

*IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA*

CHARLESTON DIVISION

_____	X	
MAYA NYE, LISA BRAGG, SUE DAVIS,	:	Civil Action
WARNE FERGUSON, REGINA HENDRIX,	:	No. 2: 11-cv-00087
MILDRED HOLT, JIM LEWIS, BEVERLY	:	
STEENSTRA, ROBIN BLAKEMAN, PAULA	:	
CLENDENIN, SARAH ELLIOTT, JAMES R.	:	
MITCHELL, DENISE GIARDINA, MIKE	:	
HARMAN, DONNA WILLIS and BARBARA	:	
FRIERSON, current and former	:	
citizens of, and workers in,	:	
Kanawha County, West Virginia,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	DATE: February 10, 2011
BAYER CROPSCIENCE, L.P. a for-profit	:	
Delaware Limited Partnership,	:	
	:	
Defendant.	:	
	:	
_____	X	

*TRANSCRIPT OF MOTIONS HEARING
BEFORE CHIEF JUDGE JOSEPH R. GOODWIN
IN CHARLESTON, WEST VIRGINIA*

Court Reporter: Teresa L. Harvey, RMR, RDR, CRR

Proceedings recorded by mechanical stenography;
transcript produced by computer.

APPEARANCES:

For the Plaintiffs: **WILLIAM V. DePAULO, ESQ.**
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For the Defendant: **MICHAEL M. FISHER, ESQ.**
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1 PROCEEDINGS had before The Honorable Joseph R. Goodwin,
2 Chief Judge of the United States District Court for the
3 Southern District of West Virginia, in Charleston, West
4 Virginia, on February 10, 2011, as follows:

5 *COURTROOM DEPUTY CLERK:* The matter before the
6 court is Maya Nye, et al. v. CropScience L.P., Civil Action
7 No. 2:11-cv-87.

8 *THE COURT:* We are here for a brief hearing,
9 basically argument, on plaintiffs' pending motion for a
10 temporary restraining order.

11 Has counsel noted their appearances for the record?

12 *MR. DePAULO:* William DePaulo from Charleston, West
13 Virginia, for plaintiffs.

14 *MR. FISHER:* Your Honor, Mike Fisher and Tom Hurney
15 from Jackson Kelly on behalf of defendant Bayer CropScience.
16 Also at counsel table is the plant manager from Institute,
17 Mr. Steve Hedrick.

18 *THE COURT:* Thank you. By way of brief summary,
19 it's my understanding that a lawsuit by Ms. Nye and a group of
20 concerned citizens has been brought against the defendant Bayer
21 CropScience. The plaintiff has brought private and public
22 nuisance claims, among other claims, based on the planned
23 resumption of production of methyl isocyanate, or MIC, at the
24 Bayer chemical plant in Institute, West Virginia.

25 The matter before the court today is the motion for

1 temporary restraining order. As counsel knows, I don't plan to
2 take additional evidence here. I will hear argument and I do
3 have questions based upon the matters that have been filed. It
4 is certainly the case that every judge wishes they had a more
5 complete record to deal with when they're dealing with a
6 temporary restraining order, but that's not to be, hence the
7 short fuse on temporary restraining orders.

8 I just wanted to note before we get started that the
9 standard for granting a preliminary injunction, or temporary
10 restraining order, for that matter, was set forth by the
11 Fourth Circuit in the case styled *Real Truth About Obama v.*
12 *Federal Election Commission*, 607 F.3d 355, a 2007 Fourth
13 Circuit case. Do you remember that case was reversed on other
14 grounds, came back to the Fourth Circuit, and they reentered it
15 as regards the injunction test replacing *Blackwelder*. That
16 case requires plaintiffs to establish:

- 17 1. That they're likely to succeed on the merits of their
18 case;
- 19 2. That they are likely to suffer irreparable harm in the
20 absence of preliminary relief;
- 21 3. That the balance of equities tips in their favor; and
- 22 4. That the injunction is in the public interest.

23 Counsel should focus their arguments today accordingly.

24 Mr. DePaulo, it is your motion; I'll let you begin.

25 **MR. DePAULO:** Thank you, Your Honor. Let me first

1 acknowledge Mr. Fisher, who is updating my TR0 form, and I
2 don't mean to diminish in any way the difference between *Truth*
3 *About Obama* and the predecessor. I do think it's relevant to
4 point out that to the extent that *Truth About Obama* places a
5 slight, if you will, higher standard on likelihood of success,
6 that may be extremely important in many cases, but in a
7 nuisance case where the court really is looking at the balance
8 of equities, to a very great degree, a balancing of alternative
9 uses of land and the impact on others, I think it's the case
10 that standard merges very closely with the balancing of the
11 equities, and we don't have to debate that with any great
12 vigor, I don't think. But all of the issues that would be
13 addressed under the heading of "likelihood of success" on a
14 nuisance matter are, in fact, the same matters which one would
15 address in the question of balancing the equities between the
16 parties, so to the extent that I may impinge from one to the
17 other, I ask the court's indulgence, but I want the court to
18 understand, perhaps, why I'm doing that. And I want to, again,
19 look at the balancing of the equities and that balancing test.
20 There is one very, very distinctive feature in this case which
21 I believe may in fact go straight to the bottom line of the
22 case, and it's this: On January 10, 2011, Bayer announced that
23 they are already -- they have already made the decision to
24 terminate this business in 18 months. They've already
25 announced the termination of 220 jobs associated with the

1 production of Temik, so the court is not confronted, on the one
2 hand, with what is potentially a high-growth industry: it's
3 220 now, but it's going to be 440 in a year, and it's going to
4 be 3,000 in six years, and it's going to be the engine that
5 brings West Virginia into the forefront of the modern economy.
6 That's not the case. They've already announced this business
7 is going away.

8 They suggested in their affidavit to the court here today
9 that continued production of MIC is necessary, though, under
10 the heading of public interest because of its significant
11 importance in the agricultural field as an insecticide,
12 although we only got that affidavit today, and they acknowledge
13 that they have entered into what they call -- well, they
14 describe it as a permit with EPA. The reality is that EPA gave
15 notice to Bayer that they were going to have to extinguish the
16 production of that product because of its very severe adverse
17 health effects, the association with very increased levels of
18 colon cancer and other very significant health risks.

19 **THE COURT:** Get back to your -- get back to your
20 motion on this case.

21 **MR. DePAULO:** My only point, Your Honor, is if
22 that's the only matter cited in support of the public interest,
23 I don't think we need to spend a lot of time on that topic
24 either.

25 The core of this case, it's real simple. Bayer, since

1 it's own ownership of the facility in 2002, has a very, very,
2 very checkered history of safety, the outstanding feature of
3 which was the explosion on August 28, 2008, the Larvin
4 production plant, which is immediately adjacent to -- it's
5 integrated with the MIC production facility. The outstanding
6 features of that explosion are that virtually everything that
7 they should not have done - that is Bayer - in the process,
8 they did; and virtually everything they were required to do,
9 they avoided. They turned off the air monitors. They overrode
10 the valves that would have automatically shut off the feeding
11 of highly volatile facilities into a facility -- into the
12 residue treater once it hit center temperatures. They did
13 everything wrong you could do wrong.

