No. 12-15268-BB

IN THE

United States Court of Appeals for the Eleventh Circuit

FREDDY LOCARNO BALOCO, *et al.*,

Plaintiffs-Appellants,

v.

DRUMMOND COMPANY, INC., *et al.*,

Defendants-Appellees.

On Appeal from the
United States District Court
for the Northern District of Alabama

BRIEF FOR APPELLEES

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Locarno Baloco v. Drummond Co., Inc., No. 12-15268-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Appellees certify that, to the best of counsel's knowledge, the following persons have an interest in the outcome of this case, in addition to those identified in the briefs for appellants:

Itochu Coal Americas Inc.

Itochu Corporation (ITOCY)

Presley, Benjamin T. (Appellees' counsel)

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees certify that Drummond Company, Inc. is the parent company of Appellee Drummond Ltd.; that Appellee Drummond Company, Inc. has no parent company; and that Itochu Corporation (ITOCY) owns 20% of the Drummond entities' Colombian operations through a new subsidiary, Itochu Coal Americas Inc., which is based in Birmingham, Alabama.

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that oral argument is appropriate in this case. The procedural history is complex and the facts are unusual. The Court would benefit by hearing orally from counsel.

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STATEMENT OF JURISDICTION

Neither the district court nor this Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 or 1350. *See infra* at 54-55. This Court has appellate jurisdiction under 28 U.S.C. § 1291. Plaintiffs filed their notice of appeal on October 11, 2012, following the district court's September 12, 2012 dismissal of the case.

STATEMENT OF ISSUES ON APPEAL

1. Did the district court correctly hold that the claims of the plaintiffs were barred by non-party preclusion because (1) there was a substantive legal relationship between plaintiffs and the previous litigants, and (2) plaintiffs' interests were adequately represented by the previous litigants?

2. Are the claims of the original eight plaintiffs also barred by the doctrine of party preclusion because they were parties in a prior action where they litigated and lost at trial?

3. Did the district court properly consider deposition testimony of the original eight plaintiffs' mothers from the previous case saying they were bringing claims on behalf of themselves and their children?

4. Did the district court properly strike newly-executed declarations from plaintiffs and their mothers stating they did not intend to be involved in the previous case?

STATEMENT OF THE CASE

In 2007, a federal jury in Birmingham, Alabama found Drummond Ltd. and its President Augusto Jiménez not liable for the deaths of Valmore Locarno, Victor Orcasita, and Gustavo Soler, union leaders who worked at Drummond's coal mine in Colombia, South America. *In re Juan Aguas Romero v. Drummond Co., Inc., et al.*, No. 03-cv-575 ("*Drummond I*"); Supp. RE 12-3, Jury Verdict Form. The judgment was affirmed by this Court in all respects. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008). The jury verdict in *Drummond I*, along with the summary judgment rulings that preceded the trial, resolved issues and claims identical to those being presented here. RE 95 (Vol. II), Mem. Op. at 13. *Compare* Supp. RE 63-3, Third Am. Compl. ("TAC") (*Drummond I*), *with* RE 60 (Vol. I), First Am. Compl. ("FAC"). The sole issue that was determined in *Drummond I* was liability: namely, whether Drummond and Augusto Jiménez were responsible for the deaths of Locarno, Orcasita and Soler under the Alien Tort Statute ("ATS") and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 and Note. RE 95 (Vol. II), Mem. Op. at 13; Supp. RE 12-3, Jury Verdict Form at 1-2. Because the *Drummond I* jury decided the liability issue in favor of the defendants, it did not reach the damages issue. Supp. RE 12-3, Jury Verdict Form at 3-5.

Locarno, Orcasita, and Soler were killed in 2001 during a time of intense violence in Colombia when conflicts between guerillas and paramilitaries, along

with other outlaw groups, killed thousands of civilians. RE 60 (Vol. I), FAC ¶ 37. Union leaders, in particular, were frequent victims of violence by the primary paramilitary group, the Autodefensas Unidas de Colombia ("AUC"). *Id.* ¶¶ 42-43. The theory of the complaint in this case is that Drummond collaborated with the AUC in the killings of Locarno, Orcasita and Soler. *Id.* ¶ 8.

The *Drummond I* case was initially filed in 2002 in the Northern District of Alabama. The plaintiffs in the initial complaint were the "estates" of the three union leaders. *See Rodriguez v. Drummond Co., Inc.*, No. 02-CV-665-KOB, Compl. (Mar. 14, 2002). Defendants filed a motion to dismiss arguing, in part, that estates did not have standing to bring these claims under Alabama law because only "personal representatives" have standing to sue for wrongful death. *Id.*, Memo. in Supp. Mot. to Dismiss (May 30, 2002). Before responding to the motion to dismiss, plaintiffs filed an amended complaint that substituted individual relatives and heirs of the union leaders for the "estates." *Id.*, First Am. Compl. (June 28, 2002). These individuals, including the wives and companions of the union leaders, proceeded anonymously as "Jane Does." *Id.*; RE 95 (Vol. II), Mem. Op. at 7-10.

The "Jane Does" sued on behalf of themselves and their minor children, and as personal representatives of the estates of the decedents. RE 95 (Vol. II), Mem. Op. at 12; Supp. RE 63-2, Second Am. Compl. (*Drummond I*) ¶¶ 15-18; RE 63-4,

Not. of Ident. ¶¶ 3-6. All twelve Plaintiffs here are children and heirs of the three union leaders who were killed. RE 60 (Vol. I), FAC ¶¶ 18-29. Eight of the twelve Plaintiffs were also child-plaintiffs in *Drummond I* through their mothers as their representatives. RE 95 (Vol. II), Mem. Op. at 7-12, 16.

In 2004, the district court granted the plaintiffs' motion to file a Third Amended Complaint anonymously, subject to the condition that they file contemporaneously a "Notice of Identities of John Doe and Jane Doe Plaintiffs" informing the court and defendants of the identities of the anonymous plaintiffs. RE 63-4, Not. of Ident. at 3; Supp. RE 33, Mem. Op. at 6-7. The Third Amended Complaint named as defendants Drummond Company, Drummond Ltd., Garry Drummond and Augusto Jiménez, the President of Drummond Ltd.'s Colombian branch. Supp. RE 63-3, TAC ¶¶ 22-27. The causes of action were under the ATS, the TVPA and for wrongful death under the "laws of Alabama, the laws of United States and the laws of Colombia." *Id.* ¶ 83.

The Notice of Identities, which was expressly incorporated in the Third Amended Complaint, identified the "Doe" plaintiffs as the wives and "permanent companions"[1] of the murdered men, and their minor children. RE (Vol. I), 63-4, Not. of Ident. at 1-2. Plaintiffs now admit that the Notice of Identities includes

[1]Colombian law recognizes as heirs an individual's children both by his legal spouse and by any "permanent companion."

eight of the Appellants here: Freddy Locarno Baloco, K. P. L. B., M. A. O. A., A. P. O. A., Ingrid Karina Soler Urrego, Stefany Orcasita, Ayleen Orcasita, and Sergio Soler. RE 95 (Vol. II), Mem. Op. at 12. In the Third Amended Complaint, the Doe plaintiffs sought damages "for the harm they have suffered individually as well as for the harm suffered by Locarno, Orcasita and Soler" and for their "loss of life." Supp. RE 63-3, TAC ¶¶ 70, 76, 85. Each plaintiff raised claims "*de iure proprio* for the damages she suffered as a result of the murder of [the union leader] as well as *de iure hereditatis* for the damages which [the union leader] suffered in the course of and as a result of his murder." *Id.* ¶ 14-19. Specifically, the plaintiffs in *Drummond I* acted as the union leaders' "legal successors" who "occupy the place of the aforesaid deceased in this case." *Id.* ¶ 20. They "are the repository of these decedents' rights." *Id.* The verdict and final judgment in *Drummond I* were based on the Third Amended Complaint and the incorporated Notice of Identities.

The original complaint in the present case ("*Drummond II*") was filed in March 2009, by eight children of the union leaders, alleging once again that Drummond and certain of its executives collaborated with paramilitaries to murder Messrs. Locarno, Orcasita and Soler and, therefore, that they were liable for damages under the ATS and TVPA. Supp. RE 33, Mem. Op. at 1-2. Defendants filed a motion to dismiss on *res judicata* grounds and for lack of standing under the ATS and the TVPA. *Id.* at 4. The district court granted the motion to dismiss as to

five of the eight plaintiffs on preclusion grounds, finding that those five plaintiffs were among the children who had brought claims in *Drummond I*. *Id.* at 8-9. The other three plaintiffs were dismissed for lack of standing. *Id.* at 17. That decision was reversed by this Court, which found that the plaintiffs did have standing under the ATS and the TVPA, and that the preclusion issues could not be resolved on the face of the pleadings. *Baloco v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011). The Court remanded "for further factual development as to the scope, if any, of the Children's involvement in the *Drummond I* litigation." *Id.* at 1351.

