No. 21-10994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN D. CARSON,
Plaintiff-Appellant,

v.

MONSANTO COMPANY,
Defendant-Appellee,

On Appeal from the United States District Court
for the Southern District of Georgia
No. 4:17-cv-00237-RSB-CLR (Baker, J.)

DEFENDANT-APPELLEE MONSANTO COMPANY'S UNOPPOSED MOTION TO FILE DOCUMENTS UNDER SEAL

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3), Appellee Monsanto Company, through undersigned counsel, hereby submits this Certificate of Interested Persons and Corporate Disclosure Statement.

Below is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, part corporations, any publicly held corporations that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Interested Persons

1. Baker, Hon. R. Stan, United States District Judge
2. Boswell, Chase E., Attorney for Appellee (in the District Court)
3. Calhoun, Martin C., Attorney for Appellee
4. Carson, John D., Sr., Appellant
5. Hollingsworth, Joe G., Attorney for Appellee
6. Imbroscio, Michael X., Attorney for Appellee
7. Lasker, Eric G., Attorney for Appellee
8. Madison, Ashleigh Ruth, Attorney for Appellant
9. Marshall, K. Lee, Attorney for Appellee

10. Ray, Hon. Christopher L., United States Magistrate Judge

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Dated: April 28, 2021

Respectfully submitted,

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Defendant-Appellee Monsanto Company respectfully moves for leave to file under seal the parties' "Confidential Settlement Agreement and Release," which is Exhibit 1 to the Declaration of Michael X. Imbroscio filed in support of Monsanto's Opposition to the Motion by Non-Parties for Leave to File Letter Brief ("Opposition"), as well as an unredacted version of that Opposition. In support of its Motion, Monsanto states as follows:

1. On April 22, 2021, non-parties to this case filed with this Court a Motion for Leave to File Letter Brief. Attached to the non-parties' Motion were a "letter brief" and a declaration that purport to describe aspects of a confidential settlement agreement entered into by and between Plaintiff Dr. John D. Carson, Sr. and Defendant Monsanto Company in *John D. Carson v. Monsanto Company*, Civil Action No. 4:17-cv-237 (S.D. Ga.). The non-parties do not assert that they have seen the settlement agreement.

2. As Monsanto affirmatively explained in its civil appeal statement, filed with this Court on April 5, 2021, Dr. Carson and Monsanto Company entered into a "high-low" settlement agreement under which the amount of Dr. Carson's recovery is contingent on how this Court resolves his appeal of the district court's dismissal of his failure-to-warn claim. The non-parties' letter brief and declaration includes hearsay descriptions of the settlement agreement that are incomplete, misleading, and in some respects inaccurate.

3. Because the non-parties have purported to describe the settlement terms in detail, but in inaccurate and misleading ways, Monsanto believes that the Court should see a full and complete copy of the parties' executed "Confidential Settlement Agreement and Release." However, the parties have strong interests in maintaining the confidentiality of their private agreement and have required that the settlement agreement, with certain exceptions allowing for disclosure to the Court, remain confidential under Section 9.0 of the agreement. Accordingly, Monsanto respectfully requests leave to file under seal the settlement agreement (Exhibit 1 of the Imbroscio Declaration), and an unredacted version of its Opposition.[1]

4. In the most recent, leading court of appeals case concerning the effect of a high-low settlement on appellate jurisdiction, the Second Circuit granted a motion to file the settlement agreement at issue there under seal, and permitted the parties to heavily redact their briefs in describing the settlement's terms. *See* Order, *Linde v. Arab Bank, PLC*, 16-2119 (2d Cir. May 26, 2017), ECF No. 218 (granting motion for leave to file under seal a copy of the settlement agreement referenced at oral argument); *see also Linde v. Arab Bank, PLC*, 882 F.3d 314,

[1] On the public docket, Monsanto has filed a lightly redacted, public version of its Opposition. The only information redacted from the publicly filed version of Monsanto's Opposition is the "high" payment amount Dr. Carson will recover if he prevails on this appeal. Pursuant to 11th Circuit Rule 25-5(a), Monsanto has redacted Dr. Carson's social security number from all filed documents in which it appears.

318 n.4 (2d Cir. 2018) ("The Confidential Appendix detailing the parties' settlement agreement is unsealed only to the extent referenced in this opinion."). Maintaining the confidentiality of a private settlement agreement is particularly appropriate in the context of mass tort litigation, where there are numerous other plaintiffs bringing claims similar to Dr. Carson's.

5. Moreover, Monsanto's proposed approach provides significantly more public disclosure than what the Second Circuit authorized in *Arab Bank*. Monsanto's Opposition quotes certain terms of the settlement agreement relevant to this Court's jurisdiction, and Monsanto does not seek to redact those terms from the public briefing apart from the "high" amount of the settlement. *Cf. United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998) (concluding that "presumption of access to settlement negotiations, draft agreements, and conference statements is negligible to nonexistent," because, among other things, release of documents impairs the Article III function of fostering settlements).