14 Most important of the things they did wrong, though, Your
15 Honor, initially once it happened was they failed to follow the
16 most elementary NIMS protocol there is, that is, let the people
17 outside know what's happening. Let the people outside who are
18 in charge of the responsibility for emergency response know.
19 Do we need to tell people to evacuate? Should they
20 shelter-in-place? What is it we should do? And the bottom
21 line is people on the outside encountered a stone wall that
22 night. When the CSB investigation began, again, perhaps not
23 a stone wall, maybe a wall of paper. Bayer's Chief Executive
24 Officer in April, 2009, before the United States Congress,
25 admitted that -- with some level of candor, I will grant, that

1 they had basically obstructed or attempted to obstruct CSB's
2 investigation of the matter by asserting, on a bad faith basis,
3 certain exemptions from public disclosure arising from Homeland
4 Security legislation. He admitted very candidly that that was
5 done primarily as a means of protecting not the Homeland
6 Security but Bayer's profitability. That's what that was
7 asserted for.

8 The problem it presents for the court today and for the
9 community living with them is: How do we know when Bayer's
10 telling the truth? There is nothing in any of those assertions
11 that tipped their hand and said, well, we don't really mean it
12 here. How does the court know? How does any member of the
13 community know when they say, well, this time we've turned on
14 all the air monitors, we have upgraded the bypass valves,
15 we've got instant analysis by computer of the water content of
16 the MIC mixture, we've had outside experts come in and, if you
17 will, put holy water on all that we have done, how does this
18 court know that that entire elaborate explanation and defense
19 under the heading of "let us go forward" is any different from
20 the assertion of the Homeland Security exemptions earlier?
21 There is nothing that tells us that. When Bayer opens its
22 mouth on Monday, they're telling the truth, but when they open
23 their mouth on Tuesday, they're lying, so the court can't take
24 things at face value.

25 Now, the history of the explosions and leaks and fires

1 from 2002 forward, under Bayer's ownership, and for decades
2 preceding that has -- doesn't go away. The history is present
3 for people that live in the community. When every -- the last
4 Wednesday of every month at noon when a very loud siren goes
5 off that you can hear it, depending on where you are throughout
6 the county, there are people in Institute who immediately react
7 with the same fear that they experienced on the night of
8 August 28, 2008 when the Larvin unit blew up, or any of the
9 other previous or subsequent incidents that caused
10 shelters-in-place, or deaths, or fires, chemical spills.

11 So the consequence of that, from the nuisance point of
12 view, though, is that these people are today living with a
13 current nuisance. It is a nuisance generated from a history,
14 but it is nonetheless real. And that is separate from any
15 anticipation of the future and what the future may bring.

16 Now, it is not the case -- I mean, I want -- that's a
17 reason-based fear. That is if you lived through the August 28,
18 2008 experience, it's not irrational to be anxious. If you
19 lived through any of the other explosions going back to 1993,
20 before and subsequent, it's not irrational. It's normal.
21 It's real.

22 There is one fantasy-based assertion in all of this, and
23 that is that it won't happen again. There is only one thing
24 that the court absolutely can know, and that is there will be
25 additional fires; there will be additional explosions; there

1 will be additional chemical leaks at that facility. To say
2 that there is not going to be would be to disregard 63 years of
3 history that are laid out in crimson in the records before the
4 court and in the publications throughout the county for the
5 last several decades. To take the position, as Bayer does,
6 that, well, today we've got a new, improved MIC facility, take
7 our word for it, we've had outside experts say it's okay,
8 please give us the green light, let us turn it on and go
9 forward, would require you to engage in a complete fantasy.
10 That is, we can create -- if the projection of a future
11 explosion is reasonable enough, the court has authority, under
12 *Chambers* and other cases decided in this jurisdiction long,
13 long ago, to enjoin the activity.

14 The *Chambers* case talks about a presumption that someone
15 entering into a legitimate business is going to conduct their
16 business safely, and absent some contrary evidence, you can't
17 enjoin them. Even in *Chambers*, though, the court said: But if
18 things don't go as we anticipate, you can always come back.

19 Bayer is not entering the MIC business from scratch with
20 no history. They are reentering the MIC and Larvin production
21 business.

22 **THE COURT:** Mr. DePaulo, the defendants have
23 asserted in response to your motion that MIC production is a
24 lawful activity and that they have obtained all necessary
25 governmental approval to resume production. What's your

1 response to that?

2 *MR. DePAULO:* EPA has issued them a permit to
3 produce the insecticide Temik. They have not issued a permit
4 to construct MIC in the manner which Bayer does. Specifically,
5 Bayer is the only facility in the world who produces MIC at
6 this point and maintains it on-site in storage facilities.
7 There is another alternative technology available adopted by
8 Dupont. They only generate enough for their immediate use.
9 It's immediately consumed; no MIC is left on-site.

10 EPA didn't permit the process; they permitted the product.
11 So we can take no solace from an EPA permit that says: "I can
12 sell Temik." It's not germane to the matter that it's lawful
13 to produce pesticides. A lot of things are lawful but which
14 if conducted in an inappropriate place or in inappropriate
15 circumstances are nuisances, and the law books are full of
16 those.

17 The real question before the court, if we were starting
18 from scratch, that license may be just the most perfect thing
19 on earth. We aren't. We've got 60 years of history, and we've
20 got in the last few weeks here a Chemical Safety Board report
21 which provides a long laundry list of things which should be
22 done by OSHA, by EPA, by the State Health and Human Services
23 Department, by the State Fire Department, by --

24 *THE COURT:* What, if any, legal effect does any of
25 that have on their ability to start up this production?

1 **MR. DePAULO:** Well, the effect it has is on their
2 right to go forward. I mean if they have got electricity, they
3 can turn it on. It has no impact on their ability; it has an
4 enormous ability (*sic*) on their right to do that in the
5 center -- in the middle of a population center.

6 Also outstanding is a congressionally-mandated study by
7 the National Academy of Sciences that says: Let's look into
8 the inherent risk of producing MIC in a major population
9 center.

10 The bottom line, they're saying, is: We don't need --
11 we've got an EPA permit for the product; we don't really need
12 a permit *per se* to manufacture these other component elements,
13 so, Judge, just please stand aside and allow us to go forward,
14 and take our word for it. Even though our CEO has admitted to
15 Congress that we use PR mirrors -- smoke and mirrors as needed
16 to advance our cause, the court today should disregard that and
17 not wait for the NAS study and not wait to see if, in fact, any
18 of the Safety Board standards have --

19 **THE COURT:** Let me direct your attention by a few
20 questions to the law underpinning your case.

21 **MR. DePAULO:** Yes.

22 **THE COURT:** The law of public nuisance, the law of
23 private nuisance. You have suggested by your pleadings, as I
24 read them, that this court adopt a theory of nuisance that
25 allows it to balance the catastrophic -- potentially

1 catastrophic nature of the harm against the likelihood that
2 that harm will come to pass. What in West Virginia law
3 supports that theory? And, if nothing, is there anything in
4 West Virginia law that forecloses that theory?