On remand, the district court permitted the plaintiffs to file a First Amended Complaint adding four new plaintiffs, Greysi Paola Locarno Larios, Gustavo Alberto Locarno Larios, Linda Teresa Orcasita Pineda, and Vanessa Katherine Orcasita Pisccioty, and two new defendants, Mike Tracy and James Adkins.[2] RE 60 (Vol. I), FAC ¶¶ 16, 33, 34. In the First Amended Complaint, the plaintiffs claim to be the "children and legal heirs" of the three union leaders. *Id.* ¶ 1. Several of the plaintiffs are minors and purport to sue "through their legal guardian and representative." *Id.* ¶ 15. They claim to be the "legal beneficiaries" of the union leaders with "standing to sue to recover their personal damages." *Id.* ¶ 17. "Plaintiffs seek compensatory and punitive damages in amounts to be ascertained at trial for the harm they have suffered individually as well as for the harm suffered by

[2]James Adkins was dismissed for lack of personal jurisdiction on July 6, 2012. Supp. RE 92, Order of Dismissal.

Locarno, Orcasita and Soler leading up to and during their murders and for their loss of life." *Id*. The causes of action—ATS, TVPA and wrongful death—remained the same.

Defendants moved to dismiss the new plaintiffs on statute of limitations grounds,[3] and for summary judgment as to all plaintiffs on grounds of non-party preclusion. RE 95 (Vol. II), Mem. Op. at 14, 22. Defendants also moved for summary judgment as to the original eight children based on evidence from the record in *Drummond I* (which was not before this Court in the first appeal) that those children were properly represented by their mothers as guardians and are therefore bound by party preclusion. *Id.* at 2 n.2. That evidence was deposition testimony by the mothers of each of the original eight plaintiffs identifying those plaintiffs by name as their children, and affirming that they were bringing claims on behalf of themselves and on behalf of their children.[4]

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[3]The claims of the new plaintiffs were filed more than ten years after the deaths of their fathers, Locarno and Orcasita. The district court did not reach the statute of limitations issue, and defendants thus do not argue it on this appeal. However, Defendants do not waive our arguments on this point, should the case return to the district court.

[4]Yaneth Baloco Tapia testified in her deposition in *Drummond I* on April 20, 2005, that she was bringing the lawsuit on her behalf and on behalf of her children, Freddie Locarno Baloco and K.P.L.B. RE 63-5 (Vol. I), Jane Doe II Dep. at 7:14-16; 25:22-26:14. Nancy Cordoba Vidal testified in her deposition in *Drummond I* on April 6, 2005, that she was bringing the lawsuit on behalf of herself and her minor daughter, Stefany Orcasita Cordoba. RE 63-6 (Vol. I), Jane Doe III Dep. at 11:14-16; 16:10-14; 20:14-21. Elisa Victoria Almarales testified in her deposition in *Drummond I* on

In addition to their deposition testimony, the mothers in *Drummond I* signed declarations in 2003 in support of their request for leave to proceed anonymously. In these declarations, the mothers stated under oath that they had hired their counsel of record to bring this case not only on behalf of themselves but also on behalf of their entire family. For example, Nancy Ibeth Cordoba Vidal (Jane Doe III) stated: "I have retained Terry Collingsworth and Daniel Kovalik as counsel to solicit compensation in a complaint against Drummond for the damages and suffering that my family, including my minor children, has experienced as a result of the assassination of my husband, and on behalf of my husband's estate to which I am an heir." Appellees' Mot. to Supp. R. (Jan. 22, 2013), Ex. B, Cordoba Decl. ¶ 5. *See also id*., Ex. A, Baloco Decl. ¶ 6; Ex. C, Almarales Decl. ¶ 6; Ex. D, Urrego Decl. ¶ 6.

At oral argument on the motions, counsel for plaintiffs attempted to avoid the identification of the eight children as plaintiffs in the Notice of Identities by claiming it was "sloppy drafting." Supp. RE 94, Hrg. Trans. (Aug. 7, 2012) 41:12-23; 44:1-9. Plaintiffs also argued that the deposition testimony by the mothers that

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April 7, 2005, that she was bringing the lawsuit on behalf of herself and her minor children, Ayleen Paola Orcasita Almarales, M.A.O.A. and A.P.O.A. RE 63-7 (Vol. I), Jane Doe IV Dep. at 8:9-11; 10:18-23; 19:6-10. Nubia Yolanda Urrego Urrea testified in her deposition in *Drummond I* on April 7, 2005, that she was bringing the lawsuit on behalf of herself and her minor children, Sergio Esteban Soler Urrego and Ingrid Karina Soler Urrego. RE 63-8 (Vol. II), Jane Doe V Dep. at 5:16-18; 12:16-21; 16:17-24.

they were bringing claims on behalf of their children was inadmissible because it was hearsay and called for a legal conclusion. *Id.* at 24:7-9. Plaintiffs submitted new declarations by those mothers stating that "I never intended to comment on my children's legal status in the litigation. I also never intended to involve my children . . . ." RE 69-1 (Vol. II), Urrego Decl. ¶ 8; *see also* RE 69-4 (Vol. II), Baloco Decl. ¶¶ 7, 10 (similar statements); RE 69-7 (Vol. II), Almarales Decl. ¶¶ 6, 9 (similar statements); RE 69-11 (Vol. II), Cordoba Decl. ¶¶ 6, 8 (similar statements). The district court found that the deposition testimony in *Drummond I* was "not a matter that can now be debated and subject to a flip flop once the import of those answers is realized." RE 95 (Vol. II), Mem. Op. at 20. Accordingly, the court held that "to the extent that the declarations attempt to create an issue of fact on the question of intent (*see* Doc. #94 at 71-72), they are **STRICKEN** as sham declarations." *Id.* at 20 n.14 (emphasis in original).

In its decision, the district court did not reach the question of party preclusion despite the "ocean of evidence that the children in this case were in fact the children represented in *Drummond I*." *Id.* at 16. Rather, the court granted summary judgment on the claims of all plaintiffs based upon the doctrine of non-party preclusion. The Court found that the plaintiffs were adequately represented in *Drummond I* and that "[b]ecause the decedents, their representatives, and their heirs and beneficiaries are all in privity with one another," there was a substantive legal

relationship between the parties which made the finding of no liability in *Drummond I* binding on the plaintiffs in this case. *Id.* at 17-18. The district court also rejected the argument that the mothers' deposition testimony was inadmissible as a legal conclusion, stating "it is beyond debate that the mothers testified as to the *fact* that they were bringing the lawsuit on behalf of their children." *Id.* at 11 n.9 (emphasis in original). This appeal followed.

STANDARDS OF REVIEW

Plaintiffs leave out a key part of this Court's standard of review. They correctly note that this Court will review the district court's application of the legal requirements of preclusion *de novo*. *See Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir. 2004). However, they do not mention the standard of review for the key question here—whether the relationship between the mothers in *Drummond I* and Plaintiffs here satisfies the party requirement of non-party preclusion. "[W]hether a party is in privity with another for preclusion purposes is a ***question of fact*** that is reviewed for ***clear error***." *Griswold v. County of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010) (emphasis added).

The Court reviews the district court's rulings on the admissibility of evidence for abuse of discretion, and will only reverse if the moving party establishes a substantial prejudicial effect. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1281 n.75 (11th Cir. 2008). "[E]ven if error is found it must of course rise above

the threshold of harmless error." *Perry v. State Farm Fire & Casualty Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984) (quoting *Wallace v. Ener*, 521 F.2d 215, 222 (5th Cir. 1975).

Furthermore, the Court may affirm the district court's judgment based "on any ground that finds support in the record." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (internal quotations omitted).

SUMMARY OF ARGUMENT

All Plaintiffs in this case are heirs and beneficiaries of the estates of the union leaders on behalf of which the personal representatives, wives and companions of the union leaders, brought claims for damages against these defendants under the ATS and TVPA in *Drummond I*. The district court carefully examined the record and correctly found that there was a "substantive legal relationship" between the mothers in *Drummond I* and the children in this case which precludes relitigation of their claims under *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S.Ct. 2161, 2171 (2008). Under *Taylor*, substantive legal relationships are not limited to those affecting interests in property, as Plaintiffs argue. *Taylor* stated that qualifying relationships "include, but are not limited to" relationships affecting property interests, and courts before and after *Taylor* have not limited the doctrine as Plaintiffs suggest here.

The district court also properly found that all Plaintiffs are precluded from relitigating claims for the deaths of the union leaders because they were adequately

represented by someone with the same interests who was a party in *Drummond I*. *Taylor*, 553 U.S. at 894, 128 S.Ct. at 2171. Plaintiffs cannot credibly deny that the children who are Plaintiffs in the present case have exactly the same interest as the mothers in *Drummond I* in establishing liability of the Defendants for the deaths of their fathers, and in recovering damages on behalf of the victims in which they share as heirs. Plaintiffs' primary argument is that under this Court's prior ruling in this case, *Baloco v. Drummond, Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011), the children have "separate and distinct" claims which were not and could not have been adequately represented by the mothers in *Drummond I*.

That argument is a misreading of *Baloco*, which held only that these Plaintiffs, in addition to their mothers, have *standing* to pursue ATS and TVPA claims. It said nothing to indicate these are "separate and distinct" claims from those asserted by the mothers. The Court stated, in a footnote to its opinion, that under the TVPA, the children are not limited to the measure of damages recoverable in a wrongful death action, which is necessarily brought to recover damages on behalf of the victim. 640 F.3d at 1347 n.11. But the district court properly found that this is "of no moment," because the interests of the mothers and children were perfectly aligned on the question of liability, which was the *only* question decided by the jury in *Drummond I*. RE 95 (Vol. II), Mem. Op. at 21, n.15.

