

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

AT CHARLESTON

**MAYA NYE, a citizen of Kanawha
County and other current or
former residents of, and workers
in, Kanawha County**

Plaintiffs,

v.

**CIVIL ACTION NO.: 2:11-cv-00087
Honorable Judge Joseph Robert Goodwin**

BAYER CROPSCIENCE, L.P.,

Defendant.

**DEFENDANT BAYER CROPSCIENCE, L.P.'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Defendant Bayer CropScience, L.P. (hereinafter "Bayer"), by counsel, responds in opposition to Plaintiffs' Motion for Temporary Restraining Order. Bayer submits that said motion should be denied and, in support thereof, state as follows:

I. Brief Statement of Facts

The crux of the Plaintiffs' Motion for Temporary Restraining Order is based on their "fear" that some potential, uncertain, and unspecified adverse event might occur when Bayer begins its lawful production of methal isocyanate ("MIC") at its Institute, West Virginia plant. This "fear" does not establish any right of the Plaintiffs to any equitable or injunctive relief and does not establish that Bayer is guilty of any nuisance under the law.

Bayer has successfully manufactured MIC for over forty (40) years at the Institute plant. Bayer manufactures MIC pursuant to law and permits issued by the West Virginia Department of Environmental Protection. MIC is a necessary chemical used in the manufacturing of pesticides which are essential for crop production throughout the United States and elsewhere.

Bayer's resumption of production of MIC at the Institute plant is the result of an agreement with the Environmental Protection Agency for the production of a pesticide known as Temik for a limited period of time. At this time, there is not any substitute product for Temik, a pesticide vital to cotton and peanut crops. Any efforts to prevent the production of Temik would have an immediate and adverse impact on approximately 300 jobs in West Virginia and Georgia and could result in damages estimated in the millions of dollars, not to mention the adverse effect it would have on this nation's agricultural industry.¹

As will be explained below, the Plaintiffs have failed to meet their burden of producing clear evidence that they are entitled to injunctive relief. Not only have the Plaintiffs cited and relied on the wrong standards surrounding injunctive relief, they have also failed to establish any clear proof that Bayer's lawful production of MIC would in any manner constitute a nuisance. Accordingly, the Plaintiffs' motion is without merit and must be denied.

II. Argument

A. Legal Standard

Rule 65(b) of the Federal Rules of Civil Procedure sets forth the limited circumstances under which a temporary restraining order can be granted as follows:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it

¹ Due to the time constraints involved, counsel has been unable to obtain an affidavit in support of these facts. Counsel will endeavor to produce an affidavit prior to the hearing on February 10, 2011.

clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

W. Va. R. Civ. P. 65(b). “A temporary restraining order, like the preliminary injunction, is an ‘extraordinary remedy’ that should be issued ‘sparingly and in limited circumstances.’” *Marfork Coal Co. v. Smith*, 2010 WL 391511, *3 (S.D.W.Va. 2010) citing *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)).

Rule 65 also requires a party moving for a temporary restraining order to give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. *Id.* at (c). This Court has previously stated that a determining factor in setting the amount of security needed is whether the “loss of the bond proceeds would be a significant financial deterrent to similar applications.” *Bragg v. Robertson*, 54 F.Supp.2d 635, 653 (S.D.W.Va. 1999).²

The Fourth Circuit addressed the different functions of temporary restraining orders and preliminary injunctions in *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999):

While a preliminary injunction preserves the status quo pending a final trial on the merits, a temporary restraining order is intended to preserve the status quo only until a preliminary injunction hearing can be held: Under federal law [temporary restraining orders] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.

² Counsel for Bayer has indicated to the plaintiffs’ counsel that it stands to lose \$530,000 a day. While Bayer acknowledges the plaintiffs may not have the means to pay this amount daily, it urges the court to weigh the loss of \$530,000 a day into its determination of the amount of security needed.

