



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

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

**ORDER GRANTING DEFENDANT DRUMMOND’S MOTION TO DISMISS COUNT I:
INDEMNIFICATION AND COUNT XI: CONCEALMENT BY BALCH;
ORDER DENYING DEFENDANT DRUMMOND’S MOTION TO DISMISS COUNT II:
MISREPRESENTATION BY DRUMMOND; COUNT III: CONCEALMENT BY
DRUMMOND; COUNT IV: CONVERSION BY DRUMMOND; COUNT XI:
CONCEALMENT BY DRUMMOND; AND COUNT XII: PROMISSORY FRAUD BY
DRUMMOND; ORDER LIFTING STAY ON DISCOVERY**

This matter came before the Court on a Telephonic Hearing on Plaintiffs’ Third Amended Complaint [Document 137], Defendant Drummond Company, Inc.’s (“Drummond”) Motion to Dismiss Plaintiffs’ Third Amended Complaint [Document 155] and Plaintiffs’ Response to Drummond’s Motion to Dismiss Plaintiffs’ Third Amended Complaint [Document 167]. Acknowledged participants in this Hearing were Bert Newsome, Esquire, representing the Plaintiffs; Andrew Campbell, Esquire, and Cason Kirby, Esquire, with Campbell Partners, L.L.C. and Bruce F. Rogers, Esquire, and Sela Stroud Blanton, Esquire, with Bainbridge Mims Rogers & Smith, L.L.P. representing the Defendant Balch. Also, telephonically present was David Boyd, client representative of Defendant Balch. Representing the Defendant Drummond Company, Inc. (“Drummond”) were William A. Davis, III, Esquire, H. Thomas Wells, III, Esquire, and Benjamin T. Presley, Esquire, with Starnes Davis Florie, L.L.P., and Anthony Joseph, Esquire, with Maynard Cooper & Gale. The Official Court Reporter was Ms. Karen Hinch, with Veritext Legal Solutions.

The Court takes judicial notice of the court file and has reviewed and considered the aforementioned Complaint, Motion, and Response. The Court has heard and considered

arguments of counsel and has read and considered the statutes and cases cited by counsel for the Plaintiffs and Defendant Drummond. Plaintiffs, in their Third Amended Complaint, allege the following claims against Defendant Drummond, to wit: Count I: Indemnification by Drummond; Count II: Misrepresentation by Drummond; Count III: Concealment by Drummond; Count IV: Conversion by Drummond; Count XI: Concealment by Balch and Drummond; and Count XII: Promissory Fraud by Drummond. The court file reflects that the Court's Order of 7/21/2020 [Document 181] replaced Plaintiff's Complaint [Documents 1 & 2, filed 3/15/2019], First Amended Complaint [Document 41, filed 4/19/2019], and Second Amended Complaint [Document 67, filed 5/6/2019] with Plaintiffs' Third Amended Complaint [Document 137, filed 11/11/2019] and that the factual allegations against Defendant Drummond contained within the Plaintiff's prior complaints remain consistent.

The court file reflects that Plaintiff's initial Complaint was filed on 3/15/2019, and the **Court FINDS** that the filing dates of the Amended Complaints relate back to the date of the original pleading, pursuant to Rule 15(c)(1) and (2) of the Ala. R. Civ. P.

Defendant Drummond has filed its Motion to Dismiss Plaintiff's Third Amended Complaint [Document 155], pursuant to Rule 12(b)(6) of the Ala. R. Civ. P. Motions to Dismiss for failure to state a claim test the **legal** sufficiency of the Complaint. The Court in *Brown v. Williamson*, 134 F. Supp. 2d 1286 (M.D. Ala. 2001), held that "A court may dismiss a complaint **only** if it is clear that no relief could be proven consistent with the allegations set forth in the complaint...'We may not...[dismiss] unless it appears **beyond a doubt** that the **plaintiff can prove no set of facts** in support of the claims in the complaint that would entitle him or her to relief.' **In deciding a motion to dismiss, the court will accept as true** all well-pleaded **factual allegations** and view them in a light most favorable to the non-moving party...." [Emphasis added.]