5 **MR. DePAULO:** The answer to the latter is "no." I
6 would suggest to the court that the *Chambers* case incorporates
7 within it the proposition that the court has acknowledged and
8 I've suggested, that is, the balancing of the risk against the
9 scale of the catastrophe. And *Chambers*, although it, if you
10 will, starts with the proposition of a presumption of safety
11 with a legitimate -- a lawful activity, it acknowledges that
12 that someone entering that business may have a clean slate,
13 but the plain implication is, and *Chambers* makes clear, if as
14 you go forward this business is in fact operated badly, you
15 can come back, that -- and, you know, let's stop and think for
16 one second. What's the logic behind it? If six months later
17 the plaintiffs and the defendants in *Chambers* were back before
18 the court, there's no reason why that defendant couldn't come
19 before them and say, well, I've really cleaned up my act.
20 I've done -- I've hired more people; you know, I've got faster
21 response time, X, Y, Z, all these improvements. Implicit in
22 *Chambers* is a -- the notion that the court is going to have to
23 make an informed judgment as to the likelihood that that person
24 has, in fact, cleaned up their act. Otherwise, the history
25 would be irrelevant.

1 **THE COURT:** How do you define "public" in the context
2 of this litigation? Because you bring private nuisance and
3 public nuisance claims.

4 **MR. DePAULO:** Yes. By that red dot, Your Honor. I
5 don't know if you can see it or not.

6 **THE COURT:** Well, I've seen it. I've seen something
7 like it somewhere.

8 **MR. DePAULO:** Yes. That's an exhibit which is from
9 Bayer's Offsite Consequences Analysis, its OCA.

10 **THE COURT:** Is that relevant to the determination of
11 who the general public is, for the purpose of the public
12 nuisance analysis?

13 **MR. DePAULO:** I believe so, Your Honor, yes.

14 **THE COURT:** All right.

15 **MR. DePAULO:** The Offsite Consequences Analysis is
16 an addendum, appendix to the Risk Management Proposal EPA's
17 fliers -- EPA is mandated to make copies available in fifty
18 locations, plus the District of Columbia. And, in their
19 wisdom, they have elected to choose to decide the fifty sites
20 does not include one in all fifty states, so there is no copy
21 of this document available in West Virginia. And Maya and I
22 had to travel to Washington, D.C. Federal law also prohibits
23 her from making a mechanical copy of it, so she had to write
24 down the data.

25 There are really two important components, for the court's

1 purposes -- well, there are three: Latitude, longitude, which
2 orients the thing, Bayer's estimate of a 25-mile radius of the
3 outside perimeters of the disaster. It's Bayer's position that
4 300,912 people reside inside that red circle. In my judgment,
5 that's a fair definition of the public interest -- or the
6 public who is involved here. Those are the people in what
7 Bayer calls the vulnerability zone.

8 *THE COURT:* People closer -- that's 25 miles?

9 *MR. DePAULO:* Yes.

10 *THE COURT:* Somebody within a mile, two miles, it
11 would depend on how much MIC got loose, I assume; how the winds
12 were blowing --

13 *MR. DePAULO:* Absolutely.

14 *THE COURT:* -- all those kind of things.

15 *MR. DePAULO:* There are a hundred and one variables.

16 *THE COURT:* What effect does proximity have, that
17 is, proximity of a person, to the leak, for want of a better
18 word, or the explosion or catastrophic event, have on the
19 showing necessary to maintain a private nuisance claim in a
20 case like this?

21 *MR. DePAULO:* Well, Your Honor, the plaintiffs in
22 this case reside all within that area. Several reside in
23 downtown Charleston. Other plaintiffs live immediately
24 adjacent to the plant itself.

25 *THE COURT:* Well, I guess another way to ask you the

1 question is: The ones who live immediately adjacent to the
2 plant, is their claim for private nuisance superior to or in
3 any way differentiated from the people who live at the outer
4 border?

5 *MR. DePAULO:* In a matter of degrees, yes.

6 *THE COURT:* Does that matter of degree matter?

7 *MR. DePAULO:* Here is where I think the matter of
8 degree begins and ends, Your Honor: People in the center of
9 that red dot have the strongest possible case. The further
10 away you get from it, the more diminished your potential is
11 for exposure.

12 *THE COURT:* And when you get -- and when you get
13 outside it, and there are thousands of people who live outside
14 it --

15 *MR. DePAULO:* Yes.

16 *THE COURT:* -- those people wouldn't be members of
17 the public? Is that what you're saying?

18 *MR. DePAULO:* Well --

19 *THE COURT:* What I'm trying to --

20 *MR. DePAULO:* They are not in the vulnerability
21 zone.

22 *THE COURT:* What I'm trying to say, West Virginia
23 law, and nuisance law generally, makes a very substantial
24 distinction between availability of injunctive relief in the
25 case of a public nuisance and in the case of a private

1 nuisance, and "public" is not readily defined in the case law,
2 and I'm trying to get you to do that.

3 *MR. DePAULO:* Okay. Well, I appreciate you helping
4 me with the question, Your Honor.

5 *THE COURT:* All right.

6 *MR. DePAULO:* I would say, for purposes of the
7 court's analysis - and I'll maybe bring a different analysis -
8 certainly anybody within the circle would have standing to
9 complain. The weight and compelling character of their
10 argument may be assessed by the court differently than
11 somebody -- for someone at the perimeter rather than someone
12 at the epicenter.

13 I hope that's responsive to the court's question.

14 *THE COURT:* Well, how are these plaintiffs -- I'll
15 just -- let me help you a little bit more. How are the
16 plaintiffs that live right next to the plant -- how are their
17 injuries special and different from others in the general
18 public, as you define it? Because they would have to be, if
19 you have a claim for a private nuisance.

20 *MR. DePAULO:* Which would be two ways in which I
21 think they are different. One will be what I will call, for
22 want of a more professional or technically correct term, is --
23 I'll just call "the blast area." That is, there are people
24 close enough who they literally are going to feel the blast.
25 Their house will shake; glass in their windows will break;

1 conceivably shrapnel -- a 5700-pound stainless steel --

2 *THE COURT:* Let me stop you just a minute, because
3 I'm still stuck with my very limited record for a temporary
4 restraining order. What is there in the record that you've
5 given me -- and it admittedly is pretty good size by the time
6 all those exhibits are there. What is there that shows that
7 differentiation?

8 *MR. DePAULO:* The addresses, Your Honor. The
9 addresses of the plaintiffs.

10 *THE COURT:* Does the Offsite Consequences Analysis
11 reveal relevant and distinct impacts based on proximity or
12 other factors?

13 *MR. DePAULO:* It does not, Your Honor, not certainly
14 in any part that's available. And if I might, let me tell you
15 I think what the reason for that is. The critical determinate
16 for a chemist, and I will not feign any great chemical skills
17 with the court here, but it's the parts per million in a given
18 dispersal. For different chemicals, two parts per million are
19 going to be toxic; some chemicals it would be two parts per
20 billion. For some, it will be a lower number. For this -- and
21 if you look at the Offsite Consequences Analysis produced by
22 Bayer - and, Your Honor, it's in the materials available to the
23 court - there's a spreadsheet --

24 *THE COURT:* I saw it. It's a little hard for me to
25 understand, but I've got the spreadsheet.

1 **MR. DePAULO:** Your Honor, if you look at it, there
2 are dozens of chemicals and they all have different parameters
3 in which their worst case scenario is defined. So for the
4 people who are -- the further away you get from the
5 epicenter -- and I'll say this is my common sense, it may well
6 be common ignorance, but one intuitively, I think, concludes
7 that the further you get away from it, there's a higher
8 probability of dispersal, so that the parts per million or
9 parts per billion are going to diminish with time and distance.
10 That would be the second differentiation, apart from what I
11 called earlier somebody "in the blast area," people who are
12 going to, theoretically, or in reality maybe even have shrapnel
13 fly past them or break a window or hit them.

