12-15268-BB

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; Case No.: 09-00557 CV-RDP
The Honorable R. David Proctor

APPELLANTS' OPENING BRIEF

Terrence P. Collingsworth
CONRAD & SCHERER, LLP
1156 15th Street NW, Suite 502
Washington, DC 20005
202-543-5811

Attorneys for Plaintiffs-Appellants,
Freddy Locarno Baloco, et al.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 26.1-1, Plaintiff-Appellants Freddy Baloco, *et. al.* hereby submit their Certificate of Interested Persons.

District Court Trial Judge
Honorable R David Proctor
United States District Court
Northern District of Alabama

Plaintiffs-Appellants

A.P.O.A.
through her guardian and representative Elisa Almarales Viloria
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

K.P.L.B.
through her guardian and representative Yaneth Ester Baloco Tapia
Ontario, Canada
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Locarno Baloco, Freddy
Ontario, Canada

C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Locarno Larios, Greysy Paola
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005 202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Locarno Larios, Gustavo Alberto
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

M.A.O.A.
through his guardian and representative Elisa Almarales Viloria
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Orcasita Almarales, Ayleen Paola
Colombia, South America

C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Orcasita Cordoba, Stefany Loren
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Orcasita Pineda, Linda Teresa
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Orcasita Pisccioty, Vanessa Katerine
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Soler Urrego, Ingrid Karina
Colombia, South America

C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001 Fax: 1-866-803-1125
tc@conradscherer.com

Soler Urrego, Sergio Esteban
Colombia, South America
C/O Terrence P. Collingsworth
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Counsel for Plaintiffs-Appellants

Carmichael, Thomas L.
CARMICHAEL LAW FIRM
(ASB-1587-a34t)
301 North Walston Bridge Road
Suite 100
Jasper, AL 35504
P: 205-302-0099
tlc4injury@yahoo.com

Collingsworth, Terrence P.
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
tc@conradscherer.com

Hager, Eric
CONRAD & SCHERER, LLP
Ave. Republica de El Salvador 500 e Irlanda

Edificio Siglo XXI, PH Oficina W
Quito, Ecuador
+(593-2) 248-8829
Fax: +(593-2) 245-2961

Levesque, Christian A.
CONRAD & SCHERER LLP
1156 15th St., NW, Suite 502
Washington , DC 20005
202-543-4001
Fax: 1-866-803-1125
clevesque@conradscherer.com

Defendant-Appellees

Drummond Company Inc.
1000 Urban Center Dr. Ste. 300
Birmingham, AL 35242
(205) 945-6300

Drummond Ltd.
1000 Urban Center Dr. Ste. 300
Birmingham, AL 35242
(205) 945-6300

Jimenez, Augusto
President of Drummond Ltd.
C/O Drummond Ltd.
1000 Urban Center Dr. Ste. 300
Birmingham, AL 35242
(205) 945-6300

Tracy, Mike
President of Mining of Drummond Company Inc.
C/O Drummond Company Inc.
1000 Urban Center Dr. Ste. 300
Birmingham, AL 35242
(205) 945-6300

Counsel for Defendant-Appellees

Cochran, Rachel B.
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700
Fax: 202-639-7890
rachel.cochran@bakerbotts.com

Davis, William Anthony, III
STARNES & ATCHISON LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
205-868-6000
Fax: 205-868-6099
tdavis@starneslaw.com

Jeffress, William H. Jr.
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700
Fax: 202-639-7890
william.jeffress@bakerbotts.com

Kropf, Sara E.
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700
Fax: 202-639-7890
sara.kropf@bakerbotts.com

Parr, Bryan H.
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700
Fax: 202-639-7890

bryan.parr@bakerbotts.com

Piggott , Philip G.
STARNES & ATCHISON LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
205-868-6000
Fax: 205-868-6099
Email: ppiggott@starneslaw.com

Super, David A.
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700
Fax: 202-639-7890
david.super@bakerbotts.com

Wells, Huey Thomas, III
STARNES & ATCHISON LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
205-868-6000
Fax: 205-868-6099
twells@starneslaw.com

STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Circuit Rule 28-1(c), Plaintiffs-Appellants hereby request oral argument before this Court. This case arises under the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. §1350, and includes important public policy questions, including whether the Plaintiffs' claims were barred by previous litigation, despite the fact that they were not parties and each has separate and distinct wrongful death claims under the TVPA and the ATS. Resolution of this issue would be facilitated if the Court had the opportunity to question the parties and hear elaboration on the briefing.

Respectfully submitted this 10th day of December, 2012,

/s/ Terrence Collingsworth
By: _____
Terrence P. Collingsworth
Conrad & Scherer, LLP
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

OTHER AUTHORITIES

TABLE of RECORD REFERENCES in the BRIEF

Brief Page #		Docket #
7, 9, 10, 11	Plaintiffs' First Amended Complaint	60
40	Exhibit C, Notice of Filing Notice of Identities of John Doe and Jane Doe Plaintiffs, in support of Defendants' Motion for Summary Judgment	63-4
33	Exhibit D, April 20, 2005 Deposition of Jane Doe II, in support of Defendants' Motion for Summary Judgment	63-5
33	Exhibit E, April 6, 2005 Deposition of Jane Doe III, in support of Defendants' Motion for Summary Judgment	63-6
33	Exhibit F, April 7, 2005 Deposition of Jane Doe IV, in support of Defendants' Motion for Summary Judgment	63-7
33	Exhibit G, April 7, 2005 Deposition of Jane Doe V, in support of Defendants' Motion for Summary Judgment	63-8
33, 35, 52	Plaintiffs' Opposition to Defendants' Motion for Summary Judgment based on Res Judicata and Memorandum of Points and Authorities	69
52, 55	Exhibit 1, Declaration of Nubia Yolanda Urrego Urrea, in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment	69-1
52, 54	Exhibit 4, Declaration of Yaneth Esther Baloco Tapia, in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment	69-4

52, 55	Exhibit 7, Declaration of Elisa Victoria Almarales Viloria, in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment	69-7
52, 55	Exhibit 11, Declaration of Nancy Iventh Cordoba Vidal, in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment	69-11
4, 13, 15, 16, 17, 19, 20, 23, 24, 26, 27, 30, 31, 32, 37, 39, 42, 44, 48, 49	Memorandum Opinion	95
5	Final Order	96

I. INTRODUCTION AND BACKGROUND

This is the second time that Plaintiffs-Appellants are appealing to this Court issues related to the District Court's dismissals based on *res judicata*. Plaintiffs-Appellants are twelve minor and adult children of three murdered Colombian union leaders, Valmore Locarno Rodriquez, Victor Hugo Orcasita Amaya, and Gustavo Soler Mora. The Plaintiffs' fathers were executed in 2001 by the United Self-Defense Forces of Colombia (AUC), a Colombian paramilitary force that was designated a terrorist organization by the U.S. State Department in 2001. Plaintiffs allege that the AUC was paid by Appellees, the Drummond Defendants,[1] to assassinate Plaintiffs' fathers who were top union officers of Drummond's coal mine in Colombia. These children bring their own individual claims seeking damages for the murder of their fathers under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350, for war crimes and extrajudicial killing.

Eight of the twelve Plaintiffs-Appellants brought the first appeal in February 2010. These eight children's mothers were Plaintiffs in *In re Juan Aquas Romero v. Drummond*, Case No. CV-03-BE-575-W (hereinafter "*Drummond I*"). The mothers sued Defendants in *Drummond I* as the domestic partners of the murdered

[1] The Defendants are: Drummond Company, Inc. (DCI); Drummond Ltd. (DLTD); the President of DLTD, Augusto Jiménez; the President of DCI Mining, Mike Tracy (hereinafter "Drummond" or "Defendants").

union leaders under the ATS and TVPA, 28 U.S.C. § 1350, for war crimes and extrajudicial killing. The first appeal was filed after the District Court found the eight children-Plaintiffs lacked standing to bring separate claims under the ATS and TVPA and, additionally, dismissed their claims on *res judicata* grounds. The Eleventh Circuit reversed and remanded on May 20, 2011, holding as a matter of first impression that the eight children-Plaintiffs whose mothers participated in *Drummond I* had standing to bring *separate* legal claims under both the ATS and TVPA for their own injuries arising from the death of their fathers. *See Baloco v. Drummond Company, Inc.*, 640 F.3d 1338, 1345-47(11th Cir. 2011). As to the issue of *res judicata*, this Court held that the mere relationship between the mothers and their children did not establish the children were parties to *Drummond I*, and that "[a]lthough their mothers were also plaintiffs in *Drummond I,* [it could] not presume that they intended to represent their children's *separate legal interests* . . . ." *Id.* at 1351 (emphasis added).

After remand, Plaintiffs filed the Third Amended Complaint (TAC) and added four "new" children.[2] These children were not parties to *Drummond I* and it is undisputed that their mothers did not participate in the *Drummond I* litigation as Plaintiffs or in any other capacity. The District Court assumed without deciding

[2] Although Appellants contend that none of the children were proper parties in *Drummond I* for the purpose of applying *res judicata*, there is no dispute that the "new" Plaintiffs' mothers did not participate in any way in *Drummond I*. Plaintiffs use the term "new" Plaintiffs to distinguish between the eight original children whose mothers were Plaintiffs in the first litigation.

that the eight original children-Plaintiffs were not parties to the *Drummond I* litigation, and instead granted summary judgment as to them, and granted dismissal as to the four "new" children-Plaintiffs, holding all the claims were barred by the doctrine of nonparty preclusion.

The District Court's decision conflicts with a long line of Supreme Court precedent holding that as a general rule each litigant is entitled to his day in court, and nonparty preclusion is applied only in exceptional circumstances when the litigant's due process rights are not violated. As Supreme Court precedent makes clear, claims and issues in certain circumstances will necessarily be re-litigated in order to protect a nonparty's due process rights. *See Taylor v. Sturgell*, 553 U.S. 880 (2008); *Richards v. Jefferson*, 517 U.S. 793, 795-97 (1996). The District Court failed to protect the children's due process rights by creating what amounts to a common-law class action despite that the children's interests were not adequately represented in the *Drummond I* litigation based on the *Taylor* standard.

