

*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 18, 2011
BAYER CROPSCIENCE, L.P. a for-profit	:	
Delaware Limited Partnership,	:	
	:	
Defendant.	:	
	:	
_____	X	

*TRANSCRIPT OF 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.**
179 Summers Street, Ste. 232
Charleston, WV 25301

For the Defendant: **ALVIN L. EMCH, ESQ.**
MICHAEL FISHER, ESQ.
Jackson Kelly
P. O. Box 553
Charleston, WV 25322

1 PROCEEDINGS had before Chief Judge Joseph R. Goodwin, in
2 chambers in Charleston, West Virginia, on February 18, 2011:

3 *THE COURT:* Let's note the appearances for the record
4 here.

5 *MR. DePAULO:* William DePaulo on behalf of the
6 plaintiffs.

7 *MR. EMCH:* Your Honor, Al Emch and Mike Fisher of
8 Jackson Kelly on behalf of Bayer CropScience.

9 *THE COURT:* As a preliminary matter, I want to thank
10 the parties for your cooperation, insofar as I've heard about
11 it, in working with Judge Stanley on discovery. One of the
12 inherent drawbacks in Rule 65 is the very truncated period
13 within which one has from issuance of a TRO to considering a
14 preliminary injunction. The character of those two proceedings
15 is so different that I want to take a moment to emphasize it.
16 While the standard is absolutely the same, a TRO, as all of you
17 know, is generally an ex parte or a one-sided affair, as it was
18 on notice in this case. You don't have the formal presentation
19 of the evidence. In fact, the rule contemplates affidavits or
20 verified complaints with no evidence on the other side. The
21 preliminary injunction hearing, on the other hand, contemplates
22 a record developed as fully as it can be, given the time
23 constraints.

24 I don't -- and I'm not going to settle any discovery
25 disputes that are currently existing. If you have any,

1 Judge Stanley is down the hall. But I can tell you what I
2 expect at the hearing. First of all, we'll do it in a fairly
3 formal way. We'll do a ten-minute opening statement by the
4 plaintiff. You've got to have those to satisfy your clients.
5 It also is good to give me a preview of where you're going
6 with your case. And a ten-minute opening statement by the
7 defendants, again, with a preview of where they're headed.

8 And then, Mr. DePaulo, we'll turn to your side for the
9 presentation of evidence. It is tempting in cases that have
10 the, how shall we say, the public appeal of cases like this to
11 play to the galleries. I know that none of you would ever
12 consider doing such a thing.

13 *MR. DePAULO:* I'm especially immune, Your Honor.

14 *THE COURT:* You're especially immune to that, I'm
15 certain. It is, though -- we are limited in time and it is
16 therefore important that we reserve our time to get the
17 evidence in. And, quite frankly, while I enjoy watching good
18 lawyers engage in bombastic repartee, it's not going to be very
19 helpful, so, having said that, I'll ask you what I think you're
20 already prepared to answer. How many witnesses do you plan to
21 call?

22 *MR. DePAULO:* Your Honor, I've designated six people
23 as experts and eight as fact witnesses.

24 *THE COURT:* All right.

25 *MR. DePAULO:* And let me add, if I might --

1 **THE COURT:** Sure.

2 **MR. DePAULO:** -- real quickly, it's very probable
3 that the number five expert witness, Randy Huffman of DEP, will
4 not appear. Pam Nixon, the No. 4 person, is the environmental
5 advocate there, and I've issued a subpoena for her and I think
6 that will probably satisfy the evidentiary showing that I
7 wanted to make there.

8 **THE COURT:** All right. Can you give me just a brief
9 idea of what each of the experts and fact witnesses may say?
10 And I'm not going to hold you to this.

11 **MR. DePAULO:** I understand. My first witness, Your
12 Honor, V. Ramana Dhara, is a medical doctor.

13 **THE COURT:** Say that again, in case she didn't get it
14 the first time.

15 **MR. DePAULO:** It's the initial "V," and then Ramana,
16 R-a-m-a-n-a, and the last name is Dhara, D-h-a-r-a. He's an
17 M.D. Your Honor, he is a medical doctor who will testify as
18 to what MIC does to people, and he will testify as to what
19 chemicals -- I should say what toxins are generated when MIC
20 decomposes. He will talk about -- I should add, he's been to
21 Bhopal back and forth perhaps as many as a dozen times, and
22 stayed for two weeks or more each time. He is very, very
23 familiar with what happened there. He's very familiar with
24 the layout of the Institute plant, at least until recently, so
25 he will be able to testify as to the likely, for want of a

1 better -- the scale of the catastrophe. In other words, if
2 the equation that I'm asking the court to apply is, and it is,
3 the one where you apply a likelihood number, a percentage
4 number against a catastrophe, he's going to be the person to
5 say what is the likely impact on people at one mile, two miles,
6 five miles, seven, nine, twelve, fifteen, out to twenty-five,
7 based upon a very extensive history of involvement with the
8 Bhopal matter itself.

9 J. Patrick Conlon, I put "R.E." next to his name. I think
10 he's a registered engineer, but I don't know that. That was
11 my first draft and I never went back and changed it. He is a
12 former employee of the Chemical Safety Board and his area of
13 expertise is something -- it sounds like industrial process
14 safety, and I may have those words in the wrong order, but he's
15 going to testify to the percentage side, Your Honor. In other
16 words, taking a look at the --

17 *THE COURT:* Process hazards analysis?

18 *MR. DePAULO:* Yes. He's a person who would look at a
19 plant and the manner in which they've configured it and state
20 what either conspicuous or inconspicuous dangers are inherent
21 in the layout. He will comment upon the rebuild of the plant
22 from an industrial process point of view.

23 Rahul Gupta is the Kanawha County-Charleston Department
24 of Health director. He is under the rubric of the Chemical
25 Safety Board's recommendations. He's the person who would be

1 in charge of implementing what is described colloquially as
2 the Contra Costa County ordinance, and that is an ordinance
3 which is discussed in the Chemical Safety Board report as --
4 effectively as being a model which municipalities and counties
5 would or could adopt as a means of anticipating or dealing
6 with, planning for, the kind of disaster that occurred at
7 Bhopal or last August 2008 at Institute.