This ruling granting summary judgment should also be affirmed on the independent ground of party preclusion as to eight of the twelve Plaintiffs. This Court reversed the district court's dismissal of the original complaint on this ground, finding that the pleadings in *Drummond I* that were before the Court on the appeal were insufficient to show that the children were parties, and remanding for further factual development. The Court now has before it the sworn testimony in *Drummond I* by each mother of these eight children, stating unequivocally that she brought the suit on behalf of herself ***and her children***. In the district judge's words, there is an "ocean of evidence" establishing that the eight Plaintiffs were the children represented in *Drummond I*, and summary judgment is required on that ground.

Finally, the district court properly exercised its discretion in striking the new declarations submitted by the mothers in opposition to the motion for summary judgment—which were nothing more than claims that they never intended to do what they did—in an effort to create a factual question. And contrary to Plaintiffs' argument, the testimony of the mothers at their depositions in *Drummond I* is not inadmissible hearsay.

ARGUMENT

I. The Claims Of All Plaintiffs Are Barred By Non-Party Preclusion

The issue of liability for the killings in this case has already been fully litigated to a jury verdict in favor of Defendants. To allow that exact issue to be litigated

again—by simply swapping one heir for another—is an affront to the well-settled principles of *res judicata*, which serve the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (U.S. 1979). As held by the district court, "[r]elitigation of the issue of liability would constitute a wholesale disregard for the verdict of the jury and the decision of the court in *Drummond I*." RE 95 (Vol. II), Mem. Op. at 12.

The claims of all Plaintiffs are barred by the well-settled doctrines of non-party claim and issue preclusion. There is no dispute that these claims all rest on the contention that Defendants collaborated with paramilitaries in the murders of Locarno, Orcasita and Soler -- a contention that was tried to a verdict in *Drummond I.* There is no dispute that the verdict of the jury (and the granting of summary judgment on some claims) was a final judgment on the merits, or that the district court was one of competent jurisdiction. Plaintiffs challenge only one element of both doctrines—whether the same party or someone sufficiently close to that party was a plaintiff in the prior litigation.

The district court correctly rejected Plaintiffs' arguments and entered judgment in favor of Defendants for two reasons based on *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161 (2008). First, Plaintiffs here, as heirs of the three

deceased union leaders, had a "substantive legal relationship" with the wives of the union leaders who sued on behalf of their estates for wrongful death in *Drummond I*.[5] Second, the plaintiffs in *Drummond I* "adequately represented" Plaintiffs here because their interests were fully aligned and because the record demonstrates that the wives were acting in a representative capacity. The district court's conclusions that Plaintiffs were in a substantive legal relationship with the mothers and that the mothers adequately represented Plaintiffs may be reversed only if there was clear error by the district court. *See Griswold v. Cnty of Hillsborough*, 598 F.3d at 1292.

A. Whether Plaintiffs Have A "Separate and Distinct" Measure Of Damages Is Not Controlling

In their opening brief, Plaintiffs rely heavily on the contention that in its prior decision in this case, this Court held that the children have "separate and distinct legal claims for their own losses." Br. at 13; *see also id*. at 19 ("their own distinct legal claims"); *id. at* 20 ("the children's distinct wrongful death claims"). That is a blatant misreading of the opinion in *Baloco*. This Court held only that these Plaintiffs have ***standing*** to sue under the ATS and TVPA. In its discussion of the ATS, the Court's opinion did not address whether the children's claims are separate, much less "distinct," from the claims asserted by the mothers in

[5]The complaint in *Drummond I* and here assert both federal law claims (under the ATS and TVPA) and state-law wrongful death claims. However, the claims under the ATS and TVPA are based on the extrajudicial killings of the three union leaders. As a result, the district court described all of the claims as "wrongful death" claims. This brief will adopt the same phrase to describe all of the claims.

Drummond I. Nor was the Court called upon to do so, because the only issues presented were standing to sue and whether the children were parties in the prior litigation.

In its discussion of standing under the TVPA, this Court did state that the statute creates a cause of action for wrongful death claimants that is "separate" from the cause of action by a legal representative of the victim. *Baloco* at 1348-49. That holding was based on an opinion of a Colombian lawyer saying merely that children may be wrongful death claimants under Colombia law. *Id*. at 1349. The opinion also included a footnote in which the Court, while declining to "speculate" on what damages might be warranted for such a claimant, disagreed with decisions from the United States District Court for the District of Colombia and stated in *dicta* that the appropriate measure of damages "is not limited by the Children's status as wrongful death claimants." *Id.* at 1347 n.11.

The district court, in its ruling granting summary judgment in this case, did not ignore this aspect of the Court's ruling in *Baloco*. It recognized that the children now have "separate *damage* claims from their mothers," but reasoned that the controlling inquiry on the non-party preclusion issue is the alignment of the parties on the question of *liability*. RE 95 (Vol. II), Mem. Op. at 21 n.15. Liability was the only question decided by the court and jury in *Drummond I*, and there are

no "separate" or "distinct" claims by the present Plaintiffs regarding the Defendants' responsibility for the murders of the union leaders.

In this case, Plaintiffs bring claims "for damages on behalf of the decedents" as well as "for their own damages." RE 60 (Vol. I), FAC ¶ 1. In their opening brief, Plaintiffs studiously avoid mentioning the former. And they do not confront the fact that in *Drummond I*, the mothers sought—on behalf of *all* heirs—damages on behalf of the decedents. Supp. RE 63-3, TAC ¶¶ 15-18. Plaintiffs cannot credibly argue that multiple plaintiffs may pursue "separate and distinct" claims "on behalf of decedents." That would produce the anomalous result that the liability of a defendant for wrongful death "on behalf of a decedent" would be multiplied by the number of heirs the decedent happened to have.

B. The District Court Relied on a Substantive Legal Relationship, Not On A "Close Family Relationship"

Plaintiffs also repeatedly argue that a "close family relationship is an insufficient basis to apply nonparty preclusions." Br. at 18-19. This argument is a straw man. The district court did not hold that a family relationship is sufficient. In fact, it expressly acknowledged that "a familial relationship standing alone is, indeed, not enough to satisfy the question where non-party preclusion is the issue." RE 95 (Vol. II), Mem. Op. at 17-18, n.12. The issue is not whether Plaintiffs have a familial relationship with the mothers in *Drummond I*, but whether they have a "substantive legal relationship."

C. All of the Plaintiffs Are In a Substantive Legal Relationship with the Mothers in *Drummond I*

Nonparties who are in a preexisting "substantive legal relationship" with persons who were plaintiffs in a prior lawsuit satisfy the test of preclusion. *Taylor*, 553 U.S. at 894, 128 S.Ct. 2172. *Taylor* did not limit such relationships to property rights, as Plaintiffs argue. Nor did it purport to overrule any existing precedent as to what legal relationships may be included in this exception.

As the district court found, Plaintiffs' claims both in *Drummond I* and in this case were brought "*iure heriditatis*" (as heirs) for damages suffered because of the union leaders' killings. RE 95 (Vol. II), Mem. Op. at 17. Plaintiffs in both cases are heirs of the same estate, and the mothers in *Drummond I* acted as the personal representatives of those estates. *Id*. As a result, "the decedents, their representatives and their heirs and beneficiaries are all in privity with each other." *Id*.

The Supreme Court has not directly addressed whether heirs have a substantive legal relationship with the estate's personal representative or with other beneficiaries of the estate for preclusion purposes. However, the Court has held that this type of relationship exists in a trustee-beneficiary relationship. When an action is brought "'by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment.'" *Chicago, R.I. & P. RY. Co. v. Schendel*, 270 U.S. 611, 620, 46 S.Ct. 420, 423-24 (1926). Indeed, "[i]t

would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed." *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U.S. 741, 745 (1876). The Supreme Court has equated the personal representative-heir relationship with the trustee-beneficiary relationship. "Where the personal representative is entitled to sue, it is only as trustee for described persons—the 'heirs' of the decedent." *Spokane & I.E.R. Co. v. Whitley*, 237 U.S. 487, 495, 35 S.Ct. 655, 656 (1915) (interpreting Idaho law).

Alabama law equates the personal representative of an estate with a trustee or fiduciary. Ala. Code § 43–2–840 ("If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of the personal representative's fiduciary duty to the same extent as a trustee of an express trust."); *see also United States Fid. & Guar. Co. v. Birmingham Oxygen Serv., Inc.*, 290 Ala. 149, 155, 274 So. 2d 615, 621 (1973) (holding that if the personal representative obtains a wrongful death recovery, "he acts as a quasi trustee for those who are entitled thereto under the statute of distribution."); *Ex parte Callan Assocs., Inc.*, 87 So. 3d 1161, 1170 (Ala. 2011) (describing "the general rule of trust and estate law" as "the right and obligation to pursue a legal claim on behalf of an estate (whether a trust estate or a decedent's estate) belongs to the person who holds legal title to the estate and who

has the legal obligation to preserve and administer the estate, i.e., the ***trustee*** of a trust or the ***personal representative*** of a decedent's estate") (emphasis added).

