

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 16 C 08515
)	
v.)	
)	Judge Edmond E. Chang
DEERE & COMPANY,)	
PRECISION PLANTING, LLC, and)	
MONSANTO COMPANY,)	
)	
Defendants.)	

ORDER

The Court held a pretrial conference on April 26, 2017. This Order summarizes the motions and pretrial issues that were addressed during the pretrial conference.

I. Motion in Limine

The government filed a motion in limine to exclude Defense Exhibit 37, a presentation prepared by non-party Ag Leader. The document is 26 pages (plus an appendix) and contains both statements of fact and statements expressing a plan. Because no proffer of facts established a hearsay exception (*e.g.*, a Rule 803(6) business record), any statements of fact in Exhibit 37 are inadmissible on hearsay grounds and must be established independently through other evidence. With regard to statements of plan, those are admissible under Federal Rule of Evidence 803(3) as proof of Ag Leader’s then-existing plans, so long as the Exhibit’s sponsoring witness can lay the proper foundation for the Exhibit’s creation (which it sounds like will be accomplished). The fact that the Exhibit was prepared after reflection and with the assistance of counsel does not limit its admissibility—although it may affect the weight of the Exhibit’s probative value—because statements by business entities are typically made in a more deliberate fashion and are not held to the same expectation of spontaneity as statements by individuals.

II. Trial Length

The one-hour openings are authorized, although the parties should bear in mind that the Court has read each sides' very helpful pretrial memoranda. The government may use 53 hours of examination time, and the defense may use 47 hours. The Court and the parties will track the amount of time each side uses to present its case. To the extent that they are needed at all, closing arguments will take place after the completion of post-trial briefings.

III. Motion to Compel Expert Discovery Information

The Defendants have moved to compel the government to provide the names and contact information of the growers and planters interviewed by the government's expert witness, Dr. Tasneem Chipty. The Defendants learned of these interviews in early January 2017, and knew that the government refused to disclose the names as of Chipty's deposition, R. 260, Defs.' Mot. to Compel at 2, which took place on March 2, 2017, *id.* at Exh. A. The government maintained its refusal in emails on March 6 and 7. *Id.* at Exh. B. The Defendants should have raised the issue with the Court earlier than the filing date of the motion, April 13, 2017, in light of the discovery deadline and the likely follow-up discovery that would be caused by defense interviews of the growers and planters. Because of the untimeliness of the motion, and because the Defendants have developed their own evidence from other growers and planters, the motion to compel is denied.

IV. Deposition Designations and Objections

The parties must submit the final list of which witnesses will be testifying in court versus via deposition by May 3, 2017. Witnesses that appear in the final deposition designations list cannot be called to provide live testimony at trial, and witnesses on the in-court list must testify live unless there is specific good cause (such as an emergency-based, unanticipated unavailability). Absent a motion showing good cause, the Court will not require growers outside the 100-mile limit to testify live in court. If any of the deposition designations are subject to objections (as recorded in the parties' Joint Filing of Deposition Designation Objections, R. 278), the Court will issue a separate order deciding those objections. Depositions need not be read into the record, but instead redacted versions (excising out the non-designated portions) will be offered and accepted into evidence.

V. Witness Examinations

The government may cross-examine Defendants' employees and Ag Leader employees as adverse witnesses, and conversely the defense must ask non-leading questions. If reasonably necessary to rebut government evidence introduced later in the trial and that was not anticipated, the defense may recall (for response purposes) in its case those adverse witnesses called by the government.

VI. Exhibits

Additional exhibits. Each party may add up to 50 more exhibits beyond the previously imposed 500-exhibit limit in light of the limited ongoing discovery. The additional exhibits must arise out of discovery on to the Revised Agreement with Ag Leader.

Demonstrative exhibits. The parties will exchange their lists of expert demonstrative exhibits by May 17, 2017, and make their objections and confidentiality designations by May 24, 2017. They will then meet and confer before trial to resolve any disputes. With regard to non-expert demonstrative exhibits, the parties have agreed to follow the 7 a.m., two-day-in-advance procedure set forth on page 8 of the April 21, 2017 Joint Status Report, R. 275.

Expert reports during testimony. The parties have agreed that their retained experts may testify with their respective reports in front of them, and may refer to the reports during testimony at any time without the need to lay foundation for refreshing memory.

Reports prepared by outside entities. A number of Defendants' exhibits are subject to a particular hearsay objection from the government—namely, that they are out-of-court reports created by consultants or other outside entities and therefore do not fall under the business-records exception. *See* Pl.'s Objections to Defs.' Exhs. 52, 171, 190, 191, 207, 362, 385; *see also* Fed. R. Evid. 803(6). The Defendants argue that the reports qualify as the Defendants' business records even though they were prepared by consultants because Defendants relied on those reports and adopted the information within them. The Court ordered the parties to submit additional briefing on this issue. The Defendants will file an opening brief by May 3, 2017, the Government will respond by May 8, 2017, and the Defendants will file a reply brief by May 10, 2017.

Motion to Seal Trial Exhibits. The Court takes under advisement the disputes concerning necessary redactions as presented in the motion to seal the remaining trial exhibits.

Objections to Exhibits. Objections to the Government's proposed exhibits are decided as follows:

Number	Description	Objections	Ruling
Plaintiff Exhibit 65	12-03-2015 Heather Mouser (Deere) 2015 Performance Appraisal	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 129	11-17-2015 Email from Christopher Meskan (Deere) to David Hoffman (Deere) re 'GPM' attaching Meskan's 2015 Performance Management Appraisal	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 201	2014 Performance Management Appraisal of Rebecca Guinn (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 204	11-04-2016 Performance Management Appraisal of Nathaniel Hartsock(Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 205	11-10-2016 2015, Performance Management Appraisal of Dennis Meade (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.