This Court, in deciding the herein Defendant Drummond's Motion to Dismiss, has accepted as true all well-pleaded factual allegations contained within the Plaintiff's Third Amended Complaint. The Court acknowledges that Plaintiffs, in the aforementioned Complaint, have alleged factual allegations and conclusory statements; however, the **Court will accept as true all well-pleaded factual allegations** and view them in a light most favorable to the non-moving Parties, the herein Plaintiffs. The Court has considered the following alleged facts as set forth in Plaintiffs' Third Amended Complaint, and **for purposes of Defendant Drummond's**

Motion to Dismiss, this Court will accept these allegations as true and view them in the light most favorable to the Plaintiffs:

1. The Plaintiffs allege in their Third Amended Complaint that, at all relevant times, Blake Andrews (“Andrews”) was the General Counsel of Defendant Drummond [Paragraph 3], Mike Tracy (“Tracy”) was the CEO of Defendant Drummond [Paragraph 4], and until February 7, 2019, Plaintiff David Roberson was a Vice-President with Defendant Drummond, subordinate to Andrews and Tracy. Plaintiff David Roberson was required to perform duties and responsibilities assigned to him by Andrews and Tracy. Plaintiff David Roberson is not a lawyer [Paragraph 5].

2. Plaintiffs further allege that at all relevant times, Plaintiff Anna Roberson was and is the wife of Plaintiff David Roberson [Paragraph 6].

3. Plaintiffs allege that in late 2013, the Environmental Protection Agency (“EPA”) proposed placing a particular site in Jefferson County, Alabama on a National Priorities List (“NPL”), which was a prelude to designating Defendant Drummond as a Responsible Party for the cleanup costs at the site. The cleanup costs were estimated at over \$100 million dollars [Paragraph 7].

4. Plaintiffs allege that Drummond hired Defendant Balch & Bingham, LLP (“Balch”) to create and implement a public-relations campaign that would prevent the placement of the site on the National Priorities List and the designation of Defendant Drummond as a Responsible Party [Paragraph 8].

5. Plaintiffs allege that Defendant Balch devised a public relations plan (“the Plan”) to employ a local foundation, the Oliver Robinson Foundation (“the Foundation”) to conduct a campaign directed toward the community, the State of Alabama, and the EPA. Oliver Robinson was a state legislator, and he controlled the Foundation [Paragraph 9].

6. Plaintiffs allege that under the Plan, Oliver Robinson and the Foundation would (a) seek to convince the residents of North Birmingham not to have their property tested for toxins, such as lead and arsenic and (b) Trey Glenn and Scott Phillips would seek, by lobbying ADEM, to prevent the State of Alabama from giving the legally required assurances to the EPA that the state would cover the required 10% of the cleanup costs that could not be recovered from PRPs [Paragraph 10].

7. Plaintiffs allege that Defendant Balch contracted with Trey Glenn (“Glenn”), who

invoiced Defendant Balch under the company name of Southeast Engineering & Consulting, LLC, and Glenn directed payments to Scott Phillips (who served on the Alabama Environmental Management Commission – “AEMC”). The AEMC is the entity who oversees ADEM [Paragraph 90].

8. Plaintiffs further allege that neither Glenn nor Phillips, while they were lobbying ADEM to oppose the EPA’s listing of North Birmingham as a Superfund site, disclosed to ADEM the existence of their contract with Defendant Balch or that they were being paid, indirectly, by Defendant Drummond [Paragraph 91].

9. In November 2014, before implementation of the Plan, the Plaintiff David Roberson asked Gilbert (a lawyer who was employed by Defendant Balch) if he had inquired with the ethics lawyers at Defendant Balch whether the Plan was legal and ethical. Gilbert represented to the Plaintiff that Defendant Balch’s in-house ethics attorneys had reviewed the Plan and determined it was legal [Paragraph 11]. In fact, Defendant Balch’s in-house ethics’ attorneys had informed Gilbert that Robinson had and was acting illegally in performing duties under the Plan. Neither Defendant Balch (via Gilbert) nor Defendant Drummond notified Plaintiff of this fact or took any remedial or corrective action [Paragraph 16].

10. Plaintiffs allege that Defendant Balch and Defendant Drummond concealed from Plaintiff David Roberson that Defendant Drummond was paying Phillips pursuant to Glenn’s contract with Defendant Balch to lobby ADEM [Paragraph 92].

11. Plaintiffs allege that on or about February 12, 2015, Gilbert and Defendant Balch prepared a contract between Defendant Balch and the Foundation. Plaintiff did not participate in preparing the contract, and he did not see the contract until the summer of 2018, during his criminal trial [Paragraph 12].

