (“In order to be held to have ratified a wrongful act of his or her agent, the principal must be shown to have had knowledge of the facts relating to the act to be ratified. The principal had to have had knowledge of the tortious character of the agent’s acts in order for there to be ratification.”). Nor does the 2nd Amended Complaint allege how Drummond purportedly benefited from Balch’s alleged misrepresentations and concealment. *Exch. Sec. Bank v. King*, 301 So. 2d 193, 196 (Ala. Civ. App. 1974) (“Ratification can occur only after full knowledge of the facts and acceptance of any benefits by the one to ratify.”). Plaintiff’s ratification/adoption theory of vicarious liability fails for these reasons alone.

Moreover, Alabama law clearly provides that Drummond cannot be held vicariously liable under a theory of “respondeat superior” if the underlying claims against its alleged agent—Balch—fail as a matter of law. *See* Doc. 37 (Drummond’s Mtn. to Dismiss) at 17; Doc. 48 (Drummond’s Mtn. to Dismiss the 1st Am. Compl.) at 18. This settled rule also applies to Plaintiff’s new ratification/adoption theory of vicarious liability. *See Jones Exp., Inc. v. Jackson*, 86 So. 3d 298, 304–05 (Ala. 2010) (quoting *Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 824 (Ala. 1999)) (“an employer could be liable for the intentional torts of its agent if the employer participated in, authorized, or ratified the wrongful acts, but . . . to prove such liability one must demonstrate, among other things, ‘the underlying tortious conduct of an offending employee....’”); *Doe By & Through Doe v. W. Restaurants Corp.*, 674 So. 2d 561, 563 (Ala. Civ. App. 1995) (“To

show that an employer implicitly ratified or tolerated another employee's wrongful conduct, *the complaining employee must prove the underlying tortious conduct* of the offending employee, and also [actual knowledge of that conduct and a failure to remedy it]" (emphasis added).

All the fraudulent misrepresentation and concealment claims against Balch fail as a matter of law because they are all premised, once again, on the theory that Plaintiff was wrongfully convicted because he relied on Balch's representations regarding the legality of paying the Oliver Robinson Foundation: "Plaintiff is not a lawyer or otherwise legally trained regarding such matters, and he believed and reasonably relied upon Gilbert's misrepresentations to his detriment by refraining from objecting to the Plan and approving Balch's invoices seeking reimbursement for what the prosecution charged and the jury determined were 'bribes' to Oliver Robinson." Doc. 67 (2nd Am. Compl.) at ¶ 68. Accordingly, all of these claims are (1) barred by the *Hinkle* Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama. Doc. 48 (Drummond's Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond's Mtn. to Dismiss) 4-16. They also fail as a matter of law for all of the reasons argued by Balch. *See* Docs. 28 and 55 *generally*.⁶ In the absence of any cognizable underlying claim against Balch, Drummond cannot be held liable under *any* theory of vicarious liability. *Stovall v. Hancock Bank of Alabama, Inc.*, No. 2:12-CV-1036-MEF, 2013 WL 3357851, at *6 (M.D. Ala. July 3, 2013) ("[T]he law is well-settled that a defendant cannot be held vicariously liable for a tort when the plaintiff cannot establish underlying liability for that tort.").

⁶ Drummond adopts and incorporates herein all of Balch's dismissal arguments.

For all of these reasons, to the extent the 2nd Amended Complaint can be construed as alleging that Drummond is vicariously liable for Counts V through IX, those Counts are due to be dismissed against Drummond as a matter of law.

CONCLUSION

WHEREFORE, for the reasons set forth above, Drummond respectfully requests this Honorable Court to enter an Order dismissing all claims against Drummond, with prejudice.

ORAL ARGUMENT RESPECTFULLY REQUESTED

DATED: May 16, 2019

Respectfully submitted,

s/ William A. Davis, III

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EXHIBIT 4



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

**DAVID ROBERSON,
Plaintiff,**

v.

**DRUMMOND COMPANY, INC.
AND BALCH & BINGHAM, LLP
Defendants.**

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Case No.: CV-2019-901210.00

PLAINTIFF'S MOTION TO STRIKE EXHIBITS

Statement of the Background

The defendants have attached numerous documents to their motions to dismiss, and they ask the court to take "judicial notice" of them. Collectively, the defendants ask the court to take "judicial notice" of the following documents:

- (a) Brief of David Lynn Roberson in the United States Court of Appeals for the Eleventh Circuit [Doc. # 38].
- (b) Excerpts from the testimony of "Gilbert" [Doc. # 39]
- (c). Excerpts from the closing argument of "Asbill" [Doc. # 39]
- (d). Excerpts from the sentencing hearing for David Lynn Roberson [Doc. # 49].
- (e). Excerpts from the testimony of "Ingle" [Doc. # 29]
- (f) Excerpts from the testimony of "Tracy" [Doc. # 29].
- (g) Excerpts from the testimony of "O. Robinson" [Doc. # 29]
- (h) Excerpts from the testimony of "Pilcher" [Doc. # 29].
- (i). Letter dated August 3, 2016, from the Environmental Protection Agency to the mayor of Tarrant [Doc. # 30].

In addition to these “attached exhibits,” the defendants refer to portions of the record in Roberson’s criminal trial – without attaching documents substantiating their quotations and references [E.g., Doc. # 76, at pages 10-11].

Statement of Legal Authority

In support of the court’s authority to consider the documents, the defendants cite *Banks, Finley, White & Co. v. Wright*, 864 So.2d 324, 327 (Ala. Civ. App. 2001):

This court has adopted a precedent, which a number of federal appellate courts have also embraced, that “if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.” *Wilson v. First Union Nat’l Bank of Georgia*, 716 So. 2d 722, 726 (Ala. Civ App. 1998). Documents attached to a motion to dismiss are considered a part of the pleadings if those documents were specifically referred to in the plaintiff’s complaint and are central to the claim being brought.

According to *Wright*, three conditions must be satisfied for the court to consider documents attached to a motion to dismiss:

1. The documents must be “indisputably authentic”;
2. The documents must be “specifically referred to in the plaintiff’s complaint,” and
3. The documents must be “central to the claim being brought.”

As a corollary of the attachment-rule, documents that are not “central to the plaintiff’s claim,” but are central to a defense, may not be considered. In *Barry v. Drennen*, 982 So. 2d 478, 483(Ala. 2007), the court held,

The tax map, which purportedly defeats Barry’s status as an abutting landowner, is not referred to in the complaint and is not central to the plaintiff’s claim, as was a provision in the insurance policy made the basis of the action in *Newson*. The map does not fall within the recognized exception.

The basis for the attachment-rule is this: “If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.” *Donoghue v. American Nat’l Ins. Co.*, 838 So. 2d 1032 (Ala. 2002) (quoting *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997)).

In summary, the attachment-rule is intended to be a rifle not a shotgun. It is not designed to try a case on a “Motion to Dismiss.” It prevents a plaintiff from playing fast-and-loose with the court by saying that a document says one thing, when it really says the opposite.

There are also other legal principles that limit a court’s authority to take “justice notice” of court proceedings. Although a court make take notice of its own records, “[g]enerally, a court may not take judicial notice of the records of another court.” *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company Inc.*, 190 So. 3d 895, 910-11 (Ala. 2015).

The Plaintiff’s Motion to Strike

The plaintiff moves the court to strike and not consider any of the references in the defendants’ motions to documents, records, and proceedings in United States District Court (whether supported by attachments or not) – other than the allegations of the Plaintiff’s Complaint. In ruling on a Motion to Dismiss, a circuit court may not take judicial notice of proceedings in the United States District Court:

In *Garrison v. Hayden*, 495 So. 2d 616, 617 (Ala. 1996), the Supreme Court reversed the dismissal of a complaint, where the court had taken judicial notice of federal proceedings:

Initially, we note that the defendants argue in their brief that the trial court dismissed the plaintiff's complaint after properly taking judicial notice of a prior criminal prosecution that allegedly involved some of the same facts that form the basis of the plaintiff's complaint. However, there is nothing in the record supporting this argument.

In their motion to dismiss, the defendants alleged that the plaintiff was barred from proceeding under his complaint in this case because he had previously filed two actions in the United States District Court for the Middle District of Alabama, which were still pending and which involved the same subject matter as the present case. See § 6-5-440, Alabama Code 1975; *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala.1981); although the defendants do not mention the two federal cases in their brief, we note that the trial court could not properly have taken judicial notice of those cases. *Crossland v. First National Bank of Montgomery*, 233 Ala. 432, 172 So. 255 (1937). Therefore, dismissal of the complaint cannot be upheld on that ground.

The plaintiff further moves the moves the court to strike each of the defendants' attachments separately and severally, on the same grounds.

The plaintiff further moves the court to strike each of the defendants' attachments, separately and severally, on the following grounds, separately and severally:

- (a) The attachment is not "specifically referred to in the plaintiff's complaint."
- (b) The attachment is not "central to the plaintiff's claim."
- (c) The attachment is offered in support of the defendants' affirmative defenses of collateral estoppel, the statute of limitations, or the *Hinkle*-rule.
- (d) The testimony excerpted in attachments does not portray the entirety of the proceedings in the month-long federal trial.
- (e) The attachment does not purport to correct a misrepresentation in the complaint of any particular document – which is the sole purpose the attachment rule.

WHEREFORE, the plaintiff moves the court to STRIKE AND NOT CONSIDER (1) the documents attached to the defendants' "Motions to Dismiss" (2) and the references in the defendants' briefs to testimony, exhibits, and proceedings in Roberson's criminal trial in federal court – *other than the allegations of the complaint.*

/s/ Burt W. Newsome

Burt W. Newsome (NEW047)

Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 24th day of May 2019.

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/s/ Burt W. Newsome
Burt W. Newsome
Attorney For Plaintiff

EXHIBIT 5

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

**DAVID ROBERSON,
 Plaintiff,**

v.

**DRUMMOND COMPANY, INC.
 AND BALCH & BINGHAM, LLP
 Defendants.**

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Case No.: CV-2019-901210.00

**PLAINTIFF’S MOTION TO STRIKE BALCH & BINGHAM’S SUPPLEMENT
 TO ITS MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED
 COMPLAINT**

Defendant Balch & Bingham filed late yesterday what it purports to be the indictments of Joel Gilbert, Steve McKinney and David Roberson. Plaintiff moves to strike the attachment of Balch & Bingham, LLP as the Circuit Courts of Alabama do not take judicial notice of the records of another court and the Balch attachment is not authenticated. See *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company, Inc. and Morgan Asset Management, Inc.*, 190 So.3d 895 (Ala. 2015)

The plaintiff moves the court to strike and not consider any of the references in the defendants’ motions to dismiss to the indictment. In ruling on a Motion to Dismiss, a circuit court may not take judicial notice of proceedings in the United States District Court:

In *Garrison v. Hayden*, 495 So. 2d 616, 617 (Ala. 1996), the Supreme Court reversed the dismissal of a complaint, where the court had taken judicial notice of federal proceedings:

Initially, we note that the defendants argue in their brief that the trial court dismissed the plaintiff’s complaint after properly taking judicial notice of a prior criminal

prosecution that allegedly involved some of the same facts that form the basis of the plaintiff's complaint. However, there is nothing in the record supporting this argument.

In their motion to dismiss, the defendants alleged that the plaintiff was barred from proceeding under his complaint in this case because he had previously filed two actions in the United States District Court for the Middle District of Alabama, which were still pending and which involved the same subject matter as the present case. See § 6-5-440, Alabama Code 1975; *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala.1981); although the defendants do not mention the two federal cases in their brief, we note that the trial court could not properly have taken judicial notice of those cases. *Crossland v. First National Bank of Montgomery*, 233 Ala. 432, 172 So. 255 (1937). Therefore, dismissal of the complaint cannot be upheld on that ground.

ARCP 56(c) requires all documents in support of a motion for summary judgment to be filed at least 10 days before the hearing and all such attachments must be authenticated. Said filing is untimely and any attachments should have been filed with the Defendant's original Motion To Dismiss/Motion For Summary Judgment.

WHEREFORE, the plaintiff moves the court to STRIKE AND NOT CONSIDER the unauthenticated indictment attached to Balch & Bingham, LLP's supplement to its motion to dismiss/motion for summary judgment.

/s/ Burt W. Newsome
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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 28th day of May 2019.

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/s/ Burt W. Newsome

Burt W. Newsome
Attorney For Plaintiff

EXHIBIT 6

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

**DAVID ROBERSON,
Plaintiff,**

v.

Case No.: CV-2019-901210.00

**DRUMMOND COMPANY, INC.
AND BALCH & BINGHAM, LLP
Defendants.**

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MOTION TO STRIKE PROPOSED ORDER OF BALCH & BINGHAM, LLP

COMES NOW the Plaintiff and for Motion To Strike the Proposed Order of Balch & Bingham, LLP states as follows:

Balch & Bingham misquotes the law in paragraph 3 of its proposed Order. Balch asserts that an attorney-client relationship is not a required an element for the Alabama Legal Services Act to apply to a claim.

As the Supreme Court of Alabama, the Court of Civil Appeals of Alabama and the 11th Circuit Court of Appeals have all held, **“An essential element of a claim under the Alabama Legal Services Liability Act IS THE EXISTENCE OF AN ATTORNEY CLIENT RELATIONSHIP.”** See *Bryant v. Robledo*, 938 So.2d 413 (Ala.Civ.App. 2005), *Brackin v. Trimmier Law Firm*, 897 So.2d 207 (Ala. 2004) and *Mississippi Valley Title Insurance Company v. Thompson*, 802 F.3d 1248 (11th Cir. 2015). To create an attorney-client relationship under Alabama law, there must be a contract of employment between the attorney and the client, the same as in other cases of contract. See *Board of Commissioners of the Alabama State Bar v. R.B. Jones*, 291 Ala. 371 (Ala.1973) and *Mississippi Valley Title Insurance Company v. Thompson*, 802 F.3d 1248 (11th Cir. 2015).

Furthermore, Balch quotes the case of *Robinson v. Benton*, 842 So.2d 631 (Ala.2002) for its erroneous statement of law that a claim under ALSA is not dependent on an attorney-client relationship. The Supreme Court of Alabama’s holding in *Robinson* was **that a non-client could not pursue a claim under ALSA – completely the opposite of the rule of law Balch cites the case for in its proposed Order. The Supreme Court of Alabama has repeatedly held that for ALSA to apply an attorney-client relationship evidenced by a contract must exist and non-clients can bring suit against attorneys under common law fraud causes of action.** See *Kinney v. Williams*, 886 So. 2d 753 (Ala. 2003), *Robledo v. Bryant*, 938 So. 2d 413 (Ala. Civ. App. 2005), *Line v. Ventura*, 38 So. 3d 1 (Ala. 2009), *Fogarty v. Parker, Poe, Adams & Bernstein*, 961 So. 2d 784 (Ala. 2006), *Smith v. Math*, 984 So. 2d 1179 (Ala. Civ. App. 2007), *Cunningham v. Langston*,

Frazer, Sweet & Freese, P.A., 727 So. 2d 800 (Ala. 1999) and *Mississippi Valley Title Insurance Company v. Thompson*, 802 F.3d 1248 (11th Cir. 2015).

Balch similarly misquoted *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F.Supp. 2d 1122 (N.D. Ala. 2012) in its motion to dismiss (See Exhibit 1) which clearly holds that for a claim to fall under ALSA it must be brought by a CLIENT AGAINST HIS/HER ALABAMA LEGAL SERVICE PROVIDER.

CONCLUSION

For the reasons stated above, the defendants' Motions to Dismiss have no merit and should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 5th day of June, 2019.

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Hon. Yawanna McDonald
Hon. Cason M. Kirkby
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/s/ Burt W. Newsome
Burt W. Newsome
Attorney For Plaintiff

Guthrie, 897 F. Supp. 2d 1122, 1178-78 (N.D. Ala. 2012).” [Doc. # 76, page 5, ¶ 9].¹⁷

Baswell-Guthrie expressly found that the plaintiffs were “clients”; it called them the “plaintiff-clients.” Regrettably, Balch omits this finding from its quotation:

| Balch’s Quotation [Doc. # 28, at 8] (underlying and boldface omitted; line break added to show omission) | 897 Supp. 2d at 1179 (omitted language in boldface) |
|--|---|
| <p>Plaintiffs’ claims against those attorneys – regardless of whether the claims are framed under the Alabama Legal Services Liability Act, or as a common-law negligence claim, or as “escrow agent liability” – are claims that arose out of the provision of legal services by Alabama legal-services-providers.</p> <p>And in this State, it is the strong public policy that all such actions should be brought under, and governed by, the Alabama Legal Services Liability Act.</p> | <p>Plaintiffs’ claims against those attorneys – regardless of whether the claims are framed under the Alabama Legal Services Liability Act, or as a common-law negligence claim, or as “escrow agent liability” – are claims that arose out of the provision of legal services by Alabama legal-services-providers to the plaintiff-clients of the Alabama legal-services-providers. And in this State, it is the strong public policy that all such actions should be brought under, and governed by, the Alabama Legal Services Liability Act.</p> |

When the omitted finding is considered, *Baswell-Guthrie* doesn’t support Balch’s argument. Roberson wasn’t a “client” – like the “plaintiff-clients” in *Baswell-Guthrie*.

Finally, contrary to Balch’s argument, “Alabama courts” have permitted non-clients to sue attorneys outside the ALSLA – even when their claims were closely related to the attorney’s representation of a “client.”

In *Robledo v. Bryant*, 938 So. 2d 413 (Ala. Civ. App. 2005), the plaintiffs sued an attorney and his wife for fraud and breach of contract to recover money paid to the attorney

¹⁷ Substantially the same language appears in Balch’s first Motion to Dismiss [Doc. # 28, at 8].

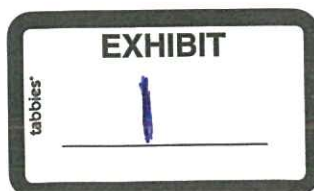


EXHIBIT 7

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|-----------------------------------|---|---|
| DAVID ROBERSON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | CIVIL ACTION NO. 01-CV-2019-901210 |
| DRUMMOND COMPANY, INC. and |) | |
| BALCH & BINGHAM, LLP, |) | |
| |) | |
| Defendants. |) | |

**DRUMMOND COMPANY, INC.’S MOTION TO STRIKE “PLAINTIFF’S RESPONSE
 TO DRUMMOND’S SUPPLEMENTAL BRIEF”**

COMES NOW Drummond Company, Inc. (“Drummond”) and hereby moves to strike Plaintiff’s Response to Drummond’s Supplemental Brief (“Plaintiff’s Response”) as untimely and in violation of this Court’s instructions. Not only is Plaintiff’s Response untimely, it fails to answer the Court’s specific question concerning the scope of the ALSLA.

ARGUMENT

I. PLAINTIFF’S RESPONSE IS UNTIMELY.

At the May 29, 2019 hearing on the Defendants’ Motions to Dismiss the Plaintiff’s 2nd Amended Complaint, this Court directed the parties to provide supplemental briefing on the following issue:

THE COURT: . . . I’m going to take under advisement and **allow two weeks** for the parties to brief me as to why Counts 1, 2 and 3 should not be dismissed, because those counts allege that there was some act or failure to act or omission that was done by Drummond’s general counsel, who is a legal services provider. And if Drummond’s legal counsel is liable, then you can get to Drummond under respondeat superior. But if Drummond’s legal counsel is not liable because he’s outside the statute of limitations, **I need to be briefed on how we can now have Drummond liable when the only access or the only vehicle by which Drummond would be liable is as the employer.**

Doc. 115 (May 29, 2019 Hrg. Tr.) at 64:13-65:2 (emphasis added).

Two weeks from May 29 was June 12. Plaintiff chose to file his supplemental brief on June 5. Doc. 111. Drummond filed its supplemental brief on June 12. Doc. 114. The Court provided until June 12 for any supplemental filings, and did not permit responsive submissions outside this deadline. Nevertheless, Plaintiff responded to Drummond's supplemental brief on June 13, in complete disregard of this Court's instructions. Plaintiff's Response should be stricken for this reason alone.

II. PLAINTIFF FAILED TO ADDRESS THE COURT'S QUESTION.

This Court requested briefing on the specific question of how Drummond could be liable where the allegations are against its General Counsel which, if brought directly against the General Counsel, would be governed by the ALSLA. Plaintiff's Response does not address this question, but rather argues that no claim in the case (including those against Balch) could be subject to the ALSLA's statute of limitations. This is yet another disregard for this Court's orders, as this Court has already ruled that the ALSLA's statute of limitations applies to the claims against Balch:

- "I want to read the law as it applies. Because in the complaint, plaintiff has used the fraud statute. It is the Court's opinion that that is not the appropriate statute which applies to this cause of action. It's pursuant to 6-5-570 [the ALSLA]." Doc. 115 (May 29, 2019 Hrg. Tr.) at 45:5-10.
- "So any of the causes of action in here, the Court finds really are pursuant to this particular statute [the ALSLA]." *Id.* at 46:5-7.
- "[T]he Court is of the opinion that the complaint sets forth all of the deadlines and all of the statutory deadlines. And this action falls outside of the statute of limitations. So based on that, I am going to grant defendant Balch and Bingham's motion to dismiss, because the action, in the Court's view, is outside the statutory period." *Id.* at 49:4 – 50:11.

Completely ignoring the Court's findings, Plaintiff claims the ALSLA's statute of limitations cannot apply because Plaintiff did not have "an attorney-client relationship with either

Co-Defendant Balch or Co-Defendant Drummond,” and cites a law review article written by a partner in the undersigned’s firm published in 2000. Plaintiff’s Response at 2. Plaintiff fails to mention that two years after the above article was published, the Alabama Supreme Court made clear that an attorney-client relationship is *not* a prerequisite to the application of the ALSA’s statute of limitations, and that: “No case before this action has specifically dealt with the question whether an action filed against an attorney by a nonclient and arising out of that attorney’s rendition of legal services to a third party was subject to the ALSLA.” *Morrow v. Gibson*, 827 So. 2d 756, 763 (Ala. 2002) (discussing a claim against an attorney (Gibson) by plaintiffs who “were undisputedly not Gibson’s clients,” where the trial court rejected as “simply legally incorrect” the “theory that ‘since [plaintiff] was not a client of [Gibson’s], the [ALSLA] did not apply, and the statute of limitations for regular fraud actions, i.e., when the fraud was discovered would apply,” and the trial court’s ruling was affirmed by the Supreme Court without opinion).¹

Accordingly, Plaintiff’s theory that because there is no “attorney-client relationship with either Co-Defendant Balch or Co-Defendant Drummond” the “ALSLA and its statute of limitations do not apply to Roberson’s claims against either defendant” is “simply legally incorrect.” *Morrow*, 827 So. 2d at 763. This is made clear by the plain language of the ALSLA.