(internal citations omitted). However, the standard for determining whether a temporary restraining order should be issued is the same as that used for determining entitlement to other injunctive relief. See *Marfork Coal Co.*, 2010 WL 391511 at * 3; *Camden-Clark Memorial Hosp. Corp. v. Turner*, 575 S.E.2d 362, 366 (W.Va. 2002).

The Plaintiffs incorrectly cite *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F. 2d 189 (4th Cir. 1977) as the “long-standing, controlling test for issuance of a temporary restraining order.” (Pl.’s Mem. In Supp. of T.R.O p. 9). *Blackwelder* is no longer controlling. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365 (2008); *Real Truth About Obama, Inc. v. Federal Election Com’n*, 575 F.3d 342 (4th Cir. 2009) *vacated* 130 S.Ct. 2371, *remanded to* 607 F.3d 355 (4th Cir. 2010) (“On further consideration, we now reissue Parts I and II of our earlier opinion in this case, 575 F.3d at 345-347, stating the facts and articulating the standard for the issuance of preliminary injunctions.”). “[The] *Blackwelder* standard in several respects now stands in fatal tension with the Supreme Court’s 2008 decision in *Winter*.” *Real Truth*, 575 F.3d at 347.

Under *Winter*, the four relevant factors for determining whether to issue a temporary restraining order are: “(1) that the Plaintiff is likely to succeed on the merits; (2) that the Plaintiff is likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of the equities tips in the Plaintiff’s favor; and (4) that an injunction would be in the public interest.” *Real Truth*, 575 F.3d at 346-47 citing *Winter*, 129 S.Ct. at 374.

The Court in *Real Truth* best describes the new standard under *Winter* for determining whether to issue a temporary restraining order (or preliminary injunction) as compared to *Blackwelder*:

First, the Supreme Court in *Winter*, recognizing that a preliminary injunction affords relief before trial, requires that the plaintiff make a clear showing that it will likely succeed on the merits at trial. 129 S.Ct. at 374, 376. Yet in *Blackwelder*, we instructed that the likelihood-of-success requirement be considered, if at all, only *after* a balancing of hardships is conducted and then only under the relaxed standard of showing that “grave or serious *questions* are presented” for litigation. 550 F.2d at 195-96 (emphasis added); *see also Rum Creek Coal*, 926 F.2d at 363. The *Winter* requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.

Second, *Winter* requires that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief. 129 S.Ct. at 374-76. *Blackwelder*, on the other hand, requires that the court *balance* the irreparable harm to the respective parties, requiring only that the harm to the plaintiff outweigh the harm to the defendant. 550 F.2d at 196. Moreover, *Blackwelder* allows that upon a strong showing on the probability of success, the moving party may demonstrate only a possibility of irreparable injury, *id.* at 195—a standard explicitly rejected in *Winter*, 129 S.Ct. at 375-76.

Third, in *Winter*, the Supreme Court emphasized the public interest requirement, stating, “In exercising their sound discretion, courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction.” 129 S.Ct. at 376-77 (emphasis added) (internal quotation marks and citation omitted). Yet, under the *Blackwelder* standard, the public interest requirement “does not appear always to be considered at length in preliminary injunction analyses,” even though it must always be considered. *Rum Creek Coal*, 926 F.2d at 366-67; *see also Blackwelder*, 550 F.2d at 196.

Fourth, while *Winter* articulates four requirements, each of which must be satisfied as articulated, *Blackwelder* allows requirements to be conditionally redefined as other requirements are more fully satisfied so that “grant[ing] or deny[ing] a preliminary injunction depends upon a ‘flexible interplay’ among all the factors considered ... for all four [factors] are intertwined and each affects in degree all the others.” 550 F.2d at 196. Thus, as an example, the court in *Blackwelder* observed:

The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a

decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; *and plaintiff need not show a likelihood of success.* 550 F.2d at 196 (emphasis added).

Because of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.