12. Plaintiffs allege that Defendant Balch made payments to the Foundation pursuant to the contract and submitted invoices to Defendant Drummond for reimbursement [Paragraph 13]. Blake Andrews, General Counsel for Defendant Drummond, represented to the Plaintiff that he was “confused” by having to process Defendant Balch’s invoices for the Foundation as well as other Defendant Balch invoices, and Andrews “asked and directed” the Plaintiff David Roberson to process Defendant Balch’s invoices for payments to the Foundation [Paragraph 14].

13. At all relevant times until February 7, 2019, Plaintiff David Roberson was a Vice-President of Defendant Drummond, subordinate to Andrews and Tracy, and Plaintiff was

required to perform duties and responsibilities assigned to him by Andrews and Tracy [Paragraph 5].

14. At all relevant times, Tracy was the CEO of Defendant Drummond, and his acts and omissions described herein were committed pursuant to and in the course of this relationship [Paragraph 4].

15. Plaintiff approved the reimbursements to Defendant Balch for payments to the Foundation, as he was instructed by Defendant Drummond's General Counsel, Andrews, to whom Plaintiff was subordinate [Paragraphs 15 & 5].

16. At all relevant times, Andrews was the General Counsel of Defendant Drummond; Andrews' acts and omissions described herein were committed pursuant to and in the course of this relationship, and Defendant Drummond ratified, approved, and adopted Andrews' acts [Paragraph 3].

17. On September 27, 2017, Defendant Balch attorney Joel Gilbert and Plaintiff David Roberson were indicted for violating 18 U.S.C. sections 371, 666(a), 1343, 1346, and 1956(h) [Plaintiff 17].

18. The aforementioned indictment charged that the payments to the Foundation were bribes, and it charged that the Plaintiff David Roberson was guilty of criminal conduct because he had "caused Drummond Company to pay" Defendant Balch's invoices for payments to the Foundation. Plaintiff alleges he was instructed process these invoices by Defendant Drummond's General Counsel Andrews [Paragraph 18]. The case was tried in the United States District Court in Birmingham in June-July 2018 [Paragraph 19]. On July 20, 2018, the jury convicted the Plaintiff David Roberson and Joel Gilbert on all counts [Paragraph 23].

19. Plaintiff alleges that he made the payments to the Foundation as he was directed and instructed to do by his superior and Defendant's General Counsel Andrews [Paragraph 31].

20. The Plaintiff David Roberson was permitted to remain free on bond pending his appeal [Paragraph 27].

21. On or about July 25, 2018, Plaintiffs allege that Tracy, Defendant Drummond's CEO, represented to both Plaintiffs that "they had nothing to worry about" and promised them that Defendant Drummond would keep "Plaintiff David Roberson on paid administrative leave until his appeal process was completed, and Defendant Drummond would pay [Plaintiff David Roberson] his full salary, bonuses, and benefits until the matter had been fully adjudicated"

[Paragraph 93].

22. The Plaintiffs relied on the alleged representations of Tracy [CEO of Defendant Drummond], and Plaintiff “David Roberson delayed seeking independent legal advice or filing suit against Defendant Drummond or Defendant Balch, and he did not pursue other employment opportunities that were offered to him immediately after his conviction” [Paragraph 96]. Plaintiff David Roberson, along with Plaintiff Anna Roberson, in reliance of the aforementioned representations, delayed placing their home on the market for sale [Paragraph 98].

23. Plaintiff Anna Roberson, in reliance on the representations made by Tracy [CEO of Defendant Drummond], “turned down employment opportunities that would have allowed her to earn income for herself and her husband” [Paragraph 97].

24. Defendant Drummond retained Plaintiff as an employee, on administrative leave with continued benefits, for six months and eighteen days after Plaintiff’s conviction [Paragraph 27].

25. On February 7, 2019, Defendant Drummond terminated Plaintiff’s employment without any prior notice and without stating any reason [Paragraph 28]. On or about this same date, Defendant Drummond removed from Plaintiff’s office his “employment letter” from Mr. Drummond, training certificates Plaintiff had received over his forty-year career (some while employed by the State of Alabama), billing records and correspondence from his criminal-defense attorneys, including other personal documents [Paragraph 29].