14 There is a rationale here, which I don't pretend to have
15 the expertise about it, it's conceivable an atmospheric
16 situation could exist where a cloud would go up from the plant
17 and that that cloud would maintain its density and move in one
18 direction or another so that, in fact, the further away it got
19 the better off the people were at the epicenter, and I don't
20 think that in the materials --

21 **THE COURT:** Some of my hypotheticals are not
22 necessarily going to be that great. Let me try to see if I
23 can hit something that's concerning to me. Instead of
24 producing insecticide, or in this case, the component MIC,
25 let's suppose that they're making plastique, like you see on

1 Mission Impossible, next door. If that stuff goes off, it's
2 going to hit the people that live right next door a lot harder
3 than it is the people that live a block away. Right?

4 *MR. DePAULO:* Correct. Absolutely.

5 *THE COURT:* Is that same thing true, in your way of
6 looking at this?

7 *MR. DePAULO:* It is at least with respect to what I
8 call the blast - the initial blast.

9 *THE COURT:* How about the MIC - the danger from the
10 MIC?

11 *MR. DePAULO:* Well, Your Honor, I think the danger
12 from the MIC is going to be much more greatly dispersed
13 inherently.

14 *THE COURT:* But still more dangerous to the people
15 that are closest because -- your word is "dispersed"; right?

16 *MR. DePAULO:* Yes, Your Honor, that's correct. I
17 would agree that, at least initially, it makes sense to believe
18 that the danger and the people at risk is going to diminish
19 with distance. And that's primarily because as it disperses it
20 will diminish in concentration from perhaps twenty parts per
21 million, to ten parts per million, to five, to two, to one, and
22 perhaps get beyond even trace amounts.

23 *THE COURT:* Off to another subject: You talked about
24 people having -- that the fear is perfectly rational.

25 *MR. DePAULO:* Yes.

1 **THE COURT:** Is the fear the nuisance? If not, what
2 is the nuisance?

3 **MR. DePAULO:** Well, the continued production is the
4 nuisance. The continued production, which has in the past and
5 carries with it into the future, fear. That's sufficient under
6 the current nuisance theory that I've suggested to the court to
7 satisfy the requirement. The nuisance is the operation itself.
8 Fear is the --

9 **THE COURT:** There has to be more -- it has to be more
10 than just a fear. I mean, I might be afraid of chickens.

11 **MR. DePAULO:** And the question is: Is it a
12 rationally-based fear? That's a perfectly appropriate
13 question. The analogy I've used with my clients is, you know,
14 what is a current nuisance? If somebody is burning trash next
15 door and the ash is coming down on you, that's the ash -- the
16 fire may be causing the ash, but the ash is the result and you
17 are -- a nuisance exists here.

18 They have a history, the fact that they are continuing --
19 that people are aware that they are continuing to produce MIC
20 there, in light of the history, that's the ash coming down on
21 them.

22 **THE COURT:** I might be afraid -- as in some of the
23 West Virginia cases, I might be afraid if somebody started a
24 trucking company, or opened a plant, that the trucks going by
25 would get dust and -- coal dust and so forth over upon my land.

1 I might be afraid of that, but would that be a nuisance? Or is
2 that distinguishable from your premise where the harm is
3 catastrophic?

4 *MR. DePAULO:* Well, both, Your Honor. First of all,
5 unquestionably, the catastrophic potential alters the analysis,
6 in my judgment. And this is not merely the competing value of
7 coal trucks going by versus the other alternative utilization
8 of the land, which I believe, in essence, are the facts of the
9 *Duff* case. And in there the court basically found a roughly --
10 at least enough of a parity of the social utility of the two
11 enterprises to conclude that neither one sustains -- the
12 plaintiffs in that case had not sustained their burden of proof
13 to shut down the prospective trucking business, which again,
14 although people may have great anxiety about it, there was no
15 history and they could not reasonably project, nor could the
16 court conclude, that it was reasonably certain that that would
17 be the kind of interference that they anticipated in the
18 future. But that's the perfect departure point for this court.
19 We've got 63 years of history. These people are not entering
20 the business; they're reentering it. They're reentering it
21 after having had --

22 *THE COURT:* Educate me just for a second on something
23 for the elementary. Do you need a permit of any kind from
24 anybody to make MIC?

25 *MR. DePAULO:* I don't believe -- I don't believe you

1 need to have a permit, Your Honor, *per se*.

2 **THE COURT:** Can I go set up over on my piece of land
3 in Jackson County and make MIC, if I knew how to do it?

4 **MR. DePAULO:** I can't tell the court the answer to
5 that is "yes" --

6 **THE COURT:** Perhaps your --

7 **MR. DePAULO:** But I would bet counsel for the
8 defendants does know the answer to that, and they're ahead of
9 me on that.

10 **THE COURT:** All right.

11 **MR. DePAULO:** The permitting that has been referred
12 to here has been related exclusively to end products, that is,
13 the insecticide itself. I assume that in any event you would
14 need a business permit, you know, the typical tax permit and
15 others. I cannot tell the court that MIC production *per se*
16 requires a permit.

17 But to go back to your departure point, the competing uses
18 of the coal trucks going by in the *Duff* case, what we're faced
19 with here is a history which indicates that catastrophes are
20 very much within the parameter of realities.

21 **THE COURT:** I think you're arguing something, and
22 I'm trying to pin you down because I think you're arguing
23 something that is intriguing to me. There is a difference
24 between something that causes annoyance or minor injury or
25 inconvenience and something that is catastrophic.

1 *MR. DePAULO:* Clearly.

2 *THE COURT:* In terms of nuisance law analysis, I
3 think that's what you're trying to tell me, but I'm not
4 certain.

5 *MR. DePAULO:* Well, no, Your Honor; you're right.
6 There is no question that the catastrophic scale of a potential
7 release here should weigh heavily in the court's balancing of
8 the equities. If I haven't made that explicit, I certainly
9 want to make it explicit now. There is no question that that
10 is --

11 *THE COURT:* And in weighing it against the likelihood
12 that the harm will occur.

13 *MR. DePAULO:* Yes, and let's talk about that for just
14 one moment, Your Honor, and it's this: What happened on the
15 evening of August 28, 2008? This 5700-pound stainless steel
16 residue treater exploded. It was airborne, and it took out
17 everything in its sight, sent shrapnel in every direction. It
18 is a sheer fortuity that it did not penetrate the aboveground
19 MIC storage tank that was within a few hundred feet of it. So
20 people living in the county, in their view, Your Honor, can
21 reasonably say it's like sitting at a craps table, you hope
22 that -- and you've got money on number eight; you hope the
23 people rolling the dice just keep rolling anything except
24 number seven, but we know that sooner or later seven's going
25 to come up. And their lives are on the balance.