In doing so, the District Court vastly expanded the Supreme Court's narrow category of substantive legal relationships that qualify for nonparty preclusion. Since *Taylor*, courts have unanimously observed that the qualifying relationships are almost exclusively based in property rights. The eight original children-Plaintiffs and their mothers do not have a fiduciary or another qualifying relationship sufficient to apply this exception to nonparty preclusion.

The District Court also contravened *Taylor* when it determined that the original eight children-Plaintiffs shared a "common interest" in holding the defendants liable and thus their interests were aligned. RE (Vol. II) 95, at 20-21. The Supreme Court in *Taylor* expressly rejected this reasoning, holding that such a shared interest is insufficient to demonstrate adequate representation, and courts applying *Taylor* have similarly rejected this reasoning. In fact, this Court in *Baloco* held the children have separate legal claims for their own losses, which means their interests were not aligned with their mothers for the purposes of nonparty preclusion. 640 F.3d at 1345, 1350. Moreover, there is *no* evidence in the record to suggest the mothers "understood" they were representing their children's separate and distinct interests in *Drummond I*.

As to the four "new" children-Plaintiffs' claims, whose mothers did not participate in *Drummond I*, it is undisputed that there was no substantive relationship between them and any of the mothers who participated in *Drummond I*. After erroneously concluding the "new" children-Plaintiffs also had interests aligned with the mothers in *Drummond I*, the District Court failed to address *Taylor's* second prong of adequate representation, whether the mothers in *Drummond I* understood they represented the interests of children of *different* mothers. The reasonable inference to draw is that there were conflicting interests.

Finally, the District Court made several evidentiary errors. Excerpts of the mothers' deposition testimony from *Drummond I* constitute testimony on legal conclusions, as the questions posed used legal terminology that holds a distinctly different meaning in the lay context. Additionally, the District Court should have admitted all the mothers' and children's declarations because the new declarations did not *directly contradict* testimony in the *same* case. Moreover, there was no ground to exclude declarations from the children because they did not testify in *Drummond I*.

Overall, the District Court's extremely broad application of nonparty preclusion consumes the Supreme Court's careful limitations in *res judicata* jurisprudence and binds third parties simply because they have similar interests in finding a common defendant liable for their distinct legal claims. This Court has already determined in *Baloco* that the children have distinct legal claims for the wrongful death of the decedents and denying them the ability to litigate these claims violates their constitutional due process rights and established Supreme Court precedent.

II. STATEMENT OF JURISDICTION

This appeal is taken from the District Court's September 12, 2012 final order granting summary judgment as to certain Plaintiffs' claims and granting dismissal as to other Plaintiffs' claims. RE (Vol. II) 96. The District Court had federal

question jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1350. This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES ON APPEAL

A. The District Court erred in granting summary judgment by misapplying the limited doctrine of nonparty preclusion under *Taylor v. Sturgell*, 533 U.S. 880 (2008) and in finding there was a substantive legal relationship between the mothers and children in this case.

B. The District Court erred in finding the children were adequately represented by their mothers in the *Drummond I* litigation such that nonparty preclusion applies.

C. The District Court erred in applying nonparty preclusion to dismiss the case against Plaintiffs whose mothers were not Plaintiffs in *Drummond I*.

D. The District Court erred in finding the deposition testimony of the *Drummond I* mother-Plaintiffs was admissible.

E. The District Court erred in striking the declarations of the mothers and children.

IV. STATEMENT OF THE CASE

A. Procedural History

There are two groups of Plaintiffs-Appellants in this case, all of whom are the children of Valmore Locarno, Victor Orcasita, and Gustavo Soler, the three trade union leaders executed by the AUC acting under the direction and control of Drummond. All children-Plaintiffs bring their own claims seeking damages. The following eight children-Plaintiffs' mothers participated in the *Drummond I* litigation, although the children themselves were not named as parties: Freddy Locarno Baloco, First Amended Complaint (FAC), RE (Vol. I) 60, ¶ 18; K. P. L. B., *id.* ¶ 19; Ayleen Paoloa Orcasita Almarales, *id*. ¶ 20; Stefany Loren Orcasita Cordoba, *id.* ¶ 21; M. A. O. A., *id.* ¶ 22; A. P. O. A., *id*. ¶ 23; Sergio Esteban Soler Urrego, *id*. ¶ 24; and Ingrid Karina Soler Urrego, *id*. ¶ 25.

In addition, the following four children-Plaintiffs, the so-called "new" Plaintiffs, are children of Locarno and Orcasita respectively: Greysi Paola Locarno Larios, *id.* ¶ 26; Gustavo Alberto Locarno Larios, *id.* ¶ 27, Linda Teresa Orcasita Pineda, *id.* ¶ 28; and Vanessa Katherine Orcasita Pisccioty, *id.* ¶ 29. There is no dispute that these four children were *not* parties to any prior action, and none of their mothers participated in past litigation. *See* FAC, RE (Vol. I) 60, ¶¶ 26-29.

Plaintiffs' fathers were murdered in 2001 by AUC paramilitaries who were paid by Drummond to eliminate the leadership of the union at the company's coal

mine in Colombia. In 2002, some of the domestic partners of the union leaders brought an ATS and TVPA case for the murders (*Drummond I*). That case ended in a defense verdict in 2007, which was affirmed by this Court. *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008).

After *Drummond I*, the Justice and Peace process in Colombia enabled several AUC members who participated in the union murders to finally give statements about Drummond's role in the murders. Based on this new evidence, eight children of the three union leaders filed a new case in March 2009 seeking wrongful death damages under the ATS and TVPA. The District Court dismissed the entire case, Plaintiffs appealed, and this Court reversed and remanded. *See Baloco*, 640 F.3d at 1338.

On remand, the District Court allowed Plaintiffs to amend their complaint and add the "new" children-Plaintiffs. Doc. 58. After doing so, the Court assumed without deciding that eight of the Plaintiffs were not parties to the *Drummond I* litigation, and instead granted summary judgment based on nonparty preclusion. The District Court additionally dismissed the four "new" children-Plaintiffs, holding their claims also were barred by the doctrine of nonparty preclusion. The present appeal is brought by all twelve children-Plaintiffs.

B. Statement of Facts

There is no question that Colombia is widely-known as a country that was torn by a long-standing civil conflict involving armed leftist groups on one side, and the Colombian military, as well as right-wing paramilitaries, on the other. FAC, RE (Vol. I) 60, ¶¶ 3, 11. Trade union leaders were often branded as "subversives," targeted for violence by the right-wing paramilitaries and their collaborators within the Colombian military. *Id*. ¶¶ 54-56.

Drummond had a record of problems with the guerillas attacking and destroying its facilities. As one measure of protection, Drummond used the terrorist AUC paramilitaries as a security force, one that collaborated with the regular military employed by Drummond, but which could go well beyond what the regular military could or would do in using violence to terrorize Drummond's union leadership. *Id.* ¶¶ 60-63. Drummond ultimately paid the AUC to execute the union leaders at its coal mine in Cesar Province, Colombia. *Id.* ¶ 64.

At the time of their deaths, Locarno and Orcasita were the President and Vice President, respectively, of the union that represented workers at Drummond's mine. Soler became President after Locarno's assassination, and then was himself assassinated a few months later. On March 12, 2001, Locarno and Orcasita were pulled off a Drummond company bus and murdered by paramilitaries of the AUC.

Id.¶ 72. On October 5, 2001, Soler was pulled off a public bus and murdered by paramilitaries of the AUC. *Id.* ¶ 80.

The murders occurred shortly after the Drummond employees in Colombia successfully organized a trade union and began heated discussions with Drummond for a contract that included new provisions to protect the safety of the miners. *Id.* ¶ 65. On behalf of Drummond, manager Alfredo Araujo met with leaders of the AUC, including AUC Northern Block leader Jorge Cuarenta ("Jorge 40 ") and his representatives, during the latter part of 2000 and the beginning of 2001, to arrange for the AUC to eradicate the union through violent means. *Id.* ¶ 64. In furtherance of this plan, Drummond paid the AUC to carry out the murders of Locarno, Orcasita, and Soler. *Id.*

As the union negotiations became more heated, pamphlets were disseminated around the company labeling the union a "guerilla union," and attacking Locarno and Orcasita as supporters of the guerillas. *Id.* ¶ 65. In a letter to Drummond, Locarno asked for security protection from the death threats he had received due to the pamphlets. Drummond's Senior Human Resources supervisor, Ricardo Urbina, denied his request. *Id.* ¶ 65.

Locarno and Orcasita expressed concerns to Gary Drummond, CEO of Drummond Company, Inc. (DCI) and other representatives of Defendants based on recent violence against other leaders of the union. *Id.* ¶¶ 67-68 Their request for

security was denied, despite Colombia's secret service agency, the DAS, alerting Drummond that Locarno and Orcasita were at risk of assassination. *Id*. ¶ 68.

Indeed, at least one DAS official, Rafael Garcia, witnessed the payment of monies by a top Drummond official – Alfredo Araujo – to Jorge Castro Pacheco, a sitting Colombian Senator and a representative of the AUC Northern Bloc commander Jorge 40. *Id.* ¶ 69. It was clear to Garcia from what was said at this meeting that the exchange of money was in return for the AUC's agreement to execute Locarno and Orcasita. *Id.*

Drummond's security advisor, James Adkins, along with Alfredo Araujo, met with Jorge 40 and his chief Commander, "Tolemaida," to arrange to murder the three union leaders. After the executions, Adkins and Araujo again met with Jorge 40 and several other witnesses, and in front of the Drummond managers, Jorge 40 congratulated Tolemaida for the successful operation to murder the union leaders. Araujo and Adkins then made a new arrangement with Jorge 40 in which Drummond would ultimately pay the AUC millions of dollars to buy arms and equipment and drive the leftist rebel groups out of the area of Drummond's operations. *Id.* ¶ 71; *see also id.* ¶¶ 32, 64, 69.

V. STANDARD OF REVIEW

Questions of law relating to the District Court's grant of summary judgment and dismissal are reviewed *de novo*. *See, e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005); *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir.2004) ("Because *res judicata* determinations are pure questions of law, we review them *de novo*."). The District Court's rulings on admissibility of evidence are reviewed for abuse of discretion. *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1463 (11th Cir. 1994).