6. The filing of a public brief that discloses the material terms of the settlement more than satisfies any public interest in transparency in this proceeding. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) ("[I]f a case involves private litigants, and concerns matters of little legitimate public interest, that should be a factor weighing in favor of granting or

maintaining an order of confidentiality."). This is not a case where the parties have asked the Court to approve, interpret, or enforce a settlement agreement. *See United States v. Amodeo*, 71 F.3d 1044, 1049-50 (2d Cir. 1995) (explaining that the right of access to court documents is weaker with respect to documents that played "only a negligible role in the performance of Article III duties"); *see also Romero v. Drummond Co., Inc.*, 480 F.3d 1234 (11th Cir. 2007) ("[D]ecisions less central to merits resolutions implicate lesser right-to-access considerations." (quotation marks omitted)); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 n.6 (11th Cir. 2001) (documents "unrelated, or only tangentially related, to the underlying cause of action" reflecting matters "conducted in a private matter" do not implicate right to public access (quotation marks omitted)). Rather, it is incidental to the dispute before the Court and relevant only for purposes of the Court assuring itself of its jurisdiction. In these circumstances, an appropriate balance of interests is for the agreement to be filed under seal, while the public briefing describes the elements of the settlement that are material to responding to the non-parties' improper filing.

7. Counsel for Monsanto conferred with counsel for Dr. Carson, who consents to the filing of the settlement agreement under seal.

8. There is therefore good cause to seal the parties' confidential settlement agreement and the unredacted Opposition. Accordingly, this Court should grant Monsanto's motion.

For the foregoing reasons, the Court should grant Monsanto's motion for leave to file under seal the parties' "Confidential Settlement Agreement and Release," designated as Exhibit 1 to the Declaration of Michael X. Imbroscio filed in support of Monsanto's Opposition to the Motion by Non-Parties for Leave to File Letter Brief, and the unredacted version of that Opposition.

Dated: April 28, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. R. App. P. 27(a)(2)(B), it contains 1001 words.

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), applicable pursuant to Fed. R. App. P. 27(d)(2)(E), because it has been prepared in proportionally-spaced typeface, using Microsoft Word, in Times New Roman 14-point font.

Dated: April 28, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I caused the foregoing document to be filed with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

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DEFENDANT-APPELLEE MONSANTO COMPANY'S OPPOSITION TO THE MOTION BY NON-PARTIES FOR "LEAVE TO FILE LETTER BRIEF" (PUBLIC VERSION)

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INTRODUCTION

This appeal raises an important and recurring question of federal law: whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempts a state-law claim that Monsanto Company ("Monsanto") should have provided a warning that glyphosate, the active ingredient in the popular herbicide Roundup®, causes cancer. Monsanto has faced tens of thousands of personal injury actions alleging that glyphosate causes cancer, even though the Environmental Protection Agency ("EPA") has repeatedly determined – including as recently as last year – that glyphosate does not cause cancer. The core allegation in these cases is that Monsanto is liable under state law for failing to provide a cancer warning for Roundup, notwithstanding EPA's express determination that such a warning would be false and misleading in violation of FIFRA. From the outset of this nationwide litigation, Monsanto has vigorously pursued its argument that such claims are preempted, and has made no secret of its position that appellate courts and ultimately the Supreme Court should provide a definitive resolution of this important question.

In this case, the district court agreed with Monsanto that Plaintiff Dr. John Carson's state-law failure-to-warn claims are preempted by FIFRA. It also held, however, that claims sounding in design defect were not preempted to the extent they were based on alleged defects other than lack of a cancer warning. After extensive negotiation between counsel for both parties, the parties agreed to a

settlement: Dr. Carson would dismiss his remaining claims with prejudice and appeal the dismissal of his failure-to-warn claim, with the size of Dr. Carson's recovery contingent on the outcome of that appeal.

Thus, the parties entered a "high-low" settlement fully consistent with this Court's appellate jurisdiction. As the Supreme Court has held, where such an agreement leaves "both [parties] with a considerable financial stake in the resolution of the question presented," the appellate court retains jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982). That standard is easily satisfied here: if Monsanto wins this appeal, it pays nothing more, and if Dr. Carson wins this appeal, he recovers substantially more. Monsanto has been transparent about this settlement, voluntarily describing it in its civil appeal statement filed on April 5, 2021, so that the Court can confirm for itself whether it has jurisdiction.

Now, lawyers with no ethical obligations to Dr. Carson wish to block his appeal. These lawyers represent thousands of Roundup® plaintiffs, and are evidently concerned that this Court might decide the preemption issue in a way that could harm their other cases. They are apparently so concerned that, according to a declaration they filed in this Court, they offered to "indemnify" Dr. Carson (i.e., pay him $100,000) to abandon this settlement and drop his appeal. Decl. of David J. Wool ("Wool Decl.") ¶ 31. After being rebuffed by Dr. Carson, *id.* ¶ 39 – who stands to recover substantially more than that if his appeal is successful – these

non-party lawyers have taken the extraordinary step of seeking leave to file an irregular "letter brief" to accuse Monsanto of "bad faith."