1 I do want to touch on one thing which goes to the
2 catastrophic issue, Your Honor. Counsel suggested that I've
3 not addressed the likelihood of irreparable injury. There is
4 one major difference between the parties before you. When
5 Bayer blows up its plant, it gets to start over, just
6 commandeers from the budget another \$25 million, cleans up the
7 debris and rebuilds. If a catastrophe happens anything
8 remotely on the order or magnitude that would disperse MIC in
9 that circle, there are going to be thousands of people dead.
10 Those people are not going to get a mulligan. They don't get
11 to come back and try it again: I think I'll get a house a
12 little further down the road; I'll get a house at a little
13 higher altitude; I'll get a house with a little tighter
14 windows, or maybe I'll move to Poughkeepsie. Their damage is
15 going to be irreparable.

16 *THE COURT:* The defendant is clearly going to
17 argue -- and they don't get to offer evidence today, but they
18 are clearly going to offer, as you suggest in your pleadings,
19 that they have safely rebuilt this facility. What do you
20 have -- what do they have to do to show you that what they've
21 done is safe and responsible?

22 *MR. DePAULO:* Follow the recommendations of the
23 Chemical Safety Board and allow EPA and OSHA both to go in
24 there in coordination and conduct a full audit of their
25 facilities to see what they have done.

1 **THE COURT:** Is there any law that requires that?

2 **MR. DePAULO:** The law would permit OSHA and CSB to
3 go in, Your Honor, and this court is the engine that we're
4 counting on to make them do that. And what I'm saying, Your
5 Honor, is they have a right to do that inspection.

6 **THE COURT:** Why don't I pick on Mr. Fisher for a
7 while, and I'll come back to you?

8 **MR. DePAULO:** Okay. Thank you.

9 **THE COURT:** Thank you, Mr. DePaulo. Yes, sir.

10 **MR. FISHER:** Good afternoon, Your Honor. I am going
11 to focus a little more closely, hopefully, Your Honor, on the
12 four-factor test, and one of the first things I want to bring
13 to the court's attention, and I'm sure the court is aware,
14 that plaintiffs have to meet all four factors in order to be
15 entitled to the relief that they seek, and they have to meet
16 those factors by clear evidence, that possibly succeeding on
17 the merits or possibly suffering irreparable harm is not
18 enough. There has got to be high probability, and it's got to
19 be reasonably certain.

20 The first element -- and I'll disagree with plaintiffs'
21 counsel that the first element somehow merges into the other
22 elements. I believe it may be the most important element that
23 needs to be addressed here, and especially at this stage,
24 because it is an element that is more legally driven than fact
25 driven. But it's our position, obviously, that the plaintiffs

1 are not ultimately likely to prevail on the merits. And that
2 causes us then to go into the analysis of the law of nuisance.
3 In my estimation -- and I say that the plaintiff has used both
4 the public and private nuisance concepts, and I think there has
5 even been reference to nuisance *per se*. It's our position that
6 this is not a public nuisance situation. A public nuisance is
7 one which interferes with some type of a public right or
8 inconveniences an indefinite number of people. And to bring a
9 public nuisance claim, and I think the court was focusing on
10 this, the plaintiffs would have to show that they have some
11 special injury that is not potentially going to be suffered by
12 the public at large.

13 But most importantly, and this has been addressed, is in
14 order for there to be a public nuisance, it must always arise
15 out of unlawful acts. A lawful act cannot be a public
16 nuisance, and so that's why it's our position that this is not
17 a public nuisance situation.

18 We manufacture MIC pursuant to the law and permits
19 issued -- it's actually not EPA, Your Honor, it's the
20 Department of Environmental Protection. And so since -- you
21 know, any prospective nuisance is not arising from some
22 unlawful act, we don't believe the public nuisance situation
23 is a proper cause of action.

24 **THE COURT:** Carry your analysis forward into the
25 private nuisance claim.

1 **MR. FISHER:** What I think we are dealing with is a
2 prospective private nuisance potential. And as such, the case
3 now is very clear that when the injury is eventual or
4 contingent - here that there is a fear that something might
5 happen - the law is that the courts don't typically exercise
6 their equitable powers to interfere or to restrain it. And one
7 of the reasons for that is that there is a presumption, and the
8 presumption is that a legitimate business will conduct their
9 operations in a proper way so as to not cause a nuisance.

10 Again, the plaintiffs -- there is a very high burden for
11 these prospective nuisance situations, and the standard is the
12 plaintiffs would have to establish a prospective nuisance to
13 occur beyond all ground of fair questioning. Okay? That's a
14 pretty high standard. It must be a danger that is impending,
15 imminent, and the effect certain, not the result of some
16 conjecture or hypothesis. You know, it can't be doubtful,
17 eventual or contingent. And I submit that the plaintiffs
18 cannot prevail on the claims where we are today.

19 Again, we conduct our operations pursuant to the law and
20 permits issued by DEP. There is no present nuisance that is
21 existing.

22 **THE COURT:** What do you say about the plaintiffs'
23 argument that this is continuing production of MIC, not
24 starting from a clean slate, as was true in *Chambers*? I mean,
25 what do you say to their argument that the 2008 accident

1 occurred while bringing the system online, just like you
2 propose to do now? It's all a part, as they would have it, of
3 the same piece.

4 **MR. FISHER:** There is a couple points. First of all,
5 MIC was not involved in 2008; 2008 is not 2011. My response to
6 "we don't get to start with a clean slate," I don't think that
7 that's true because of the permit that we got from the West
8 Virginia Department of Environmental Protection. Okay. If
9 we're not prepared to go forward, and we haven't dotted all
10 the i's and crossed the t's, we don't get this permit, so I
11 think that is the distinction.

12 **THE COURT:** Has the production of MIC already started
13 at the plant?

14 **MR. FISHER:** It is -- this is a process; this isn't
15 pressing a button on a coffee pot and we get --

16 **THE COURT:** When does MIC first exist as a result of
17 production?

18 **MR. FISHER:** It is in the process of startup right
19 now. We are commissioning the equipment --

20 **THE COURT:** When will the first MIC show up?

21 **MR. FISHER:** About seven days from now.

22 **THE COURT:** Go ahead. I'm sorry, Mr. Fisher.

23 **MR. FISHER:** Okay. We were talking a little bit
24 about the prospective private nuisance situation. You know,
25 it's presumed, and I think this permit helps with our

1 presumption, that we're going to conduct our business properly.
2 And any fear of the plaintiffs is just conjectural. It's a
3 hypothesis. It's contingent. It's not certain. So we have
4 only had this case about a day and a half, but as we have
5 worked through trying to draft the brief and everything, I
6 really think, Judge, this is a situation that is so clear on
7 the law that --

8 *THE COURT:* Can you just tell me --

9 *MR. FISHER:* -- you're bound to dismiss on this.

10 *THE COURT:* Can you just tell me, in general terms,
11 what the DEP permit addresses? When was it issued?

12 *MR. FISHER:* Just a moment, Your Honor. May I have a
13 moment?

14 *THE COURT:* Sure.

15 *MR. FISHER:* I just want to make sure I'm right.

16 Your Honor, the permit was issued August 11, 2010, and
17 it's a permit modified and allows us to produce MIC and
18 pesticide.

19 *THE COURT:* Is that what it says?

20 *MR. FISHER:* Yes, Your Honor. I know you're not
21 here to accept evidence and testimony. If you want this, I'll
22 give it to you; if you don't, we can provide it at a later
23 point.

24 *THE COURT:* Yeah, I'm going to have to have a more
25 developed record before long; certainly within fourteen days

1 I'm going to have to have one if I issue a TR0 in this case.

2 *MR. FISHER:* Yes, Your Honor.