575 F.3d at 345 -347.

In *Winter*, the Court rejected a standard that allowed the plaintiff to demonstrate only a “possibility” of irreparable harm or “possibility” of success on the merits because that standard was “inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S.Ct. at 375-76. This “clear showing” language creates in the party moving for a temporary restraining order or preliminary injunction the burden of proving that the likelihood of success and irreparable harm are “highly probable or reasonably certain ... a greater burden than preponderance of the evidence” *See* Black’s Law Dictionary, 577 (7th ed. 1999) (definition of clear and convincing evidence).

B. The Plaintiffs Cannot Meet Their Burden Under the *Winter* Four Factor Test

As previously stated, the Plaintiffs must clearly show: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of the equities tips in the their favor; and (4) that an injunction would be in the public interest. As will be shown, the Plaintiffs cannot meet this burden and their motion for a temporary restraining order should be dismissed.

1. The Plaintiffs cannot clearly show that they will likely succeed on the merits at trial

Generally, a condition is a nuisance when “it clearly appears that the enjoyment property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby.” *Duff v. Morgantown Energy Associates (M.E.A.)*, 421 S.E.2d 253, 256 (W. Va. 1992) (per curiam). West Virginia law recognizes two types of nuisance—public and private. Here, neither Plaintiffs’ public nor private nuisance claims are likely to succeed on the merits. Therefore, their claim for injunctive relief fails.

a. Private Nuisance

The Plaintiffs’ private nuisance claims are unlikely to succeed on the merits because Bayer’s legitimate business activity of the production of MIC is not a nuisance *per se*, and Plaintiffs cannot prove “beyond all ground of fair questioning” that the production of MIC by Bayer will produce dangers which are “impending and imminent,” the effects of which are “certain.” A private nuisance is “a substantial and unreasonable interference with the private use and enjoyment of another’s land.” Syl. pt. 1, *Hendricks v. Stalnaker*, 380 S.E.2d 198 (W. Va. 1989). Conduct rises to the level of a nuisance only if it “is intentional and unreasonable, negligent or reckless, or that results in...abnormally dangerous conditions or activities in an inappropriate place.” *Id.* at 200; *see also Duff*, 421 S.E.2d at 256. Plaintiffs must prove that they have suffered a “significant harm to their property rights or privileges” to recover for a private nuisance. *Duff*, 421 S.E.2d 253 (citing *Hendricks*, 380 S.E.2d at 201; Restatement (Second) of Torts (1979)).

Here, the Plaintiffs are suing based on the risk of a nuisance developing during the startup of the MIC unit. Courts, however, generally will not interfere in such prospective

cases. *Duff*, 421 S.E.2d at 257-58. As the Supreme Court of Appeals of West Virginia recognized in *Chambers v. Cramer*, 38 S.E. 691 (1901):

It is a general rule that when the thing complained of is not a nuisance *per se*, but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere; the presumption being that a person entering into a l[e]gitimate business will conduct it in a proper way, so that it will not constitute a nuisance.

Syl. Pt. 2, *Chambers* 38 S.E. 691; *see also Duff*, 421 S.E.2d 253. The *Chambers* Court continued to set forth the circumstances under which such an alleged prospective nuisance will be enjoined, stating:

[I]n order for equity to enjoin a private nuisance **the danger must be impending and imminent and the effect certain, not resting on hypothesis or conjecture, but established by conclusive evidence.** If the injury be doubtful, eventual, or contingent, or if the matter complained of i[s] not *per se* a nuisance, an injunction will not be granted. **In cases of prospective nuisance, a court of equity will not interfere unless the damages to be apprehended will be serious, nor when upon balancing the inconveniences or injuries, greater injury will be inflicted by granting than by refusing an injunction.**

Duff, 421 S.E.2d 258 (citing *Chambers*, 38 S.E. at 693) (emphasis added by Court in *Duff*). To warrant injunctive relief as to a prospective nuisance, “the fact that it will be a nuisance if so used must be made clearly to appear, beyond all ground of fair questioning.” Syl. Pt. 3, *Chambers*, 38 S.E. 691.