In describing the actions that would be subject to the ALSLA, the legislature chose those actions in which a “litigant” seeks legal redress. Ala. Code § 6-5-572(1) (defining “legal service liability action”). When construing statutes, “[t]here is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect

¹ Notably, the attorney who represented Gibson—and successfully argued to the trial court and the Supreme Court that the ALSLA’s statute of limitations applies to a non-client’s claim against a legal services provider—was the same attorney who authored the law review article cited by Plaintiff. *See Morrow*, 827 So. 2d at 757.

is to be given to each, and also that no superfluous words or provisions were used.” *Sheffield v. State*, 708 So. 2d 899, 909 (Ala. Crim. App. 1997) (quoting 82 C.J.S. Statutes § 316 (1953)). “[W]here plain language is used, a court is bound to interpret that language to mean exactly what it says.” *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n*, 589 So. 2d 687, 689 (Ala. 1991). The ordinary meaning of “litigant” is simply “a party to a lawsuit.” LITIGANT, Black’s Law Dictionary (11th ed. 2019). Had the legislature intended to limit legal service liability actions to only clients of a legal service provider, it could have easily used the word “client” or “former client” in place of the word “litigant.” “A legislature will not be presumed to use language without any meaning or application” *McDonald v. State*, 28 So. 2d 805, 807 (Ala. 1947).

There is nothing in the text of the ALSLA indicating the legislature’s intent to limit actions subject to the Act’s coverage to those instituted by clients. Rather, the legislature intended the Act to apply to actions against legal services providers brought by any “litigant,” whether or not that litigant is a client, and this intent is confirmed by the Supreme Court’s decision in *Morrow*.

CONCLUSION

WHEREFORE, for the reasons set forth above, Drummond respectfully requests this Honorable Court to strike Plaintiff’s Response to Drummond’s Supplemental Brief from the record in this action.

Respectfully submitted,

s/ H. Thomas Wells, III

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CERTIFICATE OF SERVICE

I hereby certify that on **June 14, 2019** I electronically filed the foregoing using the AlaFile system which will send notification of this filing to the following AlaFile participants:

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s/ H. Thomas Wells, III

OF COUNSEL

EXHIBIT 8



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

**DAVID ROBERSON and ANNA
 ROBERSON,**)

Plaintiffs,)

v.)

Case No. CV-2019-901210

**DRUMMOND COMPANY, INC. and
 BALCH & BINGHAM, LLP,**)

Defendants.)

**BALCH & BINGHAM, LLP's
MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendant Balch & Bingham, LLP (“Balch”) respectfully moves this Honorable Court to enter an order dismissing all claims against Balch in the Third Amended Complaint (doc. 137) for the same reason this Court announced the dismissal of the Second Amended Complaint – the claims are barred by the statutes of limitation and repose found in the Alabama Legal Services Liability Act (“ALSLA”). Because the underlying material facts and the governing law have not changed, this Court should dismiss all the claims in the Third Amended Complaint of Plaintiffs David Roberson (“Roberson”) and Anna Roberson¹ (collectively, “Plaintiffs”) against Balch.

A federal jury convicted David Roberson of conspiracy to bribe state legislator Oliver Robinson to oppose EPA efforts to place the 35th Avenue Superfund Site on the National Priorities List (“NPL”) and to oppose EPA efforts to annex part of Tarrant into the 35th Avenue Superfund Site (the “Oliver Robinson Plan” or the “35th Avenue Matter”). While Roberson argued in federal

¹ Anna Roberson, wife of David Roberson, is a plaintiff named for the first time in the Third Amended Complaint. (Doc. 137 ¶ 6.) Mrs. Roberson is only included as a party to the twelfth and final claim of the Third Amended Complaint for promissory fraud. (*Id.* at 23-25.) Plaintiffs only plead Count Twelve against Drummond and not against Balch. (*Id.*) Because Balch *is not* a party to the only claim to which Mrs. Roberson *is* a party, Balch does not address her inclusion as a plaintiff in this Motion.

court that it was all the fault of his lawyer, Joel Gilbert, the jury rejected that defense and convicted Roberson and Gilbert of criminal conduct spanning 2014 to 2016 and constituting conspiracy to bribe the state legislator, honest services wire fraud, and money laundering. Ironically, part of Roberson's scheme -- to prevent additional EPA testing of the Tarrant area that EPA sought to annex into the 35th Avenue Superfund Site -- failed as the EPA tested most of that area found insufficient pollution to either annex it into the 35th Avenue Superfund Site or list it on the NPL.² But lack of pollution does not excuse criminal conduct.

After Drummond terminated Roberson's employment, Roberson again sought to blame the lawyers – he sued Balch & Bingham, LLP (“Balch”) and Drummond Company, Inc. (“Drummond”) on March 15, 2019. On May 29, 2019, this Court announced that it was going to dismiss all counts against Balch under the statutes of limitations and repose found in Alabama Legal Services Liability Act (“ALSLA”). Since then, Roberson has filed a Third Amended Complaint that changes neither the underlying material facts nor the governing law. The Third Amended Complaint fails to state a claim upon which relief can be granted for each of the reasons set forth in previously filed motions to dismiss (docs. 28, 37, 48, 55, and 76, which Balch adopts and incorporates herein) and also because:

- (a) The Third Amended Complaint fails to cure any of the fatal defects in Roberson's original and prior amended pleadings;
- (b) The crux of Plaintiffs' Third Amended Complaint continues to be that Roberson relied on the same November 2014 legal advice provided by Balch to his employer, Drummond Company, Inc. (“Drummond”), and therefore Roberson's claims are time-barred;

² The EPA's letter to the Mayor of Tarrant concluded: “[T]he EPA determined the [Tarrant] Site does not warrant listing on the NPL. In addition, the EPA compared individual sampling results with risk-based action levels. Based on the data collected no properties warrant additional action under the EPA's Superfund program. Therefore, the EPA has no plans to conduct any additional actions at the Site under its Superfund authority.” (Doc. 28, Exh. B.)

- (c) Roberson's allegation that he did not timely receive notice of any alleged misrepresentation or concealment is contradicted by his receipt, in January 2017, of a subpoena in the underlying criminal investigation;
- (d) Roberson's allegation that he received additional advice in June 2016 regarding his status as a lobbyist is time-barred because of his discovery in January 2017 via the federal grand jury subpoena;
- (e) Roberson is collaterally estopped from arguing that he relied upon advice of counsel, as that issue has already been fully litigated and decided against him beyond a reasonable doubt in the underlying criminal matter; and
- (f) Roberson's additional concealment claims related to the donation of children's winter coats and payments to Trey Glenn ("Glenn") and Scott Phillips ("Phillips") remain based on Balch's legal advice to Drummond.

In further support of this Motion, Balch respectfully states as follows:

INTRODUCTION AND PROCEDURAL POSTURE

On May 29, 2019, this Court announced at a hearing that it was dismissing all claims against Balch contained in the Second Amended Complaint based on the statute of limitations and the statute of repose found in the ALSLA. Plaintiffs' Third Amended Complaint is an attempt to artfully plead around the ALSLA's statutes of limitations and repose. Because the relevant material facts and the controlling law have not changed, this Court should enter an order again dismissing all of the claims against Balch contained in Roberson's Third Amended Complaint. At its core, the Third Amended Complaint restates the same basic fact pattern and re-pleads the same legal theories as Roberson's prior pleadings. Though the Third Amended Complaint adds a few more factual allegations and a new plaintiff, Anna Roberson, it fails to state any cognizable claim that is not legally barred on its face. For this reason, like the other iterations of the complaint before it, the Third Amended Complaint is due to be dismissed.

On March 15, 2019, Roberson initially filed this lawsuit against Balch, and former Balch client Drummond. (Doc. 2.) Drummond's liability was based solely on *respondeat superior* liability for actions taken by Balch.

After receiving Balch's first Motion to Dismiss, Roberson then amended his complaint on April 19, 2019. (Doc. 41.) The First Amended Complaint, which did not change Roberson's fundamental allegations against Balch, added a conspiracy claim. (Doc. 41.)

After receiving Balch's Second Motion to Dismiss, on May 6, 2019, Roberson amended yet again, filing his Second Amended Complaint. (Doc. 67.) Despite the addition of more words and separately-enumerated causes of action, the Second Amended Complaint still relied upon the same November 2014 legal advice provided to Roberson's employer Drummond by then-Balch partner Joel Gilbert ("Gilbert"). (Doc. 67.) In the Second Amended Complaint, Roberson alleged that Gilbert reaffirmed, on subsequent dates, the same November 2014 advice that the Oliver Robinson Plan was legal. (Doc. 67 pp. ¶¶ 56, 57, 63, 70, 71, 77, 86.) However, the crux of Roberson's claim remained that in reliance on Gilbert's legal advice, Roberson was criminally convicted.

After receiving, filing a response to, arguing at a hearing, and receiving this Court's oral ruling the merits of Balch's Third Motion to Dismiss in the May 29, 2019 hearing, Plaintiffs filed their Third Amended Complaint. (Doc. 137.) The Third Amended Complaint is almost identical in substance to the Second Amended Complaint. In his Third Amended Complaint, Roberson includes conclusory allegations and legal conclusions that Balch "never functioned as" his or Drummond's lawyers in the Oliver Robinson Plan but, nonetheless, restates his allegations that his reliance on Gilbert's legal advice resulted in his conviction. (Doc. 137.) Roberson's Third Amended Complaint also adds new claims that Gilbert—a Balch lawyer— "concealed" the

illegality of paying Oliver Robinson through the funds allocated for donations of children's winter coats and the illegality of paying Glenn and Phillips. (Doc. 137.) Yet again, the crux of Roberson's claim remains that in reliance on Gilbert's legal advice, Roberson was criminally convicted.

LEGAL ARGUMENT

I. The ALSLA Still Bars Roberson's Claims.

A. The ALSLA Governs Roberson's Claims Against Balch Because They Are Based on the Provision of Legal Advice by Gilbert, a Lawyer.

The Alabama Legal Services Liability Act (the "ALSLA"), ALA. CODE § 6-5-570, *et seq.*, is the sole and exclusive cause of action against legal service providers where the cause of action is based on the performance of legal services. ALA. CODE § 6-5-573. Claims under the ALSLA must be filed within two years of the alleged wrongdoing. Although there is a six-month discovery rule for the statute of limitations under the ALSLA, in no event may a claim (whether discovered or not) be asserted more than four years after the alleged wrongdoing (ALSLA statute of repose). The November 2014 legal advice occurred more than four years before Roberson filed this lawsuit on March 15, 2019. (Doc. 2.)

Roberson claims that he did not know about Gilbert's alleged misrepresentations and suppressions until later (during the criminal trial itself), but in fact this Court can take judicial notice that Roberson was on reasonable notice of the alleged fraud/suppression as early as January 2017, when he received and responded to a federal grand jury subpoena obtained by federal prosecutors in connection with their criminal investigation of Roberson in relation with the Oliver Robinson Plan. (*See* Doc. 28 p. 6 Exh. A.) This subpoena is central to Roberson's claims because it was issued by the same federal grand jury that later indicted Roberson, was used to collect evidence that led to that very indictment, and was relied upon in his criminal trial. (*Id.*) Receipt of this subpoena, which was part of a criminal investigation of the Oliver Robinson matter, began

the running of the statute of limitations because Roberson was on notice of sufficient facts that, exercising requisite reasonable care, should have led to his discovery of any alleged misrepresentation or concealment concerning the Oliver Robinson matter. *See, e.g., Smith v. Evans*, 829 So. 2d 774, 776 (Ala. Civ. App. 2002) (“[T]he period prescribed for filing a claim begins to run when the plaintiff, acting in the exercise of ordinary care, should have discovered the misrepresentation,’ i.e., ‘the date the plaintiff has actual or constructive notice of the fraud.’”)

Roberson suggests in a footnote to the Third Amended Complaint that the ALSLA “applies only to claims by ‘clients’ against their attorneys.” (Doc. 137 p. 8 n.1.) The text of the ALSLA and this Court’s interpretations of that text, however, provide a different, two-step analysis:

- (a) The ALSLA applies if the claim is based on the deficient performance of legal services and is against an attorney; and
- (b) Once the ALSLA applies, a plaintiff must show the elements of an ALSLA claim: duty to the plaintiff, breach, proximately caused injury, and damages.

Section 6-5-572(1) defines a “Legal Services Liability Action” as “[a]ny action against a legal service provider (*i.e.*, a lawyer or law firm) in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider’s violation of the standard of care applicable to a legal service provider.”

Section 6-5-572(3) defines the “standard of care applicable to a legal service provider” as “such reasonable care, skill, and diligence as other similarly situated legal service provider in the same general line of practice in the same general locality ordinarily have and exercise in a like case.” “The language of the ALSLA makes it clear that that Act refers to actions against ‘legal service providers’ alleging breaches of their duties **in providing legal services.**” *Cunningham v. Langston, Frazer, Sweet & Freese, P.A.*, 727 So. 2d 800, 803 (Ala. 1999) (emphasis by the Court).

See Fogarty v. Parker, Poe, Adams and Bernstein, L.L.P., 961 So. 2d 784, 788-89 (Ala. 2006) (“The ALSLA applies only to allegations of legal malpractice, i.e., **claims against legal-service providers that arise from the performance of legal services**, and only to allegations against attorneys licensed to practice law in the State of Alabama.”) (Emphasis added.)

The Third Amended Complaint states that Gilbert is a lawyer who was indicted with his partner Steve McKinney (who was later dismissed by the government): “The indicted Balch attorneys” (Doc. 137 ¶ 22.) As an attorney, Gilbert was a legal service provider.

The Third Amended Complaint states that Gilbert was asked whether the plan to push back against the EPA in North Birmingham was legal:

11. In November 2014, before implementation of the Plan, the Plaintiff asked Gilbert if he had inquired with the ethics lawyers at Balch & Bingham **whether the Plan was legal and ethical**. Gilbert represented to the Plaintiff that Balch’s in-house ethics attorneys had reviewed the Plan and **determined that it was legal**.

(Doc. 137 ¶ 11) (emphases added). Gilbert provided legal advice – legal services.

Roberson attempts to avoid the ALSLA by stating in his Third Amended Complaint that “Balch & Bingham never functioned as Roberson’s attorney nor was Roberson or Drummond ever a legal services client of Balch & Bingham” (Doc. 137, ¶ 8.) As the Alabama Supreme Court explained in *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018), while a court must take a factual allegations in a complaint as true, it need not do so with “legal conclusions masquerading as facts”:

Although we are required to accept McCain’s factual allegations as true at this stage of the proceedings, we are not required to accept her conclusory allegations that Gilland acted willfully, maliciously, fraudulently, or in bad faith. Rather, to survive Gilland’s motion to dismiss, McCain was required to plead facts that would support those conclusory allegations. See *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (noting, on review of the dismissal of a complaint for failure to state a claim, that “[t]he

plaintiff's factual allegations are accepted as true" but that "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal").

Ex parte Gilland, 274 So. 3d 976, 985 n.3 (Ala. 2018) (emphasis added).³

The Third Amendment Complaint's assertion that an attorney providing legal advice "never functioned as Roberson's attorney" is a legal conclusion masquerading as a factual allegation. In short, whether telling Roberson that the Plan was legal is properly classified as "legal services" under Alabama Code § 6-5-570 et al., is a legal question for a court to decide and cannot be dictated by Roberson in an attempt to evade dismissal under the ALSLA.

B. The ALSLA Governs Roberson's Claims Against Balch Regardless of Whether the Legal Services Were Provided Pursuant to an Attorney-Client Relationship.

Claims regarding the provision of legal services by a legal service provider are governed by the ALSLA regardless of whether the plaintiff had an attorney-client relationship with the defendant lawyer or law firm. For example, in *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), the ALSLA applied to an action brought by a beneficiary of a decedent's estate even though he was not a client of the decedent's attorney. The beneficiary sued the decedent's attorney for not following the decedent's instructions to destroy her will (*i.e.*, performing legal services without meeting the standard of care). Not performing the requested legal service—destroying the will—resulted in the beneficiary receiving less under will than he would have under intestate laws. While the ALSA applied, the beneficiary had to prove the duty element of the claim:

In order to recover damages for **legal malpractice**, a plaintiff must prove the same **elements** that must be proven in a negligence action:

³ Similarly, Roberson's Third Amended Complaint states the legal conclusion that "Plaintiff first suffered legal injury or damage when he was indicted on September 17, 2017 . . ." *See, e.g.*, (Doc. 137 ¶ 86.). That legal conclusion need not be taken as true. *See Gilland*, 274 So. 3d at 985 n.3.

“To recover, the [plaintiff] must prove a **duty**, a **breach** of the duty, that the breach was the **proximate cause** of the injury, and **damages**.” *Herston v. Whitesell*, 348 So.2d 1054, 1057 (Ala.1977). (Citations omitted.) “A claim for malpractice requires a showing that **in the absence of the alleged negligence the outcome of the case would have been different**.” *Hall v. Thomas*, 456 So.2d 67, 68 (Ala.1984). (Citations omitted.)

Id. at 634-35 (some quotation marks omitted) (emphases added).

The Supreme Court concluded that “an intended beneficiary has no standing to bring a legal-malpractice action against an attorney because there is no privity between the beneficiary and the attorney, and in the absences of privity, the attorney owes no duty to the beneficiary [*i.e.*, Robinson].” *Id.* at 634.

Indeed, Alabama courts have applied the ALSLA in cases where a non-client sought recovery for common law tort claims. *See San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F.Supp. 2d 1122, 1178-79 (N.D. Ala. 2012) (granting summary judgment on claims by a non-client against real estate closing attorneys because the ALSLA was the sole and exclusive remedy where the claims arise from the alleged negligent provision of legal services). As the Court observed in *Baswell-Guthrie*:

It is not disputed that [the defendant attorneys acted] as closing attorneys for the transactions at issue, or that they held and eventually disbursed plaintiffs’ escrow funds. Thus, there is no question that those defendants were providing “legal services” when they committed the acts alleged by plaintiffs . . . **Plaintiffs’ claims against those attorneys – regardless of whether the claims are framed under the Alabama Legal Services Liability Act, or as a common-law negligence claim, or as “escrow agent liability” – are claims that arose out of the provision of legal services by Alabama legal-services-providers. And in this State, it is the strong public policy that all such actions should be brought under, and governed by, the [ALSLA].**

Baswell-Guthrie, 897 F. Supp. 2d at 1179 (emphasis added). *See also, Shows v. NCNB National Bank of North Carolina*, 585 So. 2d 880 (Ala. 1991) (applying the ALSLA to a case by defaulted

debtors who alleged that attorney negligently drafted a deed between a bank and purchasers of their property at a foreclosure sale, and holding as a matter of law that no ALSLA claim was alleged because the attorney who drafted the foreclosure deed for bank and purchasers did not represent the defaulted debtor); *Petersen v. Anderson*, 719 So. 2d 216 (Ala. Civ. App. 1997) (residual beneficiary of will sued decedent’s attorney for breach of fiduciary duty in performing legal services related to her estate, court applied ALSLA and agreed with attorney’s argument that “he owed no duty to the plaintiffs because he did not represent them at any time”). *Cf. Mississippi Valley Title Ins. Co. v. Thompson*, 754 F.3d 1330, 1332–33 (11th Cir. 2014) (“As the Alabama Supreme Court has clarified, an action against a legal service provider is not a ‘legal service liability action’ unless it involves a claim ‘originating from [the] receipt of legal services.’”)

The ALSLA does not require that the Plaintiff be a “client.” *See Robinson*, 842 So. 2d at 634-35; *Shows*, 585 So. 2d 880; *Petersen*, 719 So. 2d 216. Roberson alleges that he received and relied upon the very legal advice provided by Balch to his employer, Drummond, and Roberson alleges that he always believed that the “Plan” (to pay the Oliver Robinson Foundation and have Robinson assist in community relations efforts in the North Birmingham matter) was legal. (Doc. 137 ¶ 11) (“Gilbert represented to the Plaintiff that Balch’s in-house ethics attorneys had reviewed the Plan *and determined that it was legal.*”) (emphasis added). Roberson’s claims are fundamentally grounded in a lawyer providing legal services.

On the one hand, Roberson alleges that he relied upon, and was damaged by, Gilbert’s legal advice. (Doc. 137 ¶¶ 11, 52, 59, 67, 74, 84.) On the other hand, Roberson alleges that the ALSLA does not apply to his claims because he was not Balch’s client. (Doc. 137 p. 8 n.1.) Under either theory, Roberson loses. If he relied on the allegedly bad legal advice, the ALSLA applies, and his claims are time-barred. If he was a non-client, Balch owed him no duty and he has failed

to establish a claim under the exclusive ALSLA statute. In any event, Roberson's common law fraud and suppression claims fail because the ALSLA is the exclusive cause of action against legal services providers based on allegedly deficient provision of legal services. *See* Ala. Code § 6-5-572(1) ("A legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.").

C. The ALSLA's Statute of Limitations Bars Roberson's Claims Because They are All Based on Conduct and Notice that Occurred More than Two Years Before Roberson Filed this Action.

First, in November 2014, Gilbert is alleged to have given deficient legal advice leading to Roberson's subpoena, indictment, and conviction:

COUNT V: MISREPRESENTATIONS BY BALCH (November 2014)

52. In **November 2014**, before implementation of the Plan, the Plaintiff asked Gilbert if he had inquired with ethics lawyers at Balch & Bingham whether the Plan was legal and ethical. Gilbert misrepresented to the Plaintiff that Balch's in-house ethics attorneys had reviewed the Plan and determined that it was legal.