Defendant Drummond has filed its Motion to Dismiss Plaintiff’s Third Amended Complaint, pursuant to Rule 12(b)(6) of the Ala. R. Civ. P. [Document 155]. Defendant Drummond moves to dismiss **Count I: Indemnification by Drummond** (to wit: indemnification for the consequences Plaintiff suffered as a result of performing the duties assigned to him by Andrews [Defendant Drummond’s General Counsel] of processing Defendant Balch’s invoices for payments to the Oliver Robinson Foundation); **Count II: Misrepresentation by Drummond** (to wit: the February 2015 representation to Plaintiff by Defendant Drummond’s General Counsel Andrews that he (Andrews) was “confused” by having to process Defendant Balch’s invoices, so he directed the Plaintiff to do so); **Count III: Concealment by Drummond** (to wit: that Andrews and Defendant Drummond failed to disclose to Plaintiff that the Plan to pay the Foundation was illegal or its legality was questionable); **Count IV: Conversion by Drummond** (to wit: removing and taking from

Plaintiff's office on or about February 7, 2019, personal items that Plaintiff alleges belonged to Plaintiff); **Count XI: Concealment by [Balch] and Drummond** (to wit: that Defendant Drummond and Defendant Balch, as an agent of Defendant Drummond, failed to inform Plaintiff of the questionable legality of the invoices that Plaintiff began paying, after Defendant Drummond's General Counsel said the payments were confusing to him, said payments made to Scott Phillips who was on the Alabama Environmental Management Commission ("AEMC") which oversees the Alabama Department of Environmental Management ("ADEM"), as these payments were part of the "Plan's" campaign to seek to convince the residents of North Birmingham not to have their property tested for toxins, such as lead and arsenic, and to get Trey Glenn and Scott Phillips to lobby ADEM to prevent the State of Alabama from giving certain assurances to the EPA that the state would cover 10% of the cleanup costs that could not be recovered from the PRPs); and **Count XII: Promissory Fraud by Drummond** (to wit: that after Plaintiff David Roberson was convicted, on or about July 25, 2018, Defendant Drummond promised both Plaintiffs that they had nothing to worry about and that Defendant Drummond would maintain Plaintiff's employment with all benefits, via administrative leave, until his appeal process was completed; however, Defendant Drummond via its CEO Tracy terminated Plaintiff on February 7, 2019. Plaintiffs' reliance on Defendant Drummond's promise of being placed on administrative leave until completion of Plaintiff David Roberson's appeal process caused Plaintiffs, among other things, not to seek other employment or to place their home on the market for sale). The Court will examine the factual allegations contained within each Count and hereby acknowledges that some of the Court's discussions may overlap and apply to more than one Count.

Count I: Indemnification by Drummond. Indemnification generally comes into play in a contractual arrangement between the Parties. Plaintiff asserts in the aforementioned Complaint that the Defendant Drummond had and "has a **duty to indemnify Plaintiff** for all losses and damages that he **has suffered and will suffer** as a direct result of performing the duties assigned to him by Drummond via its General Counsel." [Emphasis added.] In a motion to dismiss, the Court will consider as true all well-pleaded **factual allegations** and view them in the light most favorable to the non-moving party, here, the Plaintiff. The Court acknowledges that Compensatory Damages are awarded to a Plaintiff, who has proven his claim(s), to fairly and reasonably compensate him for the harm caused by another's wrongdoing. The Court is

unaware of an **automatic duty to Indemnify** one for all losses or damages currently suffered and anticipated to suffer in the future as a result of performing assigned “duties,” without an agreement between the Parties establishing such a duty. Plaintiffs have neither produced nor alleged the existence of a contract or agreement between the Plaintiffs and Defendant Drummond to establish such a duty. The Court in *Brown v. Williamson, supra*, 134 F.Supp.2d 1286 (M.D. Ala. 2001) held that “A court may dismiss a complaint **only** if it is clear that **no relief could be proven** consistent with the allegations set forth in the complaint...’We may not [dismiss] unless it appears **beyond a doubt that the plaintiff can prove no set of facts** in support of the claims in the complaint that would entitle him or her to relief.” [Emphasis added.] **Plaintiffs do not allege any contract or agreement** between Plaintiff(s) and Defendant Drummond that places a “**duty**” on **Defendant Drummond** to compensate Plaintiff for **all losses or damages suffered now and anticipated to suffer in the future**. A duty to indemnify, such as alleged by the Plaintiffs, is not automatic. The **Court FINDS** that Plaintiffs cannot prove any relief consistent with the allegations set forth in the Complaint to support the Count of Indemnification. It is hereby **ORDERED** that **Defendant Drummond’s Motion to Dismiss Count I: Indemnification is GRANTED**. It is **ORDERED** that **Count I: Indemnification is hereby DISMISSED**.

