

**THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

WENDELL GILLEY,)
)
Plaintiff,)
)
v.)
)
MONSANTO COMPANY, INC.,)
ET AL.,)
Defendants.)

Case No. CV 04-PT-0562-M

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION TO
PROCEED IN FORMA PAUPERIS**

Defendants respectfully request that the Court deny Plaintiff’s Motion to Proceed *In Forma Pauperis* (Dkt. No. 217) and certify pursuant to Fed. R. App. P. 24(a)(3)(A) that Plaintiff’s appeal is not taken in good faith. In support of their opposition, Defendants state as follows:

1. Plaintiff’s *in forma pauperis* motion should be denied because his frivolous appeal lacks good faith. Plaintiff seeks to appeal from denial of his motion for relief from the Court’s judgment. That motion merely rehashed arguments that have already been rejected by this Court, the Eleventh Circuit and the United States Supreme Court. Further, Plaintiff’s *in forma pauperis* motion is unwarranted. Plaintiff did not previously proceed *in forma pauperis* in this Court,

continues to be represented by counsel on a contingency basis, and has admitted that he is not responsible for the costs associated with this litigation.

2. “An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3); *see also* Fed. R. App. P. 24(a)(3)(A). Good faith “must be judged by an objective standard” and is demonstrated when the movant “seeks appellate review of any issue not frivolous.” *Coppedge v. U.S.*, 369 U.S. 438, 445, 82 S.Ct. 917, 921 (1962). “An appeal is not taken in good faith if it is plainly frivolous.” *Mosley v. Bishop*, No. 07-0692, 2009 WL 2235841, at *1 (S.D.Ala. Jul. 24, 2009)(certifying plaintiff’s appeal as frivolous and denying motion to proceed without prepayment of fees “[n]otwithstanding a finding of economic eligibility”). A frivolous appeal is one “without arguable merit” that “is without a legal or factual basis.” *Jones v. Mitchem*, No. 1:05-cv-200-WKW, 2006 WL 3924797, at *1 (M.D.Ala. Dec. 12, 2006)(internal citations omitted).

3. Plaintiff’s appeal is plainly frivolous. Plaintiff seeks to appeal the denial of his Rule 60 motion related to the judgment entered by this Court. This Court’s judgment was affirmed by the Eleventh Circuit, and the Supreme Court denied certiorari. The Supreme Court also denied Plaintiff’s extraordinary motions for reconsideration of the denial of certiorari and recall of the mandate. (*See* Sup. Ct. Dkt., attached as Exhibit A). Plaintiff’s Rule 60 motion simply reargued points

presented and rejected repeatedly in the six years this litigation has persisted. (*See* Dkt. 212). Indeed, in denying Plaintiff's Rule 60 motion, this Court cautioned Plaintiff that "future attempts to rehash arguments which have already been resolved, such as those presented by plaintiff in [his] current motions, will be met with sanctions." (Dkt. 215).

4. Plaintiff did not heed the Court's warning and presents no legal or factual basis for his appeal. Where the "Court has thoroughly addressed the pertinent issues . . . the [Court] cannot now find, objectively speaking, that there is any non-frivolous issue to be litigated on appeal." *Fountain v. U.S.*, No. 05-0683, 2010 WL 1511561, at *4 (S.D.Ala. Apr. 9, 2010)(recommending denial of motion to appeal Rule 60(b)(6) motion *in forma pauperis*). Plaintiff's arguments have been reviewed and addressed *ad nauseum*. Plaintiff's appeal is not taken in good faith, and his *in forma pauperis* motion should be denied.

5. Plaintiff's present motion should be denied for the additional reason that it lacks merit on its face. Plaintiff testified that he "is not responsible for the payment of any costs associated with this litigation." (Deposition of W. Gilley, 91:5-7 (Jan. 11, 2005), attached as Exhibit B). Plaintiff's counsel, who has represented Plaintiff throughout proceedings in this Court, works on a contingency basis and stands to collect thirty percent of Plaintiff's recovery. (*Id.* at 90:21—91:4). Plaintiff has further testified that his attorney has paid the costs of this

litigation “in hopes of prevailing on [Plaintiff’s] individual and the class claims.” (Plaintiff’s Motion for Permission to Appeal *In Forma Pauperis* and Affidavit, ¶ 12 (11th Cir. May 14, 2010), attached as Exhibit C).¹ In these circumstances, there is no warrant for Plaintiff to proceed *in forma pauperis*. See, e.g., *Lewis v. Covenant Classical Sch. of Trace Crossing, LLC*, 435 F.Supp.2d 1172, 1172-73 (N.D.Ala. 2006)(denying motion to proceed *in forma pauperis* in part because plaintiff was represented by counsel on a contingency basis and was not responsible for costs).

6. Plaintiff has never proceeded *in forma pauperis* in this Court and the attempt to do so now is a strategy designed to avoid the taxing of costs on appeal.

Wherefore, for the above reasons, Defendants respectfully request that the Court enter an order denying Plaintiff’s Motion to Proceed *In Forma Pauperis*, certify that Plaintiff’s appeal is not taken in good faith, and grant any other relief the Court deems just and proper.

¹ Plaintiff’s references to the financial status of his attorney are, of course, immaterial to evaluating Plaintiff’s own financial status.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on the 18th day of May 2010 with the Clerk of the Court to be served by operation of the Court's electronic filing system upon Elisa Rives, P.O. Box 920, Guntersville, Alabama 35976.

/s/ Jeffrey S. Russell