IN THE 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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Summary judgment is warranted because the government cannot meet its burden to establish a relevant product market in which competition will purportedly suffer. To satisfy this burden, the government must present economic analysis that establishes the scope of the relevant product market. As a matter of law, inferences drawn from qualitative evidence, such as business documents, cannot substitute for the required economic analysis. Specifically, the government must offer economic analysis to address the key issue in defining a product market: could a hypothetical monopolist that controlled all the products in the candidate market profitably raise prices above a competitive level, or would enough consumers switch to other products to make the price increase unprofitable? The government does not carry this burden.

The government seeks to block Deere & Company ("Deere") from acquiring Precision Planting LLC ("Precision") on the theory that competition would suffer in an alleged market for what it calls "high-speed precision planting systems." Instead of conducting the required economic analysis to support its proffered market, however, the government (through its economic expert) does precisely what the Seventh Circuit has repeatedly rejected: *assume* the alleged market's existence based on inferences from cherry-picked business documents. *See, e.g.*, *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 665-66 (7th Cir. 2004). Such an approach fails to satisfy the government's burden to demonstrate through "economic evidence" that "a sufficient number of customers would switch to other technologies in response to a price increase . . . so as to make the price increase unprofitable." *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1343 (Fed. Cir. 2014) (applying Seventh Circuit law). Remarkably, the government's economic expert even conceded that she "did not econometrically estimate demand" in order to predict how consumers would respond to a price increase. Declaration of John M. Majoras ("Majoras Dec."), Ex. A ("Chipty Dep.") at 257:23-24, 323:20-324:17.

Compounding its failure of proof, the government proposes a market definition that is vague, constantly changing, and conceptually incoherent. This ever-morphing product market reinforces the government's failure to anchor its position in the required economic analysis that addresses the relevant question. Defendants' motion for summary judgment should be granted.

BACKGROUND

Deere manufactures and distributes agricultural equipment and is a well-known seller of new planters. Dkt. 90 ("Deere Answer") at 9. Precision designs and sells parts that can be installed (or "retrofitted") onto other companies' planters. Dkt. 89 ("Precision Answer") at 11. Monsanto Company owns Precision. *Id.* at 12-13. Deere announced its agreement to acquire Precision from Monsanto on November 3, 2015. Deere Answer at 11.

On August 31, 2016, the government filed this lawsuit to enjoin the transaction under section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint alleged that Deere markets a row unit, which is a product that is attached to planters and used to plant seeds, called the ExactEmerge row unit. Deere's ExactEmerge row unit can be included in new Deere planters and can also be retrofitted onto used Deere planters. Deere also markets row units other than the ExactEmerge row unit. The complaint also alleged that Precision markets certain retrofit components, including SpeedTube, that can be added to a planter's row units. The complaint then alleged that Deere and Precision "are the only two meaningful providers" in an alleged "market for high-speed precision planting systems," and that Deere's proposed acquisition of Precision would substantially reduce competition in that purported market. Dkt. 1 ("Compl.") ¶ 31. The government has since changed its market definition, but the name of its putative product market remains the same. *See infra* Part II.C.1.

Although not material to this motion, Deere seeks to acquire Precision to expand its retrofit capabilities across a wide range of products and gain a proven team of agricultural

equipment innovators with experience in moving projects quickly from concept to the field. *See* Majoras Dec., Exs. B-C. The government, however, focuses on products that are not central to the transaction. Not only that, but Deere and Precision have entered into agreements that will ensure that growers and suppliers will continue to have access to the challenged Precision products from suppliers other than the merged party.[1]

ARGUMENT

I. LEGAL STANDARD

"To survive a defendant's motion for summary judgment, a plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial." *Tri-Gen, Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 433 F.3d 1024, 1030–31 (7th Cir. 2006). Proving a relevant product market is a "necessary predicate" of the government's Section 7 claim, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), on which it bears the burden of proof. *See, e.g.*, *Menasha*, 354 F.3d at 664; *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 238 F. Supp. 2d 1024, 1033 (N.D. Ill. 2003) ("[T]o survive summary judgment on its antitrust claims, the plaintiff must offer admissible evidence that is sufficient for a [finder of fact] to find that the proposed relevant market is accurate.").