VI. SUMMARY OF ARGUMENT

There is no question that the mothers of the eight original children-Plaintiffs in this case brought a case, *Drummond I*, for the murders of the same union leaders, their partners. As noted, the mothers of the four "new" children-Plaintiffs never participated in *Drummond I*. Plaintiffs raise the following distinct grounds for reversal of the District Court's grant of summary judgment.

First, the District Court erred when it determined the original eight children-Plaintiffs had a substantive legal relationship with their mothers who participated in *Drummond I* such that they were bound by the judgment. The Supreme Court in *Taylor v. Sturgell* narrowly circumscribed the categories of substantive legal relationships that qualify for nonparty preclusion and courts since *Taylor* have observed that the qualifying relationships are almost exclusively based in property

rights. These eight children and their mothers simply did not have a substantive legal relationship, as defined by the Supreme Court, and the District Court impermissibly expanded the scope of this exception to nonparty preclusion.

Second, the District Court erred when it found that the eight children were adequately represented by their mothers in *Drummond I*. The District Court predominantly relied on the fact that the children and mothers shared a "common interest" in holding the defendants liable and thus their interests were aligned. RE (Vol. II) 95, at 20-22. The *Taylor* court expressly rejected this reasoning, holding that such a shared interest is never enough to demonstrate adequate representation, and courts since *Taylor* have similarly rejected this reasoning. Additionally, the Eleventh Circuit expressly held that the children have separate and distinct legal claims for their own losses, which means the children's and mothers' interests were not aligned for the purpose of applying nonparty preclusion.

The District Court additionally erred when it held the children were adequately represented because the mothers "understood" they were representing their children's interests in *Drummond I*. Despite the District Court's errors concerning the admissibility of certain evidence, which is discussed below, there is no evidence in the record that mothers *understood* their children had separate claims or that they were representing those separate interests. The Defendants failed to sustain their burden on summary judgment in this regard.

Third, the District Court erred when it also held that the four "new" children-Plaintiffs' claims, whose mothers did not participate in *Drummond I*, were also barred by the doctrine of nonparty preclusion. It is undisputed that there was no substantive relationship between these four children and any of the mothers who participated in *Drummond I*. Additionally, the pleadings in no way demonstrated these four children's separate interests were adequately represented. In fact, although the District Court erroneously found the "new" children-Plaintiffs had interests aligned with the mothers in *Drummond I*, it never addressed whether the mothers in *Drummond I* understood they represented these additional children's interests, as the *Taylor* decision requires. Moreover, it is reasonable to believe that the mothers in *Drummond I* had interests that conflicted with these children by *different* mothers. Here again, there is no indication the court took any care to protect these four children's interests in the first litigation.

Fourth, the District Court erred when it admitted portions of the mothers' deposition testimony from *Drummond I* because the questions called for legal conclusions that are not admissible.

Fifth, the District Court erred when it did not admit the mothers and children's declarations, holding they were "sham" affidavits. This legal term of art is reserved for those instances when new declarations directly contradict testimony in the *same* case. The declarations at issue, however, did not contradict previous

testimony in another case. Additionally, it is undisputed that none of the children testified in *Drummond I* and thus their testimony could not contradict any previous testimony. Moreover, *if* the District Court were to determine the declarations contained contradictory testimony, those portions that do not contradict previous testimony should have been admitted.

For all these reasons, this Court should reverse the District Court's grant of summary judgment and dismissal.

VII. ARGUMENT

A. The District Court Erred in Determining the Eight Original Children-Plaintiffs' Claims were Barred by Nonparty Preclusion under *Taylor*.

On remand after this Court's reversal in *Baloco*, the District Court granted summary judgment as to the eight original children-Plaintiffs based on nonparty preclusion after assuming without deciding that they were not actual parties in *Drummond I*. RE (Vol. II) 95, at 16. Specifically, the District Court ruled that eight of the children-Plaintiffs in the present case had a substantive legal relationship with the mother-Plaintiffs in *Drummond I* and the children were also adequately represented in *Drummond I* such that their claims are barred by *res judicata*.

Taylor, the Supreme Court's most recent pronouncement on *res judicata*, and its previous ruling in *Richards*, 517 U.S. at 795-97, make clear that issues will sometimes be re-litigated in order to protect the due process rights of nonparties as "[a] person who was not a party to a suit generally has not had a 'full and fair

opportunity to litigate' the claims and issues settled in the suit." *Taylor*, 533 U.S. at 892. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id*. at 893 (quoting *Richards*, 517 U.S. at 798).

Taylor recognized only six exceptions to the basic rule that a party cannot be bound by a judgment in litigation in which he was not a party. 553 U.S. at 893-95 (rejecting the doctrine of virtual representation as an exception to nonparty preclusion).[3] Of the exceptions endorsed by the Supreme Court in *Taylor*, the District Court found two exceptions barred plaintiffs' claims, each independently warranting summary judgment: 1) the existence of a "substantive legal relationship," and 2) "adequate representation." RE (Vol. II) 95, at 15. The District Court misapplied the holding in *Taylor* by impermissibly expanding these exceptions.

[3] "The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor*, 553 U.S. at 892. The District Court in this case did not address "issue preclusion," granting summary judgment and dismissing all Plaintiffs' "claims." RE (Vol. II) 95, at 22 (granting summary judgment); *id.* at 24 (granting dismissal on "res judicata" grounds). While the underlying analyses for claim preclusion and issue preclusion vary slightly, *see I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986), the analysis for their application to a nonparty is the same, *see Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379 (2011) (analyzing exception recognized in *Taylor*, a claim preclusion case, in the context of issue preclusion). Additionally, whether claim or issue preclusion, the nonparty must have had a "full and fair opportunity to litigate" the issue or claim in the earlier lawsuit. *See Taylor*, 553 U.S. at 892. Thus, for the same reasons none of the exceptions apply to bar Plaintiffs' claims, they also do not bar the litigation of any issues in this case.

1. No Substantive Legal Relationship Exists Between the Plaintiffs and Their Mothers Involved in *Drummond I* and virtually all courts since *Taylor* have held similarly in analogous situations.

"[P]re-existing substantive legal relationships between the person to be bound and a party to the judgment" is one recognized exception to nonparty preclusion. *Taylor*, 553 U.S. at 894 (internal quotations omitted). The District Court erroneously applied this exception, reasoning that "the decedents, their representatives, and their heirs and beneficiaries are all in privity with one another." RE (Vol. II) 95, at 17. The District Court's reasoning contradicts *Taylor* and finds no post-*Taylor* support in the case law.

In *Taylor*, the Supreme Court identified only three qualifying relationships for a substantive legal relationship: "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." 553 U.S. at 894. The Court indicated these exceptions originated "from the needs of property law." *Id*. After *Taylor*, courts have continually rejected attempts to extend this nonparty preclusion exception beyond the "traditional property or contract interests and relationships" illustrated in the examples provided. *See, e.g., Roybal v. City of Albuquerque*, 2009 WL 1300048, at *1, 7-8 (D.N.M. Feb. 2, 2009) (holding First and Fourth Amendment claims were "personal" and "wife's similar civil rights suit" in which husband was "aware of and participated in the proceedings" in his wife's case did not demonstrate a substantive legal relationship for purposes of nonparty

preclusion); *Pelt v. Utah*, 539 F.3d 1271, 1290-91 (10th Cir. 2008) (holding that co-beneficiaries of oil and gas royalty fund did not have a "fiduciary, contractual or property relationship," and noting that concurrent property interests did not justify nonparty preclusion); *Reneker v. Offill*, 2012 WL 2158733, at *17 (N.D. Tex. 2012) (holding exception inapplicable because relationship between corporations and their former executives is "not derived from property law and bears little, if any, similarity to the examples cited [in *Taylor*]"); *Henry E. and Nancy Horton Bartels Trust ex rel. Cornell University v. U.S.*, 88 Fed.Cl. 105, 114 (Fed. Cl. 2009) (rejecting application of "property exception where the parties were not common trustees, there was no fiduciary relationship, and the defendant failed to identify a succession or assignment of interests in property rights).

After *Taylor*, courts have made clear that a close family relationship is an insufficient basis to apply nonparty preclusion. *See, e.g., Dixon v. City of Selma*, 2011 WL 2681474, at *7 (S.D. Ala. July 11, 2011) (finding privity based on spousal relationship was not intended by the Supreme Court). Discussing *Taylor* in the context of a spousal relationship, one Court wrote:

> All of the illustrative examples the Supreme Court gives involve traditional property or contract interests and relationships. In each of the scenarios, a person effectively steps into the shoes of another person by virtue of some transaction or relationship, such as when an assignment occurs. While the Supreme Court did not foreclose additions to the list, the narrow class of examples given cautions against any significant deviations. It would take a significant expansion of the boundaries of the substantive legal relationships

> supporting preclusion to bring Mr. and Mrs. Roybal's relationship within their scope.

Roybal, 2009 WL 1300048, at *7; *see also id.* at *8-9.

First, as in all the cases referenced in the preceding paragraphs, the relationship between the eight children-Plaintiffs and the mothers in *Drummond I* bears no resemblance to the qualifying substantive legal relationships identified in *Taylor*. There is no dispute that there was no contract or property right, or even fiduciary relationship between the mothers and the children. Furthermore, the children could not conceivably "step into the shoes" of their mother because they were asserting their own distinct legal claims under the ATS and TVPA, as recognized by this Court in *Baloco*, 640 F.3d at 1345, 1350. Additionally, there is no derivative aspect of the children's claims from their mothers. The mere familial relationship between the mothers and children is not sufficient to demonstrate the "substantive legal relationship" exception to nonparty preclusion.[4] *See, e.g.*, *Taylor*, 553 U.S. at 894; *Dixon*, 2011 WL 2681474, at *7; *Roybal*, 2009 WL 1300048, at *7.

Second, the District Court's conclusion that the children and mothers' "familial relationship *as heirs to the same right*" qualifies for this nonparty exception is legally and factually unsupported. RE (Vol. II) 95, at 18, n.12. The

[4] The District Court also erroneously referred to the "privity" concept, RE (Vol. II) 95, at 16-17, which *Taylor* disfavored, 533 U.S. at 894 n.8.