8 *THE COURT:* While you're there, and because I'll
9 forget it if I don't interrupt you and say it now, it is of
10 some interest to me that in the development of tort law in
11 many, many areas it has been the case that tort law developed
12 because of regulatory failure or gaps; and I take it that that
13 is what you are suggesting from the report exists, and the
14 report suggests this as a legislative remedy.

15 *MR. DePAULO:* Correct. That's the core of it, yes,
16 Your Honor.

17 *THE COURT:* Okay. I didn't mean to interrupt you.
18 I was just curious.

19 *MR. DePAULO:* No, no, no; that's precisely it and
20 it's an accurate description of the manner in which, in my
21 view, at least, tort law has developed. And I guess I would
22 add, although it's going to sound like argument, that the
23 courts have usually led the way, because they have had to
24 because the cases -- the bad -- the hard, bad cases land in
25 the courtroom before they ever -- before the legislatures,

1 typically, or agencies respond. But that, I believe, is a
2 fair characterization of the sequence of events historically.

3 *THE COURT:* At least it is a foundation for your
4 argument as to the relevancy of this testimony.

5 *MR. DePAULO:* Yes, Your Honor. There is one --
6 Dr. Gupta will testify that, I think in his language, that the
7 best possible way to protect the citizens of Kanawha County is
8 to adopt the CSB rules; and he will further testify that we are
9 not prepared now for anything remotely on the scale of a
10 Bhopal -type disaster.

11 Pam Nixon is the environmental -- and I put "M.S." next
12 to her. I think she has a Master of Science, but she'll have
13 to tell us that. Pam Nixon is the environmental advocate at
14 the West Virginia Department of Environmental Protection, and
15 I am calling her, to some extent, as a fact witness. And I
16 don't know the extent to which she will express any opinion,
17 but I've listed her under expert witnesses, and she will
18 testify to the degree to which, if at all, DEP has, as of the
19 date of her testimony, implemented any or all of the
20 recommendations of the Chemical Safety Board.

21 *THE COURT:* Let me make it clear, I recognize that
22 we've got a week to go and we only had two weeks to begin with,
23 so I know that things are going to change in the next week; and
24 if they do, they do. Just try to be cooperative and let each
25 other know, because by surprising each other you'll drag out

1 the hearing.

2 *MR. DePAULO:* Yes. Okay. Well, I'm tipping it off.
3 I'm trying to avoid too much advocacy here, Your Honor.

4 *THE COURT:* You're doing what I want you to do; I'm
5 just saying I'm not going to hold you to --

6 *MR. DePAULO:* Okay, I understand.

7 *THE COURT:* -- these people as being your only
8 witnesses, nor as saying what you say they're going to say;
9 nor am I committing to you that I'm even going to listen to
10 them say what you say they're going to say.

11 *MR. DePAULO:* I understand, Your Honor. I
12 understand.

13 *THE COURT:* So, there you go.

14 *MR. DePAULO:* Sanjay Verma is an Indian citizen who
15 will -- who leads a, for want of a better word, a survivor
16 organization in Bhopal, and he will testify to the long-term
17 effects on a community of the kind of event that occurred in
18 1984 at Bhopal.

19 Fact witnesses, No. 1, I've listed a gentleman named Hank
20 Teschendorf, and I hope I've spelled his name correctly, and
21 let me tell the court: what is he going to testify to? "I have
22 no idea" is the short answer, and I will say this: How do I
23 know this -- who is he and how did I come about knowledge of
24 him? He was a person -- he worked for Bayer CropScience for
25 three -- thirty years or so, plus or minus at the edges. He

1 was -- and I believe he ran a chemical plant similar to the one
2 at Institute out in Missouri - somewhere in the Midwest, Your
3 Honor. He was there -- although I don't think they had any
4 MIC production, he was there at the time of the August 2008
5 explosion. He was then -- by February, '09, or thereabouts, he
6 was transferred to Institute and made -- I'm just going to call
7 him the No. 2 over there, but I have the impression that he was
8 in charge of the reconstruction. I have never talked to him.
9 I received information this past week alleging that he had been
10 forced out of Bayer CropScience because he was in charge of the
11 construction and declined to sign off on it, if you will. He
12 said it shouldn't be restarted. That's the information given
13 to me, which I have no basis for verifying whatsoever at this
14 point. And I've got a telephone number -- he left Bayer
15 CropScience, I believe at year end this past year, and he is
16 now apparently heading up a new business in Muskegon, Michigan,
17 which is an alternative energy business involved in the
18 development of new and improved batteries for automobiles, I
19 believe. And he has -- but that's a business coming into
20 being. If you call the only phone number for it, you get a
21 voicemail, which I think is his voicemail. They may not even
22 have an office. I do not have a phone number for him. I have
23 an outstanding request for a whole lot of documents pertaining
24 to him, so he may -- my ability to get him here, get testimony,
25 is totally problematic, but if he -- if I am able --

1 *THE COURT:* Who is it? Yes, ma'am?

2 *COURTROOM DEPUTY CLERK:* Excuse me. Did you need
3 Judge Stanley? She's on the phone.

4 *THE COURT:* No. I'll call her after.

5 *COURTROOM DEPUTY CLERK:* Okay.

6 *THE COURT:* You can tell her that she is most welcome
7 if she wants to come to this. I don't know. Although -- do
8 you-all have a later appointment with her or do you have
9 anything you have to take up with her?

10 *MR. EMCH:* With Judge Stanley, Your Honor?

11 *THE COURT:* Yes.

12 *MR. EMCH:* The only thing that we were going to
13 mention today to Your Honor was the question of sort of the
14 focus of the hearing, and therefore of the discovery, which we
15 would submit and request be on MIC and post the time that Bayer
16 acquired the facility, which was June of 2002. Those were two
17 things we were going to take up. We can take them up -- would
18 I like to take them up with Judge Stanley if Your Honor does not
19 wish to consider that question.

