

TRANSCRIPT OF PROCEEDINGS

MOTIONS HEARING

APPEARANCES:

For the Plaintiffs:

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For the Defendant:

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APPEARANCES (Continued):

Also Present:

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Court Reporter:

Lisa A. Cook, RPR-RMR-CRR-FCRR

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P R O C E E D I N G S

THE COURT: Good morning.

THE CLERK: The matter before the Court is *Maya Nye, et al., vs. Bayer CropScience*, Civil Action Number 2:11-CV-87.

THE COURT: Madam Court Reporter, do you have the
appearances?

COURT REPORTER: Yes, sir.

THE COURT: I'm advised, Mr. Emch, that the defendant, Bayer CropScience, has a matter.

MR. EMCH: I do, Your Honor.

THE COURT: All right.

MR. EMCH: May I proceed?

THE COURT: You may.

MR. EMCH: Your Honor, let me first express my appreciation on behalf of my client, Bayer, for the Court's indulgence and patience and that of Mr. DePaulo, and most especially of one of the court's clerks, Ms. Case, yesterday as we worked through my request that Your Honor permit us to appear before you this morning.

Your Honor, on Monday, Tuesday, Wednesday, and Thursday of this week, high-level meetings were being held at the headquarters of Bayer AG in Germany regarding the status and the future of the MIC unit at the Institute plant here in West Virginia.

1 Yesterday morning at 11:00 a.m. German time, which is
2 6:00 a.m. Charleston time, a final decision was reached by
3 the company that they would not restart the MIC unit in
4 Institute, West Virginia, and that the manufacture, use, and
5 storage of methyl isocyanate in Institute, West Virginia,
6 would cease permanently.

7 I am sure that Your Honor and Mr. DePaulo and the
8 plaintiffs and the public can understand that Bayer had a
9 very, very strong concern that this decision be communicated
10 to the management and the employees at the Institute
11 facility who have such a stake in this matter and who have
12 worked so diligently and so hard in many instances for so
13 many years to support the Institute facility, that that
14 decision be communicated to them personally face-to-face by
15 the Institute management team.

16 Mr. Steven Hedrick, who is the Institute site manager
17 for Bayer, was in Germany for those meetings. His travel
18 plans had him arriving back in Charleston at 10:00 last
19 night. In fact, I don't know exactly when he got in, but I
20 think it was about 1:00 a.m. And those meetings with
21 management and employees in Institute have been occurring
22 this morning and are, in fact, occurring probably at this
23 very moment.

24 I hope Your Honor can also appreciate that Bayer
25 likewise did not want this Court to gain information about

1 this decision through some informal mechanism.
2 Consequently, I was informed of the decision yesterday
3 morning, and that is what precipitated my, in many ways,
4 obscure efforts yesterday to arrange for an audience with
5 Your Honor.

6 The decision that was made by Bayer was a very, very
7 difficult one. The precipitating factor, as I understand
8 it -- and there have been many, many discussions in which I
9 was involved about this over the past weeks, Your Honor --
10 was this:

11 Bayer determined that it would not begin the restart of
12 the MIC unit in Institute while there was an on-going or
13 open inspection being conducted by a government regulatory
14 agency. That meant that there would be an additional delay
15 before we could begin the start-up of, at minimum, a month
16 and up to as much as six months.

17 Your Honor may recall that when this proceeding began
18 that one of the primary business goals of Bayer in
19 restarting the unit was to be able to meet the needs for
20 Temik, a product that is produced as an end result of this,
21 for the 2011 growing season.

22 Once Bayer had made the decision that they would not
23 begin the restart while an inspection was open or on-going,
24 then it became impossible and additional delay made it
25 impossible for us to meet that goal.

1 Therefore, the business became essentially unfeasible
2 at this point. And Bayer made the decision to simply move
3 forward with other plans.

4 THE COURT: Is that the OSHA inspection that I
5 read about in the paper?

6 MR. EMCH: It is, Your Honor. It is, Your Honor.

7 THE COURT: All right.

8 MR. EMCH: Thus, Your Honor, in, in effect, with
9 the decision made, it did not matter, and I mean that only
10 in the practical sense, what would be the result of the
11 hearing that Your Honor has scheduled presently for next
12 Monday.

13 Therefore, Bayer felt it was appropriate and necessary
14 that we make this known publicly and to the Court today so
15 that there would not be any further work or inconvenience in
16 connection with the hearing on the part of Mr. DePaulo and
17 his clients, of course Bayer and its people and, and very
18 importantly, obviously, Your Honor and his staff and the
19 facilities here at District Court.

20 For those reasons, Your Honor, we have come before you
21 today. I want again to thank the Court in this case and Mr.
22 DePaulo for your patience yesterday. I know I was very
23 obscure and I'm sorry for that. But I hope that you can
24 appreciate the circumstances in which I was placed.

25 Bayer stands ready at the earliest convenience of Your

1 Honor and the parties to see that an appropriate order
2 effectuating this decision by Bayer is entered by the Court.
3 I thank you once again, Your Honor, and Mr. DePaulo,
4 plaintiffs. That was the matter that I wished to bring to
5 Your Honor.

6 THE COURT: Thank you, Mr. Emch.
7 Mr. DePaulo.

8 MR. DEPAULO: Well, Your Honor, we have several
9 comments, if I may. And certainly this is not an
10 appropriate place to exhaust all issues, but a few items
11 occur to me.

12 I, I believe -- we concur, I think, in the main thrust
13 of Mr. Emch's comments. Although he didn't use the word
14 "moot," I would concur that the hearing presently scheduled
15 to start Monday is, in all probability, moot. The lawsuit
16 is not moot. There are other claims -- maybe I should stop.