II. THE GOVERNMENT CANNOT PROVE A RELEVANT PRODUCT MARKET.

A. The Government Must Prove a Market With Economic Analysis.

A product market defines the boundaries within which competition meaningfully exists among specific products. The boundaries of a product market "are determined by the reasonable

[1] Precision presently supplies components to AGCO Corporation and CNH Industrial, both of which also sell planters. Deere has agreed that, following its acquisition of Precision, those companies will continue to have independent access to those components. Deere has also entered into an agreement that will allow Ag Leader Technology to market the Precision products to anyone, just like Precision does today.

interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). An alleged product market is too narrow if it excludes reasonable substitutes for the products in the alleged market. *See Kaiser Aluminum & Chemical Corp. v. FTC*, 652 F.2d 1324, 1330 (7th Cir. 1981). A market is not "limited to products which are identical in nature" and instead includes products with varying qualities and characteristics, so long as they are "easily substituted in their end-use." *Id.* Demand substitution is key to defining an antitrust market because "the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986).

In the Seventh Circuit, "the plaintiff must provide an economic analysis of the relevant market," such as an analysis of "cross-price elasticity of demand." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). Qualitative evidence is insufficient without a rigorous, econometric underpinning, which ensures that a party does not "assume[] what is to be established." *Menasha,* 354 F.3d at 665; *see also DSM Desotech*, 749 F.3d at 1342. The Seventh Circuit "requires that a plaintiff prove that products are good substitutes using economic evidence; a conclusory assumption of competition where products or services appear to be similar is insufficient." *Reifert*, 450 F.3d at 318. "Actual data and a reasonable analysis are necessary." *Id.*

Typically, a product market is proven through the "hypothetical monopolist test," which is set forth in the government's Horizontal Merger Guidelines (the "Guidelines") and evaluates whether demand for the products in a candidate market is sufficiently strong that enough consumers would not turn elsewhere to defeat a hypothetical price increase. *See* DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (2010). Specifically, the test measures whether a

hypothetical monopolist that is selling all of the products in a candidate market could profitably impose a "small but significant and non-transitory increase in price" (a "SSNIP"). *See id.* If a SSNIP would not be profitable (because too many customers would switch to other products outside the candidate market), the candidate market is too narrow and is expanded to include enough other products such that a monopolist of the now-larger group of products could profitably impose a SSNIP. *Id.* §§ 4.1.1, 4.1.2. The Guidelines state that a SSNIP analysis is an important "methodological tool for performing the hypothetical monopolist test." *Id.* § 4.1.1; Majoras Dec., Ex. D ("Chipty Report") ¶ 92 (the hypothetical monopolist test should employ SSNIP analysis).

For a claim to survive summary judgment, the Seventh Circuit requires that the economic analysis be derived from sound data using professionally accepted analytical methods; simply presenting an economist to testify is insufficient. *See Menasha*, 354 F.3d at 664-65 (affirming grant of summary judgment because report from "an economist well situated to provide [the necessary] evidence . . . relies on [survey research] and suffers derivatively"). The requisite economic evidence supporting the alleged market definition cannot simply consist of conclusions drawn solely from business documents and anecdotal testimony. *See id.*; *DSM Desotech*, 749 F.3d at 1342. Moreover, the analysis must address the central issue, which is not simply observing what choices consumers make today, but analyzing whether the hypothetical monopolist could profitably raise prices in the future (or whether, instead, consumers would defeat any such effort by purchasing other products or services). *DSM Desotech*, 749 F.3d at 1344; *Rothery*, 792 F.2d at 219.