The Court should reject this unusual and unfounded request. Dr. Carson and Monsanto reached a high-low settlement that is contingent on the outcome of this appeal because it was in their mutual interest to do so. Under the law of this Circuit and the consistent decisions of the Supreme Court and other circuits, the Court has jurisdiction so long as both parties retain a significant financial stake in the outcome of the appeal. That is unquestionably the case here, and if the Court has any questions about its jurisdiction, Monsanto is prepared to address the issue in its merits brief, at oral argument, or otherwise as the Court directs.

What is not proper is for non-parties to try to torpedo an arms-length settlement between two parties, which provides Dr. Carson the opportunity to [redacted] his recovery if he wins his appeal. Non-parties do not have a veto right over another plaintiff's litigation strategy because they would prefer, for their own self-interested reasons, that a federal court of appeals not decide an important question of federal law. If the non-parties have an interest in this Court's resolution of the preemption issue, they should do what interested non-parties normally do: file an amicus brief and argue the merits. But the non-parties' "letter brief" does not seek to engage with this appeal's merits, or even with the well- settled case law governing appellate jurisdiction following a high-low settlement.

Instead, they seek to file a "letter brief" that is long on rhetoric and innuendo but short on facts and legal argument, and in critical respects simply wrong – such as the false assertion that the settlement agreement, which the non-parties have never seen, includes a "penalty" clause.

The Federal Rules of Appellate Procedure do not contemplate "letter briefs" by non-parties, filled with inflammatory rhetoric and mistaken assertions while making no relevant legal arguments. Leave to file such a brief should be denied.

BACKGROUND

1. Glyphosate, the active ingredient in Roundup®, is the most popular herbicide in the world, and has been approved for use by EPA since 1974. Since then, EPA repeatedly has approved the use of glyphosate under FIFRA, each time concluding that it is not likely to be carcinogenic to humans. *See, e.g.*, EPA, *Glyphosate: Interim Registration Review Decision* at 10 (Jan. 2020), https://tinyurl.com/wnklu3d (reaffirming that glyphosate poses "no risks to human health" and is "not likely to be carcinogenic to humans"). EPA's consistent view of Roundup®'s safety is shared by regulators around the world, including the European Chemicals Agency and European Food Safety Authority, and national health authorities of Australia, Canada, Germany, and New Zealand, among others.

In 2015, a working group at the International Agency for Research on Cancer ("IARC"), a constituent of the World Health Organization, issued a report classifying glyphosate as a "Group 2A" agent, meaning it is "probably

carcinogenic to humans," based on "limited" evidence of cancer in humans and "sufficient" evidence of cancer in experimental animals. IARC, Monograph on Glyphosate at 78 (Mar. 2015), https://tinyurl.com/3uhk7avb. IARC's classification reflects a hazard assessment, which considers only whether an agent is capable of causing cancer under any possible circumstances, without taking into account whether there is a risk at real-world levels of human exposure. *See id.* at 75–79.

In the wake of IARC's report, many of the world's regulatory agencies reexamined glyphosate and have reaffirmed their prior views. In the United States, EPA has conducted an extensive regulatory review, "considered a more extensive dataset than IARC," and concluded that "EPA disagrees with IARC's assessment of glyphosate." Letter from Michael L. Goodis, EPA, Office of Pesticide Programs (Aug. 7, 2019), https://tinyurl.com/y552m94m.

Notwithstanding EPA's repeated determinations – made before and after the IARC report – that glyphosate does not cause cancer, the report triggered tens of thousands of personal injury lawsuits against Monsanto, in both state and federal courts, alleging that Roundup® was responsible for causing the various plaintiffs' cancer, and that state law required Monsanto to change the FIFRA-mandated Roundup® label to warn that glyphosate causes cancer. Monsanto's consistent view is that any such state-law requirement is preempted by federal law, including FIFRA's express preemption provision, which provides that states "shall not

impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].” 7 U.S.C. § 136v(b).