The mothers in *Drummond I* brought suit not only for their own damages but also on behalf of the decedents' estates as the union leaders' "legal successors" who "occupy the place of the aforesaid deceased in this case." Supp. RE 63-3, TAC ¶ 20. They were alleged to be "the repository of these decedents' rights." *Id.* The initial named plaintiffs in *Drummond I* were the "estates" of each union leader. *Rodriguez v. Drummond Co., Inc.*, No. 02-CV-665-KOB, Compl. (Mar. 14, 2002). When it became clear that "estates" lacked standing, the plaintiffs substituted the mothers for the "estates" as the representative of the estates of the union leaders. *Id.*, First Am. Compl. (June 28, 2002).

The heirs of the union leaders' estates are bound by the mothers' conduct in *Drummond I*, just as a beneficiary is "necessarily bound" by the action of a trustee. *Chicago, R.I.*, 270 U.S. at 620, 46 S.Ct. 423-24. As this Court has explained, "estate beneficiaries bound by administrators" is one of many "legal relationships involving a significant degree of accountability or control by one party over the other party" for preclusion purposes. *EEOC v. Pemco AeroPlex, Inc.*, 383 F.3d 1280, 1288 (11th Cir. 2004).

Plaintiffs cite no case law contradicting the district court's holding that heirs to an estate are in a substantive legal relationship with the decedent and with the

estate's legal representatives. Nor do Plaintiffs distinguish the cases cited by the district court. For example, the district court relied on *Headwaters, Inc. v. U.S. Forest Serv.*, 399 F. 3d 1047, 1053 (9th Cir. 2005), where the Ninth Circuit held that several types of relationships bar subsequent suits under preclusion including "decedents and their heirs, successors in interest and survival claimants." *Id.*; *see also In re Hanson's Estate*, 210 F. Supp. 377, 385 (D.D.C. 1963), *aff'd* 327 F.2d 889 (D.C. Cir. 1962) ("The term, privity, denotes mutual or successive relationship to the same rights of property. . . . All privies, whether in estate, blood or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 677 (5th Cir. 2003) (where decedent's estate representative sued in first suit and then decedent's parents sued in subsequent suit, parents were precluded, explaining that "[g]iven that both seek wrongful death damages on behalf of [decedent] and are represented by the same counsel, they are in privity with one another"); *Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 666 (E.D. Tex. 2000) (holding that plaintiffs, who were beneficiaries of decedent, "and all other alleged beneficiaries of [decedent's] estate should be regarded as in privity with the estate and with each other regarding claims of the estate that have been filed by purported representatives of that estate").

Other courts have similarly concluded that beneficiaries of an earlier suit brought by a proper representative are later precluded from suing a second time. For example, in *Hill v. Watts*, No. 85-1517, 1986 WL 16119 at *1 (4th Cir. 1986), the decedent was killed by the police. The mother of the decedent's children filed the first lawsuit for violation of his constitutional rights as the administrator of the estate of her husband. In the second lawsuit, the mother sued both as the administrator of the estate and on behalf of her minor children for their harm arising out of their father's death. *Id.* at *2. The Fourth Circuit held that the children could not raise separate claims in the second suit because they were "statutory beneficiaries in the prior suit" by their mother. *Id*. at *4. These children "could have sought a share of any wrongful death recovery in the prior suit," and therefore, "their interests were represented in the prior suit." *Id*.; *see also Ross ex. rel. Ross v. Bd. of Educ. of Twp. High School Dist. 211*, 486 F.3d 279, 285 (7th Cir. 2007) (lawsuit on behalf of disabled child brought by parents precluded later lawsuit brought by child for same claims); *Carter v. City of Emporia*, 815 F.2d 617, 620 (10th Cir. 1987) (applying state law to conclude that "an administrator of an estate is sufficiently in privity with heirs or beneficiaries of an estate to be subject to principles of claim preclusion").

Rather than addressing this case law, Plaintiffs incorrectly contend that the district court's conclusion "contradicts *Taylor*" because *Taylor* limits the

substantial legal relationship exception to "property or contract interests and relationships." Br. at 17. In support of this proposition, however, they cite only out-of-circuit cases. *Id*. at 17-18. Plaintiffs do not quote the relevant language of *Taylor* itself: "[q]ualifying relationships include, ***but are not limited to***, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." 553 U.S. at 894, 128 S.Ct. at 2172 (emphasis added). Although *Taylor* includes property-based relationships in its representative list, it expressly stated that the list was not exhaustive. Moreover, *Taylor* cites with approval *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 798, 116 S.Ct. 1761 (1996), which held that "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust." The guardian and trustee relationships listed in *Richards* are not property-based relationships. In fact, *Richards* noted that the term "privity" can be used "to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id*.; *see also Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593, 94 S.Ct. 806, 819 (1974) (holding that "a party who acts as a fiduciary representative for the beneficial interests of the nonparties" will preclude nonparties in later suit).

Perhaps most critical, neither this Circuit nor any courts in this Circuit have limited *Taylor*'s holding with respect to "substantive legal relationships" to property-based relationships. *See, e.g.*, *Allen v. Sch. Bd. for Santa Rosa Cnty.*, 787

F. Supp. 2d 1293, 1296-97 (N.D. Fla. 2011) (noting that "relationship of employer/employee may fall within" the *Taylor* exception for substantive legal relationships).

Plaintiffs contend that because there is no "fiduciary relationship between the mothers and the children," *Taylor* does not apply. Br. at 19. Plaintiffs misstate both the law and the facts. *Taylor* did not require a "fiduciary" relationship, but a "legal" relationship. In addition, Plaintiffs overlook the fact that under Alabama law, the personal representative of the estate acts as a fiduciary for its beneficiaries. This Court has held that under Alabama law the personal representative of an estate acts in a "fiduciary capacity." *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1191 n.4 (11th Cir. 1991); *see also Parmater v. Amcord*, 699 So. 2d 1238, 1241 (Ala. 1997) (noting that Alabama allows only one recovery for wrongful death and concluding that "personal representatives" in case "acted as trustees for the heirs at law, who were the real parties in interest"); *Ruttenberg v. Friedman*, 97 So. 3d 114, 123 (Ala. 2012) (holding that personal representative of estate is liable to "interested persons" for breach of fiduciary duty). The personal representative suing for wrongful death is acting for the heirs to the estate. *See Rodgers v. McElroy*, No. 2110364, 2012 WL 3242120, at *5 (Ala. Civ. App. 2012) ("McElroy's role as the personal representative pursuing a wrongful-death claim as a result of White's death was not done for the benefit of White's estate, but for his

next of kin."). In addition, as explained below, because the mothers acted as fiduciaries for Plaintiffs, the relationship also satisfies the "adequate representation" exception articulated by *Taylor*. *See infra* § I.D.

Plaintiffs also rely on a section of the Restatement to argue that "a judgment against the plaintiff in a survival suit will not bar a subsequent wrongful death suit." Br. at 21 (citing Restatement (Second) of Judgments §47 (1982)). They cite an illustration from the Restatement where the wife of a decedent first sues in a survival suit on behalf of the decedent and then the children are later allowed to sue under a wrongful death statute. But in a survival action, the spouse (or cotenant) asserts only her own claim, and the children are not beneficiaries. The section of the Restatement cited by Plaintiffs makes clear that "a judgment against the plaintiff in the first action precludes any person ***who was a beneficiary of that action*** from being a beneficiary in the second action." Restatement (Second) of Judgments § 47; *id*. at cmt. (c) (explaining that a "person who is represented in an action ***may not relitigate claims or issues*** therein through the medium of another representative.") (emphasis added). Plaintiffs, as heirs to the union leaders' estates, were beneficiaries of the first case brought by the estates' personal representatives. They cannot "relitigate claims or issues" from *Drummond I* now—either through a different representative or individually—just because their representative lost the first time around.

Finally, Plaintiffs create out of whole cloth a new "rule" that non-party preclusion does not apply to "factually-related but distinct claims that are not legally derivative of one another." Br. at 21. Plaintiffs cite no cases from this Circuit, or any circuit, that create this "rule." Instead they cobble together this proposition from a pre-*Taylor* Fifth Circuit case, *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860 (5th Cir. 1985). *Freeman* does not articulate any "rule" about factual and legal distinctiveness. The case is also distinguishable on its facts. In *Freeman*, a car accident killed a child and injured the child's father. The father sued first for his own injuries and lost. He then sued both for his own injuries and on behalf of the child's mother and other siblings as "wrongful death beneficiaries." The Fifth Circuit concluded, first, that the father's second suit for his own injuries was precluded. *Id*. at 861-62. The portion of the second suit brought in his representative capacity on behalf of the wrongful death beneficiaries was not precluded because the two suits were brought in different capacities. *Id.* at 863-64. In the first suit, the father sued in his individual capacity and not as representative of the decedent's estate or the beneficiaries. In the second suit, he could sue separately as the representative of those beneficiaries.

The mothers in *Drummond I* sued not only in an individual capacity for their own injuries but also in a representative capacity for the heirs of the union leaders' estates. The Fifth Circuit in *Freeman* did not address the situation here, where the

first suit was in a representative capacity and the second suit is in an individual capacity by persons whose interests were represented in the first suit. The courts to address the factual situation presented in this case have concluded that the second suit is precluded. *See, e.g.*, *Hill*, 1986 WL 16119 at *1; *Ross*, 486 F.3d at 285.

