

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER AG,
MONSANTO COMPANY, and
BASF SE,

Defendants.

Civil Action No. 1:18-cv-01241 (JEB)
Judge: James E. Boasberg

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION OF THE UNITED STATES TO APPOINT
MONITORING TRUSTEE**

The United States hereby files this Memorandum in support of its motion to appoint the Honorable Michael B. Mukasey as Monitoring Trustee in this case. This motion is unopposed.

Pursuant to the Stipulation and Order entered by the Court on May 29, 2018, and the proposed Final Judgment filed with the Court on the same date, the United States has the sole discretion to propose to this Court the appointment of a Monitoring Trustee. As described below, Judge Mukasey is well-qualified to serve as Monitoring Trustee and to monitor Defendants' compliance with the proposed Final Judgment and the Stipulation and Order.

I. The Monitoring Trustee's Role and Responsibilities

The United States filed a civil antitrust Complaint on May 29, 2018, seeking to enjoin Defendant Bayer AG's ("Bayer") proposed acquisition of Defendant Monsanto

Company (“Monsanto”). The Complaint alleges that the proposed acquisition would substantially lessen competition in the agricultural industry in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition would likely result in higher prices for farmers and less innovation.

On May 29, 2018, the United States also filed a Stipulation and Order and a proposed Final Judgment that were agreed to by all parties and that are designed to eliminate the likely anticompetitive effects of the acquisition. The Court entered the Stipulation and Order on May 29, 2018. Pursuant to Section V of the Stipulation and Order, BASF SE (“BASF”) has consented to be joined as a party-defendant and to be bound by the terms of the proposed Final Judgment. In this Memorandum and the proposed Final Judgment, Bayer, Monsanto, and BASF are collectively referred to as “Defendants.”

Paragraph VIII(B) of the proposed Final Judgment provides for the appointment of a Monitoring Trustee with “the power and authority to monitor Defendants’ compliance” with the terms of the proposed Final Judgment and Stipulation and Order, and “such other powers as this Court deems appropriate.”

Under the proposed Final Judgment, Bayer and Monsanto are required to divest to BASF assets relating to various agricultural markets involving seeds, traits, and crop protection products and, pursuant to Paragraph IV(F) of the proposed Final Judgment, to warrant that, among other things, the divested assets will be sufficient for BASF to maintain the viability and competitiveness of the businesses. Paragraph IV(E) of the

proposed Final Judgment gives BASF rights to hire additional Bayer employees who have recently supported the divested businesses.

To facilitate the transition of the divested businesses to BASF and ensure their continued competitiveness, Paragraph IV(G) and Paragraph IV(H) of the proposed Final Judgment require Bayer, at BASF's option, to enter into various transition services agreements and crop protection supply or tolling agreements. Section IX of the proposed Final Judgment imposes obligations on Defendants to create and implement firewalls to prevent misuse of any confidential information that is shared pursuant to these agreements.

Until the divestitures required by the proposed Final Judgment have been accomplished, Section VIII of the Stipulation and Order requires Bayer and Monsanto to preserve and continue to operate the assets to be divested as independent, economically viable, and ongoing business concerns. Further, Section VII of the Stipulation and Order requires Monsanto be held separate from Bayer until the divestitures required by the proposed Final Judgment have been accomplished.

As explained in Paragraph VIII(B) of the proposed Final Judgment, the Monitoring Trustee's responsibilities include investigating and reporting on Defendants' compliance with their responsibilities under, and their efforts to effectuate the purposes of, the proposed Final Judgment and Stipulation and Order. Among other things, the Monitoring Trustee shall review Defendants' implementation and execution of the compliance plan required by Section IX of the proposed Final Judgment, and conduct semi-annual audits of Defendants' compliance with Section IX. The Monitoring Trustee

also shall investigate, for example, any claimed breach by Bayer of any agreement entered into pursuant to Paragraph IV(G) or Paragraph IV(H) of the proposed Final Judgment or any other agreements between Bayer and BASF that might affect the accomplishment of the purposes of the proposed Final Judgment, and, in the event the Monitoring Trustee determines that any breach has occurred, the Monitoring Trustee shall recommend an appropriate remedy to the United States.

II. Judge Mukasey's Qualifications to Serve as Monitoring Trustee

Judge Mukasey is highly qualified to serve as Monitoring Trustee in this matter. Currently of counsel at Debevoise & Plimpton LLP, Judge Mukasey served as Attorney General of the United States from November 2007 to January 2009. Prior to his service as Attorney General, Judge Mukasey served as a district judge in the United States District Court for the Southern District of New York from 1988 to 2006, becoming chief judge in 2000. Judge Mukasey has no conflicts of interest that would disqualify him from fulfilling his role as the Monitoring Trustee in this case.

As Monitoring Trustee, Judge Mukasey intends to work with Nardello & Co. LLC ("Nardello"), specifically Mark Califano, and may, pursuant to Paragraph VIII(C) of the proposed Final Judgment, retain consultants, attorneys, and others for assistance and support. Nardello is a global investigations firm experienced in conducting independent investigations and examining anticompetitive practices and other improper activity of multinational corporations and organizations. Mr. Califano is Nardello's Head of the Americas. He previously served as Senior Vice President and Managing Counsel for Global Litigation and Government Investigations for American Express.