First, the production of MIC at Bayer is not a nuisance *per se*. “[A] lawful business authorized to be conducted by the government cannot constitute a nuisance *per se*.” *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879 (2007) (citing *McGregor v. Camden*, 34 S.E. 936, 937 (1899); *Martin v. Williams*, 93 S.E.2d 835, 838 (W. Va. 1956) (“[t]he operation of a used car lot is a lawful business, and, as a general rule, it cannot be a nuisance *per se*.”)).

Bayer's production of MIC is legal. Bayer has obtained all the necessary governmental approval and is authorized to produce MIC. Accordingly, Bayer's actions are not a nuisance per se.

Second, the Plaintiffs cannot prove "beyond all ground of fair questioning" that the production of MIC by Bayer will produce dangers which are "impending and imminent," the effects of which are "certain." *Duff*, 421 S.E.2d 258 (citing *Chambers*, 38 S.E. at 693). Indeed, the Plaintiffs concede that here "imminence is impossible to determine under the best of circumstances." (Pl.'s Mem. In Supp. of T.R.O p. 19.) The Plaintiffs assertions are based only on the Plaintiffs' own hypothesis and conjecture, which is explicitly stated by the Court in *Chambers* to be insufficient to base a claim for projective injunctive relief. *Id.* Although there are risks associated with any production process, the Plaintiffs cannot prove that the dangers which they fear—a catastrophe or other similar event—are impending, imminent, or certain.³ Accordingly, the Plaintiffs' private nuisance claim will likely fail.

b. Public Nuisance

The Plaintiffs' public nuisance claims fail because Bayer's activities are legal and cannot constitute a public nuisance. Moreover, the Plaintiffs' asserted injuries (even if accepted as true) are no different in degree or character from any other individual similarly situated. The Supreme Court of Appeals of West Virginia has held that public nuisances "always arise out of unlawful acts, and that which is lawful, or is authorized by valid statute, or which the public convenience imperatively demands, cannot be a public nuisance." *Pope v. Deward M. Rude Carrier Corp.*, 75 S.E.2d 584, 589 (W. Va. 1953) (quoting 39 Am.Jur., Nuisances § 8); *but see Duff v. Morgantown Energy Assoc. (M.E.A.)*, 421 S.E.2d 253 (W. Va. 1992) (per curiam) (noting

³ Further, even if the Plaintiffs can prove beyond all ground of fair questioning an impending and imminent harm the effects of which are certain, the Plaintiffs still must prove that "the gravity of the harm outweighs the social value of the activity alleged to cause the harm" to Plaintiffs succeed. Plaintiffs cannot meet this burden.

in dicta that trucking of material on plaintiffs' road may constitute public nuisance without discussing its illegality). Again, Bayer's activities are lawful. Bayer has obtained all the necessary governmental approval and is authorized to produce MIC.

Even assuming Bayer's activities could arguably be considered a public nuisance, the Plaintiffs lack standing to bring a public nuisance claim because they cannot establish a special injury different in kind and degree than the general public. A public nuisance is an act or condition that hurts or inconveniences an indefinite number of persons. *Hark v. Mountain Fork Lumber co.*, 34 S.E.2d 348 (W. Va. 1945). "Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public." *Id.* To have standing to prosecute a claim for public nuisance, the Plaintiffs must show "that the nuisance causes them an injury different in kind from that suffered by others similarly situated, that such injury is serious and permanent, and affects the substance and value of their property." *Curry v. Boone Timber Co.*, 105 S.E. 263, 265 (W. Va. 1920). As this language indicates, the injury inflicted on the Plaintiffs must be different "both in degree and character," than that allegedly suffered by the public at large. *Keystone Bridge Co. v. Summers*, 13 W.Va. 476 (1878).

The Plaintiffs cannot maintain any public nuisance claims because they cannot show that the alleged injuries they allege they will suffer, i.e., the alleged risk of the development of a nuisance during startup of the MIC unit, are different in degree or character from any other individual similarly situated. The Plaintiffs assert their damages are different because "[p]lainly, the impact on the Plaintiffs in their homes and offices near, if not immediately adjacent to, the MIC facility are different in kind from that experienced by the community at large, and support a finding of public nuisance." (Pl.'s Mem. In Supp. of T.R.O p. 22.) However, in *Curry v. Boone*

Timber Co., 105 S.E. 263 (W. Va. 1920), the plaintiffs, under a public nuisance theory, sought to enjoin the construction and operation of a railroad crossing along a public street on a similar basis. The Court held that the plaintiffs had no standing to enjoin the construction of the railroad because they could not show any injury “peculiarly affecting them that [would] not equally affect every other owner of property along Stollings street.” *Id.* at 264.