D. The Plaintiffs Were Adequately Represented By the Mothers in *Drummond I*

Plaintiffs' claims are precluded for a separate, independent reason. They were "adequately represented" by the mothers in *Drummond I* under *Taylor*.

1. The Mothers Acted as Fiduciaries For All of the Plaintiffs

Taylor held that the adequate representation exception applies in specific types of lawsuits. "Representative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians and other fiduciaries." *Taylor*, 553 U.S. at 894, 128 S.Ct. at 2172; *see also* 18A Charles Alan Wright & Arthur R. Miller, et. al., *Federal Practice and Procedure* § 4448 at 329 (2d. ed. 2012) ("Representation [for preclusion purposes] is found most readily in traditional settings of private or official appointment. Trustees, executors, statutory representatives in death and survival actions, and guardians are familiar examples."). The mothers sued in *Drummond I* as personal representatives of the decedents' estates for wrongful death claims. They therefore acted as fiduciaries for all of the estates' heirs. *See supra* § I.C. Nothing in this fiduciary relationship is limited to the *biological* children of the mothers. Plaintiffs all claim to be "heirs"

of the three union leaders; their claims are barred by non-party preclusion because the mothers in *Drummond I* represented the heirs. In their argument on adequate representation, Plaintiffs ignore *Taylor*'s explicit holding with respect to fiduciaries. The district court's decision may be affirmed on this ground alone.

2. *Taylor*'s Two-Part Adequate Representation Test Is Satisfied

Taylor did not limit the adequate representation exception only to trustee, guardian and fiduciary relationships. It also defined a two-part test for adequate representation to govern other types of relationships. Even if the mothers did not act as fiduciaries for the heirs of three estates, they still adequately represented them. Adequate representation exists if "(1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." 553 U.S. at 900, 128 S.Ct. at 2176. Both requirements are satisfied here.

a. The Mothers' Interests Were Aligned With the Plaintiffs

Taylor does not provide a definitive test for whether interests are "aligned." The decision of other courts of appeals, however, are instructive. In *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. 2008), relied upon by Plaintiffs, the Tenth Circuit analyzed what it means to have "aligned" interests. The court explained that the concept of "aligned interests" has two parts. First, the defendant must establish that

there were "shared interests," meaning that there was the same "incentive to litigate" the issues. *Id*. at 1287. Second, "[o]nce the case proceeds to final judgment and is asserted as part of a claim preclusion defense, the question shifts from incentive to litigate to whether the absent parties' interests were *in fact* vigorously pursued and protected." *Id*. (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 61 S.Ct. 115, 118-19 (1940)) (emphasis in original).

Other courts of appeal have similarly analyzed whether interests are aligned by looking at what the party and non-party hope to accomplish in the lawsuit. *See, e.g., Yankton Sioux Tribe v. U.S. Dept. of Health and Human Services*, 533 F.3d 634, 640-41 (8th Cir. 2008). (concluding that "the interests asserted" by a party in the prior suit and the non-party in current suit "are identical" and "completely aligned" because both suits were to enforce rights of enrolled members of tribe who had received certain health benefits); *Amos v. PPG Industries, Inc.*, 699 F.3d 448, 452 (6th Cir. 2012) (explaining that interests of the union in prior suit on behalf of current employees may not be "aligned" with retired employees in present suit to satisfy first prong of *Taylor* because "an employer might offer more generous benefits for current employees, for example, in exchange for reducing benefits to retirees").

The district court found that the interests of the mothers in *Drummond I* were so aligned with those of the Plaintiffs that "this is non-party preclusion in its

simplest form." RE 95 (Vol. II), Mem. Op. at 22. The court acknowledged that *Taylor* requires "more than parallel interests or use of the same attorney in both suits." *Id*. at 20. It analyzed whether "there is a desire for the same outcome and whether the same legal theories in pursuit of that outcome are available." *Id*. at 21. Specifically, the district court found that, as a matter of fact, the interests of the mothers and Plaintiffs "all arose out of the same common nucleus of operative facts" and that both involve the "same liability fact issue—whether Drummond (and the other defendants) were responsible for the murders of these same decedents." *Id*. The "mothers who litigated in *Drummond I* possessed the same sufficient, personal incentive to litigate the liability issues as would have their children, if the children had been parties in that case." *Id*.

There is no basis to challenge this finding by the district court. Each plaintiff in this case seeks to recover for the death of the same person, on the same theories of liability, that were at issue in *Drummond I.* Plaintiffs cannot point to a single fact suggesting that the children have any interests not shared by the mothers in *Drummond I* in holding the defendants liable for the murders, or that those interests were not in fact vigorously pursued and protected by the mothers. In short, none of the key facts on which the district court's decision rested is disputed.

With regard to the alignment of interests requirement, Plaintiffs first contend that *Taylor* "expressly rejected" the reasoning applied by the district court, and that

the correct test is whether mothers in *Drummond I* bore a "legal obligation" to vindicate the Plaintiffs' rights. Br. at 27-28. Under Plaintiffs' interpretation, it is wholly irrelevant whether the mothers in *Drummond I* and the Plaintiffs here shared any interests at all, because the only test is whether the mothers had a "legal obligation" to vindicate the interests of the Plaintiffs. This position ignores *Taylor*'s plain language.

Plaintiffs cite one decision by the Court of Claims that adopts this "legal obligation" test. *Bartels Trust ex rel Cornell University v. United States*, 88 Fed. Cl. 105 (Fed. Cl. 2009). *Bartels Trust*, however, misreads *Taylor*'s adequate representation exception to encompass only those relationships that have the same formal, legal status as trustees, guardians and so forth. It entirely ignores *Taylor*'s two-part test. Had the *Taylor* Court wished to limit "adequate representation" to those specific formal relationships (or to those relationships where the representative has a "legal obligation" to bring claims), it could have done so. Instead it set forth a broader test to determine whether relationships other than those legally-defined ones satisfy due process.

Plaintiffs' second argument is that the mothers in *Drummond I* could not have protected Plaintiffs' rights because until this Court's decision in *Baloco* "clarified" the law, the mothers did not "know their children had separate legal interests to protect." Br. at 29. Again, Plaintiffs misread the decision in *Baloco*. It

created no "distinct" claim by Plaintiffs. It merely held that the children, as well as the mothers, have standing to bring wrongful death claims under the ATS and TVPA. The *Baloco* Court did, in footnote 11 of its opinion, disagree with district court decisions in another circuit and found the damages that may be recovered by the children are not necessarily limited to those available to wrongful death claimants. 640 F.3d at 1347 n.11. But Plaintiffs in this case do not seek only their own separate damages, whatever those might be. They bring claims as "the legal heirs to, and wrongful death beneficiaries of Locarno, Orcasita and Soler." RE 60 (Vol. I), FAC ¶ 1. Those are ***exactly*** the claims made in *Drummond I*, albeit by different representatives of the union leaders estates. That Plaintiffs may, as a result of the *Baloco dicta*, have a different measure of damages does not affect the fact that the mothers adequately represented each of the children in seeking to recover damages for all heirs of the union leaders.

Further, the fact that the mothers did not seek separate damages for the children is not controlling, because they *could* have done so as their children's representatives. "[R]es judicata operates to preclude not only the issues raised in the prior action, but issues which could have been raised in the prior action." *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990). The *Baloco* decision did not purport to change the law of this Circuit. If the mothers and their counsel did not understand in *Drummond I* that they had the ability to pursue separate damages

for the children, that is a result of their misreading of the law, not a result of any change in the law. Separate damages *could* have been pursued in *Drummond I*, and they are thus precluded here.

Finally, even if the second lawsuit seeks a different measure of damages, preclusion still applies as long as the rights claimed and wrongs alleged are the same. *See, e.g.*, *Hunt*, 891 F.2d 1555, 1561 (precluding second lawsuit even though "it is arguable that the causes of action are different because of the different remedies sought," because "the rights claimed and the wrongs alleged are almost identical"); *see also McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986) ("Nor does the fact that [plaintiff's] subsequent complaint seeks a different remedy for a violation of the same primary right create a new cause of action."); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) ("And it is equally settled that one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar."); *Bouchat v. Bon-Ton Dept. Stores, Inc.*, 506 F.3d 315, 328 (4th Cir. 2007) ("That [plaintiff] did not seek actual damages in [the first case] but now seeks such damages from the [defendants] does not alter our conclusion that the claims in [plaintiff's] cases are identical").

Plaintiffs have not demonstrated that the district court committed clear error when it concluded, as a matter of fact, that the interests of the mothers in *Drummond I* and Plaintiffs here are aligned.

b. The Mothers Understood They Were Acting in a Representative Capacity

The district court correctly concluded that "the mothers understood that they were bringing suit on behalf of their children," as required by *Taylor*. RE 95 (Vol. II), Mem. Op. at 20. The court considered two primary sources of evidence—the pleadings in *Drummond I* and the depositions of the mothers in that case. The court examined the Second and Third Amended Complaints and the Notice of Identities filed by the mothers which was expressly incorporated in the Third Amended Complaint. It relied on the complaints' inclusion of allegations that the mothers "seek[] damages and equitable relief on behalf of herself and their minor child for the death of [the union leader]," and the fact that the Notice of Identities defined the plaintiff pseudonyms such as "Jane Doe" to include both the mother **and** her children. *Id.* at 7-12 (emphasis in original). The district court acknowledged this Court's holding in *Baloco* that the pleadings alone were insufficient to establish that Plaintiffs were proper parties in *Drummond I*, but explained that "the Notice of Identities evidences an *intention* (as opposed to a legal conclusion) of the mothers to represent the interests of their children in *Drummond I*." *Id.* at 19.