2. Thousands of federal cases, alleging that Roundup® causes one specific form of cancer – non-Hodgkins lymphoma (“NHL”) – have been centralized in a multi-district litigation (“MDL”) in the Northern District of California. Monsanto also faces scores of other federal cases (not subject to the MDL) alleging that Roundup® causes various other forms of cancer. Dr. Carson’s case is one of those non-MDL, non-NHL cancer cases. He filed his complaint in the Southern District of Georgia alleging four counts: (1) strict liability design defect, (2) strict liability failure to warn, (3) negligence, and (4) breach of implied warranties. ECF 1 at 16-32. Monsanto moved for judgment on the pleadings. ECF 37. The district court granted that motion in part, dismissing counts 2 (failure to warn) and 4 (breach of implied warranties) as expressly preempted by FIFRA. ECF 49 at 10. The court further dismissed counts 1 (design defect) and 3 (negligence) in part, concluding that they were preempted “to the extent those claims are based on the labeling or packaging of Roundup®,” but allowed a narrow theory of potential liability to proceed: claims not based on Roundup®’s warnings but solely focused on some other alleged design defect. *Id.*

3. At the end of its ruling, the district court ordered the parties to conduct a Rule 26(f) conference and file a Rule 26(f) report with the court. ECF 49 at 16. In

light of the constraints the court's order had placed on Dr. Carson's remaining claims, the parties then engaged in settlement discussions.[1]

During those discussions, the parties sought and received two extensions of the district court's deadline for filing a Rule 26(f) report, and in those filings informed the district court that the parties were discussing settlement. *See* ECF 51-54. After a settlement was reached, Dr. Carson filed a motion to amend his complaint to dismiss counts 1 and 3 "so that the Court can enter an appealable final judgment." ECF 55 at 1. That filing adhered to this Court's instructions for how to proceed when a party "wish[es] to seek immediate appellate review of the District Court's disposition of" certain claims. *Id.* (quoting *Perry v. Schumacher Grp. of La.*, 891 F.3d 954, 958 (11th Cir. 2018)).

The agreement the parties reached was a "high-low" settlement in which the amount of Dr. Carson's recovery would be contingent on how this Court resolves

[1] Mr. Wool calls it "suspicious" that Dr. Carson would give up his remaining design defect claims "because every trial involving claims that Roundup® caused non-Hodgkin's lymphoma (NHL) had resulted in a verdict for the plaintiffs on design defect and negligence, i.e., the very claims Carson was dismissing." Wool Decl. ¶ 6. Yet in *Hardeman* – where Mr. Wool is counsel – the court found that "the evidence showed no greater defect than the absence of a warning," and "judgment as a matter of law would be entered for Monsanto on the design defect claim" if it were premised on non-warning defects. *In re Roundup Prod. Liab. Litigation*, No. 16-CV-0525-VC, 2019 WL 3219360, at *3 (N.D. Cal. July 12, 2019). In the one state case that has completed appellate review, the court did find that a non-warning design defect claim could be sustained, even though it recognized that the trial had focused on the lack of warning as the defect. Against this backdrop, it was entirely reasonable for Dr. Carson to compromise those claims, and for Monsanto to avoid litigation expense by settling them.

his appeal of the district court's dismissal of his failure-to-warn claim. The low payment, which Dr. Carson has already received, is $100,000. This payment was made in consideration of a broad release of Dr. Carson's claims and "the agreement to pursue and fully prosecute an appeal," and "the confidentiality agreement" in the settlement. Decl. of Michael X. Imbroscio ("Imbroscio Decl."), Exhibit 1, ¶ 4.0.[2] If Monsanto prevails on the present appeal, Dr. Carson will keep the $100,000 he has been paid and "shall not be entitled to any further payment." *Id.* ¶ 5.1. If Dr. Carson "obtains a mandate from the United States Court of Appeals for the Eleventh Circuit or the United States Supreme Court reversing the District Court's dismissal of Count II of the Complaint on grounds of federal preemption and [Monsanto] does not obtain a judgment from the Supreme Court of

the United States reversing such a decision from the United States Court of Appeals for the Eleventh Circuit," Dr. Carson agrees to dismiss and release his reinstated warning claim, and Monsanto agrees to pay an additional [redacted]. *Id.* In short, under the settlement, Dr. Carson recovers $100,000 if he does not prevail in his appeal (the "low") and [redacted] in total (the "high") if he does.

[2] Because the settlement agreement has been described in detail – but in misleading ways – in Mr. Wool's hearsay declaration, Monsanto is providing the agreement to the Court. The parties agreed to keep the settlement confidential, but in light of the non-parties' filing, Monsanto sought and obtained consent from Dr. Carson's counsel to file it under seal with the Court. Monsanto is moving to file the agreement under seal, but quotes the material provisions in its public brief, redacting only information about the potential "high" payment.

Aside from avoiding the expense of fact and expert discovery and the potential expense and risk of a trial, the concept of a prompt appeal was an essential part of what made this settlement mutually attractive, and thus the agreement requires both parties to "pursue and fully prosecute the appeal." *Id.* ¶ 3.2. The agreement further provides that if Dr. Carson failed to prosecute the appeal, he would "reimburse [Monsanto] the sum of ninety-nine thousand and nine hundred dollars ($99,900.00) previously paid." *Id.* ¶ 4.0.[3]