COUNT VI: CONCEALMENT BY BALCH (November 2014)

60. Gilbert and Balch withheld, concealed, and failed to disclose to the Plaintiff that its ethics attorneys had not determined that the public relations campaign [i.e., the "Plan"] was legal in **November 2014**.

(Doc. 137) (emphases added).

Roberson's claims are barred by the ALSLA's two-year statute of limitations. *See* Ala. Code § 6-5-574(a) ("All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not

afterwards. . .”). Even if the six-month extender applied to Roberson’s discovery of the alleged November 2014 act or omission by Gilbert such that he did not reasonably discover that act or omission until the date of his subpoena (January 2017) (Doc. 28, p. 6 Exh. A), the date of his indictment (September 27, 2017) (Doc. 137 ¶ 17), or the date of his conviction (July 20, 2018) (Doc. 137 ¶ 23), six months from all of these dates expired before Roberson filed his original complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . .”).

In any event, the ALSLA’s six-month discovery extension period does not apply to the four-year statute of repose. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that **in no event may the action be commenced more than four years after such act or omission or failure . . .**”) (emphasis added). These claims are barred by the ALSLA’s four-year statute of repose because the act or omission of which Roberson complains occurred in “November 2014” and Roberson did not file his complaint until March 15, 2019—more than four years after the alleged act or omission. *See* Ala. Code § 6-5-574(a) (“[I]n no event may the action be commenced more than four years after such act or omission or failure. . .”).

Second, in June 2016, Roberson alleges that Gilbert assured him that his lobbyist status did not change the advice that he had given in November 2014 that their plan was legal and ethical:

COUNT VII: MISREPRESENTATIONS BY BALCH (June 2016)

66. In June 2016, after the conviction of State Representative Hubbard for ethics violations, the Plaintiff again asked Gilbert if Balch's in-house ethics attorneys had any "problem" with the Plan or his association with it since the Plaintiff is also a registered lobbyist.

67. Gilbert again represented to the Plaintiff that he had checked with Greg Butrus and Chad Pilcher and there was no problem with what they were doing.

COUNT VIII: CONCEALMENT BY BALCH (June 2016)

73. Gilbert and Balch withheld, concealed, and failed to disclose to the Plaintiff that Butrus and Pilcher had not reviewed the Plan or determined that it was legal at or near the time of Gilbert's misrepresentations.

(Doc. 137) (emphases added).

A reconfirmation in June 2016 of the same advice given in November 2014, does not create a new act or omission. Roberson's claims are barred for the reasons stated above. Alabama law is settled that the provision of legal services does not provide a claimant a continuing tort opportunity when the claim is grounded on initial legal advice given at the outset. *See Mississippi Valley Title Ins. Co. v. Hooper*, 707 So. 2d 209, 213 (Ala. 1997) ("[T]he cause of action . . . accrued when the [title] policies were issued, and not when Mississippi Valley later settled the lawsuits filed against it based on the policies.")

Even if there had been different advice on a different legal issue—a separate act or omission—in June 2016, Roberson's claims would still be time-barred. The ALSLA's two-year statute of limitations for a June 2016 act or omission would expire in June 2018, but Roberson did not file his complaint until March 15, 2019. *See* Ala. Code § 6-5-574(a) ("All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards . . ."). Even if the six-month extender applied to Roberson's discovery of the alleged November 2014 act or omission by Gilbert such that he did not reasonably discover that act or omission until the date of his subpoena (January

2017), the date of his indictment (September 27, 2017), or the date of his conviction (July 20, 2018), six months from all of these dates expired before Roberson filed his complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . .”).

Third, Roberson attempts to avoid the ALSLA’s two-year statute of limitations by alleging that he did not discover certain parts of the Oliver Robinson Plan (for which Roberson omits the dates of the underlying criminal conduct) until his criminal trial in July 2018. Because the Third Amended Complaint repeatedly references the indictment and the criminal trial, however, we are able to date the underling criminal conduct:

“Ordinarily, we do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss.” *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir.2007) (citing *Brooks*, 116 at 1368). An exception exists, however, when “a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.” *Id.* (citing *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n. 2 (11th Cir.1999); *Brooks*, 116 F.3d at 1368–69). In these circumstances, the document becomes a part of the pleadings. *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir.1993), *quoted in Brooks*, 116 F.3d at 1369. And, “[w]here there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.” *Tucker v. Nat’l Linen Service Corp.*, 200 F.2d 858, 864 (5th Cir.1953).

Nichols v. John Hancock Life Ins. Co., No. 2:09-CV-00840-LSC, 2009 WL 3019785, at *2 (N.D. Ala. Sept. 22, 2009). The indictment states: “From in or about November 2014, and continuing until in or about November 2016, the exact dates being unknown, within Jefferson County in the Northern District of Alabama, and elsewhere, defendants JOEL IVERSON GILBERT, STEVEN

GEORGE MCKINNEY, and DAVID LYNN ROBERSON knowingly and willfully conspired, combined, and agreed with each other” (Doc. 99-Indictment ¶ 17.) And the indictment states that “Oliver L. Robinson, Jr., was a member of the Alabama House of Representatives from 1998 until his resignation on or about November 30, 2016.” (*Id.* at ¶ 3.) And the publicly available transcript of the Roberson’s criminal trial provides further detail for each of these claims.

COUNT IX: CONCEALMENT BY BALCH (February 2017)

79. In **February 2017**, Gilbert asked Chad Pilcher of Balch whether he saw any “issues” or problems with the Plan or the relationship with Oliver Robinson and the Foundation.

80. As part his review, Pilcher discovered that **Robinson had written a letter on his House of Representatives letterhead**, and he advised Gilbert that Robinson’s use of his official letterhead in performing work under the contract was illegal.

81. The **government later charged** in the Plaintiff’s indictment that Robinson committed this act in furtherance of the alleged criminal conspiracy, for which the Plaintiff was convicted.

82. Gilbert and Balch withheld, concealed, and failed to disclose to the Plaintiff that Gilbert himself was questioning the legality of the Plan and the relationship with Robinson and his foundation and that Pilcher had determined that Robinson had acted illegally.

(Doc. 137) (emphasis added).

The David Roberson indictment states that the letter Oliver Robinson wrote on his official letterhead was dated on or about March 4, 2015. (Doc. 99 ¶ 59.) Despite Gilbert’s advice to the contrary, David Roberson was aware in January 2017 (Doc. 28, p. 6, Exh. A), when he received a federal grand jury subpoena regarding the criminal investigation of his, Gilbert’s, and Oliver Robinson’s efforts in North Birmingham that the federal government was investigating whether Roberson’s, Gilbert’s, and Oliver Robinson’s actions were criminal. The January 2017 subpoena was sufficient to place Roberson on notice and to start the running of the two-year statute of

limitations in the ALSLA regarding the letter and the entire Oliver Robinson Plan. *See* Ala. Code § 6-5-574(a) (“All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards. . . .”).

Even if the ALSLA’s six-month extender applied to Roberson’s discovery of Balch ethics attorney Chad Pilcher’s February 2017 opinion of the March 4, 2015 letter such that Roberson did not reasonably discover that act or omission until the date of his subpoena (January 2017), the date of his indictment (September 27, 2017) , or the date of his conviction (July 20, 2018), six months from all of these dates expired before Roberson filed his original complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) (“provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier”).

COUNT X – CONCEALMENT BY BALCH

88. As part of its public relations campaign to defeat the EPA in North Birmingham and at the request of Joel Gilbert of Balch Bingham, **David Roberson**, on behalf of Drummond Company, **wrote a \$5,000.00 check** to be used to purchase 100 fifty dollar **gift cards to Burlington Coat Factory to be used to purchase winter coats for kids** in North Birmingham.

89. Unbeknownst to Plaintiff Roberson as Joel Gilbert concealed this information from the Plaintiff, Balch and Oliver Robinson had agreed for Oliver to keep \$2,500.00 out of the \$5,000.00. Plaintiff did not learn of this hidden fact until his **criminal trial in July of 2018**. Plaintiff suffered damages as a result of Balch’s concealment of it allowing Oliver to keep half of the \$5,000.00 as the prosecution in Roberson’s criminal trial used this \$2,500.00 payment to Oliver Robinson as damaging evidence against Roberson in his criminal trial to help it obtain a conviction against him. Roberson did not even know that Robinson had kept half of the coat money per his agreement with Balch attorney Gilbert until this came out at the criminal trial.

(Doc. 137) (emphases added).

As referenced in the Third Amended Complaint, the July 2018 criminal trial addressed the distribution of gift cards to purchase winter coats for kids from the Burlington Coat Factory. Specifically, a letter (admitted as an Exhibit 668) was discussed at the criminal trial, and that letter states the coat drive occurred in 2016. (*See* Exh. A-*U.S. v. Gilbert, et al.*, Trial Tr. July 5, 2018, pp. 1957-1961, Ex. 668) (“the 2016 Get Smart Coat Drive”); (Doc. 99-Indictment ¶ 17 (“From in or about November 2014, and continuing until in or about November 2016, the exact dates being unknown, within Jefferson County in the Northern District of Alabama, and elsewhere, defendants . . . GILBERT . . . and DAVID LYNN ROBERSON knowingly and willfully conspired, . . .”)); (*Id.* at ¶ 3) (“Oliver L. Robinson, Jr., was a member of the Alabama House of Representatives from 1998 until his resignation on or about November 30, 2016.”).

The underlying coat drive with the gift cards purchased with the check Roberson wrote on behalf of Drummond occurred in 2016. His notice that there could be criminal conduct associated with the check he wrote as part of the Oliver Robinson Plan occurred in January 2017, when Roberson received the federal grand jury subpoena showing that federal prosecutors were investigating whether conduct relating to the Plan was criminal. (Doc. 28, p. 6, Exh. A.) Two years from January 2017 is January 2019 – two months before Roberson filed this lawsuit on March 15, 2019. (Doc. 2.)

The six-month extender of Alabama Code § 6-5-654(a) does not help Roberson because adding six months to the underlying conduct date of (at the latest) November 30, 2016 (Doc. 99–Indictment ¶¶ 17, 3), the actual notice date of the federal grand jury subpoena January 2017 (Doc. 28, p.6 Exh. A), the indictment date of September 27, 2017 (Doc. 137 ¶ 17), the trial date of July 2018 (Doc. 137 ¶ 89), or the conviction date of July 20, 2018 (Doc. 137 ¶ 23), still ends up short of the date Roberson filed this lawsuit March 15, 2019 (Doc. 2).

COUNT XI – CONCEALMENT BY BALCH AND DRUMMOND

90. **Balch & Bingham, LLP contracted with Trey Glenn (who invoiced Balch under the company name of Southeast Engineering & Consulting, LLC** and directed the payments to Scott Phillips) to lobby the Alabama Department of Environmental Management (or “ADEM”) to oppose the EPA in listing the North Birmingham site on the National Priorities List.

.....

92. Balch and Drummond Company concealed from Roberson that Drummond was paying Phillips (who was on the AEMC), pursuant to a contract with Balch, to lobby the entity in which the AEMC supervises (ADEM). Roberson suffered damages as a result of Balch and Drummond’s concealment of their payments to **Glenn and Phillips as their testimony** that Drummond was paying Phillips to lobby ADEM when he was on the commission that supervises ADEM was very damaging to **Roberson at his criminal trial** and was used in part by the prosecution to convict Roberson even though he had no knowledge of this scheme and even though Glenn’s and Phillips’ invoices were being paid by Balch and reimbursed by Blake Andrews and Mike Tracy.

(Doc. 137) (emphases added).

Trey Glenn and Scott Phillips testified at Roberson’s criminal trial.⁴ Mr. Glenn testified that he and Mr. Phillips began talking to Balch and Drummond about working on the 35th Avenue

⁴ For example, at Roberson’s criminal trial, Glenn’s testified:

Q. Okay. Do you recall that in about September of 2013, that EPA named some potentially responsible parties?

A. Yes, ma'am, I am.

Q. When you learned about that, did you do anything in response to that?

A. Yes, ma'am. One of our colleagues had seen that announcement, I believe in a newspaper article, and very soon after that, after consultation with Scott Phillips, I reached out to David Roberson and just expressed interest in helping them if they needed help in responding to the EPA.

Q. All right. Why did you reach out to David Roberson?

A. Because I had a long-standing relationship with David Roberson, and he and I had been friends for a while, and we had worked together on -- throughout years and years.

matter in 2013.⁵ And Mr. Glenn testified that his and Mr. Phillips' business entity, Southeastern Engineering and Consulting ("SEC" or "SE+C"), signed a contract with Balch to work for Drummond on November 22, 2013.⁶ According to testimony at the criminal trial, Trey Glenn and

(Exh. A--*U.S. v. Gilbert, et al*, July 5, 2018, Trial Tr.2098-99.)

⁵ At Roberson's criminal trial, Glenn testified:

Q. All right. What is the date?

A. October 10, 2013.

Q. And who did you send this email to?

A. To Joel Gilbert and David Roberson.

Q. Can you tell us just generally what is this email about? What were you sending to them?

A. I was sending them a draft proposal or a scope of work that Scott Phillips and I had put together for them to consider to support them in their efforts dealing with EPA and the site.

(Exh. A--*U.S. v. Gilbert, et al*, July 5, 2018, Trial Tr. 2100.)

⁶ Glenn testified:

A. This is the agreement between Balch & Bingham and SEC.

Q. And what was the date of that agreement?

A. November 22, 2013.

....

Q. And do you know who paid invoices pursuant to this contract?

A. The payments came directly from ABC Coke/Drummond.

(Exh. A--*U.S. v. Gilbert, et al*, July 5, 2018, Trial Tr. 2110, 2112.)

Scott Phillips worked on the Oliver Robinson Plan from 2014 to 2016.⁷ Accordingly, Roberson had notice in 2013 and 2014 through 2016 that Trey Glenn and Scott Phillips were being paid by Drummond to work on the 35th Avenue Matter. And on October 17, 2014, Roberson was copied on an email from Trey Glenn regarding ADEM Director Lance LeFluer and the 35th Avenue Matter.⁸ Further, in January 2017 (Doc. 28, p.6 Exh. A), when Roberson received the federal grand

⁷.(Exh. A--*U.S. v. Gilbert, et al.*, July 6, 2018, Trial Tr. 2304) (noting work in 2016).

⁸ At Roberson's criminal trial, Glenn testified:

(Government's Exhibit 151 was admitted into evidence.)

Q. (BY MS. MARK:) All right. Mr. Glenn, we'll start from the top on this one. Who is this email from?

A. It's from me.

Q. And what's the date?

A. October 17, 2014.

Q. And who did you send this email to?

A. Sent it to Blake Andrews, Curt Jones, Steve McKinney, Joel Gilbert, Mark Polling, Bob Mason, David Roberson, with a copy to Scott Phillips.

Q. And were those all individuals either working for Balch or for Drummond that were working on this matter?

A. Yes, ma'am.

Q. Looking down in this email -- is this typical that you would send emails to them with updates about the things that you were doing in consulting with Balch and Drummond?

A. Yes, ma'am.

Q. Looking at the paragraph that begins with the word "lastly." Do you see where I'm referring to?

A. Yes, ma'am.

Q. Can you read that for us?

jury subpoena regarding the Oliver Robinson Plan and concerning the 35th Avenue Matter, he had sufficient facts to put in on notice that federal prosecutors were looking into Trey Glenn and Scott Phillips activities. Two years from January 2017 is January 2019 – two months before Roberson filed this lawsuit on March 15, 2019. (Doc. 2.)

The six-month extender of Alabama Code § 6-5-654(a) does not help Roberson because adding six months to the underlying conduct date of (at the latest) November 30, 2016 (Ex. – Indictment ¶¶ 17, 3), the actual notice date of the federal grand jury subpoena January 2017 (Doc. 28, p.6 Exh. A), the indictment date of September 27, 2017 (Doc. 137 ¶ 17), the trial date of July 2018 (Doc. 137 ¶ 89), or the conviction date of July 20, 2018 (Doc. 137 ¶ 23), still ends up short of the date Roberson filed this lawsuit March 15, 2019 (Doc. 2).

II. Roberson’s Claims Are Barred by the Doctrine of *In Pari Delicto* and the *Hinkle* Rule.

Roberson was individually indicted, tried, and convicted for his own violation of federal bribery laws. Roberson now asserts civil damage claims against Balch arising out of the exact same facts that resulted in his criminal conviction. All of the claims against Balch are barred by the doctrine of in pari delicto and the *Hinkle* Rule, because of Roberson’s criminal conviction for his actions in the underlying criminal matter. The doctrine of in pari delicto stands for the proposition that “where the fault is mutual, the law will leave the case as it finds it.” *Tucker v. Ernst & Young, LLP*, 159 So. 3d 1263, 1269 (Ala. 2014). Alabama’s Hinkle Rule provides that “[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or

A. "Lastly, with regard to ADEM and Lance's reaction to the governor's letter, et cetera, he is continuing to calm down and will be in a better frame of mind about this."

(Exh. A--*U.S. v. Gilbert, et al*, July 5, 2018, Trial Tr. 2135.)

in part on an illegal or immoral act or transaction to which he is a party.” *Id.* (quoting *Hinkle v. Railway Express Agency*, 6 So. 2d 417, 421 (Ala. 1942)). *See also Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953 (Ala. 1993) (affirming summary judgment for defendant vending machine company where minor was killed by falling machine while attempting to steal soft drinks from it). Roberson explicitly alleges that he was indicted, tried and found guilty of violating federal law. (Doc. 137 ¶¶ 23, 26.) Alabama law expressly prohibits Roberson, convicted as a felon for the very conduct he undertook, from asserting claims against Balch.

III. Roberson Is Collaterally Estopped From Arguing That He Relied Upon Advice of Counsel.

Because this exact issue was fully litigated and decided against him in the criminal trial, Roberson is collaterally estopped from arguing in this case that he relied on bad legal advice. In his federal criminal case, Roberson repeatedly argued that he relied on the advice of counsel (*i.e.*, then-Balch partner Joel Gilbert), and Gilbert even testified that he still believed the advice he gave Drummond in November 2014 was good advice. (*See* Exh. A- *U.S. v. Gilbert, et al.*, July 2, 2018, Trial Tr. 1395, 1399, 1401-1404, 1446-49 (Tracy Test.); July 16, 2018, Trial Tr. 3868-69, 3930-36 (Gilbert Test.); 4523-27 (Asbill Closing Arg. for Roberson)). Roberson went so far as to insist that the jury be instructed on his “advice of counsel” defense, and the District Court so instructed the jury. (Exh. A-*U.S. v. Gilbert, et al.*, July 18, Trial Tr. 4384 (“Evidence that a defendant in good faith followed the advice of counsel would be inconsistent with the unlawful intent required for each charge in this case.”)). The jury then rejected Roberson’s advice-of-counsel defense, and found Roberson guilty of bribery, of conspiring with Gilbert to bribe Oliver Robinson, three counts of honest services wire fraud, and conspiracy to money launder. (Doc. 99; Exh. A-*U.S. v. Gilbert, et al.* Roberson Verdict Form.)

In Roberson's federal criminal case, the Court further instructed, "[F]inding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime—not just proof that the Defendant was simply present at the scene of a crime or knew about it." (Exh. A-*U.S. v. Gilbert, et al* Doc. 249 p. 27.) The Court cautioned the jury that "simply being present at the scene of an event or merely associating with certain people and discussing common goals and interest doesn't establish proof of a conspiracy." (Exh. A-*U.S. v. Gilbert, et al* Doc. 249 p. 31.)

Roberson's arguments to the jury, and the instructions ultimately adopted by the District Court and presented to the jury, demonstrate that Roberson already has fully litigated the issue of advice of counsel, and his theory of the defense was rejected by the jury beyond a reasonable doubt. The reasonable doubt standard is much more certain and requires substantially greater evidence than the preponderance of the evidence standard applied in civil cases. *See United States v. Stitzer*, 785 F.2d 1506, 1519 (11th Cir. 1986).

The District Court's judgment of criminal convictions, finding Roberson guilty on all counts, means that the jury absolutely rejected his advice-of-counsel defense. Roberson had the opportunity to, and did, fully litigate that he relied on the advice of counsel in the criminal case (although, notably, Roberson invoked his 5th Amendment rights and refused to testify). As a result, Roberson is collaterally estopped from re-litigating in this Court his supposed reliance on advice of counsel in pursuing this civil damages malpractice case. *See Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 726 (Ala. 1990); *Ex parte Flexible Prod. Co.*, 915 So. 2d 34, 48 (Ala. 2005); *Fid.-Phenix Fire Ins. Co. of New York v. Murphy*, 146 So. 387, 392 (Ala. 1933); *Wolfson v. Baker*, 623 F.2d 1074, 1080-81 (5th Cir. 1980) (holding prior criminal conviction established complete defense in civil case under collateral estoppel).

IV. Roberson's New Claims for Concealment Fail Because Roberson Was Not Damaged By These Alleged Concealments.

In addition to their preclusion by the statutes of limitations and repose found in the ALSLA, Roberson's two new claims, Counts Ten (coat drive) and Eleven (Trey Glenn and Scott Phillips), in the Third Amended Complaint are also due to be dismissed because Roberson fails to plead he was independently damaged by these alleged wrongs. "In order to establish fraudulent concealment, a plaintiff must show . . . that the plaintiff *suffered damage as a result of the action, or inaction, induced by the defendant's failure to disclose, or concealment of, the material fact.*" *Compass Point Condo. Owners Ass'n v. First Fed. Sav. & Loan Ass'n of Florence*, 641 So. 2d 253, 255 (Ala. 1994) (emphasis added).

In Count Ten of his Third Amended Complaint, Roberson alleges that Gilbert requested he write a check from Drummond for \$5,000 to be used to donate winter coats to children in North Birmingham. (Doc. 137 ¶ 88.) Roberson further alleges that Gilbert concealed that a portion of these funds would be kept by Oliver Robinson (yet again, part of the "Plan") and that this "damaging evidence" "help[ed prosecutors] obtain a conviction against him." (Doc. 137 ¶ 89.)