The district court also correctly found that in their depositions in *Drummond I*, the mothers "time and again . . . testified that they were bringing the lawsuit on behalf of themselves ***and*** their children." *Id*. (emphasis in original). The court cautioned that this admission "is not a matter that can now be debated and subject to a flip flop once the import of those answers is realized." *Id*. at 20.

Plaintiffs sought to contradict the pleadings and depositions by new declarations from the mothers and Plaintiffs. As explained in more detail below, the district court correctly disregarded them as "sham declarations." *See infra* § IV. They contradict not only the sworn depositions but other declarations filed in *Drummond I.* Those declarations, filed by the same lawyers there as here, state that the mothers in *Drummond I* hired counsel to sue for "damages and suffering [by] my family, including my minor children," and some also declared that they sought damages "on behalf of my husband's estate." Appellees' Mot. to Supp. the R. (Jan. 22, 2012), Ex. B ¶ 5; *id.* Exs. C-D ¶ 6; *see also id* Ex. A ¶ 6. In other words, the mothers signed sworn affidavits that they were suing not only for ***their own damages***, but for those of ***their families***.

Even if the declarations are not "sham declarations," the mothers' judicial admissions in *Drummond I* that they brought suit on behalf of themselves and their children are binding here. *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (relying on "general rule that a party

is bound by the admissions in his pleadings" because "'judicial admissions are proof possessing the highest possible probative value. Indeed facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.'") (quoting *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941)). Based on the pleadings and the depositions in *Drummond I*, the district court properly found that the mothers understood that they were acting in a representative capacity for their children. Plaintiffs offer no compelling argument as to how this finding was clear error.

Throughout their brief, Plaintiffs contend that the mothers had to understand in *Drummond I* that they were "representing their children's separate legal interests." Br. at 32. That is not what *Taylor* required. *Taylor* required evidence that the prior party understood herself "to be acting in a representative capacity." 553 U.S. at 900, 128 S.Ct. at 2176. Neither *Taylor* nor any Eleventh Circuit precedent requires that the party had to understand not only that she was acting in some sort of representative capacity but also that she correctly understood the precise measure of damages or the particulars of the legal claims that might be available to the non-party she represented. Such a reading limits *Taylor* well beyond its holding.

Plaintiffs also argue that "the evidence demonstrates that none of the children understood themselves to be represented in *Drummond I* and they played no role in

that litigation," and that they did not "control the *Drummond I* litigation." Br. at 35, 36. Of course, at the time of *Drummond I*, Plaintiffs were minors and the Court cannot reasonably expect them to have understood their role in complex litigation being conducted by their parents in a foreign country, or to have played any role in its conduct. Plaintiffs' argument, taken to its logical conclusion, would mean that no minor could ever be precluded by a representative suit brought by a parent, guardian or other fiduciary because no minor would understand their representation or participate in the litigation.

3. The Adequate Representation Analysis Applies Equally to the "New" Plaintiffs

The district court correctly held that not only were the original eight plaintiffs barred by preclusion but so too are the four "new" plaintiffs who joined the case after remand from this Court. Plaintiffs first argue that the new Plaintiffs' interests are not aligned with the mothers in *Drummond I* because the mothers were not "legally obligated to represent the 'new' children's separate and distinct claims.'" Br. at 38. Plaintiffs point to no case law in this circuit—and only to a single out-of-circuit district court case—that limits *Taylor* in this way. *See supra* at 31.

Plaintiffs also argue that "there is *every reason* to think that the mothers in *Drummond I* would *not* adequately represent the new children-Plaintiffs' claims because they are children by *different* mothers." Br. at 38 (emphasis in original).

Plaintiffs offer no evidence of such animosity, nor did they plead any facts in their amended complaint supporting this theory. Indeed, given that all claims depend on exactly the same contention—that Drummond was complicit in the murders—it is impossible to conceive of a conflict among heirs depending on who their mother might be. Plaintiffs cannot rely on baseless supposition to defeat Defendants' arguments on preclusion.

Finally, Plaintiffs argue that the mothers in *Drummond I* did not "underst[and] themselves to be representing the separate interests of their partner's children by *different* mothers." Br. at 39 (emphasis in original). Plaintiffs rely on a stricter test than articulated by *Taylor*. *Taylor* requires only that the mothers understood that they were acting in a "representative capacity." 553 U.S. at 900, 128 S.Ct. at 2176. What is plain from the complaints in *Drummond I* is that the mothers were representing the estates of the union leaders and therefore representing the interests of all heirs to those estates, no matter which wife or companion may have given birth to the child. RE 95 (Vol. II), Mem. Op. at 7-10 (reviewing *Drummond I* complaints).

Plaintiffs also complain that there is no evidence that the mothers in *Drummond I* "were even aware" of the new Plaintiffs. Br. at 41. This argument is nonsensical given that *Taylor* expressly states that class actions satisfy the adequate representation standard. 553 U.S. at 894, 128 S.Ct. at 2172 ("Representative suits

with preclusive effect on nonparties include properly conducted class actions"). Class representatives are permitted to sue even if they do not know the identities of all members of the class. *See, e.g.*, 1 William B. Rubenstein, *Newberg on Class Actions* § 3:13 (5th ed. 2012) ("it is well settled that a plaintiff need not allege the exact number or specific identity of proposed class members."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:5 (9th ed. 2012) ("A party seeking class certification is not required to prove the identity of each class member or pinpoint the exact number of class members needed, as long as a good faith estimate is provided."). Class representatives owe at least some duties to all class members. *Matsushita Elec. Indus. Co., Ltd.,. v. Epstein*, 516 U.S. 367, 395 (1996) ("the class representative's duty to represent absent class members adequately is a continuing one."). *Taylor* does not add a requirement that a plaintiff knows with certainty the identity of every person being represented, as opposed to the general class of persons being represented. Here, the mothers knew they were representing the decedents' estates and thus all of the heirs or beneficiaries of those estates.

II. The Eight Original Plaintiffs Are Also Barred By Party Preclusion

Although the district court did not reach the issue, its judgment as to the eight original Plaintiffs in this action should also be affirmed on the basis of party preclusion, because those eight children were unquestionably parties in *Drummond I*.

This Court, when considering the district court's ruling on defendants' motion to dismiss, concluded that "at this stage of the proceedings when we are confined to the pleadings, we cannot conclude that the Children were also parties to the *Drummond I* suit," and remanded "for further factual development as to the scope, if any, of the Children's involvement in the *Drummond I* litigation." *Baloco v. Drummond*, 640 F.3d at 1351. On remand, Defendants presented deposition testimony from *Drummond I* in which the mothers of the eight original plaintiffs here explicitly stated that they were bringing claims in *Drummond I* on behalf of their children. The factual ambiguity at the time of the first appeal in this case has now been resolved, and it is clear that the eight original plaintiffs here were proper parties in *Drummond I* because their mothers, as general guardians, represented the interests of the children in that case.

A. The Children Were Parties in *Drummond I*

The sole element in dispute here is whether this case and *Drummond I* involve the same "parties[] or those in privity with them." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). The evidence conclusively demonstrates that the parties are the same.

First, the Notice of Identities, coupled with the deposition testimony of the *Drummond I* Jane Doe plaintiffs, shows that the eight original children-plaintiffs were also parties in *Drummond I*. Second, counsel for the children in this case and

also in *Drummond I* admitted to the district court that the children here were the same children referenced in the Notice of Identities. RE 95 (Vol. II), Mem. Op. at 12. Third, in the 2005 deposition testimony, given a year after the Third Amended Complaint was filed, each of the children was identified by name by his or her mother, and the mothers expressly confirmed that they were bringing claims on behalf of themselves and their children. *See supra* at 7 n.4. Fourth, the mothers signed declarations in *Drummond I* that they sought damages for themselves and their whole family. As the district court stated, Plaintiffs' contention that the Jane Doe plaintiffs in *Drummond I* were only proceeding in their individual capacities is "disingenuous." Supp. RE 33, Mem. Op. (Nov. 9, 2009) at 6 n.5. The mothers' testimony, which was not considered by this Court in the prior appeal, establishes beyond doubt that the children were, in fact, parties to *Drummond I* and are therefore precluded from pursuing their claims again in this case.

B. The Children Were Adequately Represented By Their Mothers in *Drummond I*

The evidence demonstrates that the mothers intended to, and did, represent their children's interests in *Drummond I* — interests that were identical to their own. The mothers and the children had the exact same interest in proving that the Drummond defendants were liable for the deaths of the union leaders. The jury in *Drummond I* (and the court on summary judgment, as to some claims) decided otherwise, and that decision binds the Plaintiffs here.

1. Because There Was No Conflict of Interest Between The Children and Their Mothers, the District Court Was Not Obligated To Consider Another Representative

Nothing in the federal rules or the controlling case law required the district court in *Drummond I* to consider the adequacy of the children's representation by their mothers or to appoint a representative other than the mothers in that litigation because there was no conflict of interest between the children and their mothers.