In their "letter brief," the lawyers for the non-parties levy a variety of inaccurate accusations mis-describing an agreement they have never seen. The amount of the low settlement payment is neither a "penalty," Wool Decl. ¶ 18, nor a "liquidated damages" provision, Letter at 2. Rather, this amount reflects that the contingent settlement was based on the conclusion of the appeal, so if Dr. Carson chose to back out of that aspect of the settlement, he would return the payment the settlement made possible. According to his declaration filed in this Court, Mr. Wool apparently attempted to induce Dr. Carson to do just that, offering to "indemnify" Dr. Carson (i.e., pay him $100,000), Wool Decl. ¶ 31, not to appeal – effectively giving Dr. Carson the opportunity to back out of the settlement, drop the appeal, and still retain his $100,000 settlement payment. Setting aside the

[3] The discrepancy between this amount and the $100,000 initial payment is because the agreement designated $100 of that payment as consideration for keeping the financial terms of the agreement confidential.

propriety of that offer, Dr. Carson, with the full advice of counsel, declined that invitation "because of the chances of obtaining the 'high' value from the settlement agreement." Wool Decl. ¶ 27.

ARGUMENT

I. This Court Has Jurisdiction Because Both Parties Retain A Significant Financial Stake In The Outcome Of This Appeal.

As Monsanto affirmatively explained in its civil appeal statement, the parties' high-low settlement fully supports this Court's jurisdiction over Dr. Carson's appeal. This Court has jurisdiction, and an appeal is not moot, where "the settlement agreement specifically reserves the right to appeal a particular claim," *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325 n.4 (11th Cir. 1999), and "success on appeal would" "affect the underlying settlement," *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 374 n.3 (11th Cir. 2012). Those conditions are met. The agreement states that Dr. Carson "reserves the right to appeal the portion of the District Court's December 21, 2020 Order (District Court Dkt. # 49) dismissing Count II of the Complaint on grounds of federal preemption." Imbroscio Decl., Exhibit 1, ¶ 2.0. And success on appeal by Dr. Carson would affect the underlying settlement – if he is successful, he recovers substantially more.

The Supreme Court and other circuits have discussed high-low settlements repeatedly. The Supreme Court considered such a settlement in *Havens Realty*

Corp. v. Coleman, 455 U.S. 363 (1982). The district court had dismissed plaintiffs' fair housing claims on standing grounds, and the court of appeals reversed that dismissal. *See id.* at 370. The parties then agreed that, "if the Court were to deny certiorari, or grant it and affirm, [plaintiffs] would each be entitled to $400 in damages and no further relief," whereas "if the Court were to grant certiorari and reverse, [plaintiffs] would be entitled to no relief whatsoever." *Id.* at 371. The Court concluded that, "[g]iven [plaintiffs'] continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-41 (1937)).

The Court reached a similar conclusion in *Nixon v. Fitzgerald*. There, former President Nixon had been sued for damages, the district court rejected his claim of absolute immunity, and the court of appeals dismissed his appeal. *See* 457 U.S. at 740-41. The parties reached a settlement under which "Nixon paid the [plaintiff] Fitzgerald a sum of $142,000"; Fitzgerald would "accept liquidated damages of $28,000 in the event of a ruling by this Court that [Nixon] was not entitled to absolute immunity"; and "[i]n case of a decision upholding [Nixon's] immunity claim, no further payments would be made." *Id.* at 744. The Court again concluded that it had jurisdiction because the "agreement between the parties

left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court." *Id.*

Based on this Supreme Court precedent, circuit courts regularly approve high-low settlements as not mooting an appeal or otherwise disturbing appellate jurisdiction. *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 324 (2d Cir. 2018) ("[W]e conclude that we possess constitutional authority to address this appeal because the parties continue to dispute the legal basis for the jury's liability determination and retain a significant financial stake in this appeal regardless of its outcome as reflected in the considerable variances in recovery provided in the parties' settlement agreement."); *In re Odes Ho Kim*, 748 F.3d 647, 652 (5th Cir. 2014) (dispute not moot where value of promissory note would be "adjusted" based on resolution of appeal); *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir. 2002) ("Boeing has already paid the Government $25 million; it has agreed to pay an additional amount of $15 million contingent upon our rulings with respect to the scope of the FCA and the HVIC. Therefore, because the parties have 'a considerable financial stake,' the case is not moot, and we will proceed to the merits of this appeal."); *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 224 (3d Cir. 2000) (court had jurisdiction where parties were "truly adverse with respect to the critical legal issue that they ask us to resolve" and review of private settlement agreement demonstrated "significant stake in the outcome").