In Count Eleven, Roberson similarly alleges that the hiring of and corresponding payments to Glenn and Phillips for lobbying related to the North Birmingham site (yet again, also part of the "Plan") was concealed from Roberson and were "very damaging to Roberson at his criminal trial and was used *in part* by the prosecution to convict Roberson." (Doc. 137 ¶ 90-92) (emphasis added).

In neither of these claims does Roberson allege that either purported concealment was a deciding factor in his conviction. Further, none of the facts alleged in Counts Ten or Eleven constitute an additional crime to the criminal acts charged in the indictment and for which Roberson was convicted (i.e., Oliver Robinson's meeting with the EPA, meeting with the AEMC,

and vote on the anti-EPA resolution in the House Rules Committee). (Doc. 99-Indictment ¶¶ 36, 58, 60.) See *United States v. Ward*, 486 F.3d 1212, 1226 (11th Cir. 2007) (“The Fifth Amendment to the Constitution provides that ‘no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury’ A fundamental principle stemming from this amendment is that a defendant can only be convicted for a crime charged in the indictment.”).

Never once does Roberson allege that he was convicted *because* of these concealments. Never once does Roberson allege that he suffered any damages at all in addition to those resulting from his other claims. In fact, Roberson never alleges that he was actually damaged at all. Rather, Roberson speculates that the two alleged concealments were merely two factors among many that contributed to his criminal conviction. Such speculative, indefinite contributions to already-existing damages are insufficient as a matter of law to maintain Roberson’s claims for fraudulent concealment. *Deng v. Scroggins*, 169 So. 3d 1015, 1026 (Ala. 2014) (“In a fraud action, ‘[t]he purpose of damages . . . is to place the defrauded person in the position he would occupy if the representations had been true.’”) Had Roberson known of the alleged facts he claims were concealed from him, he would be in the exact same position he is in now (convicted of multiple felonies), and his Third Amended Complaint does not allege otherwise. For this reason, Roberson suffered no damages as a result of his two newly-pleaded concealment claims, which must, therefore, be dismissed.

CONCLUSION

Roberson’s Third Amended Complaint is due to be dismissed for all of the reasons discussed in Balch’s prior motions to dismiss, primarily because Roberson’s claims are untimely under the ALSLA. Roberson’s two newly-pleaded claims are likewise due to be dismissed because

they are equally based on Gilbert and Balch's purported legal advice on the Oliver Robinson "Plan" and because Roberson fails to allege that he was independently damaged by any such concealments. For these reasons and all those discussed above and in Balch's prior motions, Roberson's Third Amended Complaint is due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant Balch respectfully requests the Court enter an order dismissing all claims against Balch with prejudice as a matter of law.

Respectfully submitted this 22nd day of November, 2019.

/s/ Thomas Baddley, Jr.

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CERTIFICATE OF SERVICE

I certify that on November 22, 2019, I filed the foregoing with the Clerk of the Court using the AlaFile system, which will electronically serve all counsel of record:

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Of Counsel

EXHIBIT 9

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

**DAVID ROBERSON,
Plaintiff,**

v.

**DRUMMOND COMPANY, INC.
AND BALCH & BINGHAM, LLP
Defendants.**

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Case No.: CV-2019-901210.00

**PLAINTIFF’S MOTION TO STRIKE BALCH & BINGHAM’S SUPPLEMENT
TO ITS MOTION TO DISMISS PLAINTIFF’S THIRD AMENDED COMPLAINT**

Defendant Balch & Bingham filed late Friday what it purports to be a portion of the trial transcript of USA v. Gilbert et al and included excerpts of the testimony of former Drummond CEO Mike Tracey, former Balch partner Joel Gilbert and Trey Glenn. Balch also attached what it alleges to be the Jury Instructions from the USA v. Gilbert et al trial and the Jury Verdict form as it relates to Co-Plaintiff David Roberson. Plaintiff moves to strike the attachments of Balch & Bingham, LLP as the Circuit Courts of Alabama do not take judicial notice of the records of another court and the Balch attachments are not authenticated. See *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company, Inc. and Morgan Asset Management, Inc.*, 190 So.3d 895 (Ala. 2015)

The Plaintiff also moves the court to strike and not consider any of the references in Balch’s Motion To Dismiss to any of the attachments to said motion. In ruling on a Motion to Dismiss, a circuit court may not take judicial notice of proceedings in the United States District Court.

In *Garrison v. Hayden*, 495 So. 2d 616, 617 (Ala. 1996), the Supreme Court of Alabama reversed the dismissal of a complaint, where the court had taken judicial notice of federal proceedings:

Initially, we note that the defendants argue in their brief that the trial court dismissed the plaintiff's complaint after properly taking judicial notice of a prior criminal prosecution that allegedly involved some of the same facts that form the basis of the plaintiff's complaint. However, there is nothing in the record supporting this argument.

In their motion to dismiss, the defendants alleged that the plaintiff was barred from proceeding under his complaint in this case because he had previously filed two actions in the United States District Court for the Middle District of Alabama, which were still pending and which involved the same subject matter as the present case. See § 6-5-440, Alabama Code 1975; *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala.1981); although the defendants do not mention the two federal cases in their brief, we note that the trial court could not properly have taken judicial notice of those cases. *Crossland v. First National Bank of Montgomery*, 233 Ala. 432, 172 So. 255 (1937). Therefore, dismissal of the complaint cannot be upheld on that ground.

Furthermore, well established precedent of the Supreme Court of Alabama bars attachments outside of the pleadings from being considered by the trial court in determining whether a *ARCP 12(b)(6)* Motion To Dismiss should be granted. As set out in *Brindley v. Cullman Regional Medical Center*, 709 so.2d 1261 (1988),

A motion to dismiss pursuant to *ARCP 12(b)(6)* contemplates only the determination of whether the Plaintiff's complaint states a claim upon which relief can be granted, and matters outside the pleadings never should be considered in deciding whether to grant such a motion.

Balch has filed numerous attachments outside the pleadings to both of its motions to dismiss. Its motions are really summary judgment motions and Balch wants the Court to use these attachments outside of the pleadings to grant its motion without the Plaintiff having any opportunity to conduct any discovery. Such a result would be a complete denial

of due process to the Robersons. As set out in *Wilson v. First Union National Bank of Georgia, et al*, 716 So.2d 722 (Ala.Civ.App.1998),

Thus, if the trial court does not exclude matters submitted outside the pleading, it must afford the nonmoving party all of the procedural safeguards set forth in **Rule 56, Ala.R.Civ.P.**, which pertains to summary judgment.

As Balch is aware its motion to dismiss is due to be denied if it follows the rules of civil procedure, it simply breaks the rules. As set out by the Supreme Court of Alabama in *Ex Parte Price*, 244 So.3d 949 (Ala.2017), the savings clause applicable to fraud claims, under which a claim does not accrue until the discovery by the aggrieved party of the fact constituting fraud, generally applies not only to fraud, **but to any cause of action fraudulently concealed.** (*Ala. Code §6-2-3*). The Supreme Court of Alabama went on to state in *Price*:

We note that a **Rule 12(b)(6)** dismissal is only proper when it appears beyond doubt that the Plaintiff can prove no set of facts in support of the claim that would entitle the Plaintiff to relief.

However, a dismissal based on statute of limitations is proper only if, from the face of the complaint, it is apparent that the tolling provisions do not apply.

Here, viewed in a light most favorable to Price, the complaint alleges the time and circumstances of his discovery of the claims...Therefore, the trial court erred in granting Lunsford's and Alabama One's motions to dismiss.

WHEREFORE, the plaintiff moves the court to STRIKE AND NOT CONSIDER the attachments to Balch & Bingham, LLP's Motion To Dismiss Plaintiff's Third Amended Complaint and to DENY Balch & Bingham, LLP's Motion To Dismiss Plaintiff's Third Amended Complaint as said Third Amended Complaint, when viewed in light most

favorable to the Plaintiffs, presents facts which, if proven true at trial, would entitle the Plaintiff to relief and that creates a question of fact as to whether or not the tolling statute applies to Roberson's fraud claims.

/s/ Burt W. Newsome

Burt W. Newsome (NEW047)

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 25th day of November, 2019.

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Burt W. Newsome
Attorney For Plaintiff

EXHIBIT 10

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DAVID ROBERSON and ANNA)
ROBERSON)
)
Plaintiffs,)
)
vs.)
)
DRUMMOND COMPANY, INC. and)
BALCH & BINGHAM, LLP,)
)
Defendants.)

CASE NO. 01-CV-2019-901210

MOTION TO STRIKE THE 3rd AMENDED COMPLAINT

COMES NOW Drummond Company, Inc. (“Drummond”) and respectfully moves this Court for an order striking Plaintiffs’ 3rd Amended Complaint (Doc. 137) (“3rd Amended Complaint”) from the record as untimely filed long after the period when the Plaintiffs were in possession of the facts necessary to file the 3rd Amended Complaint. In support thereof, Drummond states as follows:

1. Plaintiff David Roberson first initiated this litigation against Defendants Drummond Company, Inc. and Balch & Bingham, LLP (“Balch”), on March 15, 2019 with the filing of a Complaint for (Doc. 2) (“Original Complaint”).
2. On April 18, 2019, both Drummond and Balch filed motions to dismiss the Original Complaint. Doc. 27; Doc. 37.
3. The following day, Plaintiff David Roberson filed the 1st Amended Complaint in an effort to plead around the arguments raised by Drummond and Balch. Doc. 41. Plaintiff’s substantive factual allegations remained the same. *Compare* Doc. 2 *with* Doc. 41.

4. On April 29, 2019, Drummond filed a motion to dismiss the 1st Amended Complaint, Doc. 48, and on May 1, 2019 Balch also filed a motion to dismiss the 1st Amended Complaint. Doc. 54.

5. Once again, rather than respond to Defendants' dismissal arguments, Plaintiff filed a 2nd Amended Complaint on May 6, 2019. Doc. 67. The substantive allegations with respect to the purported "fraud" by the Defendants remained the same, but the 2nd Complaint did add a conversion count with respect to certain items purportedly "taken" from Plaintiff David Roberson's office at Drummond. *Id.* at Count IV. The 2nd Amended Complaint also added the allegation that Drummond was liable for acts alleged committed by its purported agent, Balch & Bingham, LLP, under respondeat superior, ratification, and/or adoption theory of liability. *Id.* at ¶ 2.

6. Drummond and Balch filed motions to dismiss the 2nd Amended Complaint on May 16, 2019. Doc. 78; Doc. 75. Drummond argued, as it had in its previous motions, that Plaintiff's claims were "(1) barred by the Hinkle Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama." Doc. 79 at 5 (citing Doc. 48 (Drummond's Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond's Mtn. to Dismiss) 4-16, Doc. 37 at § II, and Doc. 48 at § II). With respect to Plaintiff David Roberson's claim for conversion, Drummond argued that there had been no "wrongful or illegal act," and thus no conversion claim. Doc. 79 at 6. Balch argued, as it had argued before, that Plaintiff David Roberson's claims were time-barred, that he was collaterally estopped from arguing that he relied on advice of counsel, and that the 2nd Amended Complaint otherwise failed to state a claim. Doc. 76 at 1.

7. Plaintiff David Roberson filed a brief in opposition to Defendants' motion to dismiss on May 24, 2019. Doc. 96.

8. On May 29, 2019, this Court held an extensive hearing on the motions to dismiss. Doc. 115 (May 29, 2019 Hrg. Tr.). During that hearing, the Court requested that Drummond and the Plaintiff submit supplemental briefing on or before June 12, 2019 addressing "how we can now have Drummond liable when the only access or the only vehicle by which Drummond would be liable is as the employer" of Drummond's in-house legal counsel. *Id.* at 64:13-65:2.

9. On June 5, 2019, Plaintiff David Roberson filed a "Supplemental Brief in Opposition to Motions to Dismiss." Doc. 111. Drummond filed its supplemental brief on June 12, 2019. Doc. 114. Without requesting leave of court, Plaintiff filed a "Response to Drummond's Supplemental Brief" on June 13, 2019. Doc. 117.¹

10. On November 11, 2019 (**eight months** after the filing of the Original Complaint), Plaintiff David Roberson filed a 3rd Amended Complaint, Doc. 137, as well as a proposed order summarily denying any motions to dismiss and directing the parties to proceed with discovery. Doc. 139.

11. The 3rd Amended Complaint added Plaintiff Anna Roberson as a party. Many of the substantive allegations and counts in the 3rd Amended Complaint, however, are the same as the 2nd Amended Complaint. The additional allegations/counts in the 3rd Amended Complaint are the following:

- Balch allegedly concealed from Plaintiff Roberson that Oliver Robinson kept \$2,500 of a \$5,000 check Roberson signed for a charitable coat drive. According to the 3rd Amended Complaint, "Roberson did not even know that Robinson had kept half of the coat money per his agreement with Balch attorney Gilbert until this came out at the criminal trial." Doc. 137 at ¶ 89. These allegations form the basis of Plaintiffs' "concealment" claim against Balch (Count X).

¹ Drummond subsequently filed a motion to strike that untimely filing, Doc. 120, and Plaintiff filed a response to Drummond's motion to strike. Doc. 122.

- Balch and Drummond allegedly “concealed from Roberson that Drummond was paying [Scott] Phillips (who was on the AEMC), pursuant to a contract with Balch, to lobby the entity in which the AEMC supervises (ADEM).” Doc. 137 at ¶ 92. Roberson alleges that this was “very damaging to [him] at his criminal trial and was used in part by the prosecution to convict Roberson even though he had no knowledge of this scheme[.]” *Id.* These allegations form the basis of Plaintiffs’ “concealment” claim against Balch and Drummond (Count XI).
- “On or about July 25, 2018,” former Drummond CEO Mike Tracy represented to Plaintiffs “that ‘they had nothing to worry about’ and that Drummond would keep David Roberson on paid administrative leave until his appeal process was completed and that Drummond would pay him his full salary, bonuses, and benefits until the matter had been fully adjudicated.” Doc. 137 at ¶ 93. Plaintiffs further allege that Drummond terminated Plaintiff David Roberson on February 7, 2019. *Id.* These allegations form the basis of Plaintiffs’ purported “promissory fraud” count against Drummond (Count XII). *Id.* at ¶¶ 93-101.

12. Rule 15 of the Alabama Rules of Civil Procedure is the governing rule concerning amendments to pleadings. Pursuant to Rule 15, “[u]nless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court’s own motion or a **motion to strike of an adverse party**, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires.” *Id.* (emphasis added).

13. As indicated by the “subject to...a motion to strike” language of Rule 15, the Alabama Supreme Court has unequivocally stated that the right to amend a complaint is not an unrestrained right. The Alabama Supreme Court recently addressed Rule 15 and the timing to file an amended complaint in the case of *Ghee v. USABLE Mut. Ins. Co.*, -- So. 3d --, 2019 WL 2240143 (Ala. May 24, 2019):

Although Rule 15 requires that amendments be freely allowed, the right to amend a complaint pursuant to Rule 15 is not absolute or automatic. Rule 15 “‘is not carte blanche authority to amend ... at any time’” and the trial court has the discretion to deny an amendment for good cause. *Blackmon v. Nexity Fin. Corp.*, 953 So. 2d 1180, 1189 (Ala. 2006) (quoting *Burkett v. American Gen. Fin., Inc.*, 607 So. 2d 138, 141 (Ala. 1992)). “[A]n unexplained undue delay in filing an amendment

when the party has had sufficient opportunity to discover the facts necessary to file the amendment earlier is also sufficient grounds upon which to deny the amendment.” 953 So. 2d at 1189.

Id. at *8; *see also Rector v. Better Houses, Inc.*, 820 So. 2d 75, 78 (Ala. 2001) (holding that the trial court properly struck the amended complaint when the plaintiff offered no reason to refute the trial court’s finding that the new allegations in the amended complaint were based on facts the plaintiff had known since the beginning of the action); *Ex parte Thomas*, 628 So. 2d 483, 486 (Ala. 1993) (holding that the trial court did not abuse its discretion in denying an amendment filed **seven to eight months** after the complaint was filed); *Burkett*, 607 So. 2d at 141 (holding that the trial court did not exceed its discretion in striking the amended complaint where the plaintiffs had learned of the facts underlying the new allegations **six months** before they attempted to amend).

14. Plaintiffs’ 3rd Amended Complaint contains no new factual allegation that was discovered or that they even assert was discovered between the filing of the Original Complaint on March 15, 2019, and the 3rd Amended Complaint filed on November 12, 2019. Plaintiffs offer no explanation whatsoever as to why it took some eight (8) months to file the 3rd Amended Complaint, after already having amended twice, and causing the parties and this Court to expend considerable time and resources dealing with three prior iterations of the complaint. The allegations included in the 3rd Amended Complaint are based on facts Plaintiffs have known since the filing of the Original Complaint on March 15, 2019, and certainly by May 16, 2019 at the time of filing of the 2nd Amended Complaint. Indeed, the allegations focus on events that occurred while Plaintiff David Roberson was still an employee of Drummond Company, Inc., not subsequent acts that he claims he learned through discovery or another manner. As set forth above, Plaintiff David Roberson indisputably knew of the facts underlying the new substantive allegations in the 3rd Amended Complaint before he even filed this lawsuit. *See* ¶ 11 *supra* (detailing the new

allegations in the 3rd Amended Complaint, all of which were “discovered” by Plaintiff David Roberson either during his criminal trial or as of the date of his termination from Drummond).

15. The only new party in the 3rd Amended Complaint is Plaintiff David Roberson’s wife, Ms. Anna Roberson. Her claims are premised on the allegation that “[i]n reasonable reliance on the representations of Tracy and Drummond, the Plaintiff Anna Roberson turned down employment opportunities that would have allowed her to earn income for herself and husband,” and that she and Plaintiff David Roberson “jointly delayed placing the home on the market for sale.” Doc. 137 at ¶¶ 97-98. All these allegations refer to events that preceded Plaintiff David Roberson’s February 7, 2019 termination from Drummond Company, Inc. *Id.* at ¶ 99.

16. In short, all the material allegations in the 3rd Amended Complaint were known to Plaintiffs during the time Plaintiff David Roberson was an employee of Drummond Company, Inc. and not because of any newly discovered information that would justify this delayed filing.

17. A “trial court acts within its discretion so long as its disallowance of the amendment to the pleadings is based upon some valid ground, such as actual prejudice or undue delay.” *Ex parte Thomas*, 628 So. 2d at 486 (citing *Ex parte Reynolds*, 436 So. 2d 873 (Ala. 1983)).

18. Plaintiffs’ 3rd Amended Complaint should be stricken from the record due to an unexplained undue delay in filing the amendment when Plaintiffs had sufficient opportunity to discover the facts necessary to file the amendment earlier. As noted above in *Ghee*, an unexplained and undue delay alone is sufficient grounds upon which to deny the amendment. Even using the date of the filing of the 2nd Amended Complaint on May 16, 2019, Plaintiffs filed their 3rd Amended Complaint after a delay (approximately six (6) months) similar to that of the plaintiffs in *Burkett* (six (6) months) and *Thomas* (seven (7) to eight (8) months).

19. Simply put, the 3rd Amended Complaint is Plaintiffs' "Hail Mary" effort to (a) avoid the likely dismissal of their claims based on the governing legal authorities, (b) circumvent controlling Alabama case law, and (c) have "another bite at the apple." Plaintiffs should not be allowed to simply file a newly amended complaint purporting to add new causes of action based on facts that Plaintiffs have known since the beginning of the action every time they want to avoid an unfavorable ruling on glaring deficiencies in their lawsuit. If a plaintiff were to be allowed to undertake such action, there would never be a ruling on a motion to dismiss and plaintiffs could jam up a court's docket in perpetuity resulting in exorbitant legal costs for the defendants. Defendants submit that situation is precisely what Plaintiffs are trying to do with the filing of this 3rd Amended Complaint.

20. Drummond submits that an unexplained delay of eight (8) months to file an amendment that is simply premised on an expanded version of facts known to the Plaintiffs at the onset of the litigation is exactly the type of amendment that this Court should exercise its discretion to strike. This is all even more true considering the Original, 1st, and 2nd Amended Complaints were already subject to substantial motion practice and a lengthy hearing before this Court. Indeed, the 3rd Amended Complaint comes only after this Court indicated at the May 29th hearing that it was leaning towards dismissing all claims, with the exception of Plaintiff David Roberson's conversion claim.

WHEREFORE, PREMISES CONSIDERED, Defendant Drummond Company, Inc. requests this Court to strike Plaintiffs' 3rd Amended Complaint as untimely filed and premised on facts that were known to the Plaintiffs more than eight (8) months ago when the Original Complaint was filed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this the November 26, 2019, the foregoing document has been electronically filed with the Clerk of the Court using the AlaFile System, which will send notification of such filing to the counsel of record for all parties to this proceeding:

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OF COUNSEL

EXHIBIT 11

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|-----------------------------------|---|---|
| DAVID ROBERSON and ANNA |) | |
| ROBERSON, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | CIVIL ACTION NO. 01-CV-2019-901210 |
| |) | |
| DRUMMOND COMPANY, INC. and |) | |
| BALCH & BINGHAM, LLP, |) | |
| |) | |
| Defendants. |) | |

**DRUMMOND COMPANY, INC.’S MOTION TO DISMISS
 PLAINTIFFS’ THIRD AMENDED COMPLAINT**

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COMES NOW Drummond Company, Inc. (“Drummond”) and, pursuant to Ala. R. Civ. P. 12(b), files this Motion to Dismiss Plaintiffs’ 3rd Amended Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff David Roberson first initiated this litigation against Defendants Drummond Company, Inc. and Balch & Bingham, LLP (“Balch”), on March 15, 2019 with the filing of a Complaint (Doc. 2) (“Original Complaint”). On April 18, 2019, both Drummond and Balch filed motions to dismiss the Original Complaint. Doc. 27; Doc. 37. The following day, Plaintiff David Roberson filed the 1st Amended Complaint in an effort to plead around the arguments raised by Drummond and Balch. Doc. 41. Plaintiff’s substantive factual allegations remained the same. *Compare* Doc. 2 *with* Doc. 41.