Defendant Drummond asserts that Count II: Misrepresentation by Drummond and Count III: Concealment by Drummond are barred by the statute of limitations, as set forth in the Alabama Legal Services Liability Act (“ALSLA”), because these Counts are based on alleged representations made by Defendant Drummond's General Counsel Andrews to Plaintiff David Roberson concerning how to “process the legal bills of Drummond’s outside counsel, Balch.” Defendant Drummond’s legal counsel Andrews is a legal services provider under the Alabama Legal Services Liability Act (“ALSLA”). Andrews is not a named Defendant. Defendant Drummond is a named Defendant; however, **Defendant Drummond is not a legal services provider**. Defendant Drummond is named as a Defendant under agency principles of respondeat superior, ratification and/or adoption, based on the alleged actions/representations acted upon by Plaintiff, as a subordinate and in behalf of Defendant Drummond, to a request made by Defendant Drummond’s General Counsel Andrews on or about February 2015. **Plaintiff alleges that he first suffered legal injury and damage when he was indicted on September 27, 2017.**

Code of Alabama Section 6-5-570, sets forth a **Statement of Legislative Intent** and provides, in pertinent part:

“...It is the **intent of the Legislature** to establish a **comprehensive** system governing **all legal actions against legal service providers**. The Legislature finds that in order to protect the rights and welfare of all Alabama citizens and in order to provide for the fair, orderly and efficient administration of legal actions against legal service providers in the courts of this state, **this article provides a complete and unified approach to legal actions against legal service providers** and creates a new and **single form of action and cause of action exclusively governing the liability of legal service providers** known as a legal service liability action and **provides for the time in which a legal service liability action** may be **brought and maintained** is required.” [Emphasis added.]

Alabama Code Section 6-5-572 defines a **Legal Service Provider**:

“(2) **LEGAL SERVICE PROVIDER**. Anyone licensed to practice law by the State of Alabama or engaged in the practice of law in the State of Alabama. The term legal service provider includes professional corporations, associations, and partnerships and the members of such professional corporations, associations, and partnerships and the persons, firms, or corporations either employed by or performing work or services for the benefit of such professional corporations, associations, and partnerships including, without limitation, law clerks, legal assistants, legal secretaries, investigators, paralegals, and couriers.”

As Defendant Drummond is not a legal services provider as defined in the ALSLA, Defendant Drummond does not fall within the statutory limitations set forth in ALSLA for legal services providers. The Court also acknowledges the issue of whether Defendant Drummond’s General Counsel’s February 2015, representation to the Plaintiff, as set forth in Plaintiff’s Third Amended Complaint [Paragraphs 39, 41 and 42], was a **receipt of legal services** by the Plaintiff, to wit: that “he [Defendant Drummond’s General Counsel] was ‘confused’ by having to process Balch’s invoices for payments to the Foundation as well as other Balch invoices”...and Plaintiff’s assertion that “Plaintiff trusted and believed Drummond’s General Counsel....solely because he [General Counsel] was confused by so many different Balch invoices, and he reasonably relied on such representations and processed the invoices”...and, as a result [Plaintiff] was indicted, prosecuted, and suffered other damages.” The **Court FINDS** that Defendant Drummond’s General Counsel Andrews’ assertion of “being confused” by having to process Defendant Balch’s invoices neither provides legal advice to Plaintiff David Roberson nor was a receipt of legal services by Defendant David Roberson. See, *Mississippi Valley Title Insurance Company v. Hooper*, 707 So.2d 209 (Ala. 1997). As such, the **Court FINDS** that the

Defendant Drummond is not a legal services provider. **The Court FINDS that Count II: Misrepresentation by Drummond and Count III: Concealment by Drummond, in Plaintiff's Third Amended Complaint, are not barred by the statute of limitations, as set forth in ALSLA as to legal services providers.**

Defendant Drummond alleges that **Count II: Misrepresentation by Drummond, and Count III: Concealment by Drummond are impermissible collateral attacks on Plaintiff's criminal record.** In Defendant Drummond's Motion to Dismiss, the Court is compelled to test the legal sufficiency of the aforementioned Complaint. The Court in its prior Order [Document 199] Sustained Plaintiff's Objection to Convert Defendants' Motions to Dismiss Into Motions for Summary Judgment [Document 94] and Granted Plaintiff's Motion to Strike Drummond Company's Supplement to Motion to Dismiss Plaintiff's Third Amended Complaint [Document 160]. The **Court FINDS that Plaintiff's Count II: Misrepresentation by Drummond and Count III: Concealment by Drummond** are not due to be dismissed, at this juncture, as collateral attacks on Plaintiff's criminal record.