The lawyers for the non-parties briefly cite (Letter at 5) *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125 (9th Cir. 2005), but do not explain its facts or reasoning. *Gator.com* was a "declaratory judgment action initiated to determine the legality of a software vendor's pop-up advertising program," where the parties reached "a settlement under which the vendor permanently modified its software and the website owner relinquished all claims." *Id.* at 1127. The parties further agreed that the plaintiff would pay the defendant $10,000 if the Ninth Circuit affirmed the district court's personal jurisdiction dismissal. *Id.* at 1128. Because the case was brought for declaratory relief and the settlement made the plaintiff "ineligible for declaratory relief," the dispute was "now extinguished," and a "side bet" that is "wholly divorced from any live case or controversy" did not preserve jurisdiction. *Id.* at 1131-32. The Ninth Circuit specifically distinguished *Havens* and *Nixon* because "neither decision is a declaratory judgment action." *Id.* at 1131. Rather, both "involve plaintiffs who were seeking monetary damages and who agreed to accept a liquidated payment if they prevailed on appeal." *Id.* "The contingent settlement agreements therefore preserved a live controversy because they afforded these plaintiffs the opportunity to obtain meaningful monetary relief — the very type of relief that they sought to recover by filing suit in the first place." *Id.* Exactly the same is true here. *See also Linde*, 882 F.3d at 324-25 (distinguishing *Gator.com* on similar grounds).

Applying settled principles, this Court has jurisdiction. The original controversy that sparked Dr. Carson's lawsuit – whether Monsanto was required to warn that Roundup® causes cancer – is very much alive and disputed between the parties. And both parties have a significant stake in the outcome, since Dr. Carson will substantially increase his recovery if he prevails on this appeal.

II. It Is Not "Bad Faith" For Parties To Negotiate An Arms-Length Settlement That Is Contingent On The Outcome Of An Appeal And Then Voluntarily Disclose That Settlement.

As shown above, there is settled law governing appellate jurisdiction following a high-low settlement, and applying that law, this Court's jurisdiction is not a close question. That is presumably why the non-parties' do not engage with the relevant case law, apart from venturing that various circuit courts made their decisions "begrudgingly." Letter at 5. Instead they make aggressive pronouncements about the "integrity of [the Court's] proceedings," "fraudulently begotten judgments," and "fraud on the court." *Id.* at 4. This professed outrage is irrelevant to this Court's jurisdiction, and the Court can disregard it. Nonetheless, Monsanto will briefly respond to these inflammatory allegations.

To begin, the non-parties never explain what supposed "fraud" Monsanto allegedly committed. Monsanto *disclosed* the high-low settlement to the Court in a

Civil Appeal Statement shortly after this appeal was filed.[4]

The non-parties also try to raise Monsanto's reasons for agreeing to a settlement contingent on the outcome of an appeal, accusing Monsanto of "hoping to create a circuit split." Letter at 2. Monsanto has been clear from the beginning that it wants as many courts as possible to consider whether claims of a failure to warn that glyphosate causes cancer are preempted by federal law. And there is nothing wrong with Monsanto favoring broad consideration, at the circuit level and ultimately the Supreme Court, of an important federal question that implicates thousands of cases in which Monsanto has been sued – and about which Monsanto is confident it is right. While the non-parties may have self-interested reasons for limiting decisions on this important issue, from the *Judiciary*'s perspective, it "often will be preferable to allow several courts to pass on a given … claim in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also, e.g.*,

[4] Recognizing that this disclosure is incompatible with their claim of fraud, the non-parties fault Monsanto for not "mention[ing]" the "liquidated damages Carson would be forced to pay if he did not appeal." Letter at 4. Monsanto did not mention this part of the settlement because it does not exist. *See supra* p. 9. It is also surprising for these non-parties in particular to challenge the sufficiency of Monsanto's disclosure. In settlement discussions surrounding the appeal in *Hardeman*, the Roundup® case currently pending in the Ninth Circuit, Ms. Moore, one of the signatories of the "letter brief," proposed a high-low settlement and procured an ethics opinion that "high-low" settlements are not only ethically permissible, but that the parties need not even disclose their existence to the appeals court. *See* Imbroscio Decl., Exhibit 2. Although no such settlement was reached in *Hardeman*, and thus no issue of disclosure arose, Monsanto believes that disclosure of the current settlement is appropriate to allow this Court to assess its own jurisdiction.

Maslenjak v. United States, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (Supreme Court "usually depend[s]" on "the experience of our thoughtful colleagues on the district and circuit benches" to examine an issue). In any case, the non-parties do not cite a single authority suggesting that the motives of the parties to a settlement are relevant to appellate jurisdiction.

The non-parties also identify three supposed "features" of the present settlement that purportedly differentiate it from other high-low settlements: "[1] tying payment to the appeal itself, [2] Monsanto's dictation of his litigation strategy, and [3] severe sanctions for not appealing." Letter at 5. These arguments are factually misleading, legally unfounded, and have nothing to do with this Court's jurisdiction.