For example, in *DSM Desotech*, the plaintiff attempted to prove a relevant product market based on a mix of documents and testimony about the substitutability of the products at

issue, including testimony from "customers who indicated they would still buy [the products in the alleged market] if faced with a 5-10% price increase." 749 F.3d at 1343-44. The Federal Circuit, applying Seventh Circuit law, affirmed the grant of summary judgment because the plaintiff "failed to satisfy the stringent demand for economic data and analysis required by the Seventh Circuit." *Id.* at 1345; *see also Menasha*, 354 F.3d at 664. Among other things, the plaintiff offered no economic analysis of "the pertinent economic question of whether a sufficient number of customers would switch to a competing technology if faced with a small but significant price increase." *DSM Desotech*, 749 F.3d at 1344.

Similarly, in *ChampionsWorld, LLC v. U.S. Soccer Federation, Inc.*, 890 F. Supp. 2d 912, 947 (N.D. Ill. 2012), the plaintiff tried to prove a market consisting solely of the promotion of soccer matches by offering a regression analysis showing that soccer matches did not affect attendance at baseball games in the same area. *Id.* But this Court granted summary judgment because the plaintiff's expert had "not use[d] any generally accepted test to determine the relevant market" and "did not define the market by conducting a [SSNIP] test." *Id.* at 948. Specifically, the expert's analysis, though certainly quantitative, "tested the wrong thing—asking whether soccer games impacted [baseball] attendance, not whether higher ticket prices for [soccer] matches *would lead* consumers to select other entertainments." *Id.* (emphasis added). Looking only at consumer choices at current prices was not enough: the plaintiff's expert "ran no study at all on *consumer sensitivity to [soccer] match ticket prices*." *Id.* (emphasis added). Thus, as *ChampionsWorld* confirms, an expert's product market opinion must provide a methodologically sound analysis of demand sensitivity to support a conclusion that a sufficient number of consumers would accept a hypothetical price increase rather than purchase a product outside the candidate market. *See also, e.g.*, Guidelines § 4.1.1; *DSM Desotech*, 749 F.3d at

1344 ("[T]he evidence and testimony Desotech relies on fails to answer the pertinent economic question of whether a sufficient number of customers would switch to a competing technology if faced with a small but significant price increase."); *see also* Chipty Dep. at 257:23-24 ("I myself did not econometrically estimate demand").[2]

B. The Government Does Not Offer the Necessary Economic Analysis.

The government has fallen well short of these standards, with no meaningful "econometric evidence of any kind" showing how consumers would respond to a future, hypothetical price increase. *Menasha*, 354 F.3d at 664. The government's economic expert, Dr. Tasneem Chipty, purports to conduct a "hypothetical monopolist test," but her analysis is based on conclusory assumptions from subjective interpretations of cherry-picked documents and is devoid of any economic analysis of actual data. For instance, Dr. Chipty has not studied available price and sales data to assess the sensitivity of customer demand for the products in the alleged product market (*i.e.,* "high-speed precision planting systems"). Instead of analyzing actual data to estimate the cross-elasticity of the parties' products for her "hypothetical monopolist test," Dr. Chipty rests on statements in a few Deere documents that she construes as proof that the transaction would allow Deere to avoid a 5-15% price decrease. Dr. Chipty explained that her reliance on a potpourri of such documents was "central to [her] analysis." Chipty Dep. at 238:5-22. The Seventh Circuit, however, requires a market definition to rest on independent economic analysis and not merely on the expert's interpretation of company

[2] No specific economic analysis is mandatory, but there must be an economic analysis, it must be based on data, and it must address the correct question—*i.e.*, how consumers would react to a price increase. *See, e.g.*, *DSM Desotech*, 749 F.3d at 1342 (explaining that "an economist might analyze price relationships, buying and selling patterns, or the existence of price discrimination," which "might reveal whether customers switch between" particular products "and would thus indicate whether the products are in the same market").

documents—and that analysis must address what consumers likely would do in the event of a price increase. *See, e.g.*, *Menasha*, 354 F.3d at 664 (rejecting expert reliance on a "potpourri of survey research and armchair economics"); *ChampionsWorld*, 890 F. Supp. 2d at 949-51 (granting summary judgment because "Plaintiff cannot carry its burden on the threshold requirement of demonstrating a cognizable market" when relying on expert evidence that does not provide the requisite "economic analysis").

