

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEERE & COMPANY;

PRECISION PLANTING LLC;
and

MONSANTO COMPANY,

Defendants.

Civil Action No. 1:16-cv-08515

Judge Chang

Magistrate Judge Weisman

JOINT STATUS REPORT

The parties submit the following joint status report in connection with the Pretrial Conference scheduled for April 26, 2017 at 9:30 am.

1. Pending Motions and Issues

The following motions and issues are scheduled to be heard at the Pretrial Conference.

- (a) Plaintiff's Motion in Limine To Exclude Defendants' Proposed Inadmissible Exhibit (Dkt. No. 211).
- (b) [Proposed] Joint Pretrial Order (Dkt. No. 222).
- (c) Defendants' Motion to Compel Expert Discovery Information (Dkt. No. 264).
- (d) Plaintiff's and Defendants' Exhibit Objections (submitted to the Court on April 14, 2017).
- (e) Plaintiffs' and Defendants' Deposition Designation Objections (to be submitted to the Court on April 24, 2017).

(f) Defendants' Motion to Seal Remaining Exhibits (to be filed on April 24, 2017).

(g) Defendants' Motion to Supplement the Protective Order (Dkt. 63) (fully briefed and currently pending). Defendants respectfully advise the Court that a near term decision would greatly assist their ability to prepare for trial.

Additionally, Defendants filed their Motion for Summary Judgment (Dkt. No. 233) on April 5, 2017. With briefing not complete until May 10, 2017 (Dkt. No. 243), Defendants' Motion for Summary Judgment is not ripe for hearing.

2. Deere's Revised Agreement with Ag Leader

There have been recent developments regarding Defendants' transaction with non-party Ag Leader Technology ("Ag Leader"). As indicated in Defendants' Pretrial Brief, Defendants contend that a license agreement between Defendants and Ag Leader will remedy the alleged anticompetitive effects of Defendants' transaction. *See* R. 244 at 19-20. The United States contends that the license agreement fails to sufficiently restore competition. United States' Pretrial Memorandum, R. 258 at 21. Defendants' brief states that they have "recently entered a term sheet agreement with Ag Leader" that alters the existing license agreement. R. 244 at 2 n.2. Defendants provided the executed new definitive agreement with Ag Leader ("Revised Agreement") on April 20, 2017.

In light of these events, the parties have agreed to reopen discovery on the limited issue of the likely competitive effects of the Revised Agreement. As agreed, Defendants completed their productions and interrogatory responses regarding the new agreement on April 20, 2017. The parties have further agreed that the United States will depose two Defendant employees between May 8 and May 12, 2017; and will be allowed to conduct two depositions of Ag Leader personnel on dates to be negotiated with Ag Leader. The parties agree that the United States also

may seek from Ag Leader limited document discovery. Finally, the parties have agreed that expert witnesses will provide supplemental expert reports of no more than 10 pages limited to the likely competitive effects of the Revised Agreement no later than May 31, 2017, if that expert witness intends to testify about the Revised Agreement.

The parties agree that the limited discovery to which they have agreed will not affect the schedule that the Court has previously set. The parties agree that there is no need to alter the current dates for the pretrial conference, the start of trial, or any other outstanding dates or deadlines. In view of this agreement, the parties are proceeding with the outlined discovery under ¶ 14 of the Court's Scheduling and Case Management Order, R. 61, but wished to inform the Court of these activities and their implications.

The Revised Agreement may present an issue requiring the Court's attention in the future. Defendants plan to offer evidence regarding the Revised Agreement at trial. The United States currently lacks sufficient information to object or consent to evidence regarding the Revised Agreement at trial because the disclosures of the term sheet and executed agreement were recent occurrences, and the United States' discovery is in its initial stages. Timely completion and review of the limited discovery agreed to in the plan outlined above will inform the United States' position on this issue. Defendants contend that their previously-filed answers do not require any amendment because the answers already filed accurately reflect the Revised Agreement, and because Defendants and Ag Leader have agreed to provide to the Plaintiff the discovery it has requested regarding the changes to the agreement with Ag Leader. The United States contends that Defendants must seek leave to amend their answers and must amend their answers to reflect the Revised Agreement.