On April 29, 2019, Drummond filed a motion to dismiss the 1st Amended Complaint, Doc. 48, and on May 1, 2019 Balch also filed a motion to dismiss the 1st Amended Complaint. Doc. 54. Once again, rather than respond to Defendants’ dismissal arguments, Plaintiff filed a 2nd Amended Complaint on May 6, 2019. Doc. 67. The substantive allegations with respect to the purported “fraud” by the Defendants remained the same, but the 2nd Amended Complaint did add a conversion count with respect to certain items purportedly “taken” from Plaintiff David Roberson’s office at Drummond. *Id.* at Count IV. The 2nd Amended Complaint also added the allegation that Drummond was liable for acts allegedly committed by its purported agent, Balch & Bingham, LLP, under respondeat superior, ratification, and/or adoption theory of liability. *Id.* at ¶ 2.

Drummond and Balch filed motions to dismiss the 2nd Amended Complaint on May 16, 2019. Doc. 78; Doc. 75. Drummond argued, as it had in its previous motions, that Plaintiff’s claims were “(1) barred by the Hinkle Rule, (2) barred by the doctrine of collateral estoppel, and

(3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama.” Doc. 79 at 5 (citing Doc. 48 (Drummond’s Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond’s Mtn. to Dismiss) 4-16, Doc. 37 at § II, and Doc. 48 at § II). With respect to Plaintiff David Roberson’s claim for conversion, Drummond argued that there had been no “wrongful or illegal act,” and thus no conversion claim. Doc. 79 at 6. Balch argued, as it had argued before, that Plaintiff David Roberson’s claims were time-barred, that he was collaterally estopped from arguing that he relied on advice of counsel, and that the 2nd Amended Complaint otherwise failed to state a claim. Doc. 76 at 1.

On May 29, 2019, this Court held an extensive hearing on the motions to dismiss. Doc. 115 (May 29, 2019 Hrg. Tr.). During that hearing, the Court requested that Drummond and the Plaintiff submit supplemental briefing on or before June 12, 2019 addressing “how we can now have Drummond liable when the only access or the only vehicle by which Drummond would be liable is as the employer” of Drummond’s in-house legal counsel. *Id.* at 64:13-65:2. On June 5, 2019, Plaintiff David Roberson filed a “Supplemental Brief in Opposition to Motions to Dismiss.” Doc. 111. Drummond filed its supplemental brief on June 12, 2019. Doc. 114. Without requesting leave of court, Plaintiff filed a “Response to Drummond’s Supplemental Brief” on June 13, 2019. Doc. 117.¹

On November 11, 2019, Plaintiff David Roberson filed a 3rd Amended Complaint. Doc. 137. The 3rd Amended Complaint added Plaintiff Anna Roberson as a party. Many of the substantive allegations and counts in the 3rd Amended Complaint, however, are the same as in the 2nd Amended Complaint. The additional allegations/counts in the 3rd Amended Complaint are the following:

¹ Drummond filed a motion to strike that untimely filing, Doc. 120, and Plaintiff filed a response to Drummond’s motion to strike. Doc. 122.

- Balch allegedly concealed from Plaintiff Roberson that Oliver Robinson kept \$2,500 of a \$5,000 check Roberson signed for a charitable coat drive. According to the 3rd Amended Complaint, “Roberson did not even know that Robinson had kept half of the coat money per his agreement with Balch attorney Gilbert until this came out at the criminal trial.” Doc. 137 at ¶ 89. These allegations form the basis of Plaintiffs’ “concealment” claim against Balch (Count X).
- Balch and Drummond allegedly “concealed from Roberson that Drummond was paying [Scott] Phillips (who was on the AEMC), pursuant to a contract with Balch, to lobby the entity in which the AEMC supervises (ADEM).” Doc. 137 at ¶ 92. Roberson alleges that this was “very damaging to [him] at his criminal trial and was used in part by the prosecution to convict Roberson even though he had no knowledge of this scheme[.]” *Id.* These allegations form the basis of Plaintiffs’ “concealment” claim against Balch and Drummond (Count XI).
- “On or about July 25, 2018,” former Drummond CEO Mike Tracy represented to Plaintiffs “that ‘they had nothing to worry about’ and that Drummond would keep David Roberson on paid administrative leave until his appeal process was completed and that Drummond would pay him his full salary, bonuses, and benefits until the matter had been fully adjudicated.” Doc. 137 at ¶ 93. Plaintiffs further allege that Drummond terminated Plaintiff David Roberson on February 7, 2019. *Id.* These allegations form the basis of Plaintiffs’ purported “promissory fraud” count against Drummond (Count XII). *Id.* at ¶¶ 93-101.

SUMMARY OF THE ARGUMENT

Counts I, II, and III of the 3rd Amended Complaint allege “Indemnity,” “Misrepresentation,” and “Concealment” against Drummond and are due to be dismissed for the reasons this Court already heard at the May 29th hearing. Those claims—regardless of whether they are based on Balch’s or Drummond’s General Counsel’s alleged acts or omissions—are time-barred under the Alabama Legal Services Liability Act (“ALSLA”). *See also* Doc. 114 (Drummond’s Suppl. Br. in support of its Mtn. to Dismiss the 2nd Am. Compl.) at 3-12. These claims also fail as a matter of law for the reasons Drummond previously set forth in its prior motions to dismiss, as they all require this Court to find that Plaintiff was wrongfully convicted in his federal criminal trial. Accordingly, they are (1) barred by the Hinkle Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered

by the United States District Court for the Northern District of Alabama. *See* Doc. 79 (Drummond’s Mtn. To Dismiss the 2nd Am. Compl.) at 4-5; Doc. 48 (Drummond’s Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond’s Mtn. to Dismiss) 4-16.²

The 3rd Amended Complaint contains three new counts, two of which are against Drummond (Count XI for “Concealment” and Count XII for “Suppression”). For the reasons set forth below, both Counts fail to state a claim upon which relief can be granted.

LEGAL ARGUMENT

I. COUNTS I, II, III, AND IV FAIL TO STATE A CLAIM.

Counts I through IV of the 3rd Amended Complaint are against “Drummond” and are styled “Indemnification By Drummond,” “Misrepresentation By Drummond,” “Concealment By Drummond,” and “Conversion By Drummond.” Doc. 137 (3rd Am. Compl.) at pp. 9, 11, 12, & 13. The substantive allegations underlying each of these Counts are largely the same as those in the 2nd Amended Complaint. *Compare* Doc. 137 (3rd Am. Compl.) at ¶¶ 31-51 *with* Doc. 67 (2nd Am. Compl.) at ¶¶ 30-50. With respect to Counts I, II and III, the 3rd Amended Complaint adds the allegation that “[t]he Plaintiff first suffered legal injury or damage” when he was indicted on September 27, 2017, and that he purportedly “did not suffer any legal injury or damage before that date[.]” Doc. 137 (3rd Am. Compl.) at ¶¶ 37, 43, & 49. Count I also contains the allegation that “Drummond . . . continued to pay Plaintiff his salary while he was on administrative leave with the last payment being in February of 2019.” *Id.* at ¶ 35.

² To the extent any of Plaintiffs’ claims seek to hold Drummond vicariously liable for Balch’s alleged acts or omissions, those claims fail as a matter of law. *See* Doc. 114 (Drummond’s Supplemental Brief in support of its Mtn. to Dismiss the 2nd Am. Compl.) at 2-3.

A. Counts I, II, and III are an impermissible collateral attack on Roberson's criminal conviction.

None of these additional allegations affect Drummond's prior dismissal arguments. Counts I, II, and III should be dismissed because they are (1) barred by the Hinkle Rule, (2) barred by the doctrine of collateral estoppel, and (3) an impermissible collateral attack on a judgment rendered by the United States District Court for the Northern District of Alabama. Rather than repeat them, Drummond adopts and incorporates herein its prior briefing on these grounds for dismissal. *See* Doc. 79 (Drummond's Mtn. To Dismiss the 2nd Am. Compl.) at 4-5; Doc. 48 (Drummond's Mtn. to Dismiss the 1st Am. Compl.) at 4-18; Doc. 37 (Drummond's Mtn. to Dismiss) 4-16.

B. Counts I, II, and III are barred by the statute of limitations.

Like the 2nd Amended Complaint, Counts I, II, and III of the 3rd Amended Complaint are based on alleged representations by Drummond's General Counsel to Plaintiff David Roberson concerning how to process the legal bills of Drummond's outside counsel, Balch. *See* Doc. 137 (3rd Am. Compl.) at ¶ 14 *and compare with* Doc. 67 (2nd Am. Compl.) at ¶ 12. As this Court previously recognized, Drummond's General Counsel is a legal services provider under the ALSLA. Doc. 115 (May 29, 2019 Hrg. Tr.) at 45:11-47:12 (quoting *Ala. Code* §§ 6-5-570 and 6-5-572); 48:3-7 (emphasis added). *See also* Doc. 114 (Drummond's Supp. Br. in Support of its Mtn. to Dismiss the 2nd Am. Compl.) at 5-6.

Accordingly, Counts I, II, and III arise out of Drummond's General Counsel's provision of legal services and are governed by the ALSLA. For the reasons previously briefed by Drummond, Doc. 114 (Drummond's Suppl. Br. in Support of its Mtn. to Dismiss the 2nd Am. Compl.) at 8-9, and recognized by this Court at the May 29, 2019 hearing, Doc. 115 (May 29, 2019 Hrg. Tr.) at 48:8-50:1, those claims are time-barred under the ALSLA.

C. The 3rd Amended Complaint fails to state a claim for “conversion.”

The 3rd Amended Complaint inserts the word “wrongfully” in Count IV. Doc. 137 (3rd Am. Compl.) at ¶ 51. *See also id.* (“Drummond took unauthorized wrongful dominion and control over the personal property of Plaintiff to the exclusion of the rights of the Plaintiff.”).³ These additions are a transparent attempt to plead around the deficiency Drummond previously raised with respect to this claim, namely, the lack of any allegation that Drummond’s possession of these items was “wrongful.” Doc. 79 (Drummond’s Mtn. to Dismiss the 2nd Am. Compl.) at 6-8; *see also* Doc. 115 (May 29, 2019 Hrg. Tr.) at 54:24-55:7; 67:3-21.

While Drummond is cognizant of this Court’s prior statements at the May 29, 2019 hearing regarding the viability of Count IV, Drummond respectfully submits that the 3rd Amended Complaint fails to state a claim for conversion for the reasons already briefed to this Court. Doc. 79 (Drummond’s Mtn. to Dismiss the 2nd Am. Compl.) at 6-8. *See also Waugaman v. Skyline Country Club*, 172 So. 2d 381, 384 (Ala. 1965) (complaint properly dismissed where a plaintiff alleged that he was “wrongfully” expelled from a club but failed to allege facts showing that that the expulsion was wrongful or malicious).

D. To the extent the 3rd Amended Complaint seeks to hold Drummond vicariously liable for Balch’s acts or omissions, it fails as a matter of law.

Paragraph 2 of the 3rd Amended Complaint alleges that “Balch was the agent of Defendant Drummond Company, Inc.” and that “Drummond is liable for the torts committed by its agent, Balch & Bingham, LLP, under respondeat superior, ratification, and/or adoption.” Doc. 137 (3rd Am. Compl.) at ¶ 2. As Drummond previously briefed, Doc. 114 (Drummond’s Suppl. Br. in

³ This allegation is just a formulaic recitation of Alabama law as it applies to a conversion claim. *See Ott v. Fox*, 362 So. 2d 836, 839 (“The gist of the [conversion] action is the wrongful exercise of dominion over property in exclusion or defiance of a plaintiff’s rights”) (citations omitted).

support of its Mtn. to Dismiss the 2nd Am. Compl.) at 2-3 & Doc. 79 (Drummond’s Mtn. to Dismiss the 2nd Am. Compl.) at 8-11, these claims fail under settled rule that a principal cannot be held vicariously liable under *any* theory of liability (agency, ratification, adoption, etc.) if the underlying claims against the agent are not viable. *Id.* Drummond adopts and incorporates its prior briefing on this point.

II. COUNTS XI AND XII FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.⁴

A. Count XI does not state a claim for fraudulent concealment.

Count XI is styled “CONCEALMENT BY BALCH AND DRUMMOND” and alleges that “Balch and Drummond concealed from Roberson that Drummond was paying Phillips (who was on the AEMC), pursuant to a contract with Balch, to lobby the entity in which the AEMC supervises (ADEM).” Doc. 137 (3rd Am. Compl.) at ¶ 92. Plaintiff David Roberson allegedly “suffered damages as a result of Balch and Drummond’s concealment” because testimony at his criminal trial regarding these payments was “very damaging.” *Id.*

“The elements of a suppression claim are ‘(1) a duty on the part of the defendant to disclose facts; (2) concealment or nondisclosure of material facts by the defendant; (3) inducement of the plaintiff to act; (4) action by the plaintiff to his or her injury.’” *Aliant Bank, a Div. of USAmeribank v. Four Star Investments, Inc.*, 244 So. 3d 896, 930 (Ala. 2017) (citations omitted). Like all fraud claims, fraudulent concealment claims are subject to Rule 9(b)’s particularity requirement. *Mixon v. Cason*, 622 So. 2d 918, 920 (Ala. 1993).

⁴ The 3rd Amended Complaint also added Count X against Balch for “Concealment.” Doc. 137 (3rd Am. Compl.) at ¶¶ 88-89. That Count is not asserted against Drummond. *Id.*

i. Drummond had no duty to disclose these payments.

First, it must be pointed out this entire allegation is demonstrably false. At Mr. Roberson's criminal trial, Trey Glenn testified that he first contacted Mr. Roberson about he and Mr. Phillips getting involved in the EPA Superfund issue because he had a longstanding relationship with Mr. Roberson. Ex. 1 (Trial Transcript at 2098:8 – 2099:8). Mr. Roberson then put Mr. Glenn in touch with Joel Gilbert at Balch. *Id.*

Putting aside the utter falsity of these allegations, even assuming them to be true, whether a defendant has a duty to disclose a material fact is a threshold question of law. *Aliant Bank*, 244 So. 3d at 930. The 3rd Amended Complaint does not allege any facts showing that Drummond had a duty to disclose to Roberson that Drummond was making these payments. *See* Doc. 137 (3rd Am. Compl.) at ¶¶ 90-92. Nor does the 3rd Amended Complaint allege that Roberson asked whether these payments were being made, or that Drummond falsely responded to any such inquiry, and it is settled Alabama law that “mere silence in the absence of a duty to disclose is not fraudulent.” *Aliant Bank*, 244 So. 3d at 931 (quoting *Mason v. Chrysler Corp.*, 653 So. 2d 951, 954-55 (Ala. 1995) (collecting cases)).

ii. Plaintiffs do not allege facts showing concealment.

In addition to the lack of any duty to disclose, the 3rd Amended Complaint fails to allege facts showing how Balch and Drummond purportedly “concealed” or otherwise prevented Plaintiff David Roberson from discovering these payments. Instead, Plaintiffs summarily allege that “Balch and Drummond Company concealed from Roberson that Drummond was paying Phillips.” Doc. 137 (3rd Am. Compl.) at ¶ 92. The Alabama Supreme Court has repeatedly rejected similar allegations as insufficient to meet Rule 9(b)'s particularity requirement as it relates to fraudulent concealment. *See Miller v. Mobile County Bd of Health*, 409 So. 2d 420, 422 (Ala. 1981)

(statement in a complaint that the defendants “fraudulently conceal[ed] the defective and dangerous condition . . . after they knew said product was defective and dangerous” did not meet Rule 9(b) particularity requirements, and therefore did not adequately allege fraudulent concealment); *Lowe v. East End Memorial Hosp. and Health Centers*, 477 So. 2d 339 (Ala. 1985) (citing *Miller* and holding that plaintiff failed to adequately allege fraudulent concealment, notwithstanding the complaint’s allegation that the plaintiff “contacted the Defendants in 1981 and [] the Defendants fraudulently concealed the conduct of the Defendants from Plaintiff and denied any role in the hospital’s treatment of Plaintiff which may have caused Plaintiff’s decedent’s death”).

iii. Plaintiffs do not allege that the purported “concealment” of these payments caused them to take any course of action.

Finally, the 3rd Amended Complaint does not allege facts to satisfy the third element of a fraudulent concealment claim: “inducement of the plaintiff to act.” *Aliant Bank*, 244 So. 3d at 930. Specifically, Plaintiffs do not allege that David Roberson either took or failed to take any action because he was supposedly unaware of these payments. *See* Doc. 137 (3rd Am. Compl.) at ¶¶ 90-92. Stated differently, the 3rd Amended Complaint does not allege that Drummond’s “failure to disclose or [] concealment of [these payments] induced the plaintiff to act or refrain from acting.” *Soniat v. Johnson-Rast & Hays*, 626 So. 2d 1256, 1258 (Ala. 1993).

For all these reasons, Count XI fails to state a claim and should be dismissed.

B. Plaintiffs’ “Promissory Fraud” Count fails to state a claim upon which relief can be granted.

Count XII is styled “Promissory Fraud” and alleges that Drummond “promised and represented to both Plaintiffs” that Drummond would keep Plaintiff David Roberson on paid administrative leave pending the final resolution of the appeal of his criminal conviction. Doc. 137 (3rd Am. Compl.) at ¶¶ 93-101.

“A claim of promissory fraud is ‘one based upon a promise to act or not to act in the future.’” *Ex parte Michelin North America, Inc.*, 795 So. 2d 674, 678 (Ala. 2001) (quoting *Padgett v. Hughes*, 535 So. 2d 140, 142 (Ala. 1988)).

The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damages as a proximate consequence of the misrepresentation. To prevail on a promissory fraud claim..., two additional elements must be satisfied: (5) proof that at the time of the misrepresentation, the defendant had the intention not to perform the act promised, and (6) proof that the defendant had the intent to deceive.

Padgett, 535 So. 2d at 142. “A heavier burden is placed upon a plaintiff in a promissory-fraud case than in an ordinary fraud case.” *Ex parte Moulton*, 116 So. 3d 1119, 1144 (Ala. 2013) (citing *Heisz v. Galt Indus., Inc.*, 93 So. 3d 918 (Ala. 2012)).

Alabama is an at-will employment state. An employee may be terminated at any time, for any reason. *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987). It is also well settled in Alabama that “employees . . . bear a heavy burden of proof to establish that an employment relationship is other than ‘at will.’” *Ex parte Moulton*, 116 So. 3d at 1136 (quoting *Howard v. Wolff Broad. Corp.*, 611 So. 2d 307, 310-11 (Ala. 1992)). The 3rd Amended Complaint does not allege that David Roberson was anything other than an at-will employee or otherwise rebut this presumption. Accordingly, Roberson was an at-will employee subject to termination at any time, with or without reason. *See Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977) (“The employee can quit at will; the employer can terminate at will. This is true whether the discharge by the employer was malicious or done for other improper reasons. This has been the Alabama law since the early years of this century.”) (citations omitted).

i. Plaintiffs have not alleged a legally compensable injury.

The 3rd Amended Complaint alleges that Plaintiff David Roberson “lost the salary and benefits that Drummond promised to pay him.” Doc. 137 (3rd Am. Compl.) at ¶ 100. Plaintiffs

also claim that they “lost employment opportunities that were available to them,” were forced to put their house on the market, and “have been even further humiliated by a company and individuals that they once regarded as friends.” *Id.* Each of these alleged injuries flows from Roberson’s loss of his employment as an at-will employee of Drummond.

“[T]he showing of a loss of employment is legally inadequate to show the element of damage in a fraud claim by an at-will employee against his or her employer.” *Burrell v. Carraway Methodist Hosp. of Ala., Inc.*, 607 So. 2d 193, 196 (Ala. 1992) (citing *Salter v. Alfa Ins. Co.*, 561 So. 2d 1050 (Ala. 1990)). Because Roberson was an employee terminable at will, “there can be no legally compensable injury resulting from the employer’s terminating the employment.” *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248, 250 (Ala. 1994) (citing *Burrell*, 607 So. 2d at 193). Alabama state and federal courts have consistently applied this principle to dismiss fraud claims arising out of the termination of at-will employees. *Salter*, 561 So. 2d at 1054 (“Even assuming that Salter proved that Alfa, through one of its representatives, had intentionally or recklessly misrepresented to her that she did not have to participate at all in the investigation of the W.B. claim; that she had acted upon that misrepresentation; and that Alfa had based the termination of her contract on her failure to cooperate in the investigation, the fraud claim would still fail.”); *Stutts v. Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1582 (N.D. Ala. 1994) (“The fact of employment at will raises a barrier to a fraud action by an employee because Alabama law also clearly establishes that in order to maintain a fraud action in an employment context, the plaintiff must show that he suffered actual injury. The element of actual injury is one that plaintiff cannot meet; since an employee at will may be terminated at any time for any reason or for no reason, he

cannot show injury from the fact of changes in his employment, even if those changes are attributable to malicious action on the part of the employer.”).⁵

Roberson was an at-will employee, and under settled Alabama law he cannot recover under a theory of promissory fraud for injuries flowing from the termination of his employment.

ii. As a matter of law, Plaintiffs could not have reasonably relied on Drummond’s alleged promise of continued employment.

Reasonable reliance is an indispensable element of promissory fraud claim. *Padgett*, 535 So. 2d at 142; *Baker v. State Farm Gen. Ins.*, 585 So. 2d 804 (Ala. 1991). Because Roberson was an at-will employee, Plaintiffs could not reasonably rely on Drummond’s alleged promise to keep him on paid administrative leave as a matter of law. *Pranzo v. ITEC, Inc.*, 521 So. 2d 983, 985 (Ala. 1988); *see also Gardner v. State Farm Mut. Auto. Ins. Co.*, 822 So. 2d 1201 (Ala. Civ. App. 2001) (no reasonable reliance on employer’s promise not to fire except for theft when employee had an at-will employment agreement).