Dr. Chipty nowhere offered a SSNIP analysis, or any other economic analysis of price sensitivity, to support her conclusions. To be sure, she uses SSNIP-type language, opining that "a hypothetical monopolist over the . . . Deere and Precision Planting [technologies] would find it profitable . . . to raise prices by five to fifteen percent." Chipty Report ¶ 107. But Dr. Chipty never actually conducts any economic analysis based on "[a]ctual data" from which one could *derive* the conclusion that a hypothetical monopolist could profitably impose such a price increase. *Reifert*, 450 F.3d at 318; *see* Chipty Dep. at 326:6-10 (did not run a critical loss test).

Dr. Chipty instead assumes what should be the subject of economic analysis, interpreting the Deere documents to support her view that "*Deere personnel determined* that, absent the proposed acquisition, competition from Precision's SpeedTube would likely force Deere to lower the price of its ExactEmerge row unit" by 5-15%. Chipty Report ¶ 106 (emphasis added).[3]

[3] Dr. Chipty's inferences from these Deere documents are wrong. The documents in question do not discuss *actual* pricing strategy or practices and were certainly not authored by expert economists. In fact, there is no document in the record stating that Deere considered, planned, or would be forced to reduce ExactEmerge prices—which Deere instead has actually *increased*. But for purposes of this motion, that factual question is inconsequential, other than to be a pointed example of why the Seventh Circuit requires rigorous economic analysis and not simply cherry-picked phrases from business documents. *Cf. R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 701 (7th Cir. 2006) ("A large firm such as Reynolds, with thousands of employees, generates mountains of internal paper. Some of the employees are bound to take almost any view about almost every subject.").

Simply accepting this hypothesis (instead of testing it), Dr. Chipty tautologically observes that such a 5-15% price effect would meet the definition of a SSNIP. She further claims based on these documents, but without any analysis, that the merged company could profitably avoid such a price effect. *See id.* ¶ 107 ("*Based on this information*, a hypothetical monopolist over the two high-speed precision planting systems made by Deere and Precision Planting would find it profitable to raise the price of Deere's high-speed precision planting system by a small, but significant non-transitory amount above the price level that would have prevailed absent the merger."). In a footnote, she arithmetically derives the percentage of sales that would need to divert from the ExactEmerge row unit to Precision's SpeedTube to support a hypothesized 10% price increase, a calculation that she describes as merely "*implied by*" her assumption of a post-merger price increase based on the cited business documents rather than *derived* from economic analysis of data. *Id.* n.246 (emphasis added). Such an arithmetic exercise does not economically evaluate how consumers would *actually* respond to a hypothetical price increase, including the extent to which consumers would divert to the merged company's SpeedTube in the event of a hypothetical SSNIP on the ExactEmerge row unit—which is the economic analysis that Dr. Chipty should have performed. *DSM Desotech*, 749 F.3d at 1343.

Dr. Chipty all but conceded that she did not adequately analyze the relevant product market. She admitted—consistent with guiding Seventh Circuit principles—that "[c]ompany documents and ordinary course behavior" must be "*coupled with economic analysis*" in order to "provide sufficient basis for an economic option." Chipty Dep. at 22:12-15 (emphasis added). But she then admitted that the business documents in question were what she "used to formally implement the hypothetical monopolist test." *Id.* at 237:6-18; *see also id.* at 238:16-22 (agreeing that these documents were "central support" for her hypothetical monopolist test). She freely