20 *THE COURT:* Tell her the lawyers are here in the
21 *Nye v. Bayer* case and if she has time they would like to see
22 her briefly after this hearing.

23 *COURTROOM DEPUTY CLERK:* Okay.

24 *THE COURT:* Mr. DePaulo?

25 *MR. DePAULO:* Your Honor, the next two witnesses,

1 Sue Ferguson Davis and Donna Willis, are two African-American
2 women who live in Institute in I think what we have all
3 considered very close proximity to the Institute plant. They
4 will discuss two topics broadly: One is the fear in which they
5 live, which both is subsequent to Bayer's acquisition and
6 before that time. They will also testify to a very ironic
7 turn of events on the evening of August 2008 (*sic*). The short
8 of it is that Sue Davis' daughter in Arizona was the first
9 person to report the explosion to EPA in Washington, D.C.,
10 because Sue Davis and Donna Willis, when they ran out -- they
11 heard the explosion, they ran out of the house. They're
12 next-door neighbors, apparently. They assumed it was the
13 next-door neighbor's house that blew up, because that's how
14 close it was. When they both recognized it was the plant,
15 they hopped in their cars and took off out of Dodge, with cell
16 phone numbers. Sue grabbed the Yellow Pages. She was going
17 to call as she went, but somebody had torn out those front
18 pages that have the 800 numbers, so she called her daughter in
19 Arizona, said -- told her what was happening, said, "You got to
20 tell EPA in Washington." She then called a friend in Seattle
21 and told her the story. They both called EPA headquarters in
22 Washington, and I'm sure -- I mean, it has some element of
23 comedy about it, but the EPA headquarters people in Washington
24 asked the obvious question: "What do you know about what's
25 happening in Institute, West Virginia?" But it gets to the

1 necessity of the NIMS rules being followed, and so that, plus
2 their fear, is important.

3 Warne Ferguson is also a resident of Institute in a
4 neighborhood called Pinewood. He is an elderly African-
5 American gentleman. His wife had chronic respiratory problems.
6 She died shortly after the August 8 (*sic*), 2008 explosion, and
7 in his judgment, and hers, because of her exposure to gases
8 that night.

9 Mike Harman is also a resident of Institute. He will
10 testify to his ongoing anxiety about the matter, but also to
11 the long-term pain and experience he's had during the period of
12 Bayer ownership, and before, as a result of toxic releases.

13 Denise Giardina is a prominent American writer, West
14 Virginia writer -- American writer who teaches at West Virginia
15 State University. She will testify as to her experience in
16 1993 living through the explosion at that time, which clearly
17 antedates Bayer, but which informs and drives her daily
18 experience teaching at State.

19 Reverend Jim Lewis is a minister in Charleston, West
20 Virginia. I believe he resides in Charleston, West Virginia.
21 He will testify as to his -- the, if you will, uptick in his
22 ministerial duties counseling people who are dealing with the
23 fears that arose out of the August 28, 2008 explosion.

24 Maya Nye, who is the lead-named plaintiff, has lived her
25 entire life in Institute. She will testify as to the events,

1 again, from the 1993 explosion and from the 2008 explosion, and
2 to the fears generally of her and her family living in the
3 area.

4 *THE COURT:* What evidence or witnesses will you
5 present to support your assertions about the plaintiffs'
6 proximity to the plant?

7 *MR. DePAULO:* You mean where they --

8 *THE COURT:* Reside, uh-huh.

9 *MR. DePAULO:* Well, Your Honor, they will all give an
10 individual address.

11 *THE COURT:* I see.

12 *MR. DePAULO:* And I will try to, by that time, have
13 a map with, for want of a better word, pushpins. I'll try to
14 get a map which is perhaps a blowup of the local area, and so
15 that the pushpins will have meaning in terms of distances and
16 streets.

17 *THE COURT:* I'm not trying to, and I don't intend to
18 at this hearing, rule on admissibility or the breadth of
19 testimony of any sort, and I will tell you that I will be more
20 liberal in the admission of testimony since it's to the court
21 instead of to the court and jury, when I can use my better-
22 informed self after I walk out of the room to make that
23 admissibility determination, but it will be important that
24 counsel be prepared to object on grounds of admissibility,
25 particularly with regard to *Daubert*, *Kumho Tire* expert

1 qualifications and so forth. I don't -- I would appreciate not
2 making a huge record about that, except to the extent that it's
3 necessary to do it for the preliminary injunction.

4 *MR. DePAULO:* Your Honor, there is one other matter.

5 *MR. EMCH:* Your Honor --

6 *THE COURT:* There is one witness that you mentioned,
7 I think, and I'll ask you what you plan in other regards about
8 what seems to be your main assertion, and something counsel
9 for Bayer mentioned, that the startup of MIC production at the
10 Institute plant poses a risk of catastrophic harm to your
11 clients.

12 *MR. DePAULO:* Your Honor, the second expert,
13 Mr. Conlon, I think that would be a part of his testimony.

14 *THE COURT:* You put in your papers something that was
15 relied upon by plaintiffs at the TRO hearing, an Offsite
16 Consequences Analysis --

17 *MR. DePAULO:* Yes.

18 *THE COURT:* -- of which you provided us an unofficial
19 copy. Have you requested in discovery the copy of that -- an
20 official copy of that?

21 *MR. DePAULO:* I'm not sure if I have, although I've
22 made a number of broad requests. Let me --

23 *MR. EMCH:* I think they are probably covered. I
24 think so, Your Honor.

25 *MR. DePAULO:* Let me, if I might, Your Honor, suggest

1 something --

2 *THE COURT:* Let me just say this: the spreadsheet is
3 hard to read.

4 *MR. DePAULO:* I understand. I understand.

5 *THE COURT:* All right.

6 *MR. DePAULO:* Your Honor, just to make it a little
7 bit simpler for you, I had the same problem, and there is a
8 number of rows. There is only one row that's important, and
9 that's row 16, and that's the one where I went in there and
10 using Excel blew up the numbers a little bit bigger, so that
11 was intended to help everybody with more gray hair than black.

