

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

<b>DAVID ROBERSON and ANNA</b>	)	
<b>ROBERSON,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b>CIVIL ACTION NO. 01-CV-2019-901210</b>
	)	
<b>DRUMMOND COMPANY, INC. and</b>	)	
<b>BALCH &amp; BINGHAM, LLP,</b>	)	
	)	
<b>Defendants.</b>	)	

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**DRUMMOND COMPANY, INC.’S MOTION TO MAKE THE CASE  
 “CONFIDENTIAL”, AND FOR EVIDENTIARY HEARING AS TO WHETHER THIS  
 COURT’S ORDER HAS BEEN VIOLATED**

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COMES NOW Drummond Company, Inc. (“Drummond”), and hereby moves for an order directing the Clerk to code this case as “Confidential” to prevent further prejudicial publicity of the pre-trial discovery process, and to set an evidentiary hearing to determine whether this Court’s Order aimed at preventing such publicity (Doc. 297) has been violated.

**Introduction**

Plaintiff David Roberson stated the following to United States District Judge Abdul Kallon: “I know that had I cooperated with the government and accused others of committing crimes, I could have benefited myself, whether by not being prosecuted at all or by getting a recommendation for leniency. But I could never live with myself or face the people who believe in me if I had taken that way out. Because I would have had to lie about it.” Ex. A (Roberson Sentencing Hrg. Tr.) at 151:17-23. Plaintiffs have apparently gotten over their reluctance to falsely accuse Drummond of criminal conduct, and what has resulted is a public smear campaign which

threatens the integrity of this proceeding and risks Drummond's right to a fair trial, untainted by prejudicial pre-trial publicity.

On Thursday, February 18, 2021, Plaintiffs served their answers to Drummond's interrogatories, which were at that point overdue by 45 days.<sup>1</sup> Despite the interrogatory answers containing information concerning Plaintiffs' medical and psychological treatment (information governed by HIPAA), Plaintiffs publicly filed their interrogatory answers. Doc. 336. In less than 24 hours, those interrogatory answers were predictably posted on the internet by a blog site which it has previously been proven has been provided discovery material by Plaintiffs' counsel. Ex. B (Feb. 19, 2021 Legal Schnauzer article). The following Monday, another blog site which seems to almost exclusively publicize cases involving Plaintiffs' counsel posted the contents of these interrogatories. Ex. C (Feb. 22, 2021 Ban Balch article). Both sites focused on false allegations by Plaintiffs in their interrogatory answers, including an allegation that Drummond bribed then-Attorney General Luther Strange through campaign contributions with which Plaintiff David Roberson claims he had no involvement. One site suggested a criminal probe of Drummond, and in the next sentence stated: "Roberson's civil case ... should have been settled behind closed doors months ago." Ex. C. If any counsel had involvement in this threat of criminal prosecution tied to a settlement demand, it would be an egregious ethical violation. Ala. R. Prof. Cond. 3.10 ("A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.").

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<sup>1</sup> Plaintiffs have repeatedly attempted to paint Drummond as a party not complying with its discovery obligations. Drummond has timely responded to every one of Plaintiffs' written discovery requests, and to date has produced 7,064 pages of documents. On the other hand, Drummond served interrogatories and requests for production on December 4, 2020, and just recently received Plaintiffs' interrogatory answers 45 days late after multiple threats to file a motion to compel. Plaintiffs have yet to serve any written responses to Drummond's requests for production, and have not produced a single document in this case.