It is hereby **ORDERED** that **Defendant Drummond's Motion to Dismiss Count II: Misrepresentation by Drummond and Count III: Concealment by Drummond, in Plaintiff's Third Amended Complaint, is DENIED as being an impermissible collateral attack on Plaintiff's criminal record.**

Defendant Drummond asserts that **Count IV: Conversion by Drummond** should be dismissed, because the Plaintiff inserted the word "wrongfully in Count IV. Count IV reads: "On or about February 7, 2019, Drummond and its agents, servants or employees **wrongfully** took and removed from the Plaintiff's office his 'employment letter' from Mr. Drummond, training certificates he had received over his forty-year career (some while employed by the State of Alabama), personal bill paying records, correspondence from Plaintiff's criminal-defense attorneys and other personal documents. In addition, Drummond **wrongfully** took the file with all the records for The Alliance for Jobs and The Economy, Inc. (or "The Alliance") including but not limited to the records of who contributed money to The Alliance, the bills to The Alliance from the Oliver Robinson Foundation, the Balch invoices requesting reimbursement for the Balch payments to the Oliver Robinson Foundation, and the records of the payments made to Balch from The Alliance. Drummond took **unauthorized wrongful** dominion and control over the personal property of Plaintiff to the **exclusion** of the rights of the

Plaintiff. As a result, Drummond’s taking of these documents and records constituted a conversion” [Emphasis added.] [Paragraph 51].

Pleadings are to be liberally construed in favor of the pleader. “The purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure...Pleadings are a means, not an end, and the action should be resolved on its merits, not upon technicalities...” *Crawford v. Crawford*, 349 So.2d. 65 (Ala.Civ.App.1977). In reading the text of Plaintiff’s **Count IV: Conversion by Drummond**, it appears, on its face, that certain items alleged to have been taken specifically belonged to the Plaintiff. The Plaintiff allegedly was in possession of other items which presents the issue of ownership or possessory rights to said items by the Plaintiff and any alleged injury that Plaintiff has suffered as result of this taking and removing. Plaintiff asserts that the aforementioned “taking and removing” his personal property amounts to an exercise of dominion and control of said property to the exclusion of Plaintiff’s rights – which suggests to the Court that the aforementioned property has not been returned to the Plaintiff. As previously stated, the Court in *Brown v. Williamson*, *supra*, held that a dismissal is **only** appropriate when it is **clear** that no relief can be proven consistent with the allegations, and that it appears **beyond a doubt** that Plaintiff cannot prove any set of facts in support of the claims. The **Court cannot FIND, beyond a doubt** based, on the allegations before it, that the Plaintiff cannot prove any set of facts in support of its conversion claims. The **Court FINDS** that **Count IV: Conversion by Drummond** is not due to be dismissed, at this juncture. It is hereby **ORDERED** that **Defendant Drummond’s Motion to Dismiss Count IV: Conversion by Drummond is DENIED.**

Defendant Drummond asserts that **Count XI: Concealment by Drummond [and Balch] should be dismissed, because Defendant Drummond should not be liable to Plaintiffs for any torts committed by Defendant Balch, as the agent of Defendant Drummond.** Plaintiffs allege that Defendants Balch **and** Drummond concealed from Plaintiff David Roberson that Defendant Drummond was paying Philips (who was on AEMC), pursuant to a contract with Defendant Balch to lobby the entity in which the AEMC supervised (ADEM) [Paragraphs 90, 91 & 92]. Plaintiff alleges that “Defendant Balch was the agent of Defendant Drummond Company, Inc. and that Defendant Drummond is liable for the torts committed by its agent, Balch & Bingham, LLP, under respondeat superior, ratification, and/or adoption”

