ANDRUS WAGSTAFF, PC
7171 W Alaska Drive
Lakewood, Colorado 80226
Office: (303) 376-6360
Fax: (303) 376-6361
Website: www.AndrusWagstaff.com

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BY CM/ECF

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

Re: *Carson v. Monsanto Co.,* No. 21-10994 (11th Cir. filed Mar. 26, 2021)

Dear Mr. Smith:

We write to inform the Court that the appeal of *Carson v. Monsanto Co.*, No. 21-10994, is being litigated in bad faith and warrants immediate dismissal. Carson's counsel admits that Monsanto is *paying* Carson to appeal a decision Monsanto won at the District Court because it wants to create appellate precedent. Litigants, however, cannot buy appellate review of decisions they won. The Court should reject this attempt to manipulate our judicial system and dismiss the appeal with prejudice because Carson and Monsanto are deceiving the Court by claiming that an actual case or controversy exists when, in truth, this appeal was bought and paid for by Monsanto.

Undersigned counsel represents Edwin Hardeman, Alva Pilliod, and Alberta Pilliod, plaintiffs who prevailed at trial over claims that Roundup caused them to develop cancer. Monsanto has appealed the jury verdicts to the U.S. Court of Appeals for the Ninth Circuit (*Hardeman*) and the California Court of Appeals (*Pilliod*).[1] Monsanto recently referenced these appeals in its Civil Appeal Statement and specifically asserts that the key issue in *Carson*, *Hardeman*, and *Pilliod* is whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts state law claims alleging that Monsanto failed to warn that Roundup causes cancer. Over a dozen federal and state courts previously rejected this

[1] *Hardeman v. Monsanto Co*., Nos. 19-16636, 19-16708 (9th Cir., filed Aug. 21, 2019, Cross-Appeal, filed Aug. 30, 2019); *Pilliod v. Monsanto Co.*, No. A158228 (Cal. Ct. App. 1st Dist., filed Feb. 7, 2020). Monsanto also appealed a third jury verdict in favor of plaintiff and the California Court of Appeals affirmed the jury's verdict in *Johnson v. Monsanto Co.*, No. A155940, A156706, 2020 WL 4047332 (Cal. Ct. App. 1st Dist., July 20, 2020) (*affirming* the trial court's finding that the plaintiff's failure to warn claims were not preempted).

preemption argument, including the multidistrict litigation (MDL) proceeding specifically created to adjudicate thousands of claims that Roundup causes cancer.[2]

In *Carson*, Monsanto won preemption for the first time. But, after winning, Monsanto insisted that Carson appeal the issue to this Court and paid him money to do so.[3] We now know that Monsanto and counsel for Carson entered into a "settlement" agreement– an agreement that Monsanto itself only recently admitted exists in its Civil Appeal Statement.[4]

The settlement agreement is a pay-to-appeal scheme. Monsanto agreed to pay Carson only if he appealed the District Court's decision on preemption – *a decision that Monsanto won*. The agreement entitles Carson to another payment from Monsanto should Carson succeed on the merits. However, should Carson decide the appeal is not in his best interest and chooses to dismiss it, *Carson must pay Monsanto liquidated damages of approximately $100,000.00*. On top of that, the agreement limits the claims being appealed to only failure to warn, effectively allowing Monsanto to dictate Carson's litigation strategy.[5] This settlement is also particularly troublesome because Carson's counsel openly admits that, in the absence of the agreement, even if Carson were to prevail on the appeal, he would be unable to prosecute his case after remand to the District Court due to a lack of scientific evidence to support a causal association between his cancer and Roundup exposure.[6] Distilled to its essence, Monsanto is paying Carson to sue it in an effort to secure favorable appellate law. Monsanto is hoping to create a circuit split as they essentially point out in their Civil Appeal Statement when they reference the United States Supreme Court.

The *Carson* "settlement" agreement erodes the very foundation of our justice system, which is premised on the principle that opposing parties are actually adversarial—not paying each other to manufacture controversies and seek advisory opinions.[7] Indeed, a threshold criterion for any federal case is an actual case or controversy between the parties. At its heart, the *Carson* appeal asks the Court to decide whether a party can side-step this

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[2] *See Holyfield, v. Chevron U.S.A., Inc., et al.*, 1:20-CV-00165-JAR, 2021 WL 1380280, at *2 (E.D. Mo. Apr. 12, 2021) (collecting cases). Neither party cited to any of these courts' decisions rejecting Monsanto's preemption defense in the context of Roundup-cancer litigation. Dkt. 37; 42.

[3] The details of the "settlement" agreement are described in the attached Declaration of David J. Wool (Wool Decl.).

[4] This fact alone should warrant remand to the trial court for fact finding as to whether the settlement agreement obviates standing. Monsanto's *ipse dixit* that the settlement, of which no details were disclosed below and only minimally disclosed in its Civil Appeal Statement, is insufficient to give the Court any assurance that any true case and controversy remains for adjudication.

