

# ILLINOIS BUSINESS LAW JOURNAL

---

---

## CONSOLIDATION IN THE AGRICULTURAL MANUFACTURING INDUSTRY: DOES JOHN DEERE'S PROPOSED BUYOUT OF PRECISION PLANTING VIOLATE SECTION 7 OF THE CLAYTON ACT?

---

---

### ❖ NOTE ❖

Ryan Harding\*

#### *Abstract*

*In the fall of 2015, John Deere attempted to buy Precision Planting: a specialty manufacturer of precision planting equipment. The government objected to this sale under Section 7 of the Clayton Act. This Note will examine the technology of John Deere and Precision Planting and determine whether the acquisition of Precision Planting by Deere is legal. Finally, this Note will recommend that the government take further action to prevent continued consolidation in the agricultural manufacturing industry.*

#### TABLE OF CONTENTS

I.	INTRODUCTION.....	53
II.	BACKGROUND INFORMATION.....	54
	A. The Technology.....	54
	1. Traditional Planter.....	54
	2. High Speed Precision Planter.....	55
	B. The Art of the Deal: Precision Planting, Monsanto, John Deere, and the U.S. Department of Justice.....	56
III.	ANALYSIS.....	58
	A. Antitrust Law Generally.....	58
	B. Applicable Antitrust Law.....	59

---

\*J.D. 2017, The University of Illinois College of Law; B.S. 2013, Southern Illinois University, Edwardsville. I would like to thank my parents, Darren and Julie Harding, for all their support and encouragement.

C. Party Arguments .....	60
1. <i>The U.S. Department of Justice</i> .....	60
2. <i>John Deere</i> .....	61
D. Analysis Arguments .....	62
1. <i>Did the Government Show a Presumption of Illegality</i> .....	62
a. Cross-Elasticity .....	63
b. Traditional Planters and High Speed Precision Planters are Reasonably Interchangeable Products .....	64
2. <i>If the Government Meets Their Burden, John Deere will         Likely Rebut the Presumption of Illegality</i> .....	66
a. Are Barriers to Entry Low? .....	66
b. Competition Will Remain Competitive .....	67
3. <i>If Deere Rebut the Presumption of Illegality, the         Government Won't Be Able to Meet Their New Burden</i> .....	68
IV. CONCLUSION .....	68
V. RECOMMENDATION .....	69

## I. INTRODUCTION

Since the 1980's, the agricultural manufacturing industry has significantly consolidated.<sup>1</sup> The six largest remaining manufactures based on revenue are John Deere, Case New Holland (CNH), AGCO, Kubota, Claas, and Mahindra, respectively.<sup>2</sup> Because of falling commodity prices and declining sales in agricultural equipment, analysts in the farm industry predict further consolidation.<sup>3</sup> More specifically, analysts predict that the largest remaining manufactures will seek to acquire smaller, specialty manufactures to further increase their market share.<sup>4</sup> Such an acquisition occurred in the fall of 2015 when John Deere attempted to buy Precision Planting: a specialty manufacturer of precision planting equipment.<sup>5</sup>

---

<sup>1</sup> Aimee Cope, *2016 Outlook: Machinery Market Ripe for Consolidation*, FARM J. (Dec. 14 2015), <http://www.agweb.com/article/2016-outlook-machinery-market-ripe-for-consolidation-naa-aimee-cope/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Steve Stein, *Area Agricultural Service Precision Planting Bought by Monsanto in 2012 Being Sold to John Deere*, PEORIA J. STAR (Nov. 22 2014), <http://www.pjstar.com/article/20151122/NEWS/151129863>.

However, the government objected to this proposed merger under Section 7 of the Clayton Act.<sup>6</sup>

Part II of this Note will examine the planting technology of John Deere and Precision Planting. This section will also study the eventual purchase of Precision Planting by John Deere and the resulting government action under Section 7 of the Clayton Act to prevent the sale. Part III will analyze whether the purchase of Precision Planting by John Deere violates Section 7 of the Clayton Act. Part IV of this Note will conclude that the purchase of Precision Planting is probably legal. Finally, Part V recommends that the government take further action to prevent continued consolidation of the agricultural manufacturing industry.

## II. BACKGROUND INFORMATION

### A. The Technology

To analyze the legality of the purchase of Precision Planting by John Deere, it is necessary to describe in detail their planting technology and how this technology compares to the rest of the industry. This description will begin by examining how traditional planters work and then contrasting them with high speed precision planters.