3. Additional Issues For Consideration at the Pretrial Conference or to Be Submitted in a Proposed Trial Procedures Order

United States' Position: The United States believes that the parties' trial preparation would benefit if the Court addresses the issues discussed below at the Pretrial Conference. In the early afternoon of April 20, the United States sent Defendants the language proposed below and offered to meet and confer, but Defendants informed the United States that they need more time to arrive at their positions. The United States raised some of these issues weeks ago, while others are new issues but typical for a Pretrial Conference. Given the narrow nature of the issues presented below, the United States believes that Defendants have sufficient time to form their position on them before the Pretrial Conference.

Defendants' Position: The remainder of this Joint Status Report lists some of the topics the parties intend to submit in a Proposed Trial Procedures Order, as well as others to be determined. On April 20, the United States identified the topics below regarding certain trial procedures. The parties have not yet met and conferred regarding these topics, nor have Defendants had the opportunity to fully consider these or additional topics that will need to be addressed in a comprehensive trial procedures order. Defendants proposed that the parties separately submit such an order as early as next week, after the parties meet and confer on trial procedures. The United States, however, preferred to include the topics below in this Joint Status Report. The parties will meet and confer with the goal of submitting a joint proposed order.

a. Enlargement of the Exhibit List in Light of Additional Discovery

After review of the additional discovery regarding the Revised Agreement discussed above, the parties may desire to add exhibits to their exhibit lists, which may cause the exhibit

lists to exceed the 500 exhibit per side limit set in the Order Governing Designation and Use of Confidential Information at Trial. Dkt. No. 131 ¶ 2(a). The United States proposed that each party be permitted to add up to 50 additional exhibits beyond that 500 exhibit limit arising from the new discovery discussed above.

b. Procedures for Witness Examination

1) Monitoring of Examination Time

The parties have agreed on a proposed allocation of time, depending on the Court's decision regarding when the parties should give closing arguments. *See* [Proposed] Joint Pretrial Order, Dkt. No. 222, § IV. To ensure that each side can fairly use its own time allocated within the 17 trial days, the United States proposes the use of a chess-clock approach, in which the Court gives each side the respective agreed amount of time to present its case through both direct and cross-examination, and the Court's clerk (or the parties) tracks time spent by each party.

2) The Examination of Witnesses on Both Witness Lists

Certain witnesses appear on both the United States' and Defendants' witness lists. For the convenience of the witnesses and the Court, the United States proposes that Defendants examine those overlapping witnesses when or if called during the United States' case-in-chief. In such instances, the United States would first present direct examination of the witness, then Defendants would simultaneously cross-examine the witness on her testimony during direct examination and present her direct examination, and then the United States would conduct redirect examination on its direct examination and cross-examination on Defendants' direct examination, etc.

3) The United States' Direct Examination of Defendant- or Ag Leader-Employee Witnesses

Certain witnesses on the United States' witness list are employees of a Defendant or the defendant-aligned potential licensee, Ag Leader. (Defendants have a Joint Defense Agreement with Ag Leader for purposes of this litigation.) The United States proposes that it be permitted to ask those witnesses leading questions on direct examination. Fed. R. Evid. 611(c)(2) ("Ordinarily, the court should allow leading questions . . . when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.").

4) Defendants' Cross-Examination of Defendant- or Ag Leader-Employee Witnesses

Certain witnesses on the United States' witness list are employees of a Defendant or the defendant-aligned potential licensee, Ag Leader. The United States proposes that on Defendants' cross-examination of those witnesses, the Court not permit Defendants to ask leading questions. Though "[o]rdinarily, the court should allow leading questions . . . on cross-examination," Fed. R. Evid. 611(c)(1), an exception exists for the unordinary instance of when the cross-examination is "'cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct).'" *Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979) (quoting Fed. R. Evid. 611, Advisory Comm. Notes, 1972 Proposed Rules, Notes to Subdivision (c)).