1. It is not true that payment was "tied to noticing the appeal, *not dismissal of any of Carson's claims*." Letter at 4-5 (emphasis in original). Monsanto agreed to pay Dr. Carson an initial payment of $100,000 "[i]n consideration of the release" of his remaining claims, as well as his agreement to pursue an appeal on his failure-to-warn claim. Imbroscio Decl., Exhibit 1, ¶ 4.0. Dismissal of Dr. Carson's remaining claims absolutely was one of the preconditions of the

settlement.[5]

More importantly, the non-parties cannot explain what could be improper about expressly including an agreement to appeal as part of a high-low settlement agreement. In any high-low settlement where recoveries are contingent on the resolution of an appeal, the predicate of the settlement is that there will in fact be an appeal. Here, as in other high-low settlements, it was the possibility of an appeal that made it possible to find a resolution that was in all parties' interests in the first place. *Cf.* Reply Br., *Linde v. Arab Bank, PLC*, No. 16-2119, 2017 WL 663707, at *5 n.1 (2d Cir. filed Feb. 15, 2017) (representing that Arab Bank "would never have entered into a settlement that foreclosed it from obtaining appellate review of the judgment below").

It is impossible to know whether other high-low settlements are written precisely like this one, since they are typically not publicly disclosed. But it is at least likely that there was some such arrangement in place in *Nixon v. Fitzgerald*. Nixon was the party seeking review by the Supreme Court, but he had already paid

[5] After arguing that Dr. Carson's design defect claims were so valuable that it is "suspicious" he dropped them, Wool Decl. ¶ 6, Mr. Wool asserts the opposite: that all of Dr. Carson's claims are worthless, *see id.* ¶¶ 23-29, 32, 35, 38. As explained above, the settlement was a reasonable response to the district court's ruling that narrowed but did not end Dr. Carson's case. *Supra* n.1. As for Mr. Wool's hearsay assertion that Dr. Carson's counsel told him that she lacked evidence to support any claims linking his cancer to glyphosate, Monsanto never received that assessment of her client's claims from Dr. Carson's counsel. Facing scores of non- NHL claims across the country, Monsanto was entitled to presume that Dr. Carson was pursuing this case in good faith.

out the "low" amount, and he only stood to lose more if the Court granted *certiorari* and ruled against him. *See supra* pp. 11-12. On the non-parties' theory, Nixon could have agreed to that settlement and then just withdrawn his petition to deprive the plaintiff of the "high" payment, but there was presumably an understanding that the appeal would be pursued. Even in *Linde*, where the defendant was the party taking the appeal, the plaintiffs could theoretically have agreed to the settlement and then frustrated that appeal by dismissing the underlying case. Whatever the wrinkles of any given case, one point is clear: settling a case contingent on the outcome of an appeal presupposes that an appeal will be pursued. The settlement agreement here just made that understanding explicit.

2. The non-parties have no grounds to allege that Monsanto "dictate[d]" Dr. Carson's litigation strategy. Letter at 2. Dr. Carson was of course free to not settle on the terms offered by Monsanto, to pursue the design defect claims that remained, and then after final judgment to appeal (or not) the dismissal of his failure-to-warn claims. Mr. Wool also complains that the settlement agreement provides that only count 2 of the complaint will be appealed, Wool Decl. ¶ 16, but that is irrelevant. The district court's analysis of counts 2 and 4 substantially overlapped, and focusing the high-low agreement on count 2 simplifies the case *to*

Dr. Carson's advantage – he lost two counts below and needs to secure reversal on only one count to substantially increase his recovery.

3. Finally, the claim that the agreement imposes "heavy monetary sanctions" on Dr. Carson for not appealing is outright false. Letter at 4. There is no "penalty" for failing to appeal; Dr. Carson would just have to "reimburse" *the money Monsanto paid him under the settlement*. Imbroscio Decl., Exhibit 1, ¶ 4.0. The parties entered a settlement that was contingent on the outcome of an appeal, which understandably did not contemplate that Dr. Carson could collect his payment and then retract his agreement. Dr. Carson, in consultation with his counsel, made the informed choice to agree to this settlement arrangement because it was in his best interests to do so, including because he has an ability to obtain a substantial additional payment if he is successful.

Perhaps more fundamentally, Mr. Wool's conduct has proved all of this to be irrelevant. By offering to "indemnify" Dr. Carson for the reimbursement, Mr. Wool created a situation in which Dr. Carson *could have* backed out of the settlement, abandoned his appeal, and retained the $100,000 he had received under the settlement. But Dr. Carson declined "because of the chances of obtaining the 'high' value from the settlement agreement." Wool Decl. ¶ 27. In other words, Dr. Carson's own response to the non-parties shows that he appealed because he

had a financial interest to do so – proving that he has the financial stake in this appeal necessary for the Court's jurisdiction.