12 *THE COURT:* And as to everything you've said, I hope
13 counsel for the defendant understands that I know or have an
14 inkling what your objections might be to some of this evidence;
15 I'm just seeing where we're headed.

16 *MR. EMCH:* Would Your Honor be -- may I, Your Honor?

17 *THE COURT:* You can say anything you want.

18 *MR. EMCH:* Would you be -- you and/or the plaintiffs'
19 counsel be interested in a stipulation with respect to all or
20 some of the plaintiffs' along the lines that we stipulate that
21 they are afraid? We can pick the language.

22 *MR. DePAULO:* I'm sorry; I didn't hear that word.

23 *MR. EMCH:* That they are afraid or that they have
24 fear, and perhaps even that they think or even believe that
25 problems that they have are a result of the plant.

1 *THE COURT:* I'm not going to express an opinion on
2 whether or not I would value that. I can say to you that all
3 stipulations are encouraged, to the extent that the parties
4 find them valuable and help us reduce the amount of time in the
5 very short period we have available -- or reduce the necessity
6 of dealing with certain things.

7 *MR. DePAULO:* If I might, Your Honor?

8 *THE COURT:* Go ahead.

9 *MR. DePAULO:* I certainly understand the need for
10 some degree of judicial economy here, and in listing my facts
11 witnesses in particular, although it may seem like a somewhat
12 large number; and, unlike lawyers, some of them actually like
13 the sound of their own voice. I have -- I'm acquiring the
14 skill of beating people into submission to answer the question
15 I ask and not give us the history of western civilization.

16 *THE COURT:* I'm pretty good at that, too,
17 Mr. DePaulo, so we'll be able to move them along.

18 *MR. DePAULO:* Okay.

19 *THE COURT:* I'm going to act like Judge Casey for a
20 minute and tell you a story.

21 *MR. EMCH:* Only a few of us recognize those.

22 *THE COURT:* Well, that's right, only a few of you
23 are old enough to remember. I guess probably you qualify, and
24 I bet Mr. DePaulo comes close to qualifying.

25 *MR. DePAULO:* I think I do.

1 **THE COURT:** My brother Tom, who I practiced law with
2 for 25 years, called over one day and he said, "What are you
3 doing?" I said, "Well, I'm helping the parties in a settlement
4 conference." He said, "How's it going?" I said, "Fine; I
5 think we've got it settled." He said, "Well, you're a hell of
6 a lot better at it now than you were when you were over here."

7 **MR. DePAULO:** That's right. Amazing the difference.

8 **THE COURT:** Yeah, and I'm better at dealing with
9 witnesses now than I was. I'm sorry, I interrupted you.

10 **MR. DePAULO:** No, that doesn't hurt at all.

11 **THE COURT:** While you were talking about that,
12 though, I remember, and you relied rather heavily on this
13 report.

14 **MR. DePAULO:** The OCA, Your Honor.

15 **THE COURT:** Right. The OCA considered -- I just
16 remember this from anecdotal sources, that the OCA considered
17 an Offsite Consequences Analysis of some sort.

18 **MR. DePAULO:** Yes.

19 **THE COURT:** But did not include it in the final
20 report. Am I dreaming about that?

21 **MR. FISHER:** I think you are referring to the CSB.

22 **THE COURT:** Yeah, I am referring to the CSB. The
23 initials get me confused.

24 **MR. DePAULO:** Your Honor, I don't think they allow
25 anybody to copy -- make a mechanical copy of the Offsite

1 Consequences Analysis and, by the way, apparently, according to
2 the transcript, I made a statement that Maya and I went to
3 Washington to look at that, it was Maya and I alone, and I
4 didn't even catch the error. My girlfriend caught the error
5 and wanted me to explain how it was that --

6 *THE COURT:* That you and Maya alone -- *(inaudible*
7 *comments and laughter.)*

8 *MR. DePAULO:* Yeah, so I mean, somebody was paying
9 attention to that transcript, Your Honor.

10 *MR. EMCH:* Well, now I know why he wrote me that
11 e-mail and corrected himself. The paper trail gets longer and
12 longer.

13 *MR. DePAULO:* Yeah, anyway, Maya and I alone went --
14 well, I don't -- not with me. She went to Washington, D.C. to
15 examine that document.

16 *THE COURT:* I was just concerned about this other
17 one. It may not be anything you have or they have or anybody
18 has dealt with. One of the things, obvious -- and this I will
19 hear from Mr. Emch, I imagine, in a minute is this plant today
20 is not very much like the plant that Offsite Consequences
21 Analysis was made to deal with, and maybe that -- I don't know
22 enough -- I don't know enough about this. I mean, that's one
23 of the frustrating things about dealing with this on such a
24 short term basis. I really do want to know that assuming, as
25 I am right now for lack of any evidence or proof, I'm assuming

1 that MIC is going to be manufactured and stored in some
2 quantity at the Institute plant. I'm interested in what are
3 the consequences for a disastrous dispersal or explosion of
4 MIC in varying quantities, and, of course, I will be interested
5 from the defense perspective on how different is it if, as I
6 understand it, the MIC here now is stored underground. And
7 will it all be, or will there still be tanks aboveground?
8 Those are things I don't know; and maybe you've gotten into
9 those in discovery, I don't have any idea. Let me let you go
10 back to your witness list, and then maybe at the end after I
11 hear from both of you I can have a couple questions.

12 *MR. DePAULO:* Okay. Your Honor, if I might, on two
13 of the topics that we've talked about here, one of them being
14 the where-the-plaintiffs-live question that I hope for the
15 pushpin matter, and also on the OCA graphic depiction which I
16 provided, what I've tried to do -- and if I might, Your Honor,
17 Bayer has produced for me a three-page document which looks a
18 whole -- it's called "The Worst Case Scenario for MIC Release,"
19 and it says RMP, which is the Risk Management Program, and it
20 seems to be not absolutely identical but real, real, real close
21 to the OCA that was the basis for what was filed --

22 *THE COURT:* So the answer to my question, you fellows
23 are already into this area in discovery?