[5] *See* Wool Decl. at 16-19.

[6] *See id.* at 24.

[7] *See id.* at 11.

requirement by paying another to sue it. The Court should reject this brazen manipulation of our judicial system. This appeal should be dismissed with prejudice.

BACKGROUND

On December 5, 2017, John Carson, through his attorney, filed an action alleging Roundup exposure caused him to develop malignant fibrous histiocytoma (MFH). The complaint borrowed heavily, and largely appeared to copy, from federal actions alleging Roundup caused plaintiffs to develop non-Hodgkin's lymphoma (NHL). The complaint did not cite any scientific literature suggesting Roundup and/or its active ingredient, glyphosate, could cause MFH, despite spending considerable focus on the findings of the International Agency for Research on Cancer's findings that glyphosate (the primary chemical in Roundup) herbicide exposure is linked to NHL. Indeed, we are unaware of any scientific publication *ever* linking Roundup exposure to MFH.

The case languished in the district court for years, with Carson asking for, and receiving, repeated continuances and stays. Neither party ever disclosed experts. Monsanto moved for judgment on the pleadings, asserting a preemption argument that had, at that point, been rejected by other federal courts, the California Court of Appeals, and every state court to hear the issue. Monsanto's motion made no mention of the weight of this authority rejecting this argument. *See* Dkt. 37. Remarkably, neither did Carson's counsel. *See* Dkt. 42.

On December 21, 2020, the District Court issued an order finding Carson's failure to warn claims preempted. The District Court's order diverged from the consensus of law on this issue by conflating FIFRA *requirements* with EPA *actions*—incorrectly assuming that the actions of unelected bureaucrats at EPA, not taken pursuant to any congressionally delegated authority, invoke the Supremacy Clause of the United States Constitution. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679, 203 L. Ed. 2d 822 (2019) ("pre-emption takes place only when and if [the agency] is acting within the scope of its congressionally delegated authority.") (quotations and citations omitted).

On March 1, 2021, Carson filed a consent motion seeking to amend his complaint to dismiss counts I and III and for entry of Final Judgment. Dkt. 55. Immediately, undersigned counsel David Wool reached out to Carson's counsel and learned that Carson had signed a "settlement" agreement with Monsanto, which *required* Carson to appeal the District Court's preemption ruling.[8] The details of those discussions and the agreement are discussed in the accompanying Declaration of David J. Wool. Wool implored Carson's counsel to abandon any appeal, and broached the idea of paying Carson a reasonable settlement, or even offering to indemnify Carson should Monsanto attempt to enforce the liquidated damages provision of the agreement once he dismissed the appeal.[9] Carson, however, rejected these overtures

[8] *See id.* at 13; 16.
[9] *See id.* at 7; 14; 31.

because, as Carson's counsel put it, "there is too much risk if we do not proceed with the agreement."[10]

Instead, on March 22, 2021, the District Court granted Carson's motion and entered a final judgment. A few days later, pursuant to his obligations under the "settlement agreement" with Monsanto, Carson filed a notice of appeal on the issue prescribed by Monsanto, triggering his first payment.

On April 5, 2021, Monsanto filed its Civil Appeal Statement. The statement, *for the first time*, notified any court of a "settlement between the parties," and claimed "that settlement does not affect this Court's jurisdiction or moot the appeal." According to the Statement, "[t]he parties … reached a settlement under which [Carson] dropped his remaining claims by amending his complaint" suggesting that Monsanto had paid Carson to drop the claims. But as explained herein, Carson is not being paid to settle his other claims, but rather to enable Monsanto to seek appellate review of a decision it won below. Monsanto went on to note that "[Carson] expressly reserved his right to appeal the portion of the district court's order dismissing his failure-to-warn claim" suggesting that Carson could avoid appealing if he wanted to—there was no mention of the liquidated damages Carson would be forced to pay Monsanto if he did not appeal.

DISCUSSION

This appeal should be dismissed. The Court has inherent authority to grant relief necessary to protect the integrity of its proceedings. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S. Ct. 2123, 2132 (1991). This includes the power to set aside "fraudulently begotten judgments," as well as "the power to conduct independent investigations in order to determine whether it has been the victim of fraud or deceit." *Id.* at 44. (citations omitted). In this Circuit, fraud on the court is conduct which "attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform." *S.E.C. v. ESM Grp., Inc*., 835 F.2d 270, 273 (11th Cir. 1988) (internal citations omitted).