As set forth in Drummond’s response to Plaintiffs’ motion to deem facts admitted, filed contemporaneously herewith (Doc. 343), on Friday, February 26, 2021, Plaintiffs made a blatantly false representation to this Court regarding an invoice Plaintiffs claimed bore the handwriting of Drummond’s General Counsel. The next day one of these blogs wrote about this false statement, suggesting federal prosecutors were given manipulated evidence, that the invoice had somehow been hidden from prosecutors, and demanded a criminal probe of the matter. Ex. D (1<sup>st</sup> Feb. 27, 2021 Ban Balch article). Of course, federal prosecutors already had a copy of the invoice, used it as an exhibit at Mr. Roberson’s criminal trial, and elicited testimony confirming that the handwriting on the invoice is that of a Balch & Bingham secretary—*not* Mr. Andrews’ handwriting as falsely represented by Plaintiffs to this Court. The same day, the same blog wrote another story claiming Mr. Roberson had been shot at on Highway 280 while traveling to Plaintiffs’ counsel’s office, and accused Drummond of being involved in an assassination attempt. Ex. E (2<sup>nd</sup> Feb. 27, 2021 Ban Balch article). Information concerning this alleged event, including pictures of Mr. Roberson’s vehicle which were included in the story, could only have come from Plaintiffs or their counsel.

Plaintiffs’ counsel cannot claim ignorance of the fact that these blog sites will use any information concerning this case to publicly smear Drummond. Indeed, Plaintiffs’ counsel has publicized the posts of both of these blog sites on his Facebook page. Ex. F.

This Court has twice recognized that the coverage of this case by certain internet blogs poses a risk to a fair trial in the form of prejudicial pre-trial publicity. Doc. 297 (“Trial courts in civil cases must prevent pretrial publicity from creating a ‘carnival atmosphere,’ which threatens the integrity of the proceeding.”); Doc. 316 (“The Court affirms its position that this case will be tried in **this Court**, not in the media and not in the Court of Public Persuasion and Opinion.”).

Apparently, this Court's admonitions have not resonated with the Plaintiffs or their counsel. Drummond therefore requests that this Court direct the Clerk to code this case as "Confidential" to prevent further prejudicial publicity of the pre-trial process, and requests that this Court set an evidentiary hearing to determine whether this Court's Order aimed at preventing such publicity (Doc. 297) has been violated.

### **Relevant Facts**

On February 18, 2021, Plaintiffs publicly filed their interrogatory responses, which include the false, inflammatory, and utterly irrelevant accusation that Drummond bribed then-Attorney General Luther Strange through campaign contributions. Doc. 336 at Response No. 16.

Drummond's political contributions to Luther Strange in 2013, 2014, and 2015 are public record and were reported by the media more than three years ago. Ex. G. Plaintiff David Roberson's sworn interrogatory response claiming he had no involvement in these contributions and only became aware of them "after the fact" is demonstrably false. Roberson was directly involved in all of these contributions. Indeed, Roberson authored a memorandum regarding each of these contributions *before* Drummond made them. As Roberson's own words reflect, there is nothing nefarious about these contributions. These memoranda are internal, confidential documents of Drummond, but should the Court desire, Drummond will provide them to the Court for *in camera* review.

Less than 24 hours after Plaintiffs' counsel publicly filed these accusations, the internet blog "Legal Schnauzer" posted an article quoting them with the headline "Testimony: Drummond's contributions to Luther Strange were in exchange for opposition to EPA plans." Ex. B (Feb. 19, 2021 Legal Schnauzer article).<sup>2</sup> As this Court will recall, Legal Schnauzer has

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<sup>2</sup> Available at <https://legalschnauzer.blogspot.com/2021/02/testimony-drummonds-contributions-to.html> (last visited March 1, 2021).

previously posted inflammatory articles pertaining to this litigation and Drummond, and Plaintiffs' counsel has a documented history of providing Legal Schnauzer with court filings from this case. Doc. 305 at 5 n.2; <https://legalschnauzer.blogspot.com/2020/12/david-roberon-denies-in-discovery-for.html> (last visited March 1, 2021) (containing a copy of Plaintiffs' responses to Drummond's requests for admission which included the Alafile cover page of Plaintiffs' counsel).