24 *MR. DePAULO:* Yes.

25 *THE COURT:* And the record is developing in that

1 regard?

2 **MR. DePAULO:** Yes, Your Honor. There is one -- there
3 is one great limitation, though. His map, like my big red dot,
4 basically makes no real differentiation based upon how many
5 people -- it says there is 300,000 people in that thing, but
6 the question is: who's where? And I have made an effort to --
7 and I found a web page that produces demographic maps, again,
8 give it a latitude line, plug in whatever radii you like, and
9 they'll tell you what those are. I've given a copy of this to
10 counsel, and I've generated two reports, one that goes out one
11 mile, two miles and five miles. You can only do three circles
12 at a time. And then it overlays that over the top of what was
13 formerly the big red dot and it will tell you how many people
14 live within the first circle, the second circle, and the third
15 circle.

16 **THE COURT:** That would be an area where either a
17 stipulation of some sort would be helpful or you're probably
18 going to have to find some witness that will light that up.

19 **MR. DePAULO:** We've suggested that, and let me add
20 real quickly, if I might, Your Honor, Mr. Emch has been, I
21 think it's fair to say, forthcoming, certainly, in terms of
22 documents. And he also has made one important stipulation I
23 think that will eliminate an enormous amount of foundation
24 evidence, and that is he's prepared to stipulate, for purposes
25 of at least the February 25th hearing, but not necessarily

1 beyond that, as to the facts, but not the opinions, stated in
2 the January 20th Chemical Safety Board report. So I think by
3 itself that eliminates, you know, dozens upon dozens and dozens
4 of witnesses in reality.

5 *THE COURT:* Well, Judge Stanley told me you-all were
6 working hard in good faith, and I appreciate that.

7 *MR. DePAULO:* Thank you.

8 *THE COURT:* Go back to your witness list for me.

9 *MR. DePAULO:* Well, Your Honor --

10 *THE COURT:* Is that it?

11 *MR. DePAULO:* That's it, and I've done the standard
12 boilerplate reservations to call everybody in the northern
13 hemisphere if I need it.

14 *THE COURT:* All right. Mr. Emch, how many witnesses
15 have you got?

16 *MR. EMCH:* And, Your Honor, I don't think, unless my
17 secretary just hauled off and did it on her own, that that's
18 been filed yet, simply because I don't want to have misspelled
19 the names of any of my clients.

20 *THE COURT:* And you also -- I'm not going to require
21 that you be limited to this.

22 *MR. EMCH:* Of course. I'm not going to change any
23 of the substance, but I just want to make sure the names are
24 spelled right.

25 *THE COURT:* All right.

1 **MR. EMCH:** Your Honor, the experts that we list are
2 four in number. Mr. Gott and Mr. Napale are both individuals
3 who I would describe as having expertise in the process safety
4 world. And I'll provide résumés, of course, to Mr. DePaulo and
5 to the court, if the court wishes. But that's their area of
6 expertise. Mr. Wesevich is a structural person. He will be
7 able -- the first two will be able to talk about the safety,
8 the construction of the process by which the MIC would be
9 actually manufactured. Mr. Wesevich would talk about the
10 structural aspects, or what you might refer to as containment
11 as you were talking about. MIC, once it exists as a substance,
12 has to be moved from one place to another place through pipes.
13 And to the extent that it is stored, and Your Honor's statement
14 earlier is correct about the cutdowns in the quantity that
15 would ever be stored. The structure of the tanks, the
16 containment building, all of those new things that we are
17 working on, he would be one who could evaluate that.

18 Now, I will say for the court that as far as these experts
19 are concerned, as the court mentioned, if we call them, and
20 we're not absolutely certain that we would call them or that we
21 would need to, my intention with them, as well as with the
22 other witnesses that I'll talk to the court about, is to make
23 their testimony as crisp and brisk as I can. I don't intend to
24 have an expert on the stand for two hours to talk in great
25 detail. I intend to have an expert that will quickly give the

1 court his or her qualifications, background, experience, what
2 they've done, and give you the bottom line that I'm interested
3 in. They will obviously be able to be cross-examined or
4 questioned by the court as they would wish, but I don't intend
5 to move them slowly if they come up.

6 Dr. David Leggett, No. 4, Your Honor, there's been a lot,
7 of course, of interest and discussion about the August of 2008
8 explosion in the methomyl-Larvin unit, and that, of course, is
9 the primary subject and the driving reason - the only reason -
10 for the CSB investigation that Your Honor has talked about.
11 Dr. Leggett is the person -- the outside expert person who we
12 retained to do an independent investigation with respect to
13 that explosion and all of the parameters and things that
14 influenced or related to that explosion. His report, as well
15 as he, will be available and will be able to testify about
16 those things as well.

17 As far as the fact witnesses are concerned, Your Honor, we
18 have essentially eight persons. I do not expect that we are
19 likely to call all eight of those people. More likely, in my
20 mind, would be that we would call Steve Hedrick, who is the
21 current manager of what we call the Institute Industrial Park
22 at the moment. Patrick Ragan, who was at Institute for a very
23 long time, spanning many of the companies who have owned that
24 particular piece of land. Pat will certainly testify, and I'll
25 give you briefly what the testimony will be about here in a

1 moment. Walt Martin, the manager of maintenance and utilities
2 at Bayer CropScience now will testify. Those three gentlemen
3 collectively would cover -- and again, much here will be the
4 sense of what the court is interested in, and I know the court
5 is going to make us aware of what is -- seems meaningful and
6 what you're ready to move on about. We'll be sensitive to
7 that, but what we would plan and intend to do, in whatever
8 detail the court may wish or permit, would be a discussion --
9 a little bit of a discussion about Bayer CropScience itself and
10 where it fits in the grand scheme, some history of the
11 Institute facility, including, you know, who's there, who the
12 tenants are, what it's done historically, what it makes, what
13 those things that it makes are used for, that kind of stuff, a
14 little bit generic. We will have -- and this is the core of
15 our testimony, or the testimony we would offer, and this would
16 be mainly Mr. Ragan and Mr. Martin, who will talk about what
17 the court was just -- what the court was just mentioning. One
18 element or aspect is, and we feel it is important for the
19 court fully to understand both the origins, the regulatory
20 requirements, et cetera, that relate to what we would refer to
21 as the worst case scenario. There is what is called the worst
22 credible or reasonable case scenario. There's also a group
23 of requirements in a scenario that is -- that is done in
24 connection with emergency response planning. That's another
25 scenario. These are all governed, Your Honor, by -- I won't --

1 in one instance I'll say rigid, but particular requirements
2 that permit the agencies who may look at least at the latter
3 two, the worst credible case and the emergency response case,
4 will be of assistance to them in making plans about how they
5 might respond to a likely - and I use the word loosely - a
6 possible, or reasonably possible event.