District Court relied only on *property* law cases that all predate *Taylor* and applied the now-rejected "virtual representation" doctrine. *Taylor*, 533 U.S. at 894. In each of those cases, successors in property interests effectively stepped into the shoes of another individual concerning some property-based transaction. *See* RE (Vol. II) 95, at 17 (citing, e.g., *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005) (noting that "[p]rivity, traditionally, arose from a limited number of legal relationships in which two parties have identical or transferred rights with respect to a particular legal interest, chiefly: co-owners and co-tenants of property; decedents and their heirs, successors in interest and survival claimants …"); *Meador v. Oryx Energy Co.*, 87 F.Supp.2d 658, 665 (E.D. Tex. 2000) (holding virtual representation precluded claim regarding chain of title where prior litigant had asserted claims "individually and as attorney-in-fact for some 200 heirs")).

Third, in considering the children and mothers as "heirs to the same right," the District Court failed to address the distinction between the mothers' claims in *Drummond I*, and the children's distinct wrongful death claims in this case. The children and mothers are not "heirs to the same right" because as this Court made clear in *Baloco*, "the TVPA expressly creates a *separate cause of action* for the wrongful death claimant" that is distinct from any claim by another family member or the legal representative of the victim. 640 F.3d at 1347; *see also* 28 U.S.C. §

1350, Note § 2 (a)(2) (not limiting claims to legal representatives, but specifically stating that a "claimant" "in an action for wrongful death" is eligible to sue).

Traditionally, a judgment against the plaintiff in a survival suit will not bar a subsequent wrongful death suit. *See* Restatement (Second) of Judgments, § 47 (1982). The Restatement provides the following illustration:

> H is killed in an automobile accident with D. H is survived by W, his wife, and C, his child. W brings an action under a survival statute as his administrator for his injuries and losses up to the time of his death. Judgment is for D on the ground that D was not liable. The judgment for D in the first action does not preclude an action by W or by C under a wrongful death statute, asserting a claim for losses suffered by C as a result of H's death.

Id.; *see also* Restatement (Second) of Judgments, § 45, Comment *a: scope* (1982) ("The surviving personal injury claim and the wrongful death claim are distinct in origin and concept"); *Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F.Supp.2d 46, 54 (D.D.C. 2008) (allowing claim under TVPA by siblings of decedent after the legal representative of the estate of the victim had already settled the case with defendants and noting that plaintiffs "are not bringing action on behalf of their [deceased] brother . . . but rather for their own personal injuries as a result of the bombings.").

All courts considering the issue agree that where family members, including spouses, share factually-related but distinct claims that are not legally derivative of one another, nonparty preclusion will not bar a subsequent action. *See Freeman v. Lester Coggins Trucking Inc.*, 771 F.2d 860, 865(5th Cir. 1985); *see also, e.g.*,

Roybal, 2009 WL 1300048, at *7-9 (constitutional claims of spouses arising out of same facts were "personal" claims and thus not barred by nonparty preclusion); *Dixon*, 2011 WL 2681474, at *7 (spouses' civil rights claims arising from same incident were insufficient to apply nonparty preclusion).

In *Freeman*, the issue was whether the separate wrongful death claims for the mother and siblings of the decedent were barred by the father's previous suit for his own injuries where there was an adverse liability determination of the father's individual claims. The Fifth Circuit found that close family relationships were not sufficient to establish privity to bind a nonparty and it cited with approval the following:

> Each [family member] has an independent cause of action for personal injuries, free from claim preclusion, just as other multiple plaintiffs are presumed to own separate claims. None is bound by issue preclusion in an action for personal injuries, for the same reasons as apply to preclusion among unrelated parties . . . . [P]reclusion does not apply between litigation conducted by one family member in a personal capacity and litigation conducted by the same person as a representative of another family member.

Freeman, 771 F.2d at 863 (citing 18 Wright, Miller, and Cooper, Federal Practice and Procedure, § 4459, p. 524-25). Thus, *Freeman* held that even though the claims "stemm[ed] from the same accident," litigation by the mother and siblings for their independent wrongful death claims of a family member were not barred

"because [of a] judgment rendered against the husband-father in an earlier action on his own individual claim for his own personal injuries . . ." *Id.* at 863-64.[5]

As in the above examples, and as this Court made clear in *Baloco,* only the mothers – not the children – brought suit in *Drummond I* "for the damages which the decedent suffered in the course of and as a result of his murder." *Baloco,* 640 F.3d at 1347. The children of the deceased, however, now bring wrongful death suits for the losses they have suffered as a result of their fathers' deaths.[6] Although the children's claims in this litigation are factually related, they are legally distinct, making nonparty preclusion inappropriate. Thus, the children are not heirs or beneficiaries of the mothers' rights, nor are the children's claims derivative of the Plaintiff-mothers' claims in *Drummond I.*

In conclusion, the District Court's application of the substantive legal exception to nonparty preclusion to bar plaintiffs' wrongful death claims extends the exception far beyond the limited class of qualifying property-based

[5] The District Court erroneously tried to distinguish *Freeman* by reasoning that it did not address circumstances where there "is a familial relationship as *heirs to the same right*." RE (Vol. II) 95, at 18 n.12 (emphasis in original). As in *Freeman* where the siblings' claims were distinct and derived from the decedent's death, but were not derivative of their fathers' claims for his injuries, the mothers and children in this case have distinct claims and are not "heirs to the same right."

[6] *See Michigan Central Railroad Co. v. Vreeland,* 227 U.S. 59, 70 (1913) (explaining that the purpose of a wrongful death suit is to provide each rightful beneficiary with his or her own measure of damages for the wrongful death and each claimant may recover "the damages [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."). The Supreme Court further explained that "[a] minor child sustains a loss from the death of a parent . . . altogether different from that of a wife or husband from the death of the spouse." *Id.* at 73.

relationships envisioned by the Supreme Court in *Taylor*. In fact, the District Court failed to cite any cases justifying such a broad expansion in analogous circumstances to this case, all but one case pre-dated *Taylor*[7] and applied the now-rejected "virtual representation" test, and none of the cases addressed separate legal claims for wrongful death. Here, the claims asserted by the children are not transferrable or identical to those asserted by the mothers in *Drummond I*, and they are not properly precluded.

Thus, the District Court erred when it determined the mothers from *Drummond I* and the eight children-Plaintiffs had a substantive legal relationship that qualified them for nonparty preclusion.

2. The Children-Plaintiffs Were Not Adequately Represented by the Mothers in *Drummond I* and *Taylor* Explicitly Rejected the District Court's Application of the Adequate Representation Exception.

In *Taylor*, the Supreme Court held a nonparty may be bound by a judgment because they were "adequately represented by someone with the same interests who was a party to the suit." 553 U.S. at 894. This exception, however, applies only "in certain limited circumstances," and requires "at a minimum that: (1) the interests of the nonparty and her representative are aligned; ***and*** (2) either the party

[7] The District Court cited *Harty v. Ehden, N.V.*, 2012 WL 2312044, at *3 (S.D. Fla. June 18, 2012). RE (Vol. II) 95, at 16. That case, however, involved a nonparty member of an association whose "identical" interests were purportedly represented by the association-plaintiff, as identified in the complaint. These circumstances are not present here, and *Harty* conflicts with a myriad of other cases. *See infra*, § VII.A.2 (citing, e.g., *Access for Disabled, Inc. v. Fort Lauderdale Hospitality, Inc.*, 826 F.Supp.2d 1330, 1336 (S.D. Fla. 2011)).

understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 894; 900 (emphasis added, citations omitted). In order for a party to have been adequately represented, both prongs of the test must be satisfied. *Id.* at 900. Importantly, *Taylor* rejected the doctrine of "virtual representation," which is the concept that [p]reclusion is in order . . . whenever the relationship between a party and a nonparty is 'close enough' to bring the second litigant within the judgment." *Id.* at 898 (internal quotations omitted).

The "adequate representation" exception has rarely been applied outside of the class action context and courts have been extremely hesitant to extend this exception beyond those "limited" circumstances envisioned by the Supreme Court. *See, e.g., Amos v. PPG Industries, Inc.*, 2012 WL 5359638, at *3 (6th Cir. Nov. 1, 2012) (refusing to extend *Taylor* to suit brought by unions who made good faith attempts to benefit retirees because the nonparties were not adequately represented and the previous "action neither certified a class . . . nor employed any other 'special procedures' to protect the [plaintiffs'] interests in that action"); *National Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc.*, 628 F.3d 837, 856 (7th Cir. 2010) (previous suit by organization did not provide adequate representation to member-plaintiffs because organization "did not conduct the underlying litigation as anything like a fiduciary for its members" and

to hold otherwise would be "contrary to the Supreme Court's language in *Taylor* carefully limiting the scope of the adequate representation category of privity"); *Reneker*, 2012 WL 2158733, at *18 (N.D. Tex. 2012) ("An expansive interpretation of the adequate representative exception would recognize, in effect, a common-law kind of class action, which would circumvent the procedural protections of Rule 23, and the court declines to broaden this exception in this manner") (quoting *Taylor*, 553 U.S. at 901) (internal quotations omitted); *Access for Disabled, Inc.*, 826 F.Supp.2d at 1336 (no adequate representation found because previous litigation was neither a class action nor were the relationships recognized in *Taylor*. The District Court's application of this exception to the mothers and children in this case violates the caution espoused in *Taylor* and the restraints exercised by other courts in the post-*Taylor* case law.

a. The children and their mothers do not have aligned interests for the purpose of *res judicata*.