Tennessee and Georgia are also at-will employment states, and their cases are in accord. *See Jacobs v. Ga.-Pacific Corp.*, 323 S.E.2d 238 (Ga. App. 1984) (employer’s oral promise that employment would be permanent did not give the employee a remedy in fraud because the underlying employment contract was terminable at will); *Ely v. Stratoflex, Inc.*, 208 S.E.2d 583 (Ga. App. 1974); *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 935 (Ct. App. Tenn. 1984) (employee could not state a claim for promissory fraud against his employer for not honoring a

⁵ *See also Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham*, 711 So. 2d 995, 1002 (Ala. 1998), *overruled on other grounds in White Sands Group, L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 12-13 (Ala. 2009) (reversing a jury verdict on a fraud claim and holding that “[t]o affirm on the fraud issue would effectively eliminate the discretion employers enjoy to employ whom they will. We conclude that Corroon did not act fraudulently in its treatment of Dean during his employment with Corroon.”); *Wade v. Chase Manhattan Mortg. Corp.*, 994 F. Supp. 1369, 1385 (N.D. Ala.), *aff’d sub nom. Wade v. Chem. Residential*, 132 F.3d 1461 (11th Cir. 1997) (“Based on the at-will relationship, the court concludes that the fact that plaintiffs could lose their jobs based on the closing of the Birmingham branch office due to low productivity in the first few Months of operation was not suppressed. Defendant is entitled to have summary judgment entered in its favor as to all of plaintiffs’ fraudulent suppression claims.”).

“commitment for lifetime employment” because the employee was an at-will employee). *See also Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286 (8th Cir. 1988) (applying Missouri law) (promise of employment until retirement did not create a “sufficiently concrete expectation of guaranteed employment upon which Wilson could have reasonably relied”).

Plaintiffs’ promissory fraud claim relies upon an alleged promise of continued employment for a specified period of time. Doc. 137 (3rd Am. Compl.) at ¶ 93. However, as Alabama, Georgia, Tennessee, and other at-will employment jurisdictions hold, a promise of employment for a period of time does not create a “sufficiently concrete expectation of guaranteed employment upon which [Roberson] could have reasonably relied.” *Wilson*, 838 F.2d at 291; *Pranzo*, 521 So. 2d at 985. Plaintiffs’ claim for promissory fraud fails as a matter of law for this additional reason.

CONCLUSION

WHEREFORE, for the reasons set forth above, Drummond respectfully requests this Honorable Court to enter an Order dismissing all claims against Drummond, with prejudice.

DATED: November 26, 2019

Respectfully submitted,

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Attorneys for Drummond Company, Inc.

CERTIFICATE OF SERVICE

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s/ H. Thomas Wells, III

OF COUNSEL

EXHIBIT 12

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

**DAVID ROBERSON,
Plaintiff,**

v.

**DRUMMOND COMPANY, INC.
AND BALCH & BINGHAM, LLP
Defendants.**

§
§
§
§
§
§
§
§
§

Case No.: CV-2019-901210.00

**PLAINTIFF’S MOTION TO STRIKE DRUMMOND COMPANY’S
SUPPLEMENT TO ITS MOTION TO DISMISS PLAINTIFF’S THIRD
AMENDED COMPLAINT**

Defendant Drummond Company filed has filed as an attachment to its Motion To Dismiss Plaintiff’s Third Amended Complaint what it purports to be a portion of the trial transcript of USA v. Gilbert et al and included excerpts of the testimony of Oliver Robinson and Trey Glenn. Plaintiff moves to strike the attachments of Drummond Company, Inc. as the Circuit Courts of Alabama do not take judicial notice of the records of another court and the Drummond attachments are not authenticated. See *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company, Inc. and Morgan Asset Management, Inc.*, 190 So.3d 895 (Ala. 2015)

The Plaintiff also moves the Court to strike and not consider any of the references in Drummond’s Motion To Dismiss to any of the attachments to said motion. In ruling on a Motion to Dismiss, a Circuit Court may not take judicial notice of proceedings in the United States District Court.

In *Garrison v. Hayden*, 495 So. 2d 616, 617 (Ala. 1996), the Supreme Court of Alabama reversed the dismissal of a complaint, where the Circuit Court had taken judicial notice of federal proceedings:

Initially, we note that the defendants argue in their brief that the trial court dismissed the plaintiff's complaint after properly taking judicial notice of a prior criminal prosecution that allegedly involved some of the same facts that form the basis of the plaintiff's complaint. However, there is nothing in the record supporting this argument.

In their motion to dismiss, the defendants alleged that the plaintiff was barred from proceeding under his complaint in this case because he had previously filed two actions in the United States District Court for the Middle District of Alabama, which were still pending and which involved the same subject matter as the present case. See § 6-5-440, Alabama Code 1975; *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala.1981); although the defendants do not mention the two federal cases in their brief, we note that the trial court could not properly have taken judicial notice of those cases. *Crossland v. First National Bank of Montgomery*, 233 Ala. 432, 172 So. 255 (1937). Therefore, dismissal of the complaint cannot be upheld on that ground.

Furthermore, well established precedent of the Supreme Court of Alabama bars attachments outside of the pleadings from being considered by the trial court in determining whether a **ARCP 12(b)(6)** Motion To Dismiss should be granted. As set out in *Brindley v. Cullman Regional Medical Center*, 709 So.2d 1261 (1988),

A motion to dismiss pursuant to **ARCP 12(b)(6)** contemplates only the determination of whether the Plaintiff's complaint states a claim upon which relief can be granted, and matters outside the pleadings never should be considered in deciding whether to grant such a motion.

The motions to dismiss of both Defendants, Balch and Bingham and Drummond Company, contain numerous attachments outside the pleadings as both Defendants are keenly aware their motions are not persuasive and so they violate the rules. The Defendants would not attach the unauthenticated documents to their motions if they both did not want

this Court to consider the attachments in ruling on their motions to dismiss. Both motions to dismiss are really summary judgment motions and the Defendants want the Court to use these attachments outside of the pleadings to grant their motions to dismiss without the Plaintiff having any opportunity to conduct any discovery. Such a result would be a complete denial of due process to the Robersons. As set out in *Wilson v. First Union National Bank of Georgia, et al*, 716 So.2d 722 (Ala.Civ.App.1998),

Thus, if the trial court does not exclude matters submitted outside the pleading, it must afford the nonmoving party all of the procedural safeguards set forth in *Rule 56, Ala.R.Civ.P.*, which pertains to summary judgment.

WHEREFORE, the plaintiff moves the court to STRIKE AND NOT CONSIDER the attachments to Drummond Company's Motion To Dismiss Plaintiff's Third Amended Complaint and to DENY Drummond Company's Motion To Dismiss Plaintiff's Third Amended Complaint as said Third Amended Complaint, when viewed in light most favorable to the Plaintiffs and taking the allegations in the Plaintiff's Third Amended Complaint as true as the Court is required to do at this stage of the litigation, presents facts which, if proven true at trial, would entitle the Plaintiff to relief.

/s/ Burt W. Newsome

Burt W. Newsome (NEW047)

Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 26th day of November, 2019.

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Hon. Thomas Baddley, Jr.
Hon. Andrew Campbell
Hon. Yawanna McDonald
Hon. Cason M. Kirkby
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Hon. William Davis, III
Hon. H. Thomas Wells, III
Hon. Benjamin T. Presley
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Birmingham, AL 35203

/s/ Burt W. Newsome
Burt W. Newsome
Attorney For Plaintiff

EXHIBIT 13

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| Plaintiff, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

ORDER

This matter came before this Court on the Motions To Dismiss Plaintiff's Second Amended Complaint of Defendants Balch & Bingham, LLP and Drummond Company with counsel for all parties present. After oral arguments of the parties and consideration of all the pleadings, this Court finds as follows:

Both Balch & Bingham, LLP and Drummond Company qualify as legal service providers under the Alabama Legal Services Act. However, neither Balch & Bingham, LLP nor Drummond Company were providing legal services on behalf of Plaintiff David Roberson. As set out in their respective motions to dismiss, Balch & Bingham LLP's client was Drummond Company and Drummond Company was the Plaintiff's employer.

An essential element of a claim under the Alabama Legal Services Liability Act is the existence of an attorney client relationship. See *Code of Alabama §6-5-572, Bryant v. Robledo*, 938 So.2d 413 (Ala.Civ.App. 2005), *Brackin v. Trimmier Law Firm*, 897 So.2d 207 (Ala. 2004) and *Mississippi Valley Title Insurance Company v. Thompson*, 802 F.3d 1248 (2015). To create an attorney-client relationship under Alabama law, there must be a contract of employment between the attorney and the client, the same as in other cases of contract. See *Board of Commissioners of the Alabama State Bar v. R.B. Jones*, 291 Ala. 371 (Ala.1973) and *Mississippi Valley Title Insurance Company v. Thompson*, 802 F.3d 1248 (2015).

Neither Balch & Bingham nor Drummond Company were legal service providers to Plaintiff David Roberson which is a required element for a claim to be covered under the Alabama Legal Services Act. In addition, neither Balch nor Drummond had any type of contract whatsoever with Plaintiff David Roberson to provide legal services to him. As a result, neither the Alabama Legal Services Act nor the Statute of Limitations under the

Alabama Legal Services Act applies to this case and both Defendants Motions To Dismiss are DENIED.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]
CIRCUIT JUDGE

PROPOSED ORDER

EXHIBIT 14

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| Plaintiff, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

Proposed Order

This matter came before the Court on the Motion to Dismiss Plaintiff's Second Amended Complaint (doc. 76) (the "Motion") of Defendant Balch & Bingham, LLP ("Balch"), the Opposition Brief (doc. 96) of Plaintiff David Roberson ("Roberson" and collectively with Balch, the "Parties"), and Roberson's related Motions to Strike (docs. 92 and 102) the exhibits and supplement to Balch's Motion. The matter was submitted on the aforementioned filings, the briefing of the Parties, the allegations of Roberson's Second Amended Complaint (doc. 67), and the arguments of counsel for the Parties at the hearing on this matter held on May 29, 2019. As the Court concluded at the hearing and announced from the bench, Balch's Motion is due to be GRANTED.

Based upon the allegations of Roberson's Second Amended Complaint, the following allegations are taken as true facts for the purposes of Balch's Motion and the Court makes the following conclusions of law:

1. Roberson's original Complaint (doc. 2) was filed March 15, 2019, followed by Roberson's First Amended Complaint (doc. 41) filed on April 19, 2019, and Roberson's Second

Amended Complaint (doc. 76) filed on May 6, 2019. The Parties agree that the Second Amended Complaint is the operative pleading here.

2. Roberson's Second Amended Complaint alleged that Roberson received legal advice from Balch in November of 2014 regarding the legality of services provided by the Oliver Robinson Foundation (the "Plan"). (Second Am. Compl. ¶¶ 6-9.) Further, Roberson alleges that he relied upon this legal advice and was harmed as a result of such reliance, culminating in his conviction of multiple federal crimes on July 20, 2018. (Id. at ¶¶ 21, 54.)
3. Because Roberson's Second Amended Complaint alleges claims against a legal service provider—Balch—the Court concludes that the Alabama Legal Services Liability Act (the "ALSLA"), Ala. Code § 6-5-570, et seq., is the sole and exclusive remedy for Roberson's causes of action against Balch. The ALSLA applies to "[a]ny action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider's violation of the standard of care applicable to a legal service provider." Ala. Code § 6-5-573. The ALSLA further provides that a "legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future." Id. The ALSLA created "a new and single form of action and cause of action exclusively governing the liability of legal service providers known as a legal service liability action and provides for the time in which a legal service liability action may be brought and maintained is required." ALA. CODE § 6-5-570 (emphasis added). Nowhere in the text of the ALSLA did

the Legislature condition the application of this “comprehensive” act with its “exclusive[]” cause action on the existence of an attorney-client relationship. See *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002).

4. The claims under the ALSLA “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” Ala. Code § 6-5-574(a). Although there is a six-month discovery rule for the statute of limitations under the ALSLA – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” – the ALSLA’s statute of repose dictates “that in no event may the action be commenced more than four years after such act or omission or failure” *Id.*
5. The Court, therefore, applies the ALSLA to Roberson’s allegations in his Second Amended Complaint regarding his four claims against Balch—Counts V, VI, VII, and VIII. Count V alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in November 2014. (Second Am. Compl. ¶ 51.) Count VI alleges “omission” or concealment by then-Balch partner Gilbert in November 2014. (*Id.* at ¶ 59.) First, the ALSLA’s four-year statute of repose bars these claims. The ALSA provides “that in no event may the action be commenced more than four years after such act or omission or failure” Ala. Code § 6-5-574(a). Four years after November 2014 is November 2018. Roberson filed his complaint on March 15, 2019. His Complaint was untimely under the ALSA statute of repose.
6. Second, Counts V and VI are barred by the ALSLA’s two-year statute of limitations. The ALSLA provides that a claim “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” ALA. CODE § 6-5-

574(a). Two years after November 2014 is November 2016. Counts V and VI were untimely under the ALSA's statute of limitations.

7. Third, the ALSLA's six-month discovery rule does not save Counts V and VI. The ALSLA provides: – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” ALA. CODE § 6-5-574(a). Roberson surely would have “discovered” the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019. Counts V and VI are not saved by the ALSLA's six-month discovery rule.
8. Count's VII alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in June 2016. (Second Am. Compl. ¶ 65.) Count VIII alleges an “omission” or concealment by then-Balch partner Gilbert in June 2016. (Id. at ¶¶ 59, 73, 77.) First, this re-iteration of the November 2014 advice is barred by the ALSLA's statute of repose. ALA. CODE § 6-5-574(a). Second, two years after June 2016 is June 2018. Counts VII and VIII are barred by the ALSA's two-year statute of limitations. Id. Third, under the ALSLA's six-month discovery rule, Roberson would surely have “discovered” that the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019. Counts VII and VIII are not saved by the ALSLA's six-month discovery rule. Id.
9. Under any calculation of the applicable statute of limitations or repose of the ALSLA, be it two years, four years, or the six-month discovery rule, Roberson's claims filed on March 15,

2019 are all time-barred and, therefore, due to be dismissed with prejudice. Roberson incurred some damages, and thus his claims accrued, when he received the allegedly defective advice in November 2014 and June 2016 regarding “what they were doing” by June 2016. (Second Am. Compl. ¶ 66.) See *Coilplus-Alabama, Inc. v. Vann*, 53 So. 3d 898 (Ala. 2010). To the extent Roberson alleges any claims against Drummond based upon any agency relationship it may have had with Balch, and based on Balch’s provision of legal advice, those claims are also due to be and hereby are dismissed with prejudice.

10. Although permissible, the Court determined not to consider the record excerpts from the criminal trial because Roberson’s pleading allegations themselves were more than sufficient to find that the Second Amended Complaint is barred by the ALSLA statutes of limitations and repose. Therefore, Roberson’s motions to strike are moot and due to be and hereby are DENIED.

It is therefore **ORDERED, ADJUDGED, and DECREED** that Balch’s Motion to Dismiss the Second Amended Complaint is due to be and hereby is **GRANTED**. All claims against Defendant Balch & Bingham, LLP are hereby **DISMISSED** with prejudice.

DONE this [To be filled by the Judge].

/s/[To be filled by the Judge]
CIRCUIT JUDGE

EXHIBIT 15

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

| | | |
|------------------------------------|---|--|
| DAVID ROBERSON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. CV-2019-901210 |
| |) | |
| DRUMMOND COMPANY, INC.; AND |) | |
| BALCH & BINGHAM, LLP, |) | |
| |) | |
| Defendants. |) | |

MOTION FOR STATUS CONFERENCE

Defendant Balch & Bingham, LLP (“Balch”) respectfully requests this Honorable Court set a status conference in this action. In support of this Motion, Balch states as follows:

1. The Court held a hearing on pending motions to dismiss filed by Balch and by Drummond Company, Inc. on May 29, 2019. In that hearing, the Court announced a ruling from the bench granting Balch’s motion to dismiss, but a written order has not been entered.
2. Balch, therefore, requests the Court set this matter for a status conference to apprise the parties of the status of the case.

WHEREFORE, Balch respectfully requests the Court enter an order setting this matter for a status conference.

Respectfully submitted this the 16th day of October, 2019.

/s/ Cason M. Kirby

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 Thomas Baddley, Jr.
 Yawanna McDonald
 Cason M. Kirby
 Counsel for Balch & Bingham, LLP

OF COUNSEL

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/s/ Sela S. Blanton (with permission)

Bruce F. Rogers

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Counsel for Balch & Bingham, LLP

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/s/ Cason M. Kirby

Of Counsel

EXHIBIT 16

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

| | | |
|------------------------------------|---|--|
| DAVID ROBERSON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. CV-2019-901210 |
| |) | |
| DRUMMOND COMPANY, INC.; AND |) | |
| BALCH & BINGHAM, LLP, |) | |
| |) | |
| Defendants. |) | |

NOTICE OF FILING OF PROPOSED ORDER

Defendant Balch & Bingham, LLP (“Balch”) hereby gives notice of the filing of its proposed order granting Balch’s Motion to Dismiss Plaintiff’s Second Amended Complaint (doc. 76), as the Court announced during the hearing on this matter held on May 29, 2019. Balch’s proposed order is attached as Exhibit A to this Notice.

The transcript from the Court’s May 29, 2019, hearing is attached as Exhibit B to this Notice.

Respectfully submitted this the 23rd day of October, 2019.

/s/ Cason M. Kirby

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 Thomas Baddley, Jr.
 Yawanna McDonald
 Cason M. Kirby
 Counsel for Balch & Bingham, LLP

OF COUNSEL

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CERTIFICATE OF SERVICE

I certify that on October 23, 2019, I electronically filed the foregoing with the clerk of the Court using the AlaFile System, which will electronically serve the following counsel of record:

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Of Counsel



ELECTRONICALLY FILED
10/23/2019 12:22 PM
01-CV-2019-901210.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

EXHIBIT

A

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | |
|------------------------------------|--|
| DAVID ROBERSON, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) Civil Action No. CV-2019-901210 |
| |) |
| DRUMMOND COMPANY, INC.; AND |) |
| BALCH & BINGHAM, LLP, |) |
| |) |
| Defendants. |) |

**PROPOSED
ORDER**

This matter came before the Court on the Motion to Dismiss Plaintiff’s Second Amended Complaint (doc. 76) (the “Motion”) of Defendant Balch & Bingham, LLP (“Balch”), the Opposition Brief (doc. 96) of Plaintiff David Roberson (“Roberson” and collectively with Balch, the “Parties”), and Roberson’s related Motions to Strike (docs. 92 and 102) the exhibits and supplement to Balch’s Motion. The matter was submitted on the aforementioned filings, the briefing of the Parties, the allegations of Roberson’s Second Amended Complaint (doc. 67), and the arguments of counsel for the Parties at the hearing on this matter held on May 29, 2019. As the Court concluded at the hearing and announced from the bench, Balch’s Motion is due to be **GRANTED.**

Based upon the allegations of Roberson’s Second Amended Complaint, the following allegations are taken as true facts for the purposes of Balch’s Motion and the Court makes the following conclusions of law:

1. Roberson’s original Complaint (doc. 2) was filed March 15, 2019, followed by Roberson’s First Amended Complaint (doc. 41) filed on April 19, 2019, and Roberson’s Second

Amended Complaint (doc. 76) filed on May 6, 2019. The Parties agree that the Second Amended Complaint is the operative pleading here.

2. Roberson’s Second Amended Complaint alleged that Roberson received legal advice from Balch in November of 2014 regarding the legality of services provided by the Oliver Robinson Foundation (the “Plan”). (Second Am. Compl. ¶¶ 6-9.) Further, Roberson alleges that he relied upon this legal advice and was harmed as a result of such reliance, culminating in his conviction of multiple federal crimes on July 20, 2018. (*Id.* at ¶¶ 21, 54.)

3. Because Roberson’s Second Amended Complaint alleges claims against a legal service provider—Balch—the Court concludes that the Alabama Legal Services Liability Act (the “ALSLA”), ALA. CODE § 6-5-570, *et seq.*, is the sole and exclusive remedy for Roberson’s causes of action against Balch. The ALSLA applies to “[a]ny action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider’s violation of the standard of care applicable to a legal service provider.” ALA. CODE § 6-5-573. The ALSLA further provides that a “legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission. A legal services liability action embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.” *Id.* The ALSLA created “a new and single form of action and cause of action *exclusively* governing the liability of legal service providers known as a legal service liability action and provides for the time in which a legal service liability action may be brought and maintained is required.” ALA. CODE § 6-5-570 (emphasis added). Nowhere in the text of the ALSLA did the Legislature condition the application of this

“comprehensive” act with its “exclusive[]” cause action on the existence of an attorney-client relationship. *See Robinson v. Benton*, 842 So.2d 631 (Ala. 2002).

4. The claims under the ALSLA “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” ALA. CODE § 6-5-574(a). Although there is a six-month discovery rule for the statute of limitations under the ALSLA – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” – the ALSLA’s statute of repose dictates “that in no event may the action be commenced more than four years after such act or omission or failure” *Id.*

5. The Court, therefore, applies the ALSLA to Roberson’s allegations in his Second Amended Complaint regarding his four claims against Balch—Counts V, VI, VII, and VIII. Count V alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in November 2014. (Second Am. Compl. ¶ 51.) Count VI alleges “omission” or concealment by then-Balch partner Gilbert in November 2014. (*Id.* at ¶ 59.) First, the ALSLA’s four-year statute of repose bars these claims. The ALSA provides “that in no event may the action be commenced more than four years after such act or omission or failure” ALA. CODE § 6-5-574(a). Four years after November 2014 is November 2018. Roberson filed his complaint on March 15, 2019. His Complaint was untimely under the ALSA statute of repose.

6. Second, Counts V and VI are barred by the ALSLA’s two-year statute of limitations. The ALSLA provides that a claim “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” ALA. CODE § 6-5-

574(a). Two years after November 2014 is November 2016. Counts V and VI were untimely under the ALSA's statute of limitations.