7 *THE COURT:* Is it fair for me to assume that the
8 information that Mr. Ragan and Mr. Martin have, maybe
9 Mr. Hedrick, will be the same information that informs your
10 experts on risk analysis?

11 *MR. EMCH:* Yes, your Honor, it will be among or a
12 part of the same information.

13 *THE COURT:* Right.

14 *MR. EMCH:* Yes, that is correct. The worst case
15 scenario, Your Honor, which is the only one that really has
16 been focused upon or talked about, will probably bare a
17 considerable amount of -- I'll say a considerable amount. We
18 will try to make that as clear as we can to the court. That
19 is the particular scenario that is the most rigid, and I won't
20 be argumentative but would suggest to the court -- how shall I
21 frame it? I believe the language will remain in our response
22 to the preliminary injunction motion. It is physically
23 impossible for that scenario to ever happen, and we'll explain
24 to you why that is true. It's way off on the spectrum.

25 But those things we think are important. Your Honor is

1 interested and mentioned that the plant is probably a lot
2 different today than it was. These witnesses will talk to you,
3 again, I hope in an organized fashion so that the court can
4 understand, about the history of the MIC part of this facility.
5 And my intention at the moment is to bracket that with the
6 original, which I think is in the mid-1960's, when it was first
7 constructed and began to be used. We'll bracket that. I would
8 appreciate the court's input, but assuming that the plaintiff
9 and witnesses, like the one gentleman that he mentioned,
10 testify as we would expect them to, and the court permits it,
11 we would bracket at the time of Bhopal in the mid-1980's; the
12 next would be in 2002 when Bayer took over the Institute
13 facility; and, finally, we would come to now. Easy way to
14 state it for the court is that the "now," if you have three
15 elements to the plant, the process part that I described or
16 mentioned to the court, the transportation part, which is now
17 very minimal, and the storage part, those three parts -- the
18 storage part is entirely new. Entirely new. And overall what
19 we have planned and built and are finishing is about -- if the
20 whole thing that I just mentioned to you is a hundred percent
21 of what we do with MIC, the new part is about twenty-five
22 percent, and we will have -- we will make that as clear as we
23 can to the court, that being, again, the new stuff, the
24 structural part of it relating to the storage of this substance
25 and all of the safety measures that are in place with respect

1 to that element.

2 *THE COURT:* As Mr. Fisher no doubt knows, and as
3 Mr. DePaulo knows -- and I can't remember if you've tried a
4 case in front of me or not.

5 *MR. EMCH:* I have not, Your Honor.

6 *THE COURT:* I am not inclined to ever be inscrutable
7 or try to play hide-the-ball. I don't ask devil's advocate
8 questions, except rarely. I generally ask what I want to know,
9 because I really do want to know it. And sometimes it's not
10 because I think it's particularly meritorious, but if I'm going
11 to consider it, I need to -- if I'm going to consider this
12 theory, then I need to know this fact, and so forth. What I'm
13 trying to give you is a little bit of the what we used to do
14 back in the cigarette cases by the hour, which was sit on the
15 phone with lawyers in big cities, and they'd want to know how
16 does the judge think.

17 *MR. EMCH:* Yes.

18 *THE COURT:* Which I thought was a considerable waste
19 of time, but to the extent anybody wants to know how I think,
20 and those of you who have been before me before, I'm fairly
21 transparent. The things that interest me are fairly clear. I
22 think from my orders and from what I said on the bench, the
23 things that worry me about this case I've tried to maybe over
24 emphasize. And from what I've heard you-all say, you're right
25 on top of that. Okay. Fact witnesses.

1 **MR. EMCH:** The subject of Bhopal, Your Honor, which
2 everybody understands, I guess, and Bhopal is, in fact, not
3 only the largest, the most significant, the most terrible,
4 et cetera, but it's pretty much the only historic incident
5 involving MIC. And we are prepared, Your Honor, to do a very,
6 very comprehensive and detailed -- I'm not saying that would
7 take a day, but I'm talking about an hour or so, should Your
8 Honor wish it, should it seem appropriate, that will compare
9 indeed what happened at Bhopal with the situation that existed
10 here at the same time; and, in fact, is so, so, so dramatically
11 different from what exists today.

12 **THE COURT:** And that's what some of these fact people
13 will do?

14 **MR. EMCH:** Yes, sir; and Venay Devgon, who I do
15 notice the name is misspelled, so that's definitely one
16 correction I have to make, I will say, Your Honor, with no
17 disrespect to any of Mr. DePaulo's witnesses, knows more about
18 that than anybody in the world. And I'll just say it.

19 Al Luk is a gentleman from Research Triangle Park. I'll
20 get his exact title. Mr. Luk and Mr. DeLong would talk about
21 the impact, Your Honor, of not being permitted to resume the
22 MIC operation. And we are not going to hit that with a
23 sledgehammer, Judge. We do want to make Your Honor understand,
24 as best we can, what those ramifications would be, and we'll
25 do it, but I again assure the court that I'll do it as

1 expeditiously and in as economical way as possible.