[Paragraph 2]. Defendant Drummond asserts that it “cannot be held vicariously liable under any theory of liability (agency, ratification, adoption, etc....) if the underlying claims against the agent are not viable.” Defendant Balch & Bingham, LLP was hired by Defendant Drummond. As an aside and as discussed in the Court’s Order of 9/14/2020 [Document 205] Dismissing Defendant Balch & Bingham, LLP, the Court found that Defendant Balch is a legal services provider, covered by ALSLA, and its herein alleged actions are time barred by the statute of limitations as set forth in ALSLA. At all relevant times, however, Defendant Balch and Defendant Drummond (i.e., Drummond Company, Inc.) had an attorney-client relationship. Defendant Balch’s duty to advise extended to Defendant Drummond (the organization) and Defendant Drummond’s designated representative on behalf of the organization. Defendant Balch’s duty did not extend to Defendant Drummond’s directors, officers, employees, members, shareholders or other constituents, absent Defendant Drummond’s (the organization’s) consent. Plaintiff does not allege that any contractual relationship existed between Defendant Balch and Defendant Drummond that included an agreement to extend Defendant Balch’s duty to anyone other than the organization. The **Court FINDS** that in the context of Plaintiffs’ herein alleged facts, Defendant Drummond is not liable, under an agency theory, for the alleged torts committed by its counsel, Defendant Balch. It is hereby **ORDERED** that **Defendant Drummond’s Motion to Dismiss Count XI: Concealment by Balch is GRANTED.**

The **issue in Count XI: Concealment by Drummond** is whether Defendant Drummond had a duty to notify Plaintiff, a Vice-President of Defendant Drummond, that certain payments were being made on behalf of Defendant Drummond to lobby the Alabama Department of Environmental Management (“ADEM”) to oppose the EPA in listing the North Birmingham site on the National Priorities List, and these payments are alleged to have been paid by Drummond General Counsel Blake Andrews and approved by Defendant Drummond CEO Mike Tracy [Paragraph 90]. These are the payments that later were expressed to be “confusing” to Defendant Drummond’s General Counsel who then allegedly told Plaintiff to start making the payments. These were the payments on which Plaintiff was subsequently indicted and convicted as being identified bribes. In considering Defendant Drummond’s motion to dismiss Count XI: Concealment by Drummond, the Court cannot find beyond a doubt that the Plaintiff can prove no set of facts in support of Plaintiff’s claim of concealment against Defendant Drummond. The **Court FINDS** that Count XI: Concealment by Drummond is not due to be dismissed, at this

juncture. The Court will dismiss, as duplicative, any overlapping allegations against Defendant Drummond in Count XI that are contained within Count III: Concealment by Drummond. It is hereby **ORDERED** that **Defendant Drummond's Motion to Dismiss Count XI: Concealment by Drummond is DENIED.**

Defendant Drummond asserts **that Count XII: Promissory Fraud by Drummond should be Dismissed, because Plaintiffs fail to satisfy all elements of promissory fraud:** (1) a false representation by Defendant, (2) of a material existing fact, (3) reasonably relied upon by the Plaintiffs, (4) who suffered damages as a proximate consequence of the misrepresentation; (5) proof that at the time of the misrepresentation, the defendant had the intention not to perform the act promised, and (6) proof that the defendant had the intent to deceive. The Court acknowledges that Alabama is an at-will employment state, and an employee may be terminated at any time, for any reason, except when modified by agreement between the Parties. Plaintiffs have alleged that they failed to do certain acts in reliance on a representation made by Defendant Drummond, via Defendant Drummond's CEO Tracy, which, they allege, Defendant Drummond knew to be false when made. The pleadings are to be liberally construed, and a **dismissal** is **only appropriate** when it is clear that **no relief can be proven consistent with the Plaintiffs' allegations** and that it appears **beyond a doubt** that Plaintiff cannot prove any set of facts to support the Plaintiff(s)' claims. At this juncture, the Court cannot hold that beyond a doubt Plaintiffs cannot prove any set of facts in support of the claims of Promissory Fraud. It is hereby **ORDERED** that **Defendant Drummond's Motion to Dismiss Count XII: Promissory Fraud by Drummond is DENIED.**

It is hereby **ORDERED** that the **Court's Stay on Discovery for Plaintiffs David Roberson and Anna Roberson and Defendant Drummond Company, Inc. is LIFTED.**

DONE this 30th day of October, 2020.

/s/ TAMARA HARRIS JOHNSON
CIRCUIT JUDGE