admitted that she "didn't look at numerical data" (such as actual pricing data) in order "to validate the 5 to 15 percent assumption in those documents"—*i.e.*, by arriving at "an alternative estimation" of the figure using an econometric model. *Id.* at 247:12-15, 249:21. Critically, Dr. Chipty conceded that she "did not econometrically estimate demand" in order to predict how consumers would respond to a price increase. *Id.* at 257:23-24, 323:20-324:17. Simply put, Dr. Chipty did not perform any independent assessment validating the assumption she draws from select business documents. *See, e.g.*, *id.* at 251:13-17 ("Q: Did you make any attempt to investigate how that 5 to 15 percent figure was determined by the employees who referenced it? A: I don't have any information outside of the set of documents that I cite."). This is precisely what the Seventh Circuit has held to be categorically insufficient. *See Reifert*, 450 F.3d at 318 (requiring "economic evidence" drawn from "[a]ctual data" rather than inferences from industry documents). A putative economic analysis resting on such qualitative lay assessments "assumes what is to be established" and cannot support a market definition. *Menasha*, 354 F.3d at 665.[4]

Dr. Chipty "place[d] a lot of confidence" in the internal documents, because in her view "the personnel involved" in the internal Deere discussions "have actually implemented a version of the hypothetical monopolist test." Chipty Dep. at 243:3-6, 250:1-4. But there is no evidence that Deere's business personnel had the economic expertise to conduct a hypothetical monopolist

[4] Dr. Chipty made no serious attempt to validate the future pricing conjecture of the cherry-picked documents because she lacked the information that such an analysis requires. *See* Chipty Dep. at 247:22-248:3 (stating that she "had no access to the ultimate sales decisions in the field in terms of the types of data you would need" to assess the Deere documents and to perform a valid hypothetical monopolist test); *id.* at 249:19-22 ("the data were not available to me to do the numerical analysis that could have allowed an alternative estimation of the 5 to 15 percent"; *id.* at 251:21-22 ("I would have probably needed insights into individual sales behavior"); *id*. at 253:2-6 (sales data from the dealers to the growers "would be one source of such data"). Neither Dr. Chipty nor the government tried to obtain such data by, for example, subpoenaing dealers and/or growers in the industry. But this failure does not excuse Dr. Chipty's lack of economic analysis, given the government's burden of proof under Seventh Circuit law.

test or even knew what it was, let alone that they "actually implemented" it by "econometrically estimat[ing] demand." *Id.* at 243:3-6, 257:23-24. Moreover, as Dr. Chipty acknowledges, *id.* at 315:8-21, these documents predated the licenses and other agreements that will expand access to the Precision products and thus will significantly change the complexion of the government's proposed market. *See supra* n.1. And, in any event, such amateur, non-expert "armchair economics" cannot replace the "econometric analysis" that is necessary when the government seeks to block a merger under the Clayton Act. *Menasha*, 354 F.3d at 664. Summary judgment is required. *See, e.g.*, *DSM Desotech*, 749 F.3d at 1342 (affirming summary judgment on this basis); *Reifert*, 450 F.3d at 320 (same); *Menasha*, 354 F.3d at 664 (same); *ChampionsWorld*, 890 F. Supp. 2d at 951 (summary judgment on this basis).

C. The Serious Conceptual Problems with the Government's Proposed Market Definition Highlight the Absence of the Necessary Economic Foundation.

The government's lack of any economic analysis that addresses the key issue—*i.e.*, how consumers would respond to a hypothetical price increase—is dispositive regardless of the nature of the proposed underlying market. Yet here, the need for the required economic analysis is especially striking. As alleged, this putative "high-speed precision planting system" market includes four specific retrofitting products (vSet, vDrive, SeedSense 20/20, and Speed Tube) that are sold separately by Precision but can be used together, as well as some components contained in Deere's ExactEmerge row units and elsewhere on Deere planters (but not sold separately by Deere) that enable certain planting features. Even Dr. Chipty concedes that these ExactEmerge and Precision products are very different from each other in price, compatibility, features, and grower demand. Chipty Dep. at 151:18-152:12, 182:9-13; Majoras Dec., Ex. E ("Chipty Rebuttal") ¶¶ 20-24. The market is implausible on its face and incoherent in its application—enough so that the absence of the required economic foundation is not surprising.