Included in this Legal Schnauzer article is a link to download a copy of Plaintiffs' interrogatory responses. This PDF does not appear to have been obtained directly through Alacourt, but rather appears to be a photocopy. *Compare* Ex. H (Legal Schnauzer Copy of Interrogatory Responses) *with* Doc. 336. For example, the PDF on AlaCourt contains blue ink on the signature page, whereas the copy that appears on the Legal Schnauzer website does not. *Compare id. with* Doc. 336.<sup>3</sup> While one might think such a photocopy could have been obtained directly from the Jefferson County Clerk's office, such is not the case. The Clerk requires those requesting copies of court records to fill out a request form, which is then scanned into Alacourt providing notice to the parties of exactly who requested what documents from the case file. *See* Ex. I (Blank Request for Record Search and/or Copies of Court Records); Ex. J (Stamp-Filed Exemplar Request); Ex. K (Example of Alacourt docket showing copy request). No such copy request appears in the record of this case. In light of the above, and the fact that Plaintiffs' counsel has already undisputedly provided these blogs with other filings in this case, Drummond suspects that Legal Schnauzer was provided with a copy of the Plaintiffs' inflammatory (and false) interrogatory answers by the Plaintiffs or their counsel.

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<sup>3</sup> Drummond's counsel understands that AlaCourt maintains electronic records which reflect whether and when copies of court filings were downloaded by AlaCourt account holders. Should this Court grant Drummond's request for an evidentiary hearing, Drummond will subpoena On-line Information Services, Inc., which is the private entity that operates the AlaCourt website. *See* <https://v2.alacourt.com/AlacourtInfo/firmCompanyProfile.aspx>.

On February 22, 2021, another blog called “Ban Balch” also posted an article quoting Plaintiff David Roberson’s interrogatory answers regarding these political contributions. Ex. C (Feb. 22, 2021 Ban Balch article).<sup>4</sup> Plaintiffs’ counsel also has a documented history of providing Ban Balch with court filings. Ex. L (Aug. 25, 2017 Order by Judge Carole C. Smitherman in *Newsome v. Balch & Bingham, LLP*, Case No. CV-2015-900190). And Ban Balch (like Legal Schnauzer) has a history of posting inflammatory and false articles regarding this case and Drummond. See Docs. 307, 308, 309, 310, 311, 312, and 313 (exemplar Ban Balch articles regarding this litigation and Drummond).<sup>5</sup> After quoting Plaintiff David Roberson’s interrogatory answers and suggesting that Drummond face a criminal investigation over these contributions, ***this article directly called for a settlement of this case***: “Roberson’s civil case [...] should have been settled behind closed doors months ago.” Ex. C (Feb. 22, 2021 Ban Balch article).

Just last week, Plaintiffs filed another demonstrably false accusation, going so far as misrepresenting the evidence Plaintiffs presented to this Court. See Drummond’s Response to Mot. to Deem Facts Admitted. The day after this filing, this same Ban Balch blog wrote about it and demanded that Drummond face a “federal probe of evidence tampering.” Ex. D (1<sup>st</sup> Feb. 27, 2021 Ban Balch article). The same day, Ban Balch posted another article which makes the incredible claim that Plaintiff David Roberson was the subject of an assassination attempt while he was driving on Highway 280 and intimates that Drummond and Alabama Power were

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<sup>4</sup> Available at <https://banbalch.com/2021/02/22/confusion-bribes/> (last visited March 1, 2021).

<sup>5</sup> The Ban Balch blog has also repeatedly cross referenced the Legal Schnauzer blog when discussing this case, and has even provided a link to the Legal Schnauzer article which posted discovery responses bearing Plaintiffs’ counsel’s cover page from Alafile. See, e.g., Ex. M (Nov. 5, 2020 Ban Balch article) (“Well-read legal blog *Legal Schnauzer* reports that Roberson’s attorney, Burt Newsome, has [dispatched initial discovery requests](#).”); Ex. N (Nov. 3, 2020 Legal Schnauzer article); see also <https://banbalch.com/2020/11/08/mikey/> (quoting from Legal Schnauzer); <https://banbalch.com/2020/11/24/drag-queens/> (same); <https://banbalch.com/2020/12/17/thicker/> (same).

responsible for it. Ex. E (2<sup>nd</sup> Feb. 27, 2021 Ban Balch article). Whatever information Ban Balch received to write this article—which includes a picture of a broken window on Mr. Roberson’s vehicle—could only have come from the Plaintiffs or their counsel. Legal Schnauzer followed suit with their own article, including additional pictures of Mr. Roberson’s vehicle which (1) were not included in the Ban Balch article and (2) could only have come from Plaintiffs or their counsel. Ex. O (March 1, 2021 Legal Schnauzer article).