The District Court erroneously concluded that the interests of the children and the mothers are aligned because "all arose out of the same common nucleus of operative facts" and they share "the same sufficient, personal incentive to litigate the liability" of Defendants. RE (Vol. II) 95, at 21. *Taylor* expressly rejected this reasoning. There, the D.C. Circuit had found that the petitioner was adequately represented in an earlier lawsuit because the previous plaintiff had a strong incentive to litigate the exact same issues and shared the same lawyer. 553 U.S. at

897. The Supreme Court reversed, holding that despite the identical interests the previous party and nonparty shared in obtaining the same information from the Federal Aviation Administration pursuant to a FOIA request, this shared interest was not sufficient to demonstrate an adequacy of representation. *Id.* at 905.[8]

Courts have interpreted *Taylor* to mean that demonstrating the "same interests" for the purpose of applying nonparty preclusion is not established by simply sharing a common interest in holding the defendant liable. *See, e.g., Taylor*, 553 U.S. at 905 (holding there was no legal relationship between the plaintiff and nonparty despite shared interests); *Limon v. Berryco Barge Lines, L.L.C.*, 779 F.Supp.2d 577, 585, 586 (S.D. Tex. 2011) ("it is not enough that the nonparty may be interested in the same questions or proving the same facts," the qualifying relationships contemplated by the Supreme Court are limited to "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the

[8] To justify its determination that the children-Plaintiffs were adequately represented by their mothers in *Drummond I* because they desired liability, the District Court relies on a law review article. *See* RE (Vol. II) 95, at 20-21 (citing Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representative Dilemma*, 84 Notre Dame L. Rev. 1877, 1909 (July 2009)). This reliance is unsupported because: 1) the authors recognize that *Taylor* abandoned the virtual representation doctrine; and 2) the authors, in disagreeing with the *Taylor* decision, offer an alternative approach and present "[their] due process theory of virtual representation." *Id.* at 1911-12. In short, although the authors advocate for the use of the "virtual representation" doctrine when the party and nonparty share "a desire for the same outcome and the availability of the same legal theories in pursuit of that outcome," this represents the law as the authors wish it were and it directly contradicts the holding in *Taylor*, which the authors readily admit. *Id.* at 1903 (addressing *Taylor's* supposed failings and how to resolve perceived dilemmas).

trustee."); *Bartels Trust*, 88 Fed.Cl. at 113 ("Shared motivation alone is insufficient to qualify for this 'same interests' requirement.").

Instead of only shared interests, "the earlier party must have had some *legal obligation* to vindicate the rights of the nonparty later precluded." *Bartels Trust*, 88 Fed.Cl. at 113 (emphasis added). In *Bartels Trust*, the court refused to apply the "fiduciary exception," despite the parties' common interest in the outcome of the prior litigation, because the defendant failed to identify any legal interest that the prior party was "duty-bound" to litigate on behalf of the current plaintiff. *Id.* at 114-15; *Limon* , 779 F.Supp.2d at 586 (same); *Highway J Citizens Group, U.A. v. U.S. Dept. of Transp.*, 656 F.Supp.2d 868, 882 (E.D. Wis. 2009) ("*Taylor* suggests that only a relationship giving rise to a fiduciary duty will result in nonparty preclusion based on the party's purported representation of the nonparty.").

For many of the same reasons addressed concerning the inapplicability of the "substantive legal relationship" exception to nonparty preclusion, *see supra* Section VII.A.1, the children's interests in this case are not sufficiently aligned with their mothers from *Drummond I*. First, Defendants failed to demonstrate on summary judgment that the mothers from *Drummond I* stand in a fiduciary relationship with the children; nor were the mothers "legally obligated" or "duty-bound" to vindicate the legal rights of the children-Plaintiffs. The fact that the mothers and children were biologically related does not create a fiduciary

relationship or legal duty. *See Taylor*, 553 U.S. at 885, 894, 898 (rejecting virtual representation test); *Dixon*, 2011 WL 2681474, at *7 (close familial relationship is insufficient to demonstrate adequate representation after *Taylor*).

Second, the fact that the children have distinct claims, which was decided as a matter of first impression in *Baloco*, means by definition they do not share the same interests as the mothers in *Drummond I*. *See Fin-Ag, Inc. v. NAU Country Ins. Co.*, 2009 WL 1850334, at *13 (D.S.D. 2009) (finding litigants did not have "same interests" because contract conferred on plaintiff rights that were "separate and distinct from" the prior litigant's rights). It was not until *Baloco* that it even became clear that the children had standing to bring a *separate* wrongful death cause of action. 640 F.3d at 1347. Indeed, Drummond argued successfully to the District Court at the outset of this case that the children did ***not*** have a separate cause of action, Doc. 15, at 11-15, and the District Court agreed to dismiss their claims on this basis. Doc. 33, at 16, 17. This Court's reversal clarified the law for the parties, but there is no way that years ago during in *Drummond I* the mothers could have "*in fact* vigorously pursued and protected" the children's interests because the mothers could not have know their children had separate legal interests to protect. *See Pelt*, 539 F.3d at 1287-88 (holding that shared interests and the incentive to litigate "do not alone ensure adequate protection" to an absent party

and focusing instead on whether the class representative "vigorously pursued and protected the interests of the class" in the "actual conduct of the litigation").

Third, the other reasons the District Court cites to justify its ruling are equally unpersuasive and have been rejected by the Supreme Court. For example, the fact that the mothers and children are represented by the same attorneys does not demonstrate the children were adequately represented in *Drummond I*. *See Taylor*, 533 U.S. at 897-98 (rejecting this argument). Additionally, even though the mothers were not deliberately sabotaging their children's claims in *Drummond I* does not mean the mothers were adequately representing their separate legal interests. *Compare* RE (Vol. II) 95, at 22 (noting the mothers did not act "as a sham to prevent the children from recovering for the deaths of their fathers"),*with Taylor*, 533 U.S. at 905 (rejecting arguments that the same incentive to litigate is sufficient to determine the nonparty was adequately represented in the previous litigation).

In conclusion, under the District Court's interpretation of the adequate representation prong, nonparties would be barred under broad-sweeping circumstances whenever they shared an interest in the "valiant pursuit for a finding of liability." RE (Vol. II) 95, at 22. This Court's careful conditions for determining whether the children's interests were adequately represented in *Baloco* would be rendered moot if the mere fact of the family relationship automatically confers a

sufficient alignment of interests. This approach was squarely rejected by the Supreme Court in *Taylor* and this Court should now make this explicit as to this case.

b. There is no evidence that the mothers understood they were acting in a representative capacity in *Drummond I* or that the District Court in *Drummond I* took care to protect the children's interests.

The second prong of the adequate representation exception to nonparty preclusion requires that "the party understood herself to be acting in a representative capacity *or* the original court took care to protect the interests of the nonparty." *Taylor*, 553 U.S. at 900 (emphasis added). There is no doubt that Defendants carry the burden of proving all elements of claim and issue preclusion, which are affirmative defenses. *See id.* at 907. In this case, Defendants have submitted no evidence – admissible or otherwise – demonstrating the mothers understood they were acting in a representative capacity or that the court in *Drummond I* took care to protect the children's interests.

First, the District Court erroneously relied on the complaints, notice of identities, and the mothers' deposition testimony from *Drummond I* to find the mothers intended to represent the children's separate interests in *Drummond I* and understood themselves to be acting in a legal representative capacity. RE (Vol. II) 95, at 18-20. Regarding the pleadings, the District Court stated, "[t]he various complaints filed in *Drummond I* make plain that the mothers filed suit on behalf of

themselves and their minor children as heirs of the deceased." RE (Vol. II) 95, at 19 (citing complaint and "Notice of Identities"). The District Court justified its reliance on the pleadings by noting that although the complaints and notice of identities were not enough to demonstrate the children were "parties" in *Drummond I*, they "evidence[ ] an intention (as opposed to a legal conclusion) of the mothers to represent the interests of their children in *Drummond I*." *Id.* The District Court's reliance on the pleadings directly contradicts this Court's holding in *Baloco*:

> [a]lthough their mothers were also plaintiffs in *Drummond I*, we cannot presume that they intended to represent their children's **separate legal interests** because the Notice did not indicate that the children were present in the suit by and through their mother and next friend.

Baloco, 640 F.3d at 1351 (emphasis added). This Court, therefore, held the complaints and notice of identities did *not* evidence an intention or understanding, as the Supreme Court requires, that the mothers were representing their children's ***separate legal interests***.

Second, the District Court's reliance on the mothers' deposition testimony from *Drummond I* was also error because it does not demonstrate they *understood* they were representing the separate legal interests of their children.[9] For example, in *Drummond I* when Elsa Victoria Almarales Viloria (Jane Doe IV), the mother of

[9] Appellants contend the mothers' deposition testimony is not admissible. *See infra* §VII.C. Despite this, however, if admitted, the mothers' testimony from *Drummond I* does not demonstrate their understanding.

three children-Plaintiffs, was asked if she was filing the lawsuit only on her behalf or on behalf of her children, she testified: "I am just filing this complaint to have justice done, not only economically, because this is something that will never be repaired but also morally, because it has affected my children and myself." RE (Vol. II) 69, Pls' Response to Defs' Statement of Facts ¶ 10 (citing E. Almarales Dep. 18:11-25). The Defendants' lawyers objected that this answer was "unresponsive," highlighting this mother's lack of understanding. *See id.* Additionally, for the mothers who answered "yes" to Defendants' question concerning on whose "behalf" they brought the case, their testimony also does not address their understanding concerning representing their children's separate claims. *See* RE (Vol. I) 63-5, 25:22-26:14; 63-6, 20:14-21; 63-7, 10:18-23, 19:6-10; RE (Vol. II) 63-8, 12:16-21, 16:17-24.

To clarify the mother's intentions and understanding, which were not addressed in *Drummond* I, and the involvement of the children, Plaintiffs submitted declarations for the District Court's consideration. *See* RE (Vol. II) 69, Pls' Statement of Undisputed Facts (PSUF) ¶¶1-7; *see also infra*, § VII.D (addressing the admissibility of the declarations). In their declarations, the mothers expressly disavowed any understanding that they were representing their children's separate legal interests and, in fact, state they purposefully separated their children from the litigation for fear of their safety. *Id.* PSUF ¶¶ 2-3; *see also In re*

Consolidated Salmon Cases, 688 F.Supp.2d 1001, 1010 (E.D. Cal. 2010) (considering the express disavowals of any understanding regarding acting in a representative capacity and finding the unique interests of certain members of an association differed where members had no understanding that their interests were being represented).

It is well established that at summary judgment, district courts are required to "view the evidence and all reasonable factual inferences in the light most favorable to the nomoving party." *Wakefield v. Cordis Corp.*, 304 Fed.Appx. 804, 805 (11th Cir. 2008); *see also Brown v. UMWA 1985 Const. Worker's Pension Plan*, 2012 WL 5289406, at *1 (N.D. Ala. Oct. 18, 2012) (applying same standard in *res judicata* context); *Cobb v. Alabama*, 2012 WL 3732933, at *2 (M.D. Ala. Aug. 9, 2012) (courts must not weigh the evidence on summary judgment).