3 *THE COURT:* Let me ask you a few more questions.

4 *MR. FISHER:* Okay.

5 *THE COURT:* Let me just start by going to the
6 plaintiffs' idea.

7 *MR. FISHER:* Okay.

8 *THE COURT:* Tell me what you think. I've already
9 asked them about the theory of nuisance that would allow the
10 court to balance the potential catastrophic nature of the
11 harm against the likelihood that the harm will come to pass.
12 What do you know in West Virginia law that would foreclose
13 that theory, or what would lead you to predict that the West
14 Virginia courts would not find that to be the law of nuisance?

15 *MR. FISHER:* Your Honor, my only response to that is
16 I've never seen that in any of the nuisance cases that I've
17 read. The nuisance law is very well-defined by the West
18 Virginia courts, and very much as we have discussed in both
19 the public nuisance situation and in the private nuisance
20 situation, specifically focusing on a prospective private
21 nuisance. I mean, I just -- I don't believe that that's the
22 law in West Virginia, and there is nothing that I have read,
23 at least standing here today, that would lead me to conclude
24 that that's how the law would develop before our West Virginia
25 Supreme Court.

1 *THE COURT:* What do you have to do before you get a
2 DEP permit to produce MIC?

3 *MR. FISHER:* May I have a moment, Your Honor?

4 *THE COURT:* Sure.

5 *MR. FISHER:* Your Honor, a layman's response to your
6 question is you have to provide information to the Department
7 of Environmental Protection as to what you're going to do and
8 how you're going to do it, how you are going to conduct your
9 operations in a way so as to not contaminate the environment,
10 and to satisfy them that it's going to be produced in a proper
11 and safe manner.

12 *THE COURT:* What I'm concerned about, and it really
13 probably has nothing to do with what I've got to decide today,
14 is who at the DEP in West Virginia has any clue about what's
15 safe and not safe and how you set up a DE -- or a MIC
16 production facility?

17 *MR. FISHER:* I don't know the answer to that
18 question, Your Honor, but my guess and my assumption is that
19 they are very competent in what they do and --

20 *THE COURT:* Do they regulate the safety of
21 production?

22 *MR. FISHER:* They have a role in that, I mean, and
23 there are other agencies that are also involved, such as OSHA
24 and the Environmental Protection Agency, but the DEP can also
25 come into the facilities.

1 **THE COURT:** Prior to this startup process which is
2 underway now, was the facility physically inspected by anybody
3 in government?

4 **MR. FISHER:** No, Your Honor.

5 **THE COURT:** Let me just go through a few more
6 questions I jotted down, and I'll let you get back.

7 **MR. FISHER:** Okay.

8 **THE COURT:** You mentioned in the response that there
9 will either be an immediate or almost immediate loss of jobs if
10 the restraining order is granted. Can you explain that?

11 **MR. FISHER:** Your Honor, I overstated that and my
12 clients have let me know today that I overstated that. What I
13 should have said is if an injunction was granted, then there
14 would be the loss of 300 jobs. That's not in the case of a
15 temporary restraining order, and that was something that
16 they -- I'm glad you asked me that question, because that was
17 something that they wanted me to make sure I clarified on the
18 record to you.

19 **THE COURT:** And at least somewhere in the plaintiffs'
20 pleadings, or yours, or something, that there will be a loss of
21 jobs when the production of this chemical is phased out in 18
22 months. Is that right?

23 **MR. FISHER:** That's correct.

24 **THE COURT:** And the loss figures, the money - again,
25 this is a little bit off topic - referenced in your response

1 referred to the potential losses if MIC is not restarted? Or
2 do they refer to the facility as a whole?

3 *MR. FISHER:* It is in reference to MIC not being
4 produced and ultimately turned into Temik and provided to the
5 agricultural community.

6 *THE COURT:* So it's the loss of the profit on the end
7 result of not only the process of creating MIC, but also -- I
8 assume it's a pesticide?

9 *MR. FISHER:* Yes, sir.

10 *THE COURT:* A pesticide which is then distributed to
11 be sold?

12 *MR. FISHER:* Yes.

13 *THE COURT:* Again, I'm not in any way suggesting
14 this is a trick question, but I'm responding to your response.
15 You suggest that MIC production is essential to Bayer's
16 financial performance. I'm wondering how they've got along so
17 well since 2008?

18 *MR. FISHER:* Your Honor, they had an inventory of
19 Temik in place. That inventory is gone now --

20 *THE COURT:* Isn't MIC produced elsewhere in the
21 United States by competitors?

22 *MR. FISHER:* -- it's my understanding; and we've
23 continued to produce MIC since 2008 at the Institute plant,
24 Your Honor.

25 *THE COURT:* So we don't have to worry about peanut

1 butter, as you suggest in your response, or cotton T-shirts?

2 *MR. FISHER:* Well, I think we do, because the Temik
3 is our product and what -- you know, what my client tells me
4 is that there is not a single product that could be
5 substituted.

6 *THE COURT:* That would be as good?

7 *MR. FISHER:* As good as Temik, because it -- not
8 only is it a pesticide, but it increases the yield of crops.

9 *THE COURT:* Mr. Fisher, I have never had anyone
10 defend one of these things that hasn't told me that if I
11 granted it, it would end western civilization as we know it
12 today. So I understand your argument and am not being critical
13 of your advocacy. I'll let you get back to nuisance law.

14 *MR. FISHER:* Your Honor, I think I've really kind of
15 completed the analysis on the nuisance, which leads me into my
16 conclusion that --

17 *THE COURT:* Deal with the special nuisance.

18 *MR. FISHER:* The nuisance *per se*?

19 *THE COURT:* Right.

20 *MR. FISHER:* Okay. Your Honor, the law there is
21 very -- kind of similar to the public nuisance law. Under the
22 *Burch* case, in order for something to constitute a nuisance
23 *per se*, it cannot arise in a situation where there is a lawful
24 business authorized to be conducted by the government. That
25 cannot constitute a nuisance *per se*.

1 **THE COURT:** Say that again.

2 **MR. FISHER:** Okay. A lawful business authorized to
3 be conducted by the government cannot constitute a nuisance
4 *per se*.

5 **THE COURT:** What about a private nuisance? Just a
6 private nuisance claim.

7 **MR. FISHER:** That gets us into, you know, the
8 situation in our case, because it's not only just a private
9 nuisance, it's a prospective private nuisance.

10 **THE COURT:** Right; and they cite some cases. I think
11 they cite an Illinois case, and that's basically where I
12 extracted the argument that they seem to be making the most --
13 all the most intriguing argument they make.

14 **MR. FISHER:** Your Honor, I think the law is very much
15 in our favor here in West Virginia that they're not meeting
16 the burden, you know, by alleging this prospective private
17 nuisance. I mean, really what they are saying is that we have
18 a fear that something maybe, might happen. I mean, they don't
19 even articulate what it is they think will happen. Something
20 bad might happen; something adverse might happen. And, you
21 know, that's just -- that's just not enough.

22 **THE COURT:** Let me see if I can state their
23 position --

24 **MR. FISHER:** Okay.