Monsanto's payment for Carson to appeal, and the threat of heavy monetary sanctions if he does not, is a direct affront on the "central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *Ward v. Santa Fe Indep. Sch. Dist.,* 393 F.3d 599, 603 (5th Cir. 2004). The "settlement" agreement wrests control of Carson's litigation strategy, limiting the appeal to those aspects of the District Court's order Monsanto wants to see affirmed. To the extent Carson has a stake in the outcome of the case, it is only because Monsanto has manufactured one to achieve the result it desires.[11]

While Monsanto's Civil Appeal Statement suggests it paid Carson to settle his claims not subject to this appeal, in truth, it did no such thing. Payment of the first sum was tied to

[10] *See id.* at 39.
[11] *See id.* at 24.

noticing the appeal, *not dismissal of any of Carson's claims*.[12] Carson's attorney openly admits that Monsanto would never pay Carson *unless* he appealed the district court's preemption ruling and corroborated, in writing, that the settlement agreement *requires* Carson to appeal.[13] If Carson does not appeal, he does not get paid. Indeed, his appeal is so central to getting paid that if he elects to not appeal, he is not only bereft of any settlement, but he is also subject to hefty liquidated damages. Monsanto is paying Carson to appeal and then threatening him if he does not follow through.

To skirt the issue, Monsanto tries to redirect attention to so called "high-low" settlements which have been begrudgingly upheld by sister circuits. But Carson's pay-to-appeal scheme is not a "high-low" agreement at all and its central features—tying payment to the appeal itself, Monsanto's dictation of his litigation strategy, and severe sanctions for not appealing—bear little resemblance to the settlements described by Monsanto. In fact, undersigned counsel is unaware of *any* case upholding a settlement with any of these features, much less all three. *See, e.g., Linde v. Arab Bank, PLC*, 882 F.3d 314, 324 (2d Cir. 2018) (collecting cases). In *Linde*, for example, had the party subject to the "low" payment decided not to appeal, it simply would have ended the litigation with the smaller payment in hand. Here, appealing is not a choice for Carson in any real sense, even though Monsanto's statement that "[Carson] expressly reserved his right to appeal" implies that it is. Indeed, Monsanto's disclosure to this Court is, on its face, misleading, and speaks to the deceptive nature of this appeal.

This appeal should be dismissed—any other result would set a dangerous precedent of appellate review being "for sale" to deep-pocketed litigants. *See, e.g.*, *Gator.com Corp. v. L.L. Bean, Inc*., 398 F.3d 1125, 1130-32 (9th Cir. 2005) (dismissing appeal due to a lack of actual case or controversy after parties settled under less disturbing circumstances). In cases where "such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits." *U.S. v. Johnson*, 319 U.S. 302, 305, 63 S. Ct. 1075, 1076 (1943). Indeed, "[i]t is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them." *Id.*[14] Not doing so here, risks turning the justice system on its head by allowing deep-pocketed parties to attempt to broaden the scope of favorable rulings they receive by coercing their adversaries to appeal. This Court's decisions should not be for sale.

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[12] *See id.*at 16.

[13] *See id.* at 4; 16 and Exhibit 1 to Wool Decl.

[14] On top of this, Monsanto is "dominat[ing] the conduct of the suit" by controlling Carson's litigation strategy. *Johnson*, 319 U.S. at 304. Not only has it dictated the scope of the appeal, but the liquidated damages provision allows Monsanto, the appellee, to dictate whether Carson, the appellant, continues to prosecute *his* appeal. It is easy to see how this came to be—*Carson* was a case that was never going to succeed on the merits. *See* Wool Decl. at 24-26. *Carson's counsel freely conceded that Carson's claims lack any scientific merit and that, in the event of a remand, Carson would have to dismiss his case because he lacks evidence*. *Id.* at 24-26; 35; 38.

CONCLUSION

This appeal should be dismissed with prejudice. At a minimum, this Court should issue an order to show cause why this appeal should not be dismissed and demand the immediate production to the Court of the underlying settlement agreement and all documents evidencing communications concerning the same. This sort of judicial manipulation must be loudly and forcefully rejected.

/s/ David J. Wool
David J. Wool, Esq.
david.wool@andruswagstaff.com
ANDRUS WAGSTAFF, P.C.
7171 West Alaska Drive
Lakewood CO 80226
Telephone: (303) 376-6360
Facsimile: (303) 376-6361

/s/ Jennifer A. Moore
Jennifer A. Moore, Esq.
jennifer@moorelawgroup.com
MOORE LAW GROUP, PLLC
1473 South 4th Street
Louisville, KY 40208
Telephone: (502) 717-4080
Facsimile: (502) 717-4086
(*Application for Admission Forthcoming*)

Counsel for Edwin Hardeman

/s/*R. Brent Wisner*
R. Brent Wisner, Esq.
rbwisner@baumhedlundlaw.com
BAUM HEDLUND ARISTEI & GOLDMAN, P.C.
10940 Wilshire Blvd., 17th Floor
Los Angeles, CA 90024
Telephone: (310) 207-3233
Facsimile: (310) 820-7444

Counsel for Alva Pilliod and Alberta Pilliod