Rule 17(c)(1) controls the question of who may represent a minor. It reads: "(1) **With a Representative**. The following representatives may sue or defend on behalf of a minor or an incompetent person: (A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary." Fed. R. Civ. P. 17(c)(1). Rule 17(c)(1) does not require the court to appoint these representatives or evaluate their adequacy.

Here, the natural mothers confirmed in their depositions that they were suing on behalf of the children. Natural parents are a "general guardian" under Rule 17(c)(1)(A) and can therefore sue on behalf of their children without judicial intervention or appointment. "Rule 17(c) . . . permits authorized representatives, including parents, to sue on behalf of minors." *Devine v. Indian River Cnty Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997) (Rule 17(c) allows parents to sue, but does not allow them to sue *pro se* in such cases); *see also Gonzalez-Jimenez de Ruiz v. United States*, 231 F. Supp. 2d 1187, 1196-97 (M.D. Fla. 2002) (natural mother of

the minor plaintiffs "was not required to file the current lawsuit as a 'next friend'" because when a natural parent sues on behalf of his child and their interests coincide, no one else needs to represent the child). In fact, courts have consistently held that natural parents are "general guardians" under Rule 17(c)(1)(A) and that there is no need for judicial intervention in such a circumstance.[6]

In *Baloco* this Court explained, citing *Roberts v. Ohio Casualty Insurance Co.*, 256 F.2d 35 (5th Cir. 1958), that Rule 17(c)(2) "instructs district courts that they 'must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.'" 640 F.3d at 1350-51. Rule 17(c)(2), by its terms, applies only when there is a minor who is "unrepresented."[7] That was the case in *Roberts*, but as demonstrated by the

[6]*Cooper v. Brunswick Cnty. Sheriff's Dep't*, No. 7:10-CV-00014-D, 2011 WL 738610, at *2 (E.D.N.C. Feb. 7, 2011) (citing Rule 17(c)(1) and holding that "[u]nder the federal rules, no special appointment procedure is required when the proposed guardian is a general guardian. . . . This would apply if, as here, the proposed guardian was a natural parent of the minor child."); *Meredith v. Dusin*, No. 03-2532-CM, 2003 WL 22844157, at *1 (D. Kan. Nov. 12, 2003) ("[T]he Court finds that, as the natural father of [the minor], [the father] qualifies as a general guardian who may sue on behalf of a minor without needing a formal court appointment."); *Communities for Equity v. Mich. High Sch'l Ath. Ass'n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998) (holding that Rule 17(c) "provides that a general guardian may sue on behalf of a minor. A parent is a guardian who may so sue.").

[7]Rule 17(c)(2) states in full: "(2) **Without a Representative**. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action" (emphasis in original).

mothers' own testimony, it is not the case here. In *Roberts*, a 1958 case from the Fifth Circuit, an insurance company filed suit to set aside a damages award by the Industrial Accident Board for the death of Alonzo Roberts. 256 F.2d at 37. The Board had awarded damages to Mr. Roberts' minor children and to his mother. *Id.* The minor children and their grandmother were named as defendants in the case, but the mother was not a party to the case, nor was any other guardian of the minor children. *Id.* No representative was appointed for the children. *Id.* The Fifth Circuit held that courts must appoint a guardian ad litem or issue another order to protect the minor's interests ***in cases where the minor is "not otherwise represented***." *Id.* at 39 (emphasis added).

Two later cases in this Circuit illustrate that the district court did not need to consider appointing a representative because the minor children were properly represented by a parent. In *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980), the Fifth Circuit found the representation of a minor child adequate where he was represented by his "legal guardian, his mother" who "brought this action on his behalf." *Id.* at 1093. As a result, "there was no need for the court to appoint a guardian ad litem." *Id.* The *Croce* court distinguished *Roberts* by explaining that in *Roberts*, the minor's mother was not a party and neither she "nor any other legal representative pressed the children's interests until after a judgment was entered against them." *Id.* The *Croce* court concluded that there was no error because "the

child's mother and legal guardian was a party to the lawsuit below and vigorously pressed her child's claims before the trial court. The defendants here have demonstrated absolutely no conflict between [the mother's] interests and those of her son, nor have they shown any prejudice to the child's interests." *Id.*

Croce's distinction of *Roberts* was confirmed in *Burke v. Smith*, 252 F.3d 1260, 1264 (11th Cir. 2001). In *Burke*, as in *Croce*, the Court first considered whether the minor was represented and found that she was represented "by her mother who brought this action on her behalf." *Id.* As a result of this representation, the Court concluded that the lower court had not erred by not appointing a guardian ad litem under Rule 17(c). The Court further limited the holding in *Roberts*, explaining that "unless a conflict of interest exists between the representative and minor, a district court need not even consider the question whether a guardian ad litem be appointed. . . . Generally, when a minor is represented by a parent who is a party to the lawsuit and who has the same interests as the child there is no inherent conflict of interest." *Id.* *See also Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1185 (S.D. Fla. 2000), *aff'd*, 212 F.3d 1338 (11th Cir. 2000) ("[W]hen a parent brings an action on behalf of a child, and it is evident that the interests of each are the same, no need exists for someone other than the parent to represent the child's interests under Rule 17(c).").

The present case is strikingly similar to the facts of both *Croce* and *Burke*. As in those cases, the children's mothers were parties in *Drummond I*. The record shows no conflict of interest between the mothers and children in recovering damages for the death of the victims from the same defendants (and through the same, shared lawyers). Moreover, unlike in *Roberts* where the minor's interests were not protected in the prior litigation, there is no suggestion here that the mothers did not vigorously press the children's interests. In fact, the plaintiffs in *Drummond I* presented evidence at trial of the damages suffered by the children. *See*, *e.g.*, Supp. RE 77-2, *Drummond I* Trial Tr. at 964:5-966:9, July 17, 2007 (testimony of Jane Doe III about the financial support provided by decedent to her daughter and quantifying exactly how much he provided in support to the daughter per month in pesos). Thus there was "no inherent conflict of interest" that warranted the district court's consideration of the adequacy of the children's representation. *Burke*, 252 F.3d at 1264.

C. No Special Language Was Required in *Drummond I* for the Mothers to Bring an Action on Behalf of the Children

It is immaterial that the Third Amended Complaint did not include specific language proclaiming the representative or "next friend" capacity of the children's mothers and natural guardians. Multiple courts have found that the failure of a complaint expressly to allege the representative capacity—for example, "by and through" a "next friend"—does not affect whether a minor was adequately

represented in the litigation. *See, e.g.*, *Gonzalez-Jimenez de Ruiz v. United States*, 231 F. Supp. 2d at 1197 (finding that even if failing to file suit as "next friend" were error, it would not be a proper basis for dismissal); *Hall v. Time Ins. Co.*, 671 F. Supp. 768, 769 (M.D. Ga. 1987) (finding that failure to bring suit in representative capacity would not have deprived the court of jurisdiction). This is consistent with the Eleventh Circuit's mandate that substance take precedence over form. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252 n.11 (11th Cir. 2005) (noting that "a formulaic misstep by counsel is not fatal under the notice pleading standard (where fair notice is all that is required)").

It is worth noting that although Plaintiffs argue that this technical language was required in *Drummond I*, they do not use such language in the present complaint, even though some Plaintiffs are minors represented by their mothers. They simply say that the plaintiff is represented by her mother, "who is her guardian and representative in this case." RE 60 (Vol. I), FAC at 1 (listing parties). This Court noted on the prior appeal that without either (1) the language "by and through" a next friend in the complaint or (2) some other indicia of representation in a document "for which judicial notice" could be taken, the Children's status in *Drummond I* could not be decided at the motion to dismiss stage when the court is "confined to the pleadings." *Baloco*, 640 F.3d at 1351. The Court acknowledged

that the status of the children in *Drummond I* required a "factual determination" — one which has now been made by the district court on the complete record. *Id.*

The facts show that the Children were legally represented by their mothers. The mothers in *Drummond I* gave unambiguous notice—in the Notice of Identities and again at their depositions—that they were representing the Children. But even if they had not given such unambiguous notice, that would have no bearing on the adequacy or appropriateness of their actual representation of the Children throughout that litigation.

III. The District Court Did Not Err In Considering Previous Deposition Testimony By The Mothers Of The Eight Original Plaintiffs

The district court properly considered the previous deposition testimony as evidence in its decision on summary judgment. The district court considered whether the mothers' deposition testimony that they were suing on behalf of their children constituted inadmissible legal conclusions. The district court held that "it is beyond debate that the mothers testified as to the *fact* that they were bringing the lawsuit on behalf of children. The mothers needed no legal, 'scientific, technical or other specialized knowledge' to testify as to their understanding about their role in the litigation." Mem. Op. at 11 n.9 (quoting *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1004-05 (11th Cir. 1997)). Plaintiffs' argument that the testimony by the mothers "constituted impermissible legal conclusions concerning the legal capacity

in which they sued," Br. at 42, is curious in light of the fact that Plaintiffs' counsel offered this very testimony at trial in *Drummond I*:

> Q: How many children did you have with Mr. Orcasita?
> A: One girl.
> Q: You understand that this lawsuit is also being brought on your daughter's behalf?
> A. Yes.
> Q: And are you seeking damages in this lawsuit only on your daughter's behalf or on your behalf as well?
> A: On behalf of my daughter and on behalf of myself, of course.