25 **THE COURT:** -- as I might. They are stating that,

1 because of the track record of accidents, violations of safety
2 rules, regulations, ignoring of laws in place, and misleading
3 the public, as well as lying, that there is a high -- or a
4 likelihood which is given heavier balance by the catastrophic
5 nature of what might occur. I didn't say that exactly right.
6 That the catastrophic nature of what might occur weighs heavily
7 in the balance against the likelihood that is on the first step
8 of the injunctive analysis.

9 *MR. FISHER:* Well, you know, obviously, you know, we
10 will ultimately take issue with many of the allegations about
11 our history, including the relevance of them and the
12 significance of this accident that happened back in 2008, but I
13 think the comfort level is the permit, because I think that
14 that could --

15 *THE COURT:* But it was issued without anybody going
16 out there and looking at anything?

17 *MR. FISHER:* Right, from my understanding. The other
18 thing, and we touched a little bit about it in our affidavit
19 that we submitted, Bayer CropScience, we've invested over
20 \$36 million since the accident in 2008 in production safety and
21 communication equipment. We've recently implemented additional
22 safety measures to ensure a safe startup.

23 *THE COURT:* Let me ask you, Mr. Fisher, I don't quite
24 understand: Why would you invest \$36 million to start up
25 something and do it for only 18 months?

1 **MR. FISHER:** Your Honor, I mean, I think the Bayer
2 people can probably address that, you know, making their
3 business decisions better than I can, but, I mean, it is an
4 important product, and it is, you know, necessary to the
5 agricultural industry, and it's going to be phased out in...
6 In 18 months?

7 *(Defense counsel and Mr. Hedrick confer off the record.)*

8 **MR. FISHER:** At the time where we made the
9 investment, we did not know that it was going to be phased out.
10 It is now being phased out in about 18 months.

11 **THE COURT:** Okay.

12 **MR. FISHER:** So that is one of the reasons why. I
13 mean, there are numerous, numerous reasons why. I mean, it's
14 the right thing to do. I mean, we've been -- here today we
15 have been called liars and cheats and scoundrels, and a lot of
16 adjectives, but these are good people, and these are people
17 that live in our community, and we go to church with them and
18 everything.

19 **THE COURT:** I don't think anybody is into
20 name-calling as much as they are looking at and characterizing
21 recorded events. I mean, it is certainly true that there were
22 accidents that occurred from the violation of safety standards.
23 True? Right?

24 **MR. FISHER:** In the past, yes, Your Honor.

25 **THE COURT:** And it is true that a high executive

1 officer of your company went before Congress and said, hey, we
2 hid stuff and we made up excuses of Homeland Security because
3 we didn't want it to come out. Right?

4 *MR. FISHER:* It --

5 *THE COURT:* I mean --

6 *MR. FISHER:* There is a lot to that story, Your
7 Honor.

8 *THE COURT:* I mean, all I did was read what they put
9 in the pleadings. But that happened; right?

10 *MR. FISHER:* He did indicate -- my understanding --
11 it's been awhile since I read his testimony. It's my
12 understanding he did indicate, in part, that one of the reasons
13 why there had -- there was an SSI designation of certain
14 materials was to hopefully not get into the debate about MIC,
15 because it wasn't involved in the explosion in the methomyl
16 unit. So there is a lot of layers of things that are going on,
17 but, yes, I mean his testimony, statements, are what they are
18 and are part of that Congressional record.

19 *THE COURT:* All right. Thank you.

20 Mr. DePaulo, back to nuisance law.

21 *MR. DePAULO:* Yes, sir. I want to offer a tool to
22 the court. How do you analyze a risk as catastrophic, and the
23 scale of the catastrophe?

24 *THE COURT:* I'm sorry?

25 *MR. DePAULO:* The question you posed to both of us

1 now is the somewhat intriguing question presented by the
2 Illinois case which suggests that it's appropriate for the
3 court to look at the risk of the catastrophe and balance that
4 against the consequences.

5 *THE COURT:* The likelihood that it will occur.

6 *MR. DePAULO:* And the damage if it did.

7 *THE COURT:* Uh-huh.

8 *MR. DePAULO:* Here is what I consider the compelling
9 aspect of this: Under the analysis suggested here, you would
10 only issue an injunction after the thing blew up. That is, in
11 other words, if the law does not -- if the law cannot stop the
12 kind of disaster that occurred at Bhopal, tens of thousands of
13 people killed instantly, 25,000 and more people living the rest
14 of their lives with permanent injuries, if we have a good
15 enough inkling that that's possible, the law has got to be able
16 to stop it. I mean --

17 *THE COURT:* I have absolutely -- I have absolutely
18 no doubt that the West Virginia Legislature and the Congress
19 of the United States could take action to stop it. I have no
20 doubt of that.

21 *MR. DePAULO:* Well, Your Honor, they aren't here
22 today, unfortunately, and I'm going to do my very best here to
23 impinge upon the court's individual sense of responsibility
24 here, and the old line about, you know, at the end of the
25 flood, they interviewed every one of the drops of water. Who

1 caused all the damage? And every single drop of water there
2 said, "I was just one drop. I didn't do it; I was just one
3 drop." And there are two drops, Your Honor, here. I had to
4 bring this lawsuit because I felt it had to be brought, and if
5 I go off into the sunset realizing I said no to Maya Nye and
6 that thing blows up, I'm going to have a hard time sleeping.
7 A real hard time sleeping. And, unfortunately, Judge, the buck
8 is passing from me to you here, that is, you're the last drop
9 of water that history is going to interview.

10 *THE COURT:* Well, don't make -- don't make the
11 assumption that judges in carrying out their oath of office
12 have agreement on a personal level with the law as passed by
13 the Congress of the United States in every instance.

14 *MR. DePAULO:* I understand that, Your Honor.

15 *THE COURT:* Because making that assumption, I would
16 not have been able to answer the question could I faithfully
17 execute the law of the United States, including sentencing
18 someone to death under the statutes of the United States. And
19 I said I could.

20 *MR. DePAULO:* But you didn't like it; I understand.

21 *THE COURT:* I didn't say I didn't like it; I'm just
22 saying whether I did or not has nothing to do with what I have
23 to do. Or quit. I have the option of quitting.

24 *MR. DePAULO:* That's right, Your Honor.

25 *THE COURT:* And, actually, that's a very real option

1 anymore. I'm old enough now.

2 *MR. DePAULO:* Your Honor, if the law of nuisance were
3 anywhere near as clear and inflexible and precise and exact as
4 the law on the death penalty for some offenses, I wouldn't be
5 here. I couldn't be here. But the flip side of that is, and
6 the reality, there probably is no more flexible tort theory out
7 there than nuisance.

8 *THE COURT:* I understand your theory; I do. I'm
9 intrigued by it, and I do not believe that the West Virginia
10 Supreme Court has foreclosed it. Moreover, I believe that
11 there is a foundation of law in the West Virginia cases for
12 your theory. So there.

13 *MR. DePAULO:* Okay.

14 *THE COURT:* What I don't have, at this point, is the
15 kind of complete record I would need to certify a question to
16 the West Virginia Supreme Court; and in the context of a
17 nuisance, it would always be the case. In the context of a
18 TRO, it would always be the case that there is insufficient
19 time.

20 Before I retire for a few minutes to think about this, I'd
21 ask Mr. Fisher, are you telling me that if I don't grant a TRO
22 there is going to be MIC produced in seven days?