2 One of the things that we do want to explain to Your
3 Honor, Mr. Hedrick would do this, will be what I refer to as
4 sort of a two-case situation here. Your Honor is aware that
5 the intention had been to resume MIC production for about an
6 18-month period, and I don't remember when that is slotted in,
7 but approximately 18 months from last week or a week or two
8 ago, and then that would end it. And we've talked about
9 employees and job loss and those kinds of things, but the
10 real -- the real situation here is a little bit more involved
11 than that. What we will present for Your Honor is essentially
12 a comparison or a contrast between what we refer to -- and this
13 ties into the 18-month window as a part of the plan, what we
14 refer to as the socially responsible way that we had planned
15 to deal with the closure or the cutoff of the MIC part of our
16 operation, and the lead time necessary for that and the steps
17 that are necessary in order to deal with employees, both those
18 that will remain and those that will not remain, and the
19 difference between that situation and one in which, you know,
20 now we are not able to continue and to resume production. And
21 there will also -- Mr. DeLong in particular will testify some
22 about the market impacts with respect primarily to the stopping
23 of production of Temik, which Your Honor has heard about. But
24 again, these will be as brisk and as concise as we can make
25 them.

1 *THE COURT:* Well, I think it -- I mean, clearly, for
2 your side of the case it's important that all that is in the
3 record.

4 *MR. EMCH:* Yes, sir.

5 *THE COURT:* I need that.

6 *MR. EMCH:* Mr. Covington is listed and may be called.
7 He is a gentleman who is most knowledgeable about the
8 regulatory programs and environmental programs, permitting, and
9 et cetera, and requirements that are levied upon Bayer and in
10 particular upon MIC.

11 *THE COURT:* This will be -- he'll be the second
12 person, in addition to the lady from DEP that Mr. DePaulo is
13 going to call, that will be offended by my rather flippant,
14 but not intended in that fashion, question last week about who
15 at DEP has a clue how to safely start up an MIC plant. That
16 came more from my familiarity with state government than from
17 my judgment on the merits.

18 *MR. EMCH:* Mr. Siffryn, Your Honor, is the Director
19 of Production at Bayer CropScience. He might be called upon
20 to testify; I doubt it, but he might be.

21 And, of course, the plaintiffs' witnesses.

22 As to exhibits, once again, I don't want -- there is so
23 much stuff, as Your Honor well knows, and we want to try to be
24 as economical as we can, but we still do want the court to be
25 able to look at and review any items that are of paramount

1 signi ficance. We believe that the --

2 *THE COURT:* I'm sorry to interrupt you --

3 *MR. EMCH:* Sorry, Your Honor.

4 *THE COURT:* -- but if I don't interrupt counsel, I
5 usually forget what I wanted to ask. One of the things that
6 I've recognized in my effort to give the maximum amount of time
7 to the parties to develop the factual record is I have placed
8 myself right up to the expiration of the temporary restraining
9 order at 3:00 on Friday afternoon. I have no doubt that I can
10 readily extend it if the hearing is not complete, but I would
11 like for you to talk to your clients about the idea of a two-
12 or three-day extension beyond the hearing.

13 *MR. EMCH:* We're amenable to that, Your Honor.

14 *THE COURT:* So that I have a more mature opportunity
15 to deal with some of the exhibits that you're talking about,
16 for example.

17 *MR. EMCH:* I've discussed that with them in detail,
18 and we do not want to throw the baby out with the bath water.
19 We do want the court to be as educated as we can assist the
20 court to be, and we definitely want full consideration of the
21 matter, so that will not be a problem.

22 *THE COURT:* Well, it had occurred to me in the time
23 frame of a chemical making of pesticide that's going to go out
24 of production in a period of time, if I recall, that the
25 preliminary injunction has unusual importance one way or the

1 other, because by the time, if we took the usual course to
2 permanent injunction and had a year and a half's worth of
3 discovery, we're there and there's nothing left to try.

4 *MR. EMCH:* You're correct, Your Honor.

5 *THE COURT:* But I would count upon just the goodwill
6 of the parties, and you just have to wait until I hear all
7 this and then I'll talk to you on Friday evening or Saturday
8 evening, or whenever it is we finish, about how much time you
9 might be willing to give me to try to do a good job of it.

10 *MR. EMCH:* And I will say, Your Honor, that because
11 of the court's clarification order, based upon my perhaps
12 inartfully crafted motion seeking that, but that permitting us
13 to continue with those activities took a week or so of the
14 pressure off of the things that Your Honor is discussing.

15 *THE COURT:* Well, be thinking about it, Mr. Emch, and
16 talk to Mr. DePaulo about it, because this isn't going to be
17 easy. I've got three very smart law clerks, and as you might
18 guess, we've already been in the books a lot, and this is
19 difficult. I also note, with readiness, that both sides are
20 already really familiar with West Virginia law. You read it
21 differently, but both sides are very familiar with it, and I'm
22 put in the position of predicting what West Virginia will do.
23 And in the interests of full disclosure, I will be candid,
24 whether I deny or grant the' preliminary injunction, I will
25 likely certify the matter to the West Virginia Supreme Court

1 of Appeals, unless you can talk me out of it. Just something
2 to be thinking about. You may persuade me that the law is
3 fully settled and that there is nothing to certify. To be in
4 the interests of full transparency, that's how I might not be
5 doing it.

6 Do you have anything else you need from me today?

7 *MR. EMCH:* Your Honor, I don't think so. Again,
8 vis-à-vis the earlier question, and I just remembered, Mike -
9 the gentle touch, Your Honor - about what I'm forgetting.

10 *THE COURT:* Mike doesn't have a gentle touch.

11 *MR. FISHER:* No.

12 *MR. EMCH:* Your Honor would remember John Slack.

13 *THE COURT:* Sure.

14 *MR. EMCH:* I mean, he would have been a little more
15 demonstrative at that point.

16 *THE COURT:* We would have already had him out of the
17 room.

18 *MR. EMCH:* I will say again and represent to the
19 court and to Mr. DePaulo --

20 *THE COURT:* Let me go off the record now.

21 *MR. EMCH:* One more thing on the record.

22 *THE COURT:* All right. Sure.

23 *MR. EMCH:* We do have -- we do have some flexibility
24 on the court's consideration. There has been a lot of
25 discussion about a special master in this case, Your Honor.