Likewise, in *Thacker v. Ashland Oil & Refining Co.*, 41 S.E.2d 111 (W. Va. 1946), the plaintiff sought to enjoin the use of two gas pipelines which were constructed along a public highway with the consent of the state road commission. The Court held that the plaintiff could not maintain his action. The Court stated, “Plaintiff . . . is simply the owner of property adjoining the public road upon which the nuisance is alleged to be maintained, and his situation is not other and different from that of other property holders whose lands adjoin said road.” *Id.* at 120.

This case is no different than *Curry* or *Thacker*. The Plaintiffs consist mainly of property owners near the site upon which the nuisance is alleged to be maintained. Their situation is no different from any other property owner who owns land near Bayer. The Plaintiffs have suffered no injury that is different in “degree or character” from that of anyone else who lives near or travels by Bayer’s facility. Accordingly, the law prohibits the Plaintiffs from maintaining any public nuisance claims and, thus the Plaintiffs have little, if any, chance at succeeding on the merits of their public nuisance claim.

2. The Plaintiffs cannot clearly show they are likely to suffer irreparable harm in the absence of injunctive relief

The Plaintiffs must make a clear showing that they are likely to be irreparably harmed, absent preliminary relief, to be entitled to an injunction. *Winter*, 129 S.Ct. at 375-76 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). This is perhaps the single

most important prerequisite for the issuance of a preliminary injunction. 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (2d ed. 2010). The proof of this element requires more than a mere possibility of irreparable harm. *Real Truth*, 575 F.3d at 347. In fact, the United States Supreme Court explicitly rejected a standard that allowed a plaintiff to demonstrate only the “possibility” of irreparable harm because it was “inconsistent with [its] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S.Ct. at 375-76. Irreparable harm to the plaintiffs must be actual and imminent, not remote and speculative. *See Mylan Pharmaceuticals, Inc. v. Thompson*, 207 F.Supp.2d 476, 484 (N.D.W.Va. 2001).

Here, the Plaintiffs cannot show that they will suffer irreparable harm if Bayer is permitted to begin the manufacture of MIC. A fear of speculative or remote future injury cannot constitute irreparable harm. There must be a likelihood that immediate irreparable harm will occur. *See Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir.1997) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir.1989) (stating that the harm demonstrated by the plaintiff must be “neither remote nor speculative, but actual and imminent”). The Plaintiffs’ speculation that damage might occur is insufficient to support a claim for an injunction. *See e.g. See e.g. Mass. Coalition of Citizens with Disabilities v. Civil Defense Agency & Office of Emergency Preparedness*, 649 F.2d 71, 74-75 (1st Cir. 1981) (finding specter of nuclear accident or attack by enemy power insufficient to constitute immediate irreparable harm); *Crowther v. Seaborg*, 415 F.2d 437, 438-39 (10th Cir. 1969) (finding no evidence that research project to study economic and technical feasibility of using underground nuclear devices or explosives to generate natural gas was reasonably probable or reasonably likely to cause accident and therefore

no irreparable harm); *Chem. Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 963 F.Supp. 1083, 1095-97 (D.Utah 1997) (holding no irreparable injury where asserted risks of operation of facility for incineration of chemical warfare agents not likely).

The Plaintiffs' claim for relief based on the alleged chance of chance of the development of a nuisance during the startup of the MIC unit is insufficient. These conjectures epitomize the types of claims the United State Supreme Court sought to exclude from obtaining injunctive relief in *Winter*, and are insufficient to support their claim for the extraordinary relief which they seek. Injunctions can be granted only through a clear showing of irreparable harm; the Plaintiffs' unsubstantiated belief is simply insufficient. Accordingly, the Plaintiffs are not entitled to this extraordinary remedy.