1. The Government's Market Definition Has Been a Moving Target.

As an initial red flag, the government has not articulated a consistent market definition. The complaint alleged a market for "high-speed precision planting systems," including systems either "factory-installed on new planters" or "retrofitted onto new and used conventional planters." Compl. ¶ 26. Included systems, the government alleged, were comprised of "several critical components" that "typically include a seed delivery cartridge, an advanced seed meter, an electric drive, and a control system." *Id.* ¶ 14. Conveniently, the government alleged that only Deere and Precision products fell within its narrow market definition. *Id.* ¶ 31.

A critical element of the government's relevant market in its complaint and discovery responses was the ability to operate the planter "at speeds materially greater than 5 mph (dependent on conditions) without materially losing accuracy of seed placement." Compl. ¶ 13; Majoras Dec., Ex. F at 20. Dr. Chipty in her opening report also articulated a "higher than five mph without sacrificing singulation and good spacing" definition. Chipty Report ¶ 20. Indeed, this was the linchpin of the government's market definition. Majoras Dec., Ex. F at 8 (claiming that "[t]he revolutionary technology contained in high-speed precision planting systems *breaks the 5 mph barrier*") (emphasis added).

Dr. Chipty now disclaims this five miles per hour element, however. Chipty Dep. at 58:13-59:5. Her own analyses show that conventional planters can be—*and often are*—driven at "5 to 5 1/2 miles an hour without sacrificing singulation and good spacing"—which would, under the government's and her own prior definition, place those alternatives squarely in the relevant market. *Id.* at 87:19-20; Chipty Report Ex. 9 (Chipty Dep. Ex. 1). Faced with this reality, Dr. Chipty, at her deposition, segued to a market definition defined around "the bundle of technologies" that "enable *significantly faster* speeds without *degrading* precision relative to conventional speed planters," regardless of the speed of operation. Chipty Dep. at 57:14, 72:7-9,

87:21-24 (emphasis added). She offers no measure of "significantly faster" or "degrading [of] precision" that could be used to determine what products are in or out of her relevant market.

Dr. Chipty admits that her latest market definition is different from that espoused in her expert reports. *See id.* at 57:13-58:24. No longer tethered to a specific driving speed (or even a range of speeds), the new definition necessarily sweeps in other products (such as advanced seed meters or hydraulic downforce) that can allow a grower to increase speed without sacrificing precision. *See* Majoras Dec., Ex. G ("Bresnahan Dep.") at 30:23-32:4. Dr. Chipty provides no data or econometric analysis to support her exclusion of such alternatives.

Summary judgment is particularly appropriate for this sort of vague, fluid market definition. In *Huhta v. Children's Hospital of Philadelphia*, the plaintiff presented multiple "definitions of the relevant product market" that were "vague and varied." 1994 WL 245454, at *3 (E.D. Pa. May 31, 1994). Because this "ever-changing product market definition" was "impossible to evaluate and too vague to be useful"—and suggested a self-serving attempt to define away competition—the district court granted summary judgment. *Id.* The Third Circuit affirmed. *See Huhta v. Children's Hosp. of Phila.*, 52 F.3d 315 (3d Cir. 1995). The government's shifting market definition in this case raises the same issues and strongly underscores why rigorous economic evidence must support it.