23 *MR. FISHER:* Yes, Your Honor.

24 *THE COURT:* All right. The court will stand in
25 recess for about ten minutes.

(Court recessed at 3:02 p.m., court resumed at 3:15 p.m.)

THE COURT: The court makes the following findings:

First, having considered the very limited record currently before the court and the oral argument of counsel, I find that the plaintiffs are likely to succeed on the merits on the private nuisance claims. Based on my initial review of the West Virginia cases, it's clear that the West Virginia Supreme Court of Appeals has described the law of nuisance as flexible and adaptable to a wide variety of factual situations. *Sharon Steel Corporation v. City of Fairmont*, 380 S.E.2d 198, a 1985 case. In addition, that same court has acknowledged the authority for courts to enjoin prospective or anticipatory nuisance. *Duff versus Morgantown Energy Associates*, 421 S.E.2d 253, a 1992 case.

Second, given the very limited record, including limited evidence of the defendant's history of safety violations, alleged misrepresentations to the public, multiple accidents, chemical leaks, and in light of the fact the court has not had the opportunity to conduct a preliminary injunction evidentiary hearing, I find that the plaintiffs are likely to suffer irreparable harm in the absence of this temporary relief.

Third, I find that the balance of equities tips in favor of the plaintiffs, given the catastrophic dangers presented by the production of MIC compared with the potential for economic damages alleged by the defendant.

1 Finally, I find that this short term, temporary
2 restraining order is in the public interest.

3 I hereby order that the defendant, Bayer CropScience L.P.,
4 and its officers, agents, servants, and employees, and any
5 other person in active concert or participation with the
6 defendant be, and they are hereby, enjoined and restrained from
7 further engaging or continuing in the production of methyl
8 isocyanate at its chemical plant in Institute, West Virginia.

9 The court further orders that the plaintiffs post a bond
10 in the amount of \$10,000 pursuant to Federal Rule of Civil
11 Procedure 65(c).

12 This temporary restraining order shall be valid for
13 fourteen days only from the entry of this order this afternoon.

14 Finally, I order that any motion for preliminary
15 injunction, to be accompanied by the required memorandum of
16 law, be filed by 5:00 p.m. on February 14, 2011; any responses
17 to such motion are to be filed by 5:00 p.m. on February 18,
18 2011; and any replies by 5:00 p.m. on February 21, 2011. If
19 any motion for preliminary injunction is filed, I will set this
20 case for an evidentiary hearing on Friday, February 25, 2011,
21 at 9:00 a.m. to determine whether entry of a preliminary
22 injunction is appropriate. The parties should anticipate that
23 any hearing on the preliminary injunction will continue from
24 day-to-day until completed, and that may, and likely will,
25 include Saturday.

1 Do the parties anticipate requesting discovery during the
2 14-day existence of the TR0?

3 *MR. DePAULO:* Yes, Your Honor, and I would consider
4 it very important.

5 *THE COURT:* Mr. Fisher?

6 *MR. FISHER:* Yes, Your Honor.

7 *THE COURT:* The parties are directed to attend a
8 discovery hearing before the Honorable Magistrate Judge Mary
9 Stanley at 10:00 a.m. tomorrow, February 11, in her courtroom
10 regarding the scope and manner of discovery pending a
11 preliminary injunction hearing.

12 In the context of discovery, and I will expand upon this
13 in a written order, I would like to remind the parties that
14 they are now under a duty to preserve any and all documents,
15 and I mean documents in the expansive sense provided in the
16 rules, that are relevant to this litigation. This includes
17 making sure that anyone for the defendants, for example, who
18 is involved in any way with safety, MIC, or any of the other
19 issues presented in this complaint, take steps to preserve and
20 prevent the destruction of documents, including electronically-
21 stored information. I know the lawyers are familiar with the
22 current rules. This includes making sure that your IT
23 professionals disable any automatic destruction procedures
24 that may impact the availability of any electronically-stored
25 information that could be relevant.

1 Anything further to come before the court on this matter?

2 *MR. FISHER:* Your Honor, only one matter that I would
3 raise is we have -- assuming we were going to go forward with
4 manufacturing of MIC, and ultimately Temik, the MIC is made
5 here. It's then sent to Georgia where it is refigured, and
6 that all needs to be done by mid-March in order for the product
7 to be available to the agricultural community. With that in
8 mind, would the court consider speeding up the deadlines on
9 both the filing of the motion, responses, and having a hearing?

10 Aldicarb. I misspoke. Aldicarb is sent to Georgia.

11 *THE COURT:* Mr. Fisher, here's my concern: This is
12 a very important issue to your client, and I take it, too, an
13 important issue to the plaintiffs. It is one that I find
14 somewhat difficult on the law, and very difficult on the record
15 as it currently exists. I would like to allow this brief
16 period of time to develop that record. If the parties have
17 fully developed the record and both parties are ready to go
18 before that date, notify me, and if I can, I'll move it. If I
19 can't, I won't. I do have an obligation out of town for part
20 of that period, but I understand your situation, and if you can
21 give me the record that I want before then, and the parties are
22 in agreement, I'll try to accommodate you.

23 *MR. FISHER:* Your Honor, may I have just one more
24 moment?

25 *THE COURT:* Yes.

1 **MR. FISHER:** Your Honor, we want to be specific,
2 because we are commissioning equipment, you know, with
3 chemicals. Does your order encompass that we stop that process
4 now, or can we continue with the commissioning of the equipment
5 up to the point before it becomes --

6 **THE COURT:** I don't know what commissioning of
7 equipment means, so if you'll tell me, then I can try to --

8 **MR. FISHER:** Well, I don't know that I can explain
9 it.

10 **THE COURT:** Then I can't allow it, if I don't
11 understand it.

12 **MR. FISHER:** One moment, Your Honor.

13 Your Honor, the commissioning of equipment involves
14 injecting chemicals into the process and up to the point right
15 before the process happens to manufacture MIC. Is it the
16 judge's order -- I mean, we understand we are not to make one
17 molecule of MIC. Can we go right up to that point, or are we
18 to cease operations? We are just trying to be clear, Judge.
19 I'm not --

20 **THE COURT:** My intention is that you immediately
21 cease engagement of the production process for MIC. Again, I
22 don't pretend sophistication, and should you be able to show me
23 by motion or exhibit or otherwise that there is something that
24 I should consider, file away.

25 Temporary restraining orders are, by their nature,

1 temporary for very good reasons. I want a good record. I hope
2 I'm, by repeating myself, making it plain to both sides, and I
3 hope that my questioning here today has been taken seriously by
4 counsel on both sides as to the state of nuisance law in West
5 Virginia and the state of the factual record in this case.

6 The court's adjourned.

7 *MR. FISHER:* Thank you, Your Honor.

8 *MR. DePAULO:* Thank you.

9 *(Proceeding adjourned at 3:25 p.m., February 10, 2011.)*

10
11 ***CERTIFICATION:***

12 I, Teresa L. Harvey, Registered Diplomate Reporter, do
13 certify that the foregoing is a correct transcript from the
14 record of proceedings in the matter of Maya Nye, et al.,
Plaintiffs, v. Bayer CropScience, L.P., Defendant, Civil
Action No. 2:11-cv-00087, as reported on February 10, 2011.

15 s/Teresa L. Harvey, RMR, RDR, CRR

February 12, 2011

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