5) Remote Testimony for Farmer Witnesses

The United States proposes that the Court permit the farmer witnesses to appear remotely by live video for testimony, if needed. Due to timing, it may be difficult for the farmer witnesses to travel to Chicago for trial. Though the United States will make every effort to accommodate

the farmer witnesses and encourage their live participation, it may be more feasible for those farmers to appear remotely.

6) Witnesses Appearing by Deposition

In accordance with the Case Management Order, the parties “included as a witness on the final trial list[s]” “[e]ach witness for which a party offers deposition designations to be offered at trial.” Dkt. No. 61 ¶ 7. The parties have also exchanged deposition designations. But the parties have not indicated which witnesses on the witness list will be called only by deposition and not as a live witness.

The United States believes that it would ease preparation for trial for both sides and reduce issues arising for the Court if it were clear that if a party designating depositions for a witness will only call that witness by deposition. Therefore, the United States respectfully requests that the Court order that if a party has designated deposition testimony for a witness on its witness list, the party may not call the witness for live testimony.

c. Exchange of Demonstratives

The parties have previously agreed to postponing evidentiary objections and confidentiality designations regarding expert reports until closer to trial, so that the parties can have a better sense of which exhibits they will use as demonstratives or Federal Rules of Evidence 1006 summaries. There is also no currently agreed procedure for the exchange of or resolving disputes regarding demonstratives.

The United States first proposes that parties exchange all evidentiary objections and confidentiality designations regarding expert reports listed on the exhibit lists no later than May 15, with any disputes to be presented to the Court at the beginning of trial.

For any additional demonstrative exhibits not included with the expert reports, the United States proposes that each party serve on the other side any demonstrative or Federal Rule of Evidence 1006 summary by 7:00 am two days before the day on which the party will use the demonstrative or summary.¹ To the extent the serving party seeks to seal any portion of the demonstrative or summary, it should so indicate when serving the demonstrative or summary, giving its justification for sealing and produce any affidavits it will submit when seeking to seal the demonstrative or summary. If the receiving party has any evidentiary objections or would seek to seal portions of the demonstratives or summary, the receiving party should so state to the serving party no later than 7:00 am the day before the day on which the party will use the demonstrative or summary, including giving its justification for any request to seal and producing any affidavits it will submit when seeking to seal the demonstrative or summary. The parties should meet and confer to seek to resolve any disputes regarding evidentiary objections or confidentiality requests, and the Court should then hear any evidentiary or confidentiality disputes the day that the demonstrative or summary will be used.

The United States also proposes that demonstratives and summaries used in expert rebuttal testimony be excepted from the timing rules above. The United States' expert rebuttal testimony will likely occur shortly after the testimony of Defendants' expert, and therefore the United States will not have time to compile the exhibits and serve them in the timeframe set out above. Instead, as to demonstratives and summaries used in the United States' expert rebuttal testimony, the United States should serve those demonstratives and summaries on Defendants as soon as practicable before their use, and Defendants should then serve any evidentiary objections or confidentiality designations, including giving its justification for any request to seal and

¹ For example, if Defendants will use a demonstrative on a Thursday, they must serve the demonstrative on the United States by 7:00 am on Tuesday.

producing any affidavits it will submit when seeking to seal the demonstrative or summary, as soon as reasonable practicable thereafter.

Dated: April 21, 2017

/s/ _____
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CERTIFICATE OF SERVICE

I, Conor Craft, certify that on April 21, 2017, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court using the CM/ECF system, which will send notice of the electronic filing to all counsel of record.

/s/ _____
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