The reasonable inference from the mothers' testimony and declarations, viewed in a light most favorable to Plaintiffs, is that the mothers were *not* bringing claims in *Drummond I* "on behalf of" their children in the legal sense, but rather simply sought justice and to hold Defendants accountable. The District Court failed to draw any reasonable inferences in Plaintiffs' favor, and it is impossible to conclude from the mothers' deposition testimony that they *understood* they were representing their children's separate legal interests. As noted above, this inference is all the more reasonable given the fact that only after the mothers had testified in

Drummond I did this Court decide as a matter of first impression that the children have separate legal interests.

Additionally, the evidence demonstrates that none of the children understood themselves to be represented in *Drummond I* and they played no role in that litigation. RE (Vol. II) 69, PSUF ¶¶ 4-5. Indeed, there is a compelling argument that the required intent regarding representation must be mutual with the children also understanding that their mothers were representing them in *Drummond I. See Taylor*, 553 U.S. at 897 (noting the required "understanding by the concerned *parties* that the first suit was brought in a representative capacity") (emphasis added). The Third Circuit has assumed bilateral understanding of the parties to be represented, *see Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 313 (3d Cir. 2009), but no circuit has analyzed this issue directly. *See Amos*, 2012 WL 5359638, at *4 (acknowledging that in the general context of nonparty preclusion, understanding of initial suit's purpose to represent nonparty is necessary but declining to become first circuit to determine whether unilateral or bilateral understanding is required).

Third, there is no dispute in this case that the district court in *Drummond I* failed to take any measures to protect the interests of the children, and Defendants have made no such argument. The court in *Drummond I* conducted no hearing to determine whether the children were even proper parties to the *Drummond I*

litigation or to determine whether their separate interests were protected. *See Baloco*, 640 F.3d at 1350-51 (citing *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 38-39 (5th Cir. 1958)); *see also Taylor*, 553 U.S. at 897 (noting court had not ensured the interests of the nonparty were protected).

Similarly, there is no dispute that the children in this litigation did not "control" the *Drummond I* litigation. *See Nielsen v. U.S. Bureau of Land Management*, 252 F.R.D. 499, 511 (D. Minn. 2008) (denying preclusion where both plaintiffs made FOIA requests in their individual capacity without the right to control the other's request or subsequent legal action and neither protected each other's interests).

For all the above reasons, the District Court erred when it determined the original eight-children-Plaintiffs' interests were adequately represented by the mothers *in Drummond I.*

B. The District Court Erred in Determining the "New" Plaintiffs' claims were barred by *Res Judicata*.

Following reversal, on remand, the District Court dismissed the claims of four "new" children-Plaintiffs, holding they were barred by *res judicata* because the children's interests were completely aligned with those of the unrelated mothers in *Drummond I* because their claims supposedly "derive . . . from the death of the decedents, and, most importantly, that the *interests* of the biological children and the 'new' children are aligned here,". . . . "for purposes of attempting

to hold Defendants *liable* for the death of the decedent." RE (Vol. II) 95, at 23-24 (emphasis in original, citations omitted).[10] It is undisputed that these "new" children were not parties to the *Drummond I* litigation and their mothers did not participate in *Drummond I.*

The District Court's dismissal of the four "new" children-Plaintiffs suffers from the same infirmities addressed above concerning the eight original children-Plaintiffs, *see supra*,§ VII.A-B, but there are several additional compelling reasons why these children's claims are not barred by *res judicata*. First, the "new" children-Plaintiffs do not have aligned interests with the mother-Plaintiffs in *Drummond I*. Second, as to the "new" children-Plaintiffs, the District Court never addressed *Taylor's* second prong, which is whether "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." *Id.* at 900. For these additional reasons, the District Court's dismissal of the "new" children-Plaintiffs' claims should be reversed.

1. The "new" children-Plaintiffs' interests are not aligned with the mothers' interests in *Drummond I.*

First, as with the eight original children-Plaintiffs' interests, the "new" children-Plaintiffs' interests are not aligned with the mothers' interests in

[10] The question is not whether the "new" children-Plaintiffs' interests were aligned with the eight original children's interests, as the District Court stated. RE (Vol. II) 95, at 23. Rather the issue is whether the mothers in *Drummond I* adequately represented them. *See Taylor*, 553 U.S. at 896-97 (comparing nonparty's interests to party's interests).

Drummond I because they have separate claims that do not legally derive from the mothers' claims and the mothers were in no way legally obligated to represent the "new" children's separate and distinct claims. *See supra*, § VII.B.1; *see also Fin-Ag, Inc.*, 2009 WL 1850334, at *13 (finding litigants did not have "same interests" because contract conferred on plaintiff rights that "are separate and distinct from" the prior litigant's rights).

Second, 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. *See, e.g., Amos,* 2012 WL 5359638, at *3 (refusing to extend *Taylor* to suit brought by unions who in "good-faith attempt[ed] to benefit [the plaintiff] retirees" because the interests of current and former members were not aligned and *could* be in conflict). Thus, even more compelling than refusing to apply nonparty preclusion to "mere strangers," the mothers in *Drummond I* may have had antagonistic feelings toward the "new" children-Plaintiffs. *Cf. Richards,* 517 U.S. at 802 (describing tax payers with identical interests in challenging an occupation tax as "mere strangers" for purposes of *res judicata* because there was no indication the first plaintiffs understood themselves to be representing the interests of the nonparty, the non-parties did not have an opportunity to participate in the litigation, and the court took no care to protect the interests of the nonparty); *Taylor*, 553 U.S. at 885, 905

(finding the nonparty was not adequately represented in the first suit even though he was close friends with the first Plaintiff and they both sought the exact same information through the same FOIA request).

For all these reasons and those articulated concerning the eight original plaintiffs, the "new" Plaintiffs' interests were not aligned with the mothers in the *Drummond I* litigation.

2. There is *no* indication that the mothers in *Drummond I* understood they were representing the "new" children-Plaintiffs' claims, nor did the District Court take care to protect their interests.

As noted above, in order for the court to determine that the "new" children-Plaintiffs were adequately represented in *Drummond I*, it also had to find the mothers understood they were representing the separate and distinct claims of the children or that the District Court took care to protect their interests as nonparties. The District Court ignored this required element, and thus made no such finding, nor could it. Unlike the original eight children-Plaintiffs' claims, Defendants challenged the "new" children-Plaintiffs' claims on a motion to dismiss, not on summary judgment. RE (Vol. II) 95, at 22-24. The pleadings provide no indication that the mothers in *Drummond I* understood themselves to be representing the separate interests of their partner's children by *different* mothers. Of course, the District Court cannot consider or weigh any evidence on a motion to dismiss. *See, e.g.*, *Hall v. Smith*, 170 F. App'x 105, 107 (11th Cir. 2006) (district courts are not

"permitted to consider evidence outside of the pleadings in determining whether to grant the defendant's motion to dismiss").

Nevertheless, it is beyond dispute that the mothers in *Drummond I* never testified regarding these four children in any way; the operative complaint and notice of identities in *Drummond I* did not identify them by name or in any capacity. *Drummond I*, Case No. CV-03-BE-575-W, Doc. 77 (third amended complaint); RE (Vol. I) 63-4 (notice of identities). It is equally certain that this Court in *Baloco* already determined that even if the complaint and notice of identities had identified the "new" Plaintiffs, this is insufficient to determine they were adequately represented. *Cf. Baloco*, 640 F3d at 1350 ("The pleadings alone are simply insufficient to assure us that those asserting claims for the minor children in *Drummond I* have interests identical to those being asserted by the Children in this action."); *id.* at 1351 (noting that the notice of identities also did not demonstrate the mothers intended to represent *their own* "children's separate legal interests"). The fact that this Court determined these pleadings and notice of identities were insufficient to demonstrate the mothers' intent to represent *their own* children applies with greater force to the "new" Plaintiffs who are the children of *different mothers.*[11]

[11] The Supreme Court in *Richards* unanimously rejected arguments similar to those of the District Court when it overturned a finding of *res judicata* by the Supreme Court of Alabama. In *Richards*, three taxpayers had unsuccessfully challenged an occupation tax. Later, in a separate case, two new taxpayers, representing a class of all nonfederal employees, again challenged the

In this case, the original mother-plaintiffs did not purport to assert any claim on behalf their deceased husbands' children with *different* women, nor did the court take care to protect the interests of the nonparty children. There is no evidence that the mothers were even aware of the "new" children-Plaintiffs' existence. Moreover, it is undisputed that the "new" children-Plaintiffs did not participate in the *Drummond I* litigation in any way. To apply the doctrine of *res judicata* to the "new" Plaintiffs would be an "extreme application[ ]" that is "inconsistent" with these children's due process rights. *Richards*, 517 U.S. at 793; *see also Taylor*, 553 U.S. at 892-93.

For all the above reasons, the District Court erred when it determined the "new" children-Plaintiffs were adequately represented and failed to even consider whether the mothers in *Drummond I* understood they were representing the "new" children's separate legal interests or whether the previous court had protected their interests.

C. The District Court Erred when it Considered the Mothers' Deposition Testimony from *Drummond I* Because the Testimony Constitutes Inadmissible Legal Conclusions.

---

same tax. The Supreme Court unanimously overturned the Alabama Supreme Court, holding that in addition to a failure to provide notice to the suit, there was no indication that the original taxpayer-plaintiffs understood they were bringing suit on behalf of a class, and the judgment did not purport to bind any nonparty taxpayers, so the court could not have taken care to protect the interests of the nonparties. 517 U.S. at 801-802; *see also Taylor*, 553 U.S. at 896-97.