As the above facts reflect, this case has been the repeated subject of inflammatory and false articles posted by Ban Balch and Legal Schnauzer, with the most likely and logical source being Plaintiffs or their counsel. Those articles have included calls for criminal investigations and repeated demands that Drummond settle this case. This pretrial publicity is extremely prejudicial and threatens to destroy the integrity of this proceeding by irreparably tainting the jury pool.

### **Request for Relief**

#### **I. THIS CASE SHOULD BE DESIGNATED “CONFIDENTIAL” TO PREVENT FURTHER PREJUDICIAL PUBLICITY.**

This Court made clear that it would not tolerate public pressure tactics or the creation of a “carnival atmosphere’ which threatens the integrity of the proceeding.” Doc. 297 (Dec. 30, 2020 Protective Order) (citing *Ex parte Wright*, 166 So. 3d 618 (Ala. 2014)). This Court subsequently “affirm[ed] its position that this case will be tried in **this Court**, not in the media and not in the Court of Public Persuasion or Opinion.” Doc. 316 (Jan. 8, 2021 Protective Order). If the conduct set forth above is allowed to continue, this case will continue to be surrounded by a “carnival atmosphere” and the jury pool will be irreparably tainted. Drummond therefore respectfully requests that this case be designated “Confidential” to prevent further prejudicial publicity of the pre-trial process.

The legal standards applicable to Drummond’s request have been set forth by Judge Smitherman in another case involving Plaintiffs’ counsel in which Judge Smitherman sealed the record precisely because of the prejudicial internet postings of Ban Balch spurred on by Plaintiffs’ counsel:

2. “Courts are required to balance the First Amendment rights of trial participants with the Court’s duty to minimize the effects of prejudicial pretrial publicity.” *Gannett v. DePasquaf*, 443 U.S. 368, 378 (1979). In the case at bar, a substantial likelihood exists that continued extrajudicial comments of the type previously made to the media could prejudice a fair trial in this case. *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 197, 86 L. Ed. 192 (1941) (“Legal trials are not like elections to be won through the use of the meeting-hall, the radio, and the newspaper.”); *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907) (Holmes, J.).

3. The primary and overriding interest of this Court is in conducting a fair trial of this matter by an impartial jury, free from outside influences. The Alabama Supreme Court quoted the Fifth Circuit stating, “[a]s in criminal matters, civil cases also require avoiding ‘potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another, and preventing the creation of a carnival atmosphere, ‘which threatens the integrity of the proceeding.’”” *Ex parte Wright*, 166 So. 3d 618, 632-33 (Ala. 2014) (quoting *Marceaux v. Lafayette City-Parish Consolidated Government*, 731 F.3d 488, 494 (5th Cir. 2013)) (internal quotation marks removed).

Ex. L (Aug. 25, 2017 Order by Judge Carole C. Smitherman in *Newsome v. Balch & Bingham, LLP*, Case No. CV-2015-900190). After noting concerns that public filings were being used to feed this “carnival atmosphere,” Judge Smitherman ordered: “The Clerk is directed to place under seal all filings, past and future pleadings and other matters in this case pending further orders of this Court.” *Id.*

The identical concerns are present in this case. In Judge Smitherman’s case, there was evidence that Mr. Newsome had been feeding the Ban Balch blog information about that case. Judge Smitherman found there was “a substantial likelihood ... that continued extrajudicial comments of the type previously made to the media could prejudice a fair trial in this case.” *Id.* at

¶ 7. Applying the above legal principles, Judge Smitherman restricted the parties and their counsel “from making any extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication (via any media outlet, news, website, social media, etc.) if the person knows or reasonably should know that it will have a substantial likelihood of materially prejudicing this proceeding” and sealed the record to prevent public filings which were being used to further prejudicial pre-trial publicity. *Id.*<sup>6</sup>