7. Third, the ALSLA's six-month discovery rule does not save Counts V and VI. The ALSLA provides: – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” ALA. CODE § 6-5-574(a). Roberson surely would have “discovered” the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019. Counts V and VI are not saved by the ALSLA's six-month discovery rule.

8. Count's VII alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in June 2016. (Second Am. Compl. ¶ 65.) Count VIII alleges an “omission” or concealment by then-Balch partner Gilbert in June 2016. (*Id.* at ¶¶ 59, 73, 77.) First, this re-iteration of the November 2014 advice is barred by the ALSLA's statute of repose. ALA. CODE § 6-5-574(a). Second, two years after June 2016 is June 2018. Counts VII and VIII are barred by the ALSA's two-year statute of limitations. *Id.* Third, under the ALSLA's six-month discovery rule, Roberson would surely have “discovered” that the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019. Counts VII and VIII are not saved by the ALSLA's six-month discovery rule. *Id.*

9. Under any calculation of the applicable statute of limitations or repose of the ALSLA, be it two years, four years, or the six-month discovery rule, Roberson's claims filed on

March 15, 2019 are all time-barred and, therefore, due to be dismissed with prejudice. Roberson incurred some damages, and thus his claims accrued, when he received the allegedly defective advice in November 2014 and June 2016 regarding “what they were doing” by June 2016. (Second Am. Compl. ¶ 66.) *See Coilplus-Alabama, Inc. v. Vann*, 53 So. 3d 898 (Ala. 2010). To the extent Roberson alleges any claims against Drummond based upon any agency relationship it may have had with Balch, and based on Balch’s provision of legal advice, those claims are also due to be and hereby are dismissed with prejudice.

10. Although permissible, the Court determined not to consider the record excerpts from the criminal trial because Roberson’s pleading allegations themselves were more than sufficient to find that the Second Amended Complaint is barred by the ALSLA statutes of limitations and repose. Therefore, Roberson’s motions to strike are moot and due to be and hereby are **DENIED**.

It is therefore **ORDERED, ADJUDGED, and DECREED** that Balch’s Motion to Dismiss the Second Amended Complaint is due to be and hereby is **GRANTED**. All claims against Defendant Balch & Bingham, LLP are hereby **DISMISSED** with prejudice.

The Court directs the Clerk to enter this Order as a final judgment under Rule 54(b), ALA. R. CIV. P., as to all claims against Defendant Balch & Bingham, LLP. The Court has considered the impact of this certification upon the remaining Parties and hereby finds there is no just reason for further delay of the entry of final judgment as to Balch.

DONE this ____ day of _____ 2019.

Hon. Tamara Harris Johnson
Circuit Judge

EXHIBIT 17



AlaFile E-Notice

01-CV-2019-901210.00

Judge: TAMARA HARRIS JOHNSON

To: BURTON WHEELER NEWSOME
burt@newsomelawllc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DAVID ROBERSON V. DRUMMOND COMPANY, INC ET AL
01-CV-2019-901210.00

The following matter was FILED on 11/11/2019 9:04:50 PM

[Filer:]

Notice Date: 11/11/2019 9:04:50 PM

JACQUELINE ANDERSON SMITH
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL, 35203

205-325-5355
jackie.smith@alacourt.gov

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| Plaintiff, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

ORDER

The Court having reviewed the allegations as set out in the Plaintiffs' Third Amended Complaint hereby DENIES the Motions To Dismiss filed by Defendants Drummond Company, Inc. and Balch & Bingham, LLP both separately and severally. This Court's prior Order staying discovery pending a ruling on the pending motions is hereby WITHDRAWN and the parties are hereby ordered to proceed with discovery.

DONE this [To be filled by the Judge].

/s/ [To be filled by the Judge]
CIRCUIT JUDGE

EXHIBIT 18



AlaFile E-Notice

01-CV-2019-901210.00

Judge: TAMARA HARRIS JOHNSON

To: NEWSOME BURTON WHEELER
burt@newsomelawllc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DAVID ROBERSON V. DRUMMOND COMPANY, INC ET AL
01-CV-2019-901210.00

The following matter was FILED on 11/22/2019 2:31:06 PM

[Filer:]

Notice Date: 11/22/2019 2:31:06 PM

JACQUELINE ANDERSON SMITH
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL, 35203

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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| ROBERSON ANNA, |) | |
| Plaintiffs, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD
AMENDED COMPLAINT**

This matter came before the Court on the Motion to Dismiss Plaintiffs' Third Amended Complaint (doc. 137) (the "Motion") of Defendant Balch & Bingham, LLP ("Balch"), Balch's motions to dismiss each of the plaintiff's earlier-filed complaints (docs. 28, 55, 76, 98), Plaintiff David Roberson's ("Roberson" and collectively with Balch, the "Parties") oppositions to Balch's motions (docs. 96, 104, 111), and Roberson's Motions to Strike (docs. 92 and 102) the exhibits and supplement to Balch's Motion to Dismiss Plaintiff's Second Amended Complaint. The matter was submitted on the aforementioned filings, the briefing of the Parties, the allegations of Roberson's Third Amended Complaint (doc. 137), and the arguments of counsel for the Parties at the hearing on this matter held on May 29, 2019. As the Court concluded at the hearing and announced from the bench, Balch's Motion is due to be **GRANTED**.

Based upon the allegations of Roberson's Third Amended Complaint, the following allegations are taken as true facts for the purposes of Balch's Motion and the Court makes the following conclusions of law:

1. Roberson’s original Complaint (doc. 2) was filed March 15, 2019, followed by Roberson’s First Amended Complaint (doc. 41) filed on April 19, 2019, Second Amended Complaint (doc. 76) filed on May 6, 2019, and Third Amended Complaint (doc. 137) filed on November 11, 2019 by Roberson and his wife, Anna.¹ The Parties agree that the Third Amended Complaint is the operative pleading here.

2. Roberson’s Third Amended Complaint alleges that Roberson received legal advice from Balch in November of 2014 regarding the legality of services provided by the Oliver Robinson Foundation (the “Plan”). (Doc. 137. ¶¶ 9-11.) Further, Roberson alleges that he relied upon this legal advice and was harmed as a result of such reliance, culminating in his conviction of multiple federal crimes on July 20, 2018. (*Id.* at ¶¶ 23, 57, 63.)

3. Roberson’s Third Amended Complaint includes conclusory allegations and legal conclusions that Balch “never functioned as” his or Drummond’s lawyers in the Oliver Robinson “scheme” but, nonetheless, restates his allegations that his reliance on Gilbert’s legal advice resulted in his conviction. (Doc. 137.) Roberson’s Third Amended Complaint also adds new claims that Gilbert—a Balch lawyer— “concealed” the illegality of paying Oliver Robinson through the funds allocated for donations of children’s winter coats and the illegality of paying Glenn and Phillips. (Doc. 137.) However, the crux of Roberson’s claim remains that in reliance on Gilbert’s legal advice, Roberson was criminally convicted.

The ALSLA Governs Roberson’s Claims Against Balch Because They Are Based on the Provision of Legal Advice by Gilbert and Balch

4. Because Roberson’s Third Amended Complaint alleges claims against a legal service provider—Balch—the Court concludes that the Alabama Legal Services Liability Act

(the “ALSLA”), Ala. Code § 6-5-570, *et seq.*, is the sole and exclusive remedy for Roberson’s causes of action against Balch. The ALSLA applies to “[a]ny action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider’s violation of the standard of care applicable to a legal service provider.” . The ALSLA further provides that a “legal service liability action embraces all claims for injuries or damages or wrongful death whether in contract or in tort and whether based on an intentional or unintentional act or omission. A legal services liability action embraces any form of action in

¹ Anna Roberson is named as a plaintiff for the first time in the Third Amended Complaint. (Doc. 137 ¶ 6.) Mrs. Roberson is only included as a party to the twelfth and final claim of the Third Amended Complaint for promissory fraud. (*Id.* at 23-25.) Plaintiffs only plead Count Twelve against Drummond. (*Id.*) Mrs. Roberson does not assert any claims against Balch.

which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or statutory, available to a litigant in a court in the State of Alabama now or in the future.” *Id.* The ALSLA created “a new and single form of action and cause of action *exclusively* governing the liability of legal service providers known as a legal service liability action and provides for the time in which a legal service liability action may be brought and maintained is required.” ALA. CODE § 6-5-570 (emphasis added). Nowhere in the text of the ALSLA did the Legislature condition the application of this “comprehensive” act with its “exclusive[.]” cause action on the existence of an attorney-client relationship. *See Robinson v. Benton*, 842 So.2d 631 (Ala. 2002).

5. Roberson attempts to avoid the ALSLA by stating in his Third Amended Complaint that “Balch & Bingham never functioned as Roberson’s attorney nor was Roberson or Drummond ever a legal services client of Balch & Bingham” (Doc. 137, ¶ 8.) As the Alabama Supreme Court explained in *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018), while a court

must take a factual allegations in a complaint as true, it need not do so with “legal conclusions masquerading as facts”:

Although we are required to accept McCain’s factual allegations as true at this stage of the proceedings, we are not required to accept her conclusory allegations that Gilland acted willfully, maliciously, fraudulently, or in bad faith. Rather, to survive Gilland’s motion to dismiss, McCain was required to plead facts that would support those conclusory allegations. See *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (noting, on review of the dismissal of a complaint for failure to state a claim, that “[t]he plaintiff’s factual allegations are accepted as true” but that “**conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal**”).

Ex parte Gilland, 274 So. 3d 976, 985 n.3 (Ala. 2018) (emphasis added).²

² Similarly, Roberson’s Third Amended Complaint states the legal conclusion that “Plaintiff first suffered legal injury or damage when he was indicted on September 17, 2017” See, e.g., (Doc. 137 ¶ 86). That legal conclusion need not be taken as true. See *Gilland*, 274 So. 3d at 985 n.3.

6. The Third Amendment Complaint’s assertion that an attorney providing legal advice “never functioned as Roberson’s attorney” is a legal conclusion. Whether telling Roberson that the Plan was legal is properly classified as “legal services” under Alabama Code § 6-5-570 et al., is a legal question for the Court to decide.

The ALSLA’s Statute of Limitations Bars Roberson’s Claims Because They Are All Based on Conduct and Notice That Occurred More Than Two Years Before Roberson Filed This Action

7. The claims under the ALSLA “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” Ala. Code § 6-5-574(a). Although there is a six-month discovery rule for the statute of limitations under the ALSLA – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” – the ALSLA’s statute of repose dictates “that in no event may the action be commenced more than four years after such act or omission or failure” *Id.*

Counts V and VI

8. The Court, therefore, applies the ALSLA to Roberson's allegations in his Third Amended Complaint regarding his seven claims against Balch—Counts V, VI, VII, VIII, IX, X, and XI. Count V alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in November 2014. (Doc 137. ¶ 52.) Count VI alleges “omission” or concealment by then-Balch partner Gilbert in November 2014. (*Id.* at ¶ 60.) First, the ALSLA's four-year statute of repose bars these claims. The ALSA provides “that in no event may the action be commenced more than four years after such act or omission or failure” Ala. Code § 6-5-574(a). Four years after November 2014 is November 2018. Roberson filed his complaint on March 15, 2019. His Complaint was untimely under the ALSA statute of repose.

9. Second, Counts V and VI are barred by the ALSLA's two-year statute of limitations. The ALSLA provides that a claim “must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards” Ala. Code § 6-5-574(a). Two years after November 2014 is November 2016. Counts V and VI were untimely under the ALSA's statute of limitations.

10. Third, the ALSLA's six-month discovery rule does not save Counts V and VI. The ALSLA provides: – “if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery, whichever is earlier” ALA. CODE § 6-5-574(a). Roberson surely would have “discovered” the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019.

Counts VII and VIII

11. Count VII alleges the “act” of misrepresentation by then-Balch partner Joel Gilbert in June 2016. (Doc 137. ¶ 66.) Count VIII alleges an “omission” or concealment by then-Balch partner Gilbert in June 2016. (*Id.* at ¶ 73.) First, this re-iteration of the November 2014 advice is barred by the ALSLA’s statute of repose. ALA. CODE § 6-5-574(a). Second, two years after June 2016 is June 2018. Counts VII and VIII are barred by the ALSA’s two-year statute of limitations. *Id.* Third, under the ALSLA’s six-month discovery rule, Roberson would surely have “discovered” that the allegedly defective legal advice he received from Gilbert and any concealment revealed at the criminal trial by July 20, 2018 – the date the jury convicted him. Six months from July 20, 2018 expired before Roberson filed this action on March 15, 2019. Counts VII and VIII are not saved by the ALSLA’s six-month discovery rule. *Id.*

Count IX

12. Count IX alleges that Balch concealed from Roberson a discussion in February 2017 between Gilbert and Chad Pilcher, wherein Pilcher learned that Oliver Robinson had written a letter on his House of Representatives letterhead, and Pilcher advised Gilbert that Robinson’s use of his official letterhead was improper. (Doc. 137 ¶¶ 79-80.) Roberson alleges that he did not learn of this alleged concealment until the 2018 trial. However, the Roberson indictment states that the letter Oliver Robinson wrote on his official letterhead was dated on or about March 4, 2015. (Doc. 99 ¶ 59.) David Roberson was aware in January 2017 (Doc. 28, p. 6, Exh. A), when he received a federal grand jury subpoena that the federal government was investigating whether Roberson’s, Gilbert’s, and Oliver Robinson’s actions in North Birmingham were criminal. The January 2017 subpoena was sufficient to place Roberson on

notice and to start the running of the two-year statute of limitations in the ALSLA regarding the letter and the entire Plan.

13. Even if the ALSLA's six-month extender applied to Roberson's discovery of Balch ethics attorney Chad Pilcher's February 2017 opinion of the March 4, 2015 letter such that Roberson did not reasonably discover that act or omission until the date of his subpoena (January 2017), the date of his indictment (September 27, 2017), or the date of his conviction (July 20, 2018), 6 months from all of these dates expired before Roberson filed his original complaint on March 15, 2019. *See* Ala. Code § 6-5-574(a) ("provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . .").

Count X

14. Count X alleges that Balch concealed from Roberson that a portion of a \$5,000 check by Roberson (on behalf of Drummond) to be used for the purchase of winter coats for North Birmingham children was actually retained by Oliver Robinson. (Doc. 137 ¶¶ 88-89.) Roberson claims he did not learn of this until the 2018 trial. However, as referenced in the Third Amended Complaint, the July 2018 criminal trial addressed the distribution of gift cards to purchase winter coats for kids from the Burlington Coat Factory. Specifically, a letter (admitted as an Exhibit 668) was discussed at the criminal trial, and that letter states the coat drive occurred in 2016. (See Exh. A-U.S. v. Gilbert, et al., Trial Tr. July 5, 2018, pp. 1957-1961, Ex. 668) ("the 2016 Get Smart Coat Drive"); (Doc. 99-Indictment ¶ 17 ("From in or about November 2014, and continuing until in or about November 2016, the exact dates being

unknown, within Jefferson County in the Northern District of Alabama, and elsewhere, defendants . . . GILBERT . . . and DAVID LYNN ROBERSON knowingly and willfully conspired, . . .”); (*Id.* at ¶ 3) (“Oliver L. Robinson, Jr., was a member of the Alabama House of Representatives from 1998 until his resignation on or about November 30, 2016.”).

15. The underlying coat drive with the gift cards purchased with the check Roberson wrote on behalf of Drummond occurred in 2016. His notice that there could be criminal conduct associated with the Plan occurred in January 2017, when Roberson received the federal grand jury subpoena showing that federal prosecutors were investigating whether conduct relating to the Plan was criminal. (Doc. 28, p. 6, Exh. A.) Two years from January 2017 is January 2019 – two months before Roberson filed this lawsuit on March 15, 2019. (Doc. 2.)

16. The six-month extender of Alabama Code § 6-5-654(a) does not help Roberson because adding six months to the underlying conduct date of (at the latest) November 30, 2016 (Ex. –Indictment ¶¶ 17, 3), the actual notice date of the federal grand jury subpoena January 2017 (Doc. 28, p.6 Exh. A), the indictment date of September 27, 2017 (Doc. 137 ¶ 17), the trial date of July 2018 (Doc. 137 ¶ 89), or the conviction date of July 20, 2018 (Doc. 137 ¶ 23), still ends up short of the date Roberson filed this lawsuit March 15, 2019 (Doc. 2).

Count XI

17. Count XI alleges that Balch concealed that it was paying Trey Glenn and Scott Phillips to lobby the Alabama Department of Environmental Management (“ADEM”) in opposing the EPA listing the North Birmingham site on the NPL, while Phillips served on the AEMC which supervises ADEM. (Doc. 137 ¶¶ 90-92.) Roberson claims this was used “in part by the prosecution to convict Roberson . . .” (Doc. 137 ¶92.)

18. Trey Glenn and Scott Phillips testified at Roberson's criminal trial. Mr. Glenn testified that he and Mr. Phillips began talking to Balch and Drummond about working on the 35th Avenue matter in 2013. (*U.S. v. Gilbert, et al*, July 5, 2018, Trial Tr.2098-99.) And Mr. Glenn testified that his and Mr. Phillips' business entity, Southeastern Engineering and Consulting ("SEC") signed a contract with Balch to work for Drummond on November 22, 2013. According to their testimony at the criminal trial, Trey Glenn and Scott Phillips worked on the Oliver Robinson Plan from 2014 to 2016. Accordingly, Roberson had notice in 2013 and 2014 through 2016 that Trey Glenn and Scott Phillips were being paid by Drummond to work on the 35th Avenue Matter. And on October 17, 2014, Roberson was copied on an email from Trey Glenn regarding ADEM Director Lance LeFluer and the 35th Avenue Matter. Further, in January 2017 (Doc. 28, p.6 Exh. A), when Roberson received the federal grand jury subpoena regarding the Oliver Robinson Plan and concerning the 35th Avenue Matter, he had sufficient facts to put him on notice that federal prosecutors were looking into Trey Glenn and Scott Phillips activities. Two years from January 2017 is January 2019 – two months before Roberson filed this lawsuit on March 15, 2019. (Doc. 2.)

19. The six-month extender of Alabama Code § 6-5-654(a) does not help Roberson because adding six months to the underlying conduct date of (at the latest) November 30, 2016 (Ex. –Indictment ¶¶ 17, 3), the actual notice date of the federal grand jury subpoena January 2017 (Doc. 28, p.6 Exh. A), the indictment date of September 27, 2017 (Doc. 137 ¶ 17), the trial date of July 2018 (Doc. 137 ¶ 89), or the conviction date of July 20, 2018 (Doc. 137 ¶ 23), still ends up short of the date Roberson filed this lawsuit March 15, 2019 (Doc. 2).

CONCLUSION

20. Under any calculation of the applicable statute of limitations or repose of the ALSLA, be it two years, four years, or the six-month discovery rule, Roberson's claims filed on March 15, 2019 are all time-barred and, therefore, due to be dismissed with prejudice. Roberson incurred some damages, and thus his claims accrued, when he received the allegedly defective advice in November 2014 and June 2016. (Doc. 137. ¶¶ 52, 66.) *See Coilplus-Alabama, Inc. v. Vann*, 53 So. 3d 898 (Ala. 2010). To the extent Roberson alleges any claims against Drummond based upon any agency relationship it may have had with Balch, and based on Balch's provision of legal advice, those claims are also due to be and hereby are dismissed with prejudice.

21. The Third Amendment Complaint's assertion that an attorney providing legal advice "never functioned as Roberson's attorney" is a legal conclusion masquerading as a factual allegation. The Court finds that Gilbert and Balch were, and absolutely did function as, attorneys in connection with the work alleged in the Third Amended Complaint and made the basis of Roberson's claims. As such, the ALSLA applies to all of Roberson's claims against Balch.

22. Although permissible, the Court determined not to consider the record excerpts from the criminal trial because Roberson's pleading allegations themselves were more than sufficient to find that the Third Amended Complaint is barred by the ALSLA statutes of limitations and repose. Therefore, Roberson's motions to strike are moot and due to be and hereby are **DENIED**.

It is therefore **ORDERED, ADJUDGED, and DECREED** that Balch's Motion to Dismiss the Third Amended Complaint is due to be and hereby is **GRANTED**. All claims against Defendant Balch & Bingham, LLP are hereby **DISMISSED** with prejudice.

The Court directs the Clerk to enter this Order as a final judgment under Rule 54(b), Ala. R. Civ. P., as to all claims against Defendant Balch & Bingham, LLP. The Court has considered

the impact of this certification upon the remaining Parties and hereby finds there is no just reason for further delay of the entry of final judgment as to Balch.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE

PROPOSED ORDER

EXHIBIT 19



AlaFile E-Notice

01-CV-2019-901210.00

Judge: TAMARA HARRIS JOHNSON

To: BURTON WHEELER NEWSOME
burt@newsomelawllc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DAVID ROBERSON V. DRUMMOND COMPANY, INC ET AL
01-CV-2019-901210.00

The following matter was FILED on 12/20/2019 7:47:19 AM

[Filer:]

Notice Date: 12/20/2019 7:47:19 AM

JACQUELINE ANDERSON SMITH
CIRCUIT COURT CLERK
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JEFFERSON COUNTY, ALABAMA
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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| ROBERSON ANNA, |) | |
| Plaintiffs, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

ORDER

On May 29, 2019, this Court held a hearing on the Defendants’ Motions To Dismiss the Second Amended Complaint of Plaintiff David Roberson. On November 11, 2019, while the motions were pending, Mr. Roberson filed a Third Amended Complaint, in which his wife joined as a Plaintiff (Doc. # 137). Drummond has filed a Motion To Strike the Plaintiff’s Third Amended Complaint. The Third Amended Complaint was filed before the case was set for trial and before a case is set for trial, amendments are “freely allowed.” [See *Ala. R. Civ. P. 15(a)*] In addition, even if this Court had granted the Defendants’ original motions to dismiss, Mr. Roberson could have amended his complaint – even after the dismissal. (*Ala. R. Civ. P. 78*) Consequently, Drummond’s Motion To Strike the Plaintiff’s Third Amended Complaint is DENIED.