Over Plaintiffs' objections, the District Court relied on the mothers' deposition testimony from *Drummond I* and found, based on this testimony and the pleadings, that the eight children-Plaintiffs were adequately represented in *Drummond I.* RE (Vol. II) 95, at 11 n.9. The Court held that "the mothers testified as to the *fact* that they were bringing the lawsuit on behalf of their children. The mothers needed no legal, 'scientific, technical or other specialized knowledge' to testify as to their understanding about their role in the litigation." RE (Vol. II) 95, at 11 n.9. The District Court erred because the testimony constituted impermissible legal conclusions concerning the legal capacity in which they sued and not the *fact* of their understanding concerning their role in the litigation or whether they were representing their children's separate and distinct claims for wrongful death. As a result, it was error for the District Court to admit their testimony.

Courts have long held that legal conclusions of parties and witnesses should not be considered by the court. *See, e.g, Ojeda v. Louisville Ladder Inc.*, 410 Fed.Appx. 213, 215 (11th Cir. 2010) (affidavit did not establish a disputed issue of material fact because it contained legal conclusions and the statements would be inadmissible at trial as improper lay testimony); *Griffin v. City of Clanton, Ala*., 932 F.Supp. 1357, 1358 -59 (M.D. Ala. 1996) (expert's opinions in affidavit were "merely conclusory statements designed to have legally operative effects" and "implicate issues that are solely within the purview of the court and are not the

proper subject of evidentiary submissions") (citing *The Lovable Co. v. Honeywell, Inc*., 431 F.2d 668, 674 (5th Cir.1970) (affidavit setting forth legal conclusions cannot be treated as factual support for a party's position); *Elvin Associates v. Franklin*, 735 F.Supp. 1177, 1184 (S.D.N.Y. 1990) (party's deposition testimony that he was "bound" by a contract was "not an admission of fact, but the legal conclusion of a layman" and therefore did not bind the court); *Seeger v. AFNI, Inc*., 2007 WL 1598618, at *9 (E.D. Wis. June 1, 2007) (where plaintiffs testified in depositions that their contracts were for services under state law, the court found that "the plaintiffs' beliefs regarding this issue are irrelevant because this is an issue of law rather than a question of fact").

The use of legal terminology signals an impermissible statement of law. *See U.S. v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988) (excluding expert's testimony because the words "'manipulation,' 'scheme to defraud,' and 'fraud' are not self-defining terms but rather have been the subject of diverse judicial interpretations"). Similarly, the Sixth Circuit considered "whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate." *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985). In *Torres*, a witness was asked whether the plaintiff "had been discriminated against because of her national origin." *Id.* To determine whether the question called for an improper

legal conclusion, the court addressed: (1) "whether the question . . . tracked the language of the applicable statute," and (2) whether the term used ("discrimination") had a specialized meaning in the law and "in lay use the term has a distinctly less precise meaning." *Id.* Finding that the question called for an impermissible legal conclusion, the court emphasized that "a more carefully phrased question could have elicited similar information and avoided the problem of testimony containing a legal conclusion." *Id*.; *see also Stoler v. Penn Cent. Transp. Co.,* 583 F.2d 896, 898 -99 (6th Cir. 1978) (excluding expert testimony that a railroad crossing was "extra hazardous" because it was a legal conclusion).

One district court, recognizing that certain words or phrases can have different meanings colloquially than in the law, rejected arguments concerning layperson testimony about legal relationships:

> I disagree that these [deposition] statements [about who her employers were] are binding admissions of legal status; rather they appear to be a layperson's description of relationships using common terms that have legal meanings and significance that would not necessarily be within the contemplation of a layperson. This court cannot assume that [the deponent], a non-lawyer, would understand or intend his descriptions to constitute admissions of legal relationships.

Gonzalez-Wiley v. Tessa Complete Health Care, Inc., 2002 WL 985564, at *7 (D. Or. Mar. 21, 2002).

In this case, Defendants asked the mothers: "And is that lawsuit brought *on your behalf and also on behalf of your children* as well?" RE (Vol. II) 95, at 12.

The phrase "on behalf of," like the word "discrimination," has legal significance and without any additional questioning concerning what the mothers understood this phrase to mean, their response constitutes a legal conclusion.

But even absent legal terminology per se, courts have relied on Federal Rule of Evidence 704 to distinguish statements of fact from inadmissible legal conclusions. *See, e.g., Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Interpreting Federal Rule of Evidence 704, the Advisory Committee noted:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Fed.R.Evid. 704 Advisory Committee Notes to the 1971 Amendments.

The Fifth Circuit, commenting on the above example in the Advisory Committee Notes, stated that "[t]he first question is phrased in such broad terms that it could as readily elicit a legal as well as a fact based response." *Owen*, 698 F.2d at 240 (finding that the attorney's question regarding the "cause of the accident" was "more akin to the first, improper question [referenced in the Advisory Committee Notes] than the second, permissible one"). *See also, e.g., Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1474 (11th Cir. 1984) ("to be

admissible under Rule 704 an expert's opinion on an ultimate issue must be helpful to the jury and also must be based on adequately explored legal criteria"); *Strong v. E. I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 686 (8th Cir. 1981) (upholding the trial court's exclusion of testimony when the attorney's questions "were too broadly and simplistically phrased under Rule 704").

In this case, questions concerning on whose behalf the case was brought seeks legal representative status rather than factual information that tracked the legal criteria[12] associated with adequately representing the children's separate claims. For example, whether the mothers understood their children had separate wrongful death claims, whether the mothers intended to represent those separate interests, and whether the children were involved in the lawsuit or provided information concerning their separate wrongful death claims all relate to *facts* addressing the adequacy of legal representation. *See Taylor*, 553 U.S. at 897-98 (addressing the *facts* that are relevant to determining whether a nonparty was adequately represented in the previous litigation). As noted previously, wholly

[12] The Advisory Committee addressed "tracking the legal criteria" when it distinguished between the questions, "Did T have the capacity to make a will?," which did not provide the witness with the required elements of legal capacity, thus calling for an opinion the lay witness is not qualified to offer, and the permissible version of the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" The latter question seeks factual information for each element of capacity and whether the testator had sufficient mental capacity to (1) know the nature and extent of his property, (2) know the natural objects of his bounty, and (3) formulate a rational scheme of distribution. Without knowledge of these three elements, the witness would answer the question based upon a colloquial, not legal, definition of "capacity," and constitutes a legal conclusion.

apart from the improper question seeking a legal conclusion, until this Court's decision in *Baloco*, not even the parties' counsel could provide a definitive response to whether the children had distinct legal claims from their mothers' claims, and as a result, the Colombian widows of murdered union leaders could not have been clear about this difficult legal question.

Finally, the mother's testimony from the prior litigation is also inadmissible because it constitutes hearsay and should not be considered on summary judgment in this proceeding. *See Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999). Federal Rule of Evidence 804(b)(1), which governs the admissibility of prior testimony, does not provide a hearsay exception because Defendants never demonstrated the mothers are unavailable to testify in this case. *See Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 699-700 (N.D. Ga. 2006). Additionally, the mothers did not share the same motives in litigating the prior case because they are not predecessors in interest to the children's claims;[13] and the children did not have the opportunity, or the same motivation as in the present case, to develop the prior testimony regarding representation of their *separate* claims. *See U.S. v. DiNapoli*, 8 F.3d 909, 914-15 (2d Cir. 1993); *see also Stanley Martin Companies, Inc. v. Universal Forest Products Shoffner LLC*, 396 F.Supp.2d 606, 613-14 (D. Md. 2005) (striking depositions from prior case even where the same facts were

[13] Additionally, the mothers certainly did not share any motivation to represent the claims of the children by *different* mothers.

involved because there was no showing of unavailability, *both* parties were not involved in the past litigation, and the plaintiff's motives were different).

For all these reasons, it was error for the Court to admit the mothers' testimony from *Drummond I*.

D. The District Court Erred in Striking The Eight Original Children-Plaintiffs' and Mothers' Declarations, which Constitute Admissible Evidence.

It is undisputed that *only* the mothers of the original eight children-Plaintiffs testified in the *Drummond I* litigation. Yet, the District Court struck the mothers' declarations *and* the eight original children-Plaintiffs' declarations as so-called "shams." RE (Vol. II) 95, at 20, n. 14.[14] The District Court's sole basis for striking the declarations is based on one supposed "contradiction" between the testimony and declarations: when the mothers in *Drummond I* answered "yes" to a question concerning whether they brought the claims "on behalf" of their children. RE (Vol. II) 95, at 20. The District Court stated, "this is not a matter that can now be debated and subject to a flip flop once the import of those answers is realized." *Id.* As Appellants demonstrate below, there is no contradiction, and the District Court erred by impermissibly expanding the "sham" declaration doctrine and striking the declarations.

[14] The "new" children-Plaintiffs did not submit declarations because the Defendants filed a motion to dismiss and no discovery had taken place in this case concerning their claims.

1. The Declarations Did Not Contradict Past Deposition Testimony and Thus Are Not Sham Declarations.

The District Court erroneously struck the mothers' and children's declarations as "shams." RE (Vol. II) 95, at 20 n.14 (striking declarations and citing *Van T. Junkins & Assocs., Inc. v. U.S. Indust., Inc*., 736 F.2d 656, 657 (11th Cir. 1984)). At summary judgment, courts "may only disregard an affidavit that [1] contradicts, [2] without explanation, [3] previously given *clear* testimony." *Lane v. Celotex Corp.*, 782 F.2d 1526, 1532 (11th Cir.1986) (internal quotations omitted) (emphasis in original). Since *Van T. Junkins*, on which the District Court in this case relied to justify its decision to strike the declarations, the Eleventh Circuit has advised courts that the sham declaration rule "should be applied sparingly" at summary judgment. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 n.6 (11th Cir. 2012); *Allen v. Bd. of Pub. Educ. for Bibb County*, 495 F.3d 1306, 1316 (11th Cir. 2007) (noting the *Van T. Junkins* "rule is applied sparingly because of the harsh effect it may have on a party's case.") (internal quotations omitted).