Those same, settled legal principles apply here and support the same relief. Both Ban Balch and Legal Schnauzer have posted numerous inflammatory articles regarding Drummond and this case. Those articles make demonstrably false claims about Drummond, call for criminal investigations of Drummond, and attack the character and reputation of Drummond and its employees (including individuals that could be witnesses in this litigation). Under the Alabama Supreme Court’s decision in *Ex parte Wright*, 166 So. 3d 618 (Ala. 2014) and the cases cited in that opinion, this Court has the authority to implement safeguards that will ensure the integrity of trial and prevent the tainting of the jury pool. As also held in *Ex parte Wright*:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

166 So. 3d at 626 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-34 (1984)).

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<sup>6</sup> The Alabama Supreme Court recently affirmed Judge Smitherman’s judgment against Mr. Newsome and in favor of the defendants in the “Newsome Conspiracy Case,” and further held that the defendants were entitled to an award of more than \$180,000 in attorneys’ fees and costs under the Alabama Litigation Accountability Act because Mr. Newsome’s “entire lawsuit was groundless in fact.” *Newsome v. Cooper*, No. 1180252, 2020 WL 7415389, at \*14 (Ala. Dec. 18, 2020).

Drummond therefore requests that this Court direct the clerk to code this case as “Confidential” to prevent further prejudicial publicity of the pre-trial process.

**II. DRUMMOND REQUESTS AN EVIDENTIARY HEARING TO DETERMINE WHETHER THIS COURT’S ORDER AIMED AT PREVENTING SUCH PUBLICITY (DOC. 297) HAS BEEN VIOLATED.**

On December 3, 2020, this Court warned the parties and their counsel that, if they violated this Court’s instructions with respect to extra-judicial statements, they “shall be deemed to be in **CONTEMPT** and shall be **SANCTIONED** accordingly”:

The Court takes judicial notice of the court file and has read and considered the documents therein. Trial courts in civil cases must prevent pretrial publicity from creating a “carnival atmosphere,” which threatens the integrity of the proceeding. *Ex parte Wright*, 166 So. 3d 618 (Ala. 2014).

It is hereby **ORDERED** that **counsel** for the Parties are **PROHIBITED** from making **extra-judicial statements** that **violate** the guidelines set forth in *Ex parte Wright*, 166 So. 3d 618 (Ala. 2014) and/or **Rule 3.6 of the Alabama Rules of Professional Conduct**. It is further **ORDERED** that **counsel** for the Parties making or causing to be made any extra-judicial statement **after the issuance of this Order**, that the **Court FINDS** to be prohibited by either the aforementioned case or Rule, shall be deemed to be in **CONTEMPT** and shall be **SANCTIONED**, accordingly.

Doc. 297 (Dec. 30, 2020 Protective Order).

As set forth above, and in Drummond’s Response to Plaintiffs’ Motion to Deem Facts Admitted, and Cross-Motion for Sanctions filed contemporaneously herewith (Doc. 343), there have been numerous internet blog posts which threaten to destroy the integrity of this proceeding and irreparably taint the jury pool. Plaintiffs’ counsel has a documented history of providing Ban Balch and Legal Schnauzer with court filings from litigation. Plaintiffs and/or their counsel have also clearly provided non-public information to these sites, leading to public accusations that Drummond is involved in some sort of assassination plot. Accordingly, Drummond requests an evidentiary hearing to allow this Court to determine whether the Plaintiffs or their counsel have

violated this Court's order and should be held in contempt. Drummond respectfully requests that this evidentiary hearing be combined with the evidentiary hearing requested in Drummond's Response to Plaintiffs' Motion to Deem Facts Admitted, and Cross-Motion for Sanctions filed contemporaneously herewith (Doc. 343).

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on **March 2, 2021** I electronically filed the foregoing using the AlaFile system which will send notification of this filing to the following counsel for the Plaintiffs:

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*s/ H. Thomas Wells, III*

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