Both Defendants – Drummond and Balch – have also filed Motions To Dismiss the Plaintiff’s Third Amended Complaint for failure to state a claim. Although they assert that their motions are governed by *ARCP 12(b)(6)*, the Defendants both attached numerous documents outside of the pleadings to the motions, primarily from Mr. Roberson’s criminal trial in federal court. The Plaintiffs have filed a Motion To Strike these documents (Doc. # 147). Obviously, the Defendants attached these numerous documents outside of the pleadings for the Court to read and consider them in its ruling on the pending Motions To Dismiss. In ruling on a motion to dismiss, a court may not consider “matters outside the pleadings,” and these documents are not

part of the pleadings. Consequently, the Plaintiff's Motion To Strike is hereby GRANTED. *See Garrison v. Hayden*, 495 So. 2d 616, 617 (Ala. 1996) (circuit erred in taking "judicial notice" of the plaintiff's prior criminal proceeding in federal court); *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company Inc.*, 190 So. 3d 895, 910-11 (Ala. 2015) ("[g]enerally, a court may not take judicial notice of the records of another court.")

The Court now turns to the substance of the Defendants' Motions To Dismiss, and it applies the decisional standard applicable to motions under **ARCP 12(b)(6)**. Under that standard, "a court 'must accept the allegations of the complaint as true.'" *Murray v. Prison Health Servs., Inc.*, 112 So. 3d 1103, 1106 (Ala. Civ. App. 2012). "[A] **Rule 12(b)(6)** dismissal is only proper when it appears beyond any doubt that the Plaintiff can prove no set of facts in support of the claim that would entitle the Plaintiff to relief." *Ex parte Price*, 244 So. 3d 949 (Ala. 2017). Here, the Court simply cannot conclude, as a matter of law, that "the Plaintiff can prove no set of facts . . . that would entitle [him] to relief." In his Third Amended Complaint, which was not before the Court at the time of the hearing on the Motions To Dismiss, Mr. Roberson includes specific allegations that if proven true at trial, would remove his claims from being governed by the **ALSLA**:

Balch & Bingham never functioned as Roberson's attorney nor was Roberson or Drummond ever a legal services client of Balch & Bingham for or concerning the acts and omissions on which the Plaintiffs' claims are based. Likewise, Roberson was never the client of Drummond's in-house legal department for or concerning the acts and omissions on which the Plaintiffs' claims are based. Nor did Drummond ever provide Roberson any legal advice. Finally, Balch & Bingham was not functioning as Drummond's legal counsel for or concerning the acts and omission on which the Plaintiffs' claims are based. (Doc. # 117, ¶ 8).

Although Mr. Roberson argued these points at the hearing on May 29, 2019, and in his brief (Doc. # 96), he has now made them formal allegations in his complaint. Furthermore, since both of the Defendants Motions To Dismiss contain attachments outside of the pleadings which makes their motions in reality summary judgment motions as opposed to motions to dismiss, **ARCP 12** and **ARCP 56(f)** require the Court to give the Plaintiffs a reasonable opportunity to gather and present materials in opposition to the Defendants' Motions for Summary Judgment. Plaintiffs timely filed an **ARCP 56(f)** affidavit. **ARCP 56(f)** is required to be liberally applied by this Court in order to allow all parties to the case due process and an ample opportunity to marshal facts to support their respective positions and to ensure fairness in the litigation process. See *Phillips v.*

AmSouth Bank, 833 So.2d 29 (Ala.2002) and *Central Acceptance Corp. v. Colonial Bank of Alabama, N.A.*, 439 So.2d 144 (Ala.1983).

In light of the above mentioned, the Defendants Motions are DENIED WITHOUT PREJUDICE and can be refiled at a later date after the completion of discovery. This Court's prior Order staying discovery (Doc. #87) is hereby VACATED and the parties are hereby ordered to proceed with discovery.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE

PROPOSED ORDER

EXHIBIT 20



AlaFile E-Notice

01-CV-2019-901210.00

Judge: TAMARA HARRIS JOHNSON

To: BURTON WHEELER NEWSOME
burt@newsomelawllc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

DAVID ROBERSON V. DRUMMOND COMPANY, INC ET AL
01-CV-2019-901210.00

The following matter was FILED on 2/4/2020 1:40:51 PM

[Filer:]

Notice Date: 2/4/2020 1:40:51 PM

JACQUELINE ANDERSON SMITH
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL, 35203

205-325-5355
jackie.smith@alacourt.gov

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| ROBERSON ANNA, |) | |
| Plaintiffs, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

ORDER

The Court, having reviewed the Motions To Dismiss filed by Defendants Drummond Company, Inc. (or “Drummond”) and Balch & Bingham, LLP, hereby holds that said Motions, due to Drummond’s Motion To Dismiss having select portions of the trial transcript from Plaintiff’s federal criminal trial attached to it and Balch and Bingham’s Motion to Dismiss also having attached to it select portions of the trial transcript from Plaintiff’s federal criminal trial along with the Jury Instructions from Plaintiff’s criminal trial plus the Verdict form, holds that these attachments outside of the pleadings convert said motions of the Defendants to Motions for Summary Judgment. See *Hales v. First National Bank of Mobile*, 380 So.2d 797 (Ala.1980). [The Court also notes that, since Roberson has not completed the appellate process in the federal courts, his conviction is inadmissible at the present time in this Court. See *Durham v. Farabee*, 481 So. 2d 885 (Ala. 1985); *Fidelity-Phenix Fire Ins. Co. of New York v. Murphy*, 146 So. 387 (1933)] As a result of the Defendants’ Motions To Dismiss being converted to Motions for Summary Judgment, Plaintiffs’ Motion To Strike the attachments to the Defendants’ Motions to Dismiss (Doc. # 147) is MOOT.

ARCP 12 and *ARCP 56(f)* require the Court to give the Plaintiff a reasonable opportunity to gather and present materials in opposition to the Defendants’ Motions for Summary Judgment. Plaintiff timely filed an *ARCP 56(f)* affidavit and Motions To Strike the attachments to each of the Defendant’s Motion To Dismiss that were outside of the pleadings. *ARCP 56(f)* is required to

be liberally applied by this Court to allow parties due process and an ample opportunity to marshal facts to support their respective positions to ensure fairness in the litigation process. See *Phillips v. AmSouth Bank*, 833 So.2d 29 (Ala.2002) and *Central Acceptance Corp. v. Colonial Bank of Alabama, N.A.*, 439 So.2d 144 (Ala.1983).

In light of the above mentioned, the Defendants' Motions To Dismiss are DENIED WITHOUT PREJUDICE and can be refiled at a later date after the completion of discovery. This Court's prior Order staying discovery (Doc. # 87) is hereby VACATED and the parties are hereby ordered to proceed with discovery.

Lastly, on November 11, 2019, while the motions mentioned above were pending, Mr. Roberson filed a Third Amended Complaint, in which his wife joined as a Plaintiff (Doc. # 137). Drummond filed a Motion To Strike the Plaintiff's Third Amended Complaint. The Third Amended Complaint was filed before the case was set for trial and before a case is set for trial, amendments are "freely allowed." [See *Ala. R. Civ. P. 15(a)*] As a result, Drummond's Motion To Strike Plaintiffs' Third Amended Complaint is DENIED.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]

CIRCUIT JUDGE

EXHIBIT 21

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

**DAVID ROBERSON AND ANNA
 ROBERSON**

Plaintiffs,

v.

**DRUMMOND COMPANY, INC.
 AND BALCH & BINGHAM, LLP**

Defendants.

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Case No.: CV-2019-901210.00

PLAINTIFF’S MOTION TO RECUSE TRIAL JUDGE

COMES NOW the Plaintiffs and for Motion To Recuse the Trial Judge states as follows:

1. Both Defendants filed 12(b)(6) Motions To Dismiss the Plaintiffs Complaint for failure to state a claim for relief and said motions were heard by the Court in May of 2019.¹
2. Approximately one year later here in May of 2020, said 12(b)(6) Motions To Dismiss for failure to state a claim have not been ruled on by the Court.
3. *Alabama Canon of Judicial Ethics 3.B.(1)* states that a Judge should diligently discharge his/her administrative responsibilities. The Trial Judge is violating this canon by failing to rule on the Defendants frivolous motions for approximately one year.
4. The failure to rule on the pending motions is substantially harming the Plaintiffs while benefitting the Defendants. More specifically, the Defendant Drummond terminated the Plaintiff David Roberson from employment after publicly pledging to back him and the Plaintiffs are rapidly exhausting their limited financial resources — all the while waiting for the Court to rule. In addition, the Court has prevented

¹ The Plaintiffs have filed Amendments to their Complaint, and the Defendants have filed additional Motions to Dismiss.

the Plaintiffs from doing any discovery while the Defendants' Motions remain pending in perpetuity—as memories fade and the Plaintiffs grow older. (Roberson is in his seventies) This stay on discovery while the motions to dismiss have been awaiting a ruling has resulted in the case being stagnant for a one year period.

WHEREFORE, in light of the above mentioned, Plaintiffs pray that the Trial Judge will recuse herself from this case and that the case will be reassigned to a different Judge who will move the case forward in an equitable and timely manner that will allow the fair administration of justice to all parties involved.

RESPECTFULLY SUBMITTED on this the 4th day of May, 2020.

/s/ Burt W. Newsome

Burt W. Newsome (NEW047)

Attorney for Plaintiff

OF COUNSEL:

NEWSOME LAW, LLC

194 Narrows Drive, Suite 103

P.O. Box 382753 (35238)

Birmingham, AL 35242

Ph. (205) 747-1970

Fax (205) 747-1971

E-Mail: burt@newsomelawllc.com

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 4th day of May, 2020.

Hon. Bruce F. Rogers
Hon. Sela S. Blanton
BAINBRIDGE, MIMS, ROGERS & SMITH, LLP
The Luckie Building, Suite 415
600 Luckie Drive
Birmingham, AL 35223

Hon. Thomas Baddley, Jr.
Hon. Andrew Campbell
Hon. Yawanna McDonald
Hon. Cason M. Kirkby
CAMPBELL PARTNERS, LLC
505 20th Street North Suite 1600
Birmingham, AL 35203

Hon. William Davis, III
Hon. H. Thomas Wells, III
Hon. Benjamin T. Presley
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209

Hon. Anthony A. Joseph
MAYNARD COOPER & GALE LLP
1901 Sixth Avenue North
Regions Harbert Plaza, Suite 2400
Birmingham, AL 35203

/s/ Burt W. Newsome
Burt W. Newsome
Attorney For Plaintiff

EXHIBIT 22

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

DAVID ROBERSON AND ANNA ROBERSON

Plaintiffs,

v.

DRUMMOND COMPANY, INC. AND BALCH & BINGHAM, LLP

Defendants.

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Case No.: CV-2019-901210.00

PLAINTIFFS REQUEST FOR RULING AND /OR MOTION TO LIFT STAY ON DISCOVERY

COMES NOW the Plaintiffs and for Request for Ruling states as follows:

1. Both Defendants filed 12(b)(6) Motions to Dismiss the Plaintiffs Complaint for failure to state a claim for relief. Said motions were heard by the Court in May of 2019.
2. More than one year since the hearings on the motions, the Trial Court has not ruled on either of the Defendants' Motion to Dismiss and has stayed the discovery in the case throughout this period which has greatly prejudiced the Robersons. See affidavit of David Roberson attached as Exhibit "1". Also, the Court has stayed discovery in the case for well over one year as well as Plaintiffs discovery requests to both Defendants have been outstanding since May 3, 2019. See attached discovery at Exhibits "2" and "3".

WHEREFORE, in light of the above mentioned, Plaintiffs request a ruling on the Defendants pending motions to dismiss and/or that the stay on the discovery in the case be lifted.

SUBMITTED on this the 26th day of June, 2020.

/s/ Burt W. Newsome
 Burt W. Newsome (NEW047)
 Attorney for Plaintiff

OF COUNSEL:
 NEWSOME LAW, LLC
 194 Narrows Drive, Suite 103
 P.O. Box 382753 (35238)
 Birmingham, AL 35242
 Ph. (205) 747-1970
 Fax (205) 747-1971
 email: burt@newsomelawllc.com

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 26th day of June, 2020.

Hon. Bruce F. Rogers
Hon. Sela S. Blanton
BAINBRIDGE, MIMS, ROGERS & SMITH, LLP
The Luckie Building, Suite 415
600 Luckie Drive
Birmingham, AL 35223

Hon. Thomas Baddley, Jr.
Hon. Andrew Campbell
Hon. Yawanna McDonald
Hon. Cason M. Kirkby
CAMPBELL PARTNERS, LLC
505 20th Street North Suite 1600
Birmingham, AL 35203

Hon. William Davis, III
Hon. H. Thomas Wells, III
Hon. Benjamin T. Presley
STARNES DAVIS FLORIE LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209

Hon. Anthony A. Joseph
MAYNARD COOPER & GALE LLP
1901 Sixth Avenue North
Regions Harbert Plaza, Suite 2400
Birmingham, AL 35203

/s/ Burt W. Newsome
Burt W. Newsome
Attorney For Plaintiff

STATE OF Alabama
Shelby COUNTY)
)
)

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared David Roberson, who being known to me and being first duly sworn, deposes and says as follows:

“My name is David Roberson. I was formerly Head of Government Affairs for Drummond Company, Inc. I was convicted in federal court of conspiracy, bribery and other federal charges associated with Drummond’s and Balch & Bingham’s efforts to keep an area in North Birmingham from being named a Superfund site and Drummond Company being held a primary responsible party for the cleanup. Balch & Bingham, who was Drummond Company’s counsel during this operation, assured me at all times that what we were doing was legal. However, both Drummond Company and Balch & Bingham mislead me about many of the things that they were doing of which I was unaware of and that in combination with Balch’s false assurances that what we were doing was legal ultimately led to my conviction. I am out on bond right now pending my appeal to the 11th Circuit Court of Appeals. My appeal was argued in front of a three Judge panel at the 11th Circuit Court of Appeals in January of 2020 and a decision could come down at any time.

The delay in ruling on the pending motions to dismiss of Balch & Bingham and Drummond Company in my Civil Case that is presently pending in the Circuit Court of Jefferson County, Alabama has greatly harmed my family in many ways. First, if I lose my appeal in the 11th Circuit and am sent to prison, it will be very difficult for me to participate in any of the discovery and/or any part of this civil case. I will be seventy-years old in October 2020 and suffer from asthma and am on an inhaler. I also suffer from high blood pressure. Two, my wife has attempted suicide twice and with the stress of this delay and my pending appeal in the criminal case, I worry that this may overwhelm her with tragic consequences. She also suffers from high blood pressure, depression, anemia and insulin resistance and is in very poor health. Third, due to Drummond Company breaking our agreement and not keeping me on its payroll while my appeal to the 11th Circuit in the criminal



case is pending, we had to sell our home in Birmingham and all of its furnishings and contents for whatever we could get for it. My wife and I are now living in the residence that I had obtained for my son to attend college in Florida along with him though we are on the verge of having to sell it in the same manner that we did our home in Birmingham. Also, my son has autism and the stress of all of this plus our having to move in with him has been extremely harmful to him.

The oral arguments on the motions to dismiss in my and my wife's civil case in Jefferson County, Alabama against Balch & Bingham and Drummond Company were heard in May of 2019. Our discovery requests have been pending since May 3, 2019. We are now well over one year since then and the Judge still has not ruled on the motions to dismiss our complaint and has also stayed any discovery from being conducted in the case. The Judge called my attorney's office the week of Thanksgiving in 2019 and said a ruling would be forthcoming but no ruling on the pending motions to dismiss has ever been entered. The case has not moved forward in any manner whatsoever for well over one year. These actions have greatly harmed and prejudiced myself, my wife who also is a party in the case, and my entire family.

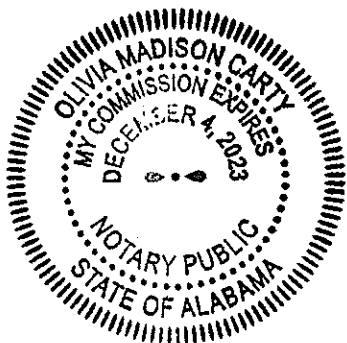
All of the above statements are true and correct and stated as facts."

David Roberson
David Roberson

STATE OF Alabama)
Shelby County)

I, the undersigned authority, a Notary Public in and for said County and State, hereby certify that David Roberson, whose name is signed to the foregoing Affidavit, and who is known to me, acknowledged before me on this day, that being informed of the contents of said affidavit, he executed same voluntarily on the day same bears date.

Sworn and subscribed before me on this the 26th day of June, 2020.



Olivia Cartwright
NOTARY PUBLIC

My Commission Expires:
12/04/2023

EXHIBIT 23



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

| | | |
|------------------------|---|-----------------------------|
| ROBERSON DAVID, |) | |
| ROBERSON ANNA, |) | |
| Plaintiffs, |) | |
| |) | |
| V. |) | Case No.: CV-2019-901210.00 |
| |) | |
| DRUMMOND COMPANY, INC, |) | |
| BALCH & BINGHAM, LLP, |) | |
| Defendants. |) | |

ORDER DENYING PLAINTIFF'S MOTION TO RECUSE

This matter comes before the Court on Plaintiff's Motion To Recuse Trial Judge [Document 174], filed 5/4/2020. The Court takes judicial notice of the court file and has read and considered the aforementioned motion. The Court acknowledges and is compliant with **Canon 3. A Judge Should Perform the Duties of His Office Impartially and Diligently**, which states, in pertinent part:

"A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be **unswayed by partisan interests, public clamor, or fear of criticism.**" [Emphasis added.]

The undersigned was randomly assigned as the trial judge in this matter, as the undersigned was one of only two Judges in this Circuit who did not recuse herself/himself from the assignment of this case. The undersigned remains unswayed by partisan interests, public clamor, or fear of criticism.

Canon 3. (4) states, in pertinent part:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, **full right to be heard** according to law...."[Emphasis added.]

Canon 3. (5) states, in pertinent part:

" A judge should dispose promptly of the business of the court, being ever mindful of matters taken under submission...."

Plaintiff contends, in its aforementioned motion for recusal, that the undersigned is violating *Canon 3.B(1)* by "failing to rule on the **Defendants' frivolous motions for approximately one year.**" [Emphasis added.] *Canon 3(B)(1)* states:

"A judge should **diligently discharge** his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." [Emphasis added.]

Let me be very clear.... this Court does not view the herein Defendants' motions or the Plaintiff's opposition as being frivolous. The Court had a Hearing on the Defendants' Motions to Dismiss; wherein, all Parties were represented by counsel. The Court's recollection is that at the conclusion of the aforementioned Hearing, on May 29, 2019, the Court advised the Parties that based on what was presented to the Court at the Hearing, the Court was inclined to grant the dismissal by Defendant Balch and Bingham and further consider the motion to dismiss by Defendant Drummond. Starting within four (4) days following the aforementioned Hearing and continuing throughout six (6) months of the herein Hearing on Defendants' Motions to Dismiss, the following has been filed with the Court, for further consideration on the herein Motions to Dismiss:

1. Plaintiff's Supplement to Plaintiff's Brief In Opposition to Defendants' Motion to Dismiss [Document 104], filed 5/30/2019;
2. Plaintiff's Motion to Strike Proposed Order of Balch & Bingham, LLP [Document 110], filed 6/5/2019;
3. Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss [Document 111], filed 6/5/2019;
4. Drummond Company Inc.'s Supplemental Brief [Document 114], filed 6/12/2019;
5. Plaintiff's Response to Drummond's Supplemental Brief [Document 117], filed 6/13/2019;
6. Drummond Co. Inc.'s Motion to Strike Plaintiff's Response to Drummond's Supplemental Brief [Document 120], filed 6/14/2019;
7. Plaintiff's Response to Defendant's Motion to Strike [Document 122], filed 6/18/2019;

8. Plaintiff's Third Amended Complaint [Document 137], filed 11/11/2019;
9. Balch & Bingham, LLP's Motion to Dismiss Plaintiff's Third Amended Complaint [Document 142], filed 11/22/2019;
10. Plaintiff's Motion to Strike Balch & Bingham's Supplement to Its Motion to Dismiss Plaintiff's Third Amended Complaint [Document 147], filed 11/25/2019;
11. Plaintiff's Response to Balch & Bingham's Motion to Dismiss Plaintiff's Third Amended Complaint [Document 149], filed 11/25/2019;
12. Drummond's Motion to Strike the Third Amended Complaint [Document 152], filed 11/26/2019;
13. Drummond Company Inc.'s Motion to Dismiss [Document 155], filed 11/26/2019;
14. Plaintiff's Motion to Strike Drummond Company's Supplement to Its Motion to Dismiss Plaintiff's Third Amended Complaint [Document 160], filed 11/26/2019;
15. Plaintiff's Objection to Drummond Company's Motion to Strike Plaintiff's Third Amended Complaint [Document 162], filed 11/26/2019;
16. Defendant's Affidavit Pursuant to Rule 56(f) [Document 165], filed 11/26/2019;
17. Plaintiff's Response to Drummond Company's Motion to Dismiss Plaintiff's Third Amended Complaint [Document 167], filed 11/27/2019.

The Court, in exercising its diligence, is affording every Party a full right to be heard on the herein issue. This Court reads the filings that are submitted to it. The court file reflects that it is the Plaintiff, who within four days of the aforementioned Hearing, initiated supplemental filings continuing through 11/27/2019, to be considered by this Court in rendering its decision regarding the pending Motions to Dismiss, said filings which are being read and considered by the Court and, in the Court's opinion, have not hamstrung the Court to render a rushed opinion without a full consideration of all filings. The Court's consideration of the herein Motions to Dismiss, in the interest of justice, necessarily includes the Parties' filings in addition to those submitted to the Court at the May 29, 2019, Hearing. Therefore, any timed-submission by the Court pursuant to the aforementioned May 29, 2019, Hearing date has been waived as a result of the additional filings to be read and considered.

It is hereby **ORDERED** that the Plaintiff's Motion to Recuse Trial Judge is **DENIED**.

DONE this 5th day of May, 2020.

/s/ TAMARA HARRIS JOHNSON

CIRCUIT JUDGE