Supp. RE 77-2, *Drummond I* Trial Tr. at 961:3-11, July 17, 2007 (testimony of Nancy Cordoba Vidal, "Jane Doe III"). Plaintiffs cannot seriously contend that this testimony is inadmissible now.

Plaintiffs cite out-of-circuit cases for the proposition that the mothers' testimony cannot be an admission that they acted on behalf of the Children because it is improper lay testimony about "legal relationships." Br. at 42-44. Those cases are inapposite. For example, in *Torres v. Cnty of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985), the court held that the trial judge should not have admitted testimony by a witness who was asked if the plaintiff "had been discriminated against because of her national origin" because it tracked almost verbatim the applicable statute, and because "discrimination" has a specific legal meaning. Here, the mothers offered factual testimony about their participation in the case, they did not answer technical questions on the legal issues involved. *See* RE 63-5 (Vol. I); RE 63-6 (Vol. I); RE 63-7 (Vol. I); RE 63-8 (Vol. II); *see also supra* at 7 n.4. For example, the mothers

did not testify that they had the legal capacity to act as representatives because they were the Children's natural mothers. They merely said that they understood that they were suing for themselves and their children. The mothers' testimony about what they understood their role in the litigation to be does not draw legal conclusions.

The mothers' testimony is not an opinion at all, any more than a witness's testimony that she is married is a legal opinion. But if it is an opinion, it is admissible under Rule 701 as lay opinion testimony. It is "rationally based" on the mothers' perception of their role in the case and is "helpful to . . . the determination of a fact in issue." Fed. R. Evid. 701. The mothers needed no "scientific, technical or other specialized knowledge" to testify as to their understanding about their role. *See, e.g.*, *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1004-05 (11th Cir. 1997) (allowing testimony that witnesses believed defendant discriminated against plaintiff because of her gender or age, concluding that these opinions are "properly admitted" under Rules 701 and 704 "if they are based on the personal observations of the witness."). This testimony is not inadmissible simply because it may go to an ultimate issue here, that is, whether the mothers represented the children in *Drummond I*. Rule 704 specifically allows such testimony.

Plaintiffs also object that the deposition testimony is inadmissible hearsay. Br. at 47-48. The statements by the mothers are not hearsay at all. Whether they

purported to represent their children in *Drummond I* can only be determined by the record of that case. Accordingly, the testimony of the mothers is not testimony to the existence of a fact at issue, it ***is*** the fact at issue. *See Cramco, Inc. v. Nat'l Labor Relations Bd.*, 399 F.2d 1, 6 (5th Cir. 1968) ("[W]hen the fact to be proved is a word spoken, it is an uncritical error to protest as to hearsay. The verbal act, as any other act, may be proved by one who heard it, saw it, or felt it. . . . The inquiry is not the truth of the words said, merely whether they were said.") (internal citations and quotations omitted). Further, because each of the children was a minor at the time of *Drummond I*, their mothers were guardians and thus spoke for their children. This testimony is, therefore, an admission by the present Plaintiffs under Rule 801(d)(2)(C).

Even if, despite the foregoing, the testimony were regarded as hearsay, evidence on summary judgment need not be in admissible form, it must only be capable of being "reduced to admissible evidence" for trial. *Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999). "[A]ny evidence which is admissible at trial can be used on summary judgment." *Beiswenger Enterprises Corp. v. Carletta*, 46 F. Supp. 2d 1297, 1299 (M.D. Fla. 1999).

If the mothers were to give testimony at a hearing inconsistent with what they said in *Drummond I*, these deposition transcripts would be admissible as prior inconsistent statements. Fed. R. Evid. 801(d)(1)(A). This rule of evidence permits

the admission as substantive evidence of testimony of a declarant-witness who testifies at trial and is subject to cross examination about her prior statement, where the prior statement "is inconsistent with the declarant's testimony and was given under penalty of perjury . . . in a deposition." *Id.* And if the mothers (all foreign nationals living outside of the United States) are not available at a hearing, Rule 804(b)(1) allows for the admissibility of their former testimony of where the testimony was (1) given during a "lawful deposition," and (2) offered against a party whose "predecessor in interest had an opportunity and similar motive to develop it by direct, cross- or redirect testimony." The mothers, in their role as guardians, are the "predecessors in interest" to the children here. The mothers had both the opportunity and similar motive to develop this testimony in *Drummond I* as both the mothers and Plaintiffs seek to hold Defendants liable for the killing of the three union leaders under same theory of liability.

IV. The District Court Properly Struck Contradictory New Declarations By The Eight Original Plaintiffs And Their Mothers

Plaintiffs attempted, in the summary judgment briefing before the district court, to manufacture a dispute of material fact by submitting new declarations from the mothers and children. Relying on these declarations, Plaintiffs argue that the mothers "did not understand themselves to have been representing their children in any legal sense . . . it was not their intention to involve their children in any way." Br. at 52. The district court considered the evidence and held that "time

and again the mothers testified in their depositions in *Drummond I* that they were bringing the lawsuit on behalf of themselves ***and*** their children in an effort to 'seek justice.'" RE 95 (Vol. II), Mem. Op. at 19. Accordingly, "to the extent that the declarations attempt to create an issue of fact on the question of intent" to represent the children, they were "**STRICKEN** as sham declarations." *Id.* at 20 n.14 (emphasis in original) (citing *Van T Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)).

The answer that the mothers gave in their sworn deposition testimony in *Drummond I* to the question on whose behalf they were bringing the lawsuit was perfectly clear: they were bringing the lawsuit on behalf of themselves and their children. This Court has not hesitated to disregard an affidavit that inexplicably contradicts "previously given clear testimony." *Van T Junkins & Assocs. v. U.S. Indus., Inc.*, 736 F.2d 656 (11th Cir. 1984); *see also Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1424, 1431 (M.D. Ala. 1996) (refusing to consider plaintiff's allegation against defendant when plaintiff's prior deposition testimony "solely" and "unambiguously" attributed the harassment to someone else). A deposition may be stricken when it is obviously submitted in response to a declaration to manufacture an issue of material fact. *Van T. Junkins*, 736 F.2d at 657. This is especially true when the person making the declaration is an interested party. *Cf. Lane v. Celotex*, 782 F.2d 1526, 1530-31 (11th Cir. 1986) (noting "little

chance of sham factual issues" exists where "[the affiant] is a disinterested witness"); *Israel v. Sonic-Montgomery FLM, Inc.*, 231 F. Supp. 2d 1156, 1165 (M.D. Ala. 2002) (accepting witness's statement made in another litigation in part because "no evidence" suggested that the witness had "a direct interest, financial or otherwise, in creating a fact issue" for the plaintiff). The declarations, submitted by interested parties, attempt to manufacture an issue of fact to avoid the grant of summary judgment against them. They were properly stricken by the district court.

Furthermore, as the district court stated, "these declarations do not refute the ***fact*** of representation." RE 95 (Vol. II), Mem. Op. at 20 n.4. The declarations do not deny that (1) the children were named as parties in the *Drummond I* pleadings; (2) the mothers testified in deposition that they were suing on behalf of the children; and (3) Mr. Collingsworth was counsel for the children in *Drummond I* and here. Most telling, none of the declarations offer any facts suggesting a conflict between the interests of the mothers and the children in *Drummond I*. The record is clear that the mothers vigorously pursued their children's interests, interests which were identical to their own.

V. Preservation of Certain Arguments

This Court has previously held that corporations may be sued both under the Alien Tort Statute and the TVPA. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). The Supreme Court has overruled that position as to the

TVPA, *Mohamed v. Palestinian Authority*, 132 S.Ct. 1702, 1211 (2012), and is presently considering whether corporations may be sued under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (argued Oct. 1, 2012). As to the ATS, defendants Drummond Company, Inc. and Drummond Ltd. are presently bound by the prior decisions of this Court, but raise the issue, as they did in the district court, as an alternative ground for affirmance of summary judgment in the event the Supreme Court overrules this Court's decisions.

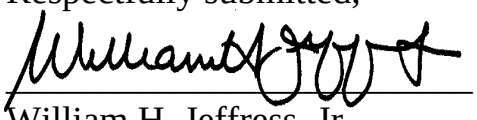
The Supreme Court also, *sua sponte*, calendared the *Kiobel* case for reargument on an additional issue: "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Because the extrajudicial killings in this case occurred in Colombia, a ruling by the Supreme Court on that issue could require dismissal of all claims against all defendants under the ATS. Again, Defendants are currently bound by prior precedent of this Court, but preserve the issue in the event the Supreme Court overrules that precedent.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: January 22, 2013

Respectfully submitted,



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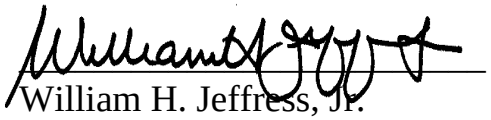

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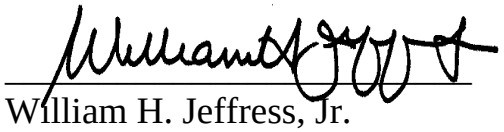

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