3. The balance of the equities does not tip in the Plaintiffs' favor

The "balance of equities" referred to in *Winter* requires courts to weigh the burden a temporary restraining order or preliminary injunction would impose on all parties involved. *Winter*, 129 S.Ct. at 377. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 376 citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

The Plaintiffs indicate that their burden if a temporary restraining order is not granted consists of: "(a) the current, palpable reason-based fear, experienced by Plaintiffs and other members of affected communities, which greatly impairs their property rights, plus (b) the imminent risk of a catastrophic industrial disaster, potentially causing permanent bodily injury and/or loss of life to thousands." (Pl.'s Mem. In Supp. of T.R.O p. 10). As shown in previous sections, the Plaintiffs' "burden" is pure speculation, relying solely on the argument that they believe a catastrophic industrial disaster is imminent without any factual proof other than their

statement that a disaster is imminent in addition to anecdotal blurbs from media sources and statements by Bayer management take entirely out of context. The “fear” of a potential outcome which is uncertain and occurs out of a lawful activity is not a tangible, irreparable harm.

Bayer, on the other hand, can point to real, tangible injuries it would suffer if a temporary restraining order is granted: 1) around 300 Bayer employees would almost immediately be out of work, with the potential of many more in the near future; 2) Bayer would be unable to fulfill current obligations it has with customers, leaving it susceptible to future lawsuits; and 3) Bayer would potentially lose revenue estimated in the millions of dollars.

As the Plaintiffs can show no actual burden, the balance of equities clearly tips in the favor of Bayer. Accordingly, the motion must be denied.

4. An injunction would not be in the public interest

“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S.Ct. at 376 citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, (1982); *see also Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). Here, the public interest weighs greatly in favor of the denial of the Plaintiffs request for injunction.

First, MIC serves a useful purpose in the national and global economy. MIC is used in the production of a number of a number of different pesticides—including a product called “Termik.” Termik is crucial to the protection of a variety of crops including cotton and peanuts, and there currently is no known alternative. This factor alone weighs greatly against the imposition of an injunction. The cessation of the production of MIC would deprive consumers of a useful tool in protecting their crops, and leave them without a viable alternative.

Second, the imposition of this injunction would cause economic hardship on farmers nationwide. Without the use of the pesticides made with MIC, farmers nationwide—who area already facing considerable financial strain as of late—will be facing the possibility of an even less fruitful harvest than years prior. This could have a significant impact on the nation's agricultural industry.

Third, the imposition of this injunction would have an immediate and significant effect on the economy. If this injunction is granted, approximately 300 jobs would be lost immediately. This will have a drastic impact not only on the 300 people who are now without employment, but also to the spouses, children and families of the newly unemployed. Moreover, other local businesses will also suffer as well. These people inject a significant cash flow into the local economy. Without that revenue stream, businesses, particularly those near the Bayer facility (ironically the ones whom the small number of the Plaintiffs here assert that they are trying to protect) will also face an increasing financial hardship.

For these reasons, as well as others, the public interest is against the imposition of the requested injunction.

III. Conclusion

WHEREFORE, for the foregoing reasons, Defendant Bayer CropScience L.P. respectfully requests that the Court deny the Plaintiff's Motion for Temporary Restraining Order and award such other and further relief as the Court deems appropriate.

BAYER CROPSCIENCE, L.P.,

By Counsel,

/s/ Michael M. Fisher

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**MAYA NYE, a citizen of Kanawha
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**CIVIL ACTION NO.: 2:11-cv-00087
Honorable Judge Joseph Robert Goodwin**

BAYER CROPSCIENCE, L.P.,

Defendant.

CERTIFICATE OF SERVICE

I, Michael M. Fisher, counsel for Bayer CropScience, L.P., do hereby certify that on February 9, 2011, I electronically filed the foregoing *Defendant Bayer CropScience, L.P.'s Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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