Plaintiff Exhibit 206	11-10-2016 2016 Performance Management Appraisal of Christopher Meskan (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 207	11-30-2015 2015 Performance Management Appraisal of Aaron Wetzel (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 209	11-04-2016, 2014 Performance Management Appraisal of John May (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 210	11-04-2016, 2015 Performance Management Appraisal of John May (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 211	12-3-2015, 2015 Performance Management Appraisal of Casey Dray (Deere)	R. 403 prejudice and cumulation; contains personal and highly confidential personnel information.	Admitted, with redactions of non-pertinent personnel information.
Plaintiff Exhibit 247	06-02-2015 Email from Justin Kauffman (PP) to Dawn Massner (PP), Brad Arnold (PP) and Keith Crow (PP), re 'RE FW PP SpeedTube Sensor'	R. 802, hearsay. The R. 803(3) state of mind exception does not apply to the hearsay statements of Dan Klein (of CaseIH) to Dawn Massner (recounted in Massner email on p. 1) as to what growers told him. Defendants further object to the government's Relevance description: Defendants do not "admit" the hearsay statements of a non-party declarant.	Admitted for nonhearsay purpose to show impact on the reader; disallowed to prove truth of assertion
Plaintiff Exhibit 300	8-01-2013 AGCO, Precision Planting Business Case T011.pdf	R. 602, foundation, no sponsoring witness. Subject to the proper foundation being laid at trial.	Admitted if AGCO witness can lay foundation at trial.

Plaintiff Exhibit 309	11-3-2015 Email from Al Myers (Ag Leader) to Justin Heath (Ag Leader) and Chad Huedepohl (Ag Leader), re 'RE John Deere acquires Monosem'	R. 805 embedded hearsay; recounts purported conversation with Deere employee.	Reserved for trial. Myers likely will be able to identify or to otherwise confirm that the Deere contact was acting within the scope of employment, but whether 803(6) applies is still open (practically, this might not matter because the exhibit can be used to refresh memory).
Plaintiff Exhibit 314	10-20-2014 Ag Leader, Pro's and Con's of Partnering with Precision Planting.pptx'	Objection withdrawn.	Admitted.
Plaintiff Exhibit 387	12-27-2016 Screenshot of Precision.Agwired.com's John Deere article, 'John Deere Excited about ExactEmerge'	R. 802 hearsay; third-party news article.	Excluded, because it implicitly contains a level of hearsay beyond the party admission. <i>See, e.g., Larez v. Los Angeles</i> , 946 F.2d 630, 642 (9th Cir. 1991).

Objections to the Defendants' proposed exhibits are decided as follows:

Number	Description	Objections	Ruling
Defendants Exhibit 52	Case presentation, Compass Project Steering Team Discussion	R. 802 hearsay. Marakon report.	Reserved pending additional briefing (see above).
Defendants Exhibit 171	Email between Deere and Boston Consulting Group with attachments regarding Project Edgar	R. 802 hearsay. BCG employees (Edgar Findings & Insights deck).	Reserved pending additional briefing (see above).
Defendants Exhibit 190	Deere email chain with attachment regarding Trimble	R. 802. hearsay. Fuld & Company attachment.	Reserved pending additional briefing (see above).

Defendants Exhibit 191	Email chain with attachment between Deere and Boston Consulting Group regarding Ag Leader	R. 802 hearsay. Cover e-mail (Myers' statement) & BlueFrame attachment. Embedded hearsay. Attachment.	Reserved pending additional briefing (see above).
Defendants Exhibit 196	Withdrawn.		
Defendants Exhibit 207	Deere email with attachment regarding Great Plains strategy	R. 802 hearsay. Attachment attributable to Blue Frame. Embedded hearsay throughout. R. 602 lacks foundation. No Sponsoring Witness for attachment.	Reserved pending additional briefing (see above).
Defendants Exhibit 362	Precision Planting valuation discussion presentation	R. 802 hearsay. Ducera statements in valuation report.	Reserved pending additional briefing (see above).
Defendants Exhibit 385	Monsanto / Precision Planting Presentation on precision planting survey results	R. 802 hearsay. Ipsos report. Embedded hearsay. Respondents' statements.	Reserved pending additional briefing (see above).
Defendants Exhibit 457	Ag Leader Newsletter, Ag Leader Insights, Summer 2014	R. 802 hearsay. Magazine. Embedded hearsay. Myers' statement.	Admitted if R. 803(6) foundation can be laid, and if 803(6) applies to the specific sections that the defense wants to rely on.
Defendants Exhibit 478	Kinze Patent Application for hybrid planter	R. 802 Hearsay; R. 602 Lacks Foundation (No Sponsoring Witness). Non party, non witness statements.	Admitted for nonhearsay purposes only.
Defendants Exhibit 479	Kinze Patent Application for hybrid planter	R. 802 Hearsay; R. 602 Lacks Foundation (No Sponsoring Witness). Non party, non witness statements.	Admitted for nonhearsay purposes only.
Defendants Exhibit 480	CNH Patent Application for a seed discharge system	R. 802 Hearsay; R. 602 Lacks Foundation (No Sponsoring Witness). Non party, non witness statements.	Admitted for nonhearsay purposes only.

Defendants Exhibit 481	CNH Patent Application for planter seed meter	R. 802 Hearsay; R. 602 Lacks Foundation (No Sponsoring Witness). Non party, non witness statements.	Admitted for nonhearsay purposes only.
Defendants Exhibit 483	CNH Patent Application for Multiple seed-type planting system	R. 802 Hearsay; R. 602 Lacks Foundation (No Sponsoring Witness). Non party, non witness statements.	Admitted for nonhearsay purposes only.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: April 27, 2017