2. The Government's Market Definition is Incoherent.

Further highlighting its failure to provide the necessary economic foundation, the government's proposed market definition is incoherent and litigation-driven. Dr. Chipty asserted that "high speed" permits more planting during a crop's optimal planting window. Chipty Dep. at 159:10-22. But she did not attempt to determine how many growers *need* to plant faster or cannot plant within the optimal planting window with their existing equipment or with an alternative product. *Id.* at 75:8-11; 109:9-13; 110:15-21; 112:7-12; 117:9-12; *cf. DSM Desotech*,

749 F.3d at 1344 (summary judgment where no evidence "for what would constitute a sufficient number"). And agronomic data show that most growers do *not* need to plant faster to achieve Dr. Chipty's primary rationale. *See* Majoras Dec., Ex. H ("Bresnahan Rebuttal") ¶¶ 90-94. Dr. Chipty herself concedes that growers are heterogeneous and that there are plausible alternatives to buying a "high-speed precision planting" system (wider planters, longer hours, etc.) that can be more "economical" for growers. Chipty Report ¶ 62; Chipty Dep. at 73:3-4; 75:1-2; 140:15-20; 218:14-220:10; 317:16-18; 322:12-323:2; 326:16-20. Despite these conceded facts, Dr. Chipty focuses only on a few growers' preferences for the parties' products, even though the "[a]ttributes of shoppers do not identify markets." *Menasha*, 354 F.3d at 665. As explained in Part II.B above, Dr. Chipty never conducted an economic analysis to address the key question: Are there enough growers with no competitive alternative to a faster, more precise planter, such that a hypothetical monopolist over the market could raise prices without concern for losing the business of other growers with different planting needs, or with different ways of addressing the same needs? *See, e.g.*, *Menasha*, 354 F.3d at 665; *DSM Desotech*, 749 F.3d at 1343.

Additionally, defining the market as a "bundle of technologies" that enables unspecified speed improvements (Chipty Report ¶ 20) is inconsistent with the nature of the products the government seeks to include in its relevant market and the way they are sold. Dr. Chipty identifies four essential components that must all be used together: an electric drive, an advanced seed meter, an advanced seed tube, and a control monitor. *Id.* ¶ 21. But she acknowledges that neither Deere nor Precision sells a "bundled" product that includes these four technologies and that Deere and Precision do not even sell comparable products. Deere sells consumers new ExactEmerge planters that incorporate the technology, as well as ExactEmerge row units that contain some (but not all) of the four components and can be retrofitted onto

Deere planters. *Id.* ¶ 23; Chipty Dep. at 51:2-9. Precision, on the other hand, sells only separate components that are priced and sold individually and either factory-installed or retrofitted onto certain planters. Chipty Report ¶ 23; Chipty Dep. at 31:10-15. Moreover, Dr. Chipty admits that each of these components faces different competitors and different levels of demand. Chipty Rebuttal ¶ 70; Chipty Dep. at 45:4-14. Such competition would plainly constrain the prices of Precision's individual components—yet the government has not even analyzed (much less modeled) it. *See* Chipty Dep. at 44:14-46:11. Without econometric evidence, there is no basis to assume that these various product types—wholegood planters, retrofit kits, and retrofit components—could ever be in the same product market, let alone define its contours.

Equally troubling, growers need not purchase Precision's four required components together, or even all from Precision. *See id.* at 27:5-29:24. Oddly, the government's theory means that a transaction for two or more components other than SpeedTube would fall within the product market only if the grower later bought SpeedTube. *See id.* at 26:7-16. Under this approach, one could *never* know whether a purchase of a subset of the Precision products at issue falls within the product market because it is impossible to know today whether the product "suite" will ever be completed. Notably, it is overwhelmingly *not* completed.

These deficiencies would have been fatal to the government's relevant market even had the government attempted to provide some threshold econometric showing. But the Court need not resolve these issues for purposes of this motion. They simply serve to illustrate the government's failure of economic proof in light of serious issues regarding the proposed product market. Without such economic proof, under binding Seventh Circuit law, the government's arbitrary, incoherent market definition cannot stand. Summary judgment is necessary.

III. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment.

Dated: April 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John M. Majoras, certify that on April 5, 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/ John M. Majoras
John M. Majoras