Not every difference between testimony and the content of a declaration can be dismissed as a true contradiction. *See, e.g., Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986) ("[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence."); *Akins v. Fulton County, Ga.*, 278 Fed.Appx. 964, 968 (11th Cir. 2008) ("the sham affidavit concept applies

to limited circumstances, and thus, every discrepancy contained in the affidavit does not justify the district court's refusal to give credence to such evidence.") (internal quotations omitted); *Croom v. Balkwill*, 2011 WL 2637437, at *9 n.18 (11th Cir. 2011) (inconsistencies between declaration and deposition testimony "were more appropriately considered 'variations of testimony' or 'instances of failed memory' going to the weight and credibility of the evidence, as opposed to falsehoods rendering the affidavit a disregardable 'sham.'"); *Israel v. Sonic-Montgomery FLM, Inc.*, 231 F.Supp.2d 1156, 1165 (M.D. Ala. 2002) (admitting affidavit that was inconsistent with prior affidavit and complaint because "[v]ariations in a witness's testimony and any other failure of memory throughout the course of discovery create an issue of credibility.").

Thus, unless there is an inherent inconsistency between the declaration and the prior testimony, "the general rule allowing an affidavit to create a genuine issue even if it conflicts with earlier testimony in the party's deposition . . . governs." *Jackson v. Municipality of Selma*, 2011 WL 833982, at *4 (S.D. Ala. Mar. 4, 2011) (citing *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir.1987)); *Durden v. Citicorp Trust Bank, FSB*, 2009 WL 6499365, at *8 (M.D. Fla. 2009) (same).

The circumstances in this case do not satisfy any of the three requirements to determine an affidavit is a sham because the mothers' and children's declarations do not contradict "previously given clear testimony" and even if they did, the

mothers have explained any differences. *See Lane*, 782 F.2d at 1532. The District Court failed to even analyze these three factors.

First, none of the children-Plaintiffs have previously provided testimony in *Drummond I* because they did not participate in any way in that litigation. There is, therefore, no testimony that their declarations could contradict. *Tippens v. Celotex Corp.*, 815 F.2d 66, 68 (11th Cir. 1987) ("an affidavit is properly considered a sham whenever the affiant . . . directly contradicts *that person's* unequivocal deposition testimony.") (emphasis added); *see also Akins*,278 Fed.Appx. at 968 ("when party has given clear answers to unambiguous questions which negate existence of any genuine issue of material fact, *that party* cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.") (emphasis added).

Second, the mothers' testimony does not contradict their earlier testimony. As discussed above, the mothers were asked an ambiguous question that could, and did, elicit testimony constituting a legal conclusion. The mothers' declarations do not deny that they answered certain questions in the affirmative in their depositions. Rather, they explain their prior testimony by stating that "[w]hen I testified during the first case during my deposition and at the trial, and, in fact, every time I spoke about or referenced the case, I spoke as an individual, not as a lawyer. I was not commenting on my rights or my children's rights as a lawyer, and

I never intended to comment on my child's legal status in the litigation." RE (Vol. II) 69-4 (Y. Baloco Decl. ¶ 7); *id.* 69-7 (E. Almares Decl. ¶ 6); *id.* 69-11 (N. Cordoba ¶ 6); *id.* 69-1 (N. Urrego ¶ 8).

It is evident from the mothers' declarations that there is no inherent contradiction with their deposition testimony and they can be read consistently. The mothers did not understand themselves to have been representing their children in any legal sense and in fact they attested that it was not their intention to involve their children in any way due to fears for their safety. *See* RE (Vol. II) 69, PSUF ¶¶ 2, 3. Additionally, the mothers' prior testimony did not address whether they understood themselves to be representing their children's separate legal interest. There simply is no contradiction and the declarations and deposition testimony are not inherently inconsistent. *See Knox v. Brundidge Shirt Corp*., 942 F.Supp. 522, 533 (M.D. Ala. 1996) (denying motion to strike portion of affidavit in part, because "even if they "appear[] contradictory," if "the two statements can be read consistently," affidavits submitted at summary judgment must not be stricken."); *Addison v. Ingles Markets, Inc.,* 2012 WL 3600844, at *5 (M.D. Ga. 2012) ("A statement in an affidavit that is merely at odds with an earlier deposition testimony is not grounds for exclusion.") (citing *Tippens,* 805 F.2d at 954); *Brassfield v. Jack McLendon Furniture,* 953 F.Supp. 1424, 1430 (M.D. Ala. 1996)

("sham affidavit" rule bars only affidavit statements that are "inherently inconsistent" with earlier deposition testimony).[15]

Third, the Plaintiffs' mothers provided a plausible explanation for any inconsistency that can be gleaned from a comparison between their declaration and their deposition testimony: when they testified they were not speaking as lawyers regarding the legal representation of their children, and they never intended their children to have been involved in *Drummond I*. *See, e.g., McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003) (when party offers plausible explanation for contradictions between sworn statements and affidavit, affidavit should not be disregarded as sham.); *Telfair v. First Union Mortg. Corp*., 216 F.3d 1333, 1342-43 (11th Cir. 2000) (considering affidavit even though it contained details about a product about which the witness had "professed ignorance" during previous deposition, since it is plausible that he would have informed himself of the product in the interim); *Martin v. Shelby Telecom, LLC*, 2012 WL 2476400, at *4 n.5 (N.D. Ala. 2012) (when "deposition testimony could reasonably be read in its context to reflect Martin's understanding of Shelby's

[15] Additionally, the testimony by Plaintiffs' mothers from *Drummond I* is inadmissible, as Plaintiffs' mothers were making impermissible legal conclusions. *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir.1985)("Conclusory allegations without specific supporting facts have no probative value."); *Petty v. United Plating, Inc*., 2012 WL 2047532, at *1 (N.D.Ala. 2012)(Court did not admit Plaintiffs' legal conclusion that he was "similarly situated."). *See also supra* § VIII.C.

general vacation policy as opposed to the policy's application to him," contradictory affidavit admissible.).

Finally, even if portions of the mothers' declarations are found to be inconsistent and irreconcilable with their prior testimony, only those portions found to be inherently inconsistent without explanation should be stricken. *Cannon v. Dyncorp.,* 462 F.Supp.2d 1190, 1196 n.8 (M.D. Ala. 2005) (only "the contradictory statements in Cannon's affidavit are due to be stricken," rather than entire affidavits.); *Thomas v. Alabama Council on Human Relations, Inc*., 248 F.Supp.2d 1105, 1113 (M.D. Ala. 2003) ("*portions* of affidavits which are clearly inconsistent with prior deposition testimony are due to be stricken") (emphasis added).

For example, the following excerpts of the mothers' declarations contain facts that were not addressed in prior deposition testimony and which are relevant to the analysis of whether the children were adequately represented in *Drummond I*. Ms. Baloco states that "[n]either of my children, including Freddy Locarno Baloco and Katherine Paola Locarno Baloco, provided deposition testimony, and they did not testify in the trial. They also did not answer any written questions posed by the Defendants. Additionally, to my knowledge, they have never spoken with any of the attorneys that represented me in the *Drummond I* litigation." RE (Vol. II) 69-4 (Y. Baloco Decl. ¶ 5). "I decided to proceed in the case using only a

pseudonym, in order to keep my children as safe as possible and limit their exposure in the case." *Id.* ¶ 9. "My intention from the beginning of the case was to limit my children's involvement and participation." *Id.* ¶ 10. The remaining mothers' declarations likewise include relevant facts such as these. *See* RE (Vol. II) 69-7 (E. Almares Decl. ¶¶ 7, 9); 69-11 (N. Cordoba Decl. ¶¶ 6-7); 69-1 (N. Urrego ¶¶ 5, 9-10).

For all these reasons, it was error for the District Court to strike the mothers' and children's declarations.

2. Regardless, the Mothers' Opinions About Questions of Law Do Not Estop Them From Taking A Different Position in a Subsequent Case.

Although Plaintiffs-Appellants contend that none of the statements contained in their declarations conflict with their testimony in *Drummond I,* even if they did, a statement of opinion on a question of law does not estop a plaintiff from taking a different position in a subsequent case. *See Sturm v. Boker*, 150 U.S. 312, 336 (1893) (no estoppel against plaintiff taking a different position on his rights in relationship to some goods under a contract); *Weinstein Co. v. Smokewood Entm't Grp., LLC*, 664 F. Supp. 2d 332, 339 n.4 (S.D.N.Y. 2009) (a different position in a prior case cannot constitute a judicial admission because judicial admissions "are statements of fact rather than legal arguments made to a court"); *Seeger*, 2007 WL 1598618, at *9; *R & B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783,

786-87 (8th Cir. 2001); (permissible for defendant to change testimony at trial concerning whether a contract bound the defendant because deposition testimony concerned a legal conclusion); *Elvin,* 735 F.Supp. at 1184 (a legally conclusive "admission" in a deposition not dispositive, and trial testimony to the contrary considered.); *cf. Blake v. Race*, 487 F.Supp.2d 187, 205 n.13 (E.D.N.Y. 2007) ("the Court is not aware of any cases, where the doctrine of collateral estoppel has applied to the credibility of non-party witness testimony.").

The District Court erred when it struck the mothers' and children's declarations as shams because the declarations did not contradict past testimony.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's grant of summary judgment as to the eight original children-Plaintiffs and reverse the District Court's dismissal of the four "new" children-Plaintiffs' claims. *Res judicata* is an equitable rule that should not be used to achieve an inequitable result that violates the due process rights of the children by denying them an opportunity to litigate their important claims.

Dated: December 10, 2012

Respectfully submitted,

/s/ Terrence Collingsworth

By: _____

Terrence P. Collingsworth
Conrad & Scherer, LLP
1156 15th Street N.W., Suite 502

Washington, D.C. 20005
Telephone: 202-543-5811
Email: tcollingsworth@conradscherer.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32 (a)(7)(C), I certify that Plaintiffs/Appellants Opening Brief complies with Rule 32 (a)(7)(B)(i) in that it has a text typeface of 14 points and contains 13, 882 words.

Respectfully submitted this 10th day of December 2012,

/s/ Terrence Collingsworth
By: _____
Terrence P. Collingsworth
Conrad & Scherer, LLP
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Opening Brief was served via FedEx overnight on this 10th day of December 2012, on the following:

William Anthony Davis, III
H. Thomas Wells, III
Philip G. Piggott
STARNES DAVIS FLORIE LLP
PO Box 598512
Birmingham , AL 35259-8512
205-868-6000

William H. Jeffress, Jr.
David A. Super
Rachel B Cochran
Sara E Kropf
Bryan H. Parr
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington , DC 20004-2400
202-639-7700

/s/ Susana Tellez

Susana Tellez