In sum, instead of engaging with the actual question of Article III jurisdiction – the answer to which is clear, *see supra* § I – the non-parties' "letter brief" and Mr. Wool's declaration just repeatedly label the settlement "disturbing," "troublesome," "manipula[tive]," "shock[ing]," in "bad faith," and so on. But no number of adjectives can change the facts:

- the parties to this case saw a mutual interest in reaching a settlement that would be contingent on the resolution of an appeal;
- they reached an agreement that gives both parties a significant financial stake in the appeal's outcome, as required by the numerous courts that have approved high-low settlement agreements;
- the parties spelled out their agreement to participate in an appeal, which at a minimum is implicit in any high-low arrangement;
- had Dr. Carson decided not to appeal, he would not have had to pay a "penalty," but simply agreed to reimburse the previously-made settlement payment that Monsanto would not have paid him but for that settlement;
- if there was ever any doubt that Dr. Carson is pursuing this appeal because he is attracted to the possibility of the "high" payment, it is abundantly clear

now, in light of Mr. Wool's remarkable admission that he unsuccessfully offered to pay off Dr. Carson $100,000 to drop this appeal; and

- Monsanto affirmatively and voluntarily disclosed the existence of this settlement at the outset of this appeal so that the Court could assure itself of its jurisdiction.

The "letter brief" comes nowhere close to showing that any of this constitutes an assault on this Court's integrity. Instead, this is a situation where non-parties to this case, with their own interests, are determined to derail this appeal, prevent this Court from addressing an important question of federal law, and block Dr. Carson from the potential to greatly increase his recovery under the settlement agreement. This Court should not permit such meddling.

CONCLUSION

For the foregoing reasons, the Court should deny the motion by non-parties for leave to file a "letter brief."

Dated: April 28, 2021

Respectfully submitted,

By: */s/ Michael X. Imbroscio*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. R. App. P. 27(a)(2)(B), it contains 5,198 words.

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), applicable pursuant to Fed. R. App. P. 27(d)(2)(E), because it has been prepared in proportionally-spaced typeface, using Microsoft Word, in Times New Roman 14-point font.

Dated: April 28, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I caused the foregoing document to be electronically filed with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

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DECLARATION OF MICHAEL X. IMBROSCIO

I, Michael X. Imbroscio, hereby declare as follows:

1. I am a partner at the law firm of Covington & Burling LLP, counsel for defendant Monsanto Company ("Monsanto"). I make this declaration to set forth facts relevant to Monsanto's Opposition to the Motion by Non-Parties "for Leave to File Letter Brief." I make this declaration based on my personal knowledge and, if called as a witness, I would and could testify competently to these matters.

2. Attached as Exhibit 1 is a true and correct copy of the "Confidential Settlement Agreement and Release" by and between Plaintiff Dr. John D. Carson, Sr. and Defendant Monsanto Company concerning *John D. Carson v. Monsanto Company*, Civil Action No. 4:17-cv-237 (S.D. Ga.).

3. Attached as Exhibit 2 is a true and correct copy of a letter from Professor Lynn A. Baker to Ms. Jennifer A. Moore, dated February 13, 2020, which was provided to Monsanto by counsel for Edwin Hardeman.

I hereby declare under penalty of perjury that the facts set forth herein are true and correct.

Executed this 28th day of April, 2021

By: */s/ Michael X. Imbroscio*
Michael X. Imbroscio

EXHIBIT 1

Confidential Settlement Agreement and Release

[FILED UNDER SEAL]

EXHIBIT 2

Letter from Professor Lynn A. Baker to
Ms. Jennifer Moore (Feb. 13, 2020)

AUSTIN LAW AND ECONOMICS CONSULTANTS, INC.
2210 Greenlee Drive
Austin, TX 78703

February 13, 2020

Jennifer A. Moore, Esq.
Moore Law Group, PLLC

VIA E-MAIL

Dear Jennifer:

You have asked for my expert opinion regarding the permissibility of the parties entering into a high-low agreement in connection with a matter on appeal, including whether any such agreement must be disclosed to the relevant court.

As a tenured professor at the University of Texas School of Law who regularly teaches a course on Professional Responsibility and a seminar on mass tort settlements ("Mega-Settlements"), as a published scholar on the professional responsibilities of lawyers who represent multiple clients, and as an experienced expert and consultant regarding the ethical rules applicable to group litigation and settlements, I am happy to provide my expert opinion.

I know of no authority that prohibits the parties to an appeal from negotiating a binding "high-low" agreement regarding the outcome of the appeal in a situation such as the one contemplated in which the outcome of the appeal would determine the final settlement value. In addition, I know of no authority, including any applicable Ninth Circuit court rule, that requires the parties to disclose such a high-low agreement to the court. ABA Model Rule 3.3 (and the various state equivalents) regarding "Candor Toward the Tribunal" also does not require any such disclosure.

I have been involved in numerous settlements that involved a high-low agreement in connection with an appeal, including one matter that is currently pending in a federal Court of Appeals. In sum, it is my expert opinion that the parties in the current context may ethically enter into a high-low agreement in connection with the appeal and are under no ethical or other obligation to disclose that agreement to the Ninth Circuit.

I have enclosed a complete copy of my resume setting forth my qualifications for serving as an expert in this matter.

Sincerely,

Lynn A. Baker
Frederick M. Baron Chair in Law
University of Texas School of Law