1 *THE COURT:* Judge Stanley has told me about that.

2 *MR. EMCH:* And I think -- I don't want to -- I don't
3 want to mischaracterize Mr. DePaulo's position, but I think
4 the basic objection that Mr. DePaulo had stated before
5 Judge Stanley in saying that the plaintiffs would not consent
6 to that was the timing and whether or not there would be time.
7 We obviously thought a lot about that, too, but it certainly
8 is our position and our belief that, again, if you have a
9 qualified person that would be selected for this role, we
10 believe that there is sufficient time, with full cooperation
11 from us, which you would have, for such a person to be helpful
12 to the court. And we make no suggestion whatsoever as to how
13 the court might choose to use such a person, if selected.

14 *THE COURT:* As the time has burned up, as the candle
15 has burned, then the opportunity for selection, availability,
16 arrival, use of a special master has diminished. There's
17 nothing I would like better than to have a lot of smart people
18 telling me things in this case. I don't know what I can get
19 from somebody in three or four days that I'm not going to be
20 able to get from the hearing; and I gather, just from a rough
21 listen to what Mr. DePaulo is saying, and from what you're
22 saying, that I'm going to be able to get a pretty good idea.
23 Would I like to have had more information? Yes. The more
24 probabilistic the catastrophic harm is, the more likely it
25 is -- well, that's not right -- the more -- the more the law

1 favors the plaintiffs. Having risk analysis experts, as you
2 do - and as you do - testify about that matter makes a big
3 difference in the case, I think. I'm not certain about that,
4 because I haven't been able to absorb all of what's been placed
5 in front of me after it's been digested a good bit by people
6 that are bright, so I'll just have to do the best I can. And
7 if I get to the end of this and I say, I need this, or I don't
8 understand this, I'll say it and you'll hear it. We'll just
9 have to take it as it comes.

10 One of the -- one of the interesting parts of our legal
11 system is we act -- we ask lawyers to become specialists in
12 many areas in a hurry, and over a career in the law all of you
13 have mastered the intricacies of machinery and lots of things,
14 and then promptly forgotten most of it. I think at one time
15 I knew more about an oil field pump jack than most engineers.
16 I don't remember any of it now. We'll just have to -- you
17 recognize my limitations, both of you do, because you're bright
18 lawyers and you're good lawyers, and I know you'll help me the
19 best you can, and I appreciate it.

20 Now, did you need to see Judge Stanley?

21 *MR. DePAULO:* I think it would be helpful, frankly,
22 Your Honor.

23 *THE COURT:* To answer your question: I don't think
24 I can pull off a special master in the time remaining before
25 this hearing. If we had three weeks instead of one week, yes.

1 I don't have three weeks, so. . . .

2 *MR. EMCH:* Would Your Honor -- would Your Honor wish
3 for us to consider whether or not we could have three weeks?

4 *THE COURT:* Sure. Sure. If you could give me three
5 weeks to get a special master in, take a look at things --
6 picked by the court, take a look at things, provide a report to
7 everybody, and then give me a week after the hearing to do my
8 job, that gives me a full month extra to do a better job. But
9 I don't know what that does to your process. I don't have --
10 I don't have any sense of that, so I'm reactive when it comes
11 to that. I can't -- I understand -- Mr. DePaulo's reservation,
12 apparently, is very similar to mine.

13 *MR. EMCH:* Right.

14 *THE COURT:* And I have no doubt that if I get into
15 you folks giving me lists of experts we'll get in an even
16 bigger fight, but what I would do if I were -- if I had the
17 opportunity is I would go out and find somebody on my own, and
18 one or both of you will probably hate them, but at least I
19 would -- it would be a completely independent person.

20 *MR. DePAULO:* Your Honor, if I might, I don't oppose
21 anything that will assist the court in making a decision. And
22 I acknowledge fully the very highly technical character of this
23 information, and perhaps as a consequence of that, the premium
24 to the court of having access to expertise. My concern is
25 that if it were rushed, and I've used the phrase, and perhaps

1 somewhat caustically, that it would amount to no more than
2 really a photo op to show somebody going through the plant.
3 Now, I gather what Mr. Emch is contemplating, and I'm perfectly
4 prepared to listen to it, is what sounds like perhaps a
5 somewhat lengthy extension of the TR0 to accommodate a
6 hearing -- or I should say this interim study. If I might --

7 *THE COURT:* Special master, yes. I don't know if he
8 is contemplating, but he is suggesting.

9 *MR. DePAULO:* Well, they're thinking about it.
10 That's all right. And that's not a commitment on his part;
11 he's got to talk to his client. We have been in receipt of
12 somewhere between five and seven thousand pages worth of
13 documents over the last 72 hours, and the biggest concern at
14 our office is we're going to burn up the printer. I say that
15 only half facetiously; we have already bought a second printer.
16 But that's trivial compared to the problem of simply reading
17 the material. We are in the process of doing that, and we've
18 got a number of competent people available to us to assist, all
19 of whom have signed the appropriate protective orders and
20 nondisclosures agreements. But I guess the question that --
21 my immediate reaction is, you know, if we were to have that
22 kind of a somewhat extended TR0 period would the contemplation
23 be that the hearing -- and I'm thinking just out loud here,
24 would the hearing that we presently have scheduled for a week
25 from now and the briefing relating to it --

1 **THE COURT:** Would be three weeks from now.

2 **MR. DePAULO:** -- would also be extended?

3 **THE COURT:** Sure.

4 **MR. DePAULO:** Okay. Well, I mean, I'm not opposed to
5 anything that assists the court in making a decision, if it in
6 fact does that.

7 **THE COURT:** Well, let's go off the record for a
8 minute. Is that all right?

9 *(Remarks had off the record and the proceeding adjourned*
10 *at 2:17 p.m., February 18, 2011.)*

11

12 ***CERTIFICATION:***

13 I, Teresa L. Harvey, Registered Diplomat Reporter, do
14 certify that the foregoing is a correct transcript from the
15 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 18, 2011.

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

March 4, 2011

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