17 I take it that the appropriate order to be entered to
18 effectuate the permanent cessation of the production of MIC
19 would be, in fact, a permanent injunction. And that's what
20 we would suggest as the appropriate --

21 THE COURT: If they stop producing it, there's
22 nothing to enjoin.

23 MR. DEPAULO: Pardon me?

24 THE COURT: If they stop producing it, there's
25 nothing to enjoin.

1 MR. DEPAULO: Well, Your Honor, I think that might
2 be an appropriate matter for all of us to, to brief. And
3 certainly I --

4 THE COURT: I don't need a brief on that. I'm
5 telling you if there's nothing being produced, there's
6 nothing to enjoin.

7 MR. DEPAULO: Well, I appreciate the Court --

8 THE COURT: Or store for that matter.

9 MR. DEPAULO: Or -- true.

10 THE COURT: I read your complaint. Your complaint
11 is as to the production, transportation, and storage within
12 the plant of MIC. Am I right?

13 MR. DEPAULO: That's correct. Well, along with
14 other issues.

15 THE COURT: And if they stop doing that, then
16 there's nothing left of your equitable remedy with regard to
17 MIC. Am I right?

18 MR. DEPAULO: That's correct, Your Honor. And the
19 only issue then is the formality of the order that
20 effectuates that. And I, I won't belabor the point.

21 THE COURT: All right. I do not understand what
22 your other claims are, but I'll give you-all a chance to
23 meet and let me know.

24 MR. DEPAULO: Well, Your Honor, if I --

25 THE COURT: Sure.

1 MR. DEPAULO: Just -- we did -- we amended the
2 complaint. There were a number of personal injury claims.
3 There were other economic claims. And there was a claim for
4 medical monitoring and related issues.

5 We also filed a motion yesterday which raises its own
6 issues, including issues relating to the possibility of
7 sanctions in this matter which I don't believe we can just
8 casually discard.

9 I want us -- on behalf of the plaintiffs in this
10 matter, I want to indicate to Mr. Emch and his clients that
11 we're prepared to discuss all of those issues in an effort
12 to possibly resolving them amicably. But we would hope and
13 we would place at the top of our list of items to be
14 negotiated the fact that we would require as a condition for
15 our voluntary dismissal of the lawsuit somekind of a fair
16 and just compensation severance package for the 220
17 employees who are losing their job immediately as a result
18 of the action announced.

19 THE COURT: I have nothing in that.

20 MR. DEPAULO: I understand that.

21 THE COURT: All right. Here's what we're going to
22 do. There's a hearing set for Monday morning. I expect to
23 hear from counsel. I expect you to be here Monday morning.
24 I don't think we're going to have an injunction hearing, but
25 I'd like to see an order of some sort disposing of or

1 dealing with that portion of the case that you can dispose
2 of; or, if you can't, a motion for the Court to take such
3 action as either side rightly believes I should take.

4 I, I am reasonably certain now that the, there is no
5 remaining issue, and the report has been filed as an
6 exhibit. Dr. Mannan's report has been filed as an exhibit.
7 So, there's no issues of confidentiality or assertions of
8 need for sealing or anything like that.

9 Am I correct about that?

10 MR. DEPAULO: Your Honor, almost. At the end of
11 my deposition of Dr. Mannan, I asked him to take the report,
12 and he went through it paragraph by paragraph to designate
13 those items which had a potential Homeland Security issue.
14 He gave us what I consider a very clear laundry list of
15 matters that should be redacted. My staff has undertaken to
16 implement that redaction.

17 THE COURT: I think it's already up on the line.
18 I think it's up on line from -- I think it was filed by
19 Bayer and it's in the public record.

20 MR. DEPAULO: The entire report?

21 THE COURT: Yes.

22 MR. EMCH: Your Honor is correct.

23 THE COURT: And, again, --

24 MR. DEPAULO: If it's out there, it's out there.

25 THE COURT: -- if there's no MIC there, there's

1 nothing to --

2 MR. DEPAULO: Well, in any event, I wanted the
3 Court to be aware of the exercise we went through which we
4 deem responsive to the Court's order.

5 THE COURT: I appreciate that, Mr. DePaulo. Those
6 were the concerns I had. And I am, I am certain that
7 everybody would like a little more time, but let's try to
8 get together this afternoon. Let's come up with some
9 resolution of the injunctive matters that are pending. And
10 then I don't expect you to be able to resolve whatever else
11 it is you want to talk about. We may need motion practice
12 on that. This becomes then a very much different civil case
13 than it was.

14 MR. DEPAULO: I, I concur.

15 THE COURT: So, I'll see you -- what time is the
16 injunction hearing set? 9:00? Let me give you until 10:30
17 Monday morning so everybody can get a little sleep.

18 MR. DEPAULO: Thank you.

19 THE COURT: I'll see you at 10:30 on Monday
20 morning. Just meet this afternoon and see if you can't work
21 out something. I don't want you to work all weekend.

22 MR. EMCH: I don't think the order needs to be
23 very long, Your Honor. I'll prepare something and give it
24 to Mr. DePaulo promptly this afternoon.

25 THE COURT: All right.

1 Anything else to come before the Court?

2 (No Response)

3 THE COURT: All right. Thank you, gentlemen.

4 (Proceedings concluded at 11:15 a.m.)

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9 I, Lisa A. Cook, Official Reporter of the United
10 States District Court for the Southern District of West
11 Virginia, do hereby certify that the foregoing is a true and
12 correct transcript, to the best of my ability, from the
13 record of proceedings in the above-entitled matter.

14

15

16 s\Lisa A. Cook

March 18, 2011

17 Reporter

Date

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