#### 1. Traditional Planter

A planter is a farm implement pulled behind a tractor that automatically plants seeds into the ground.<sup>7</sup> Planters are comprised of two primary components: a toolbar and row units. The toolbar is a large metal implement pulled by the tractor and provides the basic structural framework for the planter.<sup>8</sup>

Row units are attached to the toolbar.<sup>9</sup> Every planter has an even number of row units ranging from two to forty-eight.<sup>10</sup> Essentially, row units

---

<sup>6</sup> Jessie Scott, *After Acquisition, Deere and AG Leader Will Sell Precision Planting Products*, SUCCESSFUL FARMING (Oct. 12 2016), <http://www.agriculture.com/news/machinery/after-acquisition-deere-and-ag-leader-will-sell-precision-planting-products>.

<sup>7</sup> *List of Farm Machinery in Agriculture*, WORLD AGRIC. (2016), <http://www.agrotechnomarket.com/2012/02/list-of-farm-machinery-in-agriculture.html>.

<sup>8</sup> See *The Anatomy of a Planter*, ILL. FARM GIRL (April 30, 2015), <http://www.theillinoisfarmgirl.com/the-anatomy-of-a-planter/>; see also *The Farmer's Life, How a Corn Planter Works*, YOUTUBE (Mar. 19, 2011), [https://www.youtube.com/watch?v=3M9Xl17\\_rtQ](https://www.youtube.com/watch?v=3M9Xl17_rtQ).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

insert seeds into the ground for planting. Each row unit draws seed from a main seed hopper or is individually filled with seed.<sup>11</sup> In a traditional row unit, gravity forces the seeds into a seed meter within the row unit.<sup>12</sup> The seed meter has individual holes, one seed to each hole, which allows for uniform planting.<sup>13</sup> The seed meter continually spins, dropping one seed into the ground at a time.<sup>14</sup>

The row unit also prepares the ground for the planting of seeds.<sup>15</sup> A row cleaner, which is a part of the row unit, moves through the field and pushes stalks, clods of dirt, and other debris out of the way.<sup>16</sup> Gauge wheels regulate how deep the seeds will be planted while metal discs open a narrow trench in the field for the seed meter to drop seeds into.<sup>17</sup> Once the seed is in the ground, a small plastic stick known as a seed firmer presses the seed gently against the ground.<sup>18</sup> Closing wheels then follow and close the trench; which ensures that the seeds are covered in dirt.<sup>19</sup>

## 2. High Speed Precision Planter

High speed precision planters operate in essentially the same way as traditional planters except for how the seeds are delivered to the ground. High speed precision planters use flighted belts to deliver the seed from the row unit to the seed trench rather than a seed meter.<sup>20</sup> Unlike traditional planters which use gravity tubes, these flighted belts do not rely on gravity to deliver the seed into the ground.<sup>21</sup>

Traditional planters, when traveling at speeds greater than five miles per hour, begin to bounce causing seeds to drop at different speeds from the seed meter.<sup>22</sup> This causes irregular spacing and lower yields overall.<sup>23</sup> High speed precision planters solve this problem because the flighted belts deliver the seeds in a uniform fashion, rather than relying on gravity, and increase or

---

<sup>11</sup> See *id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *SpeedTube: Plant 2X Faster*, PRECISION PLANTING (2017), <http://www.precisionplanting.com/#products/speedtube/>.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

decrease the number of seeds planted based on the speed of the planter.<sup>24</sup> This high speed precision planting technology allows for farmers to plant at up to 10 miles per hour; which is twice the speed of traditional planters.<sup>25</sup> This increased speed allows farmers to plant during better growing conditions, farm more acres, and produce higher yielding crops.<sup>26</sup>

B. The Art of the Deal: Precision Planting, Monsanto, John Deere, and the U.S. Department of Justice

Precision Planting is a Delaware corporation headquartered in Tremont, Illinois.<sup>27</sup> Precision Planting employs more than 250 workers, ships products to more than 40 countries including the United States and Canada, and operates a 100,000 square-foot production facility.<sup>28</sup> The company originally developed aftermarket products that were added onto existing planters with the goal of improving planting depth and spacing in order to increase crop yields.<sup>29</sup> More recently, the company began manufacturing precision planting equipment that can be retrofitted to update conventional planters manufactured by John Deere, Kinze Manufacturing, AGCO Corporation, and other agricultural manufactures.<sup>30</sup> These products and services directly compete with John Deere's precision planters because it allows a farmer to upgrade his existing planter at a fraction of the cost of buying a new precision planter from John Deere.<sup>31</sup>

Monsanto is a Delaware corporation headquartered in Saint Louis, Missouri.<sup>32</sup> The company provides agricultural products including seeds, herbicides, and fertilizers. The Climate Corporation is a subsidiary of

---

<sup>24</sup> See *id.*

<sup>25</sup> See Jessie Scott, *10 Tips for High-Speed Planting*, SUCCESSFUL FARMING (Feb 4, 2015), [http://www.agriculture.com/machinery/farm-implements/planters/10-tips-f-highspeed-planting\\_231-ar47375](http://www.agriculture.com/machinery/farm-implements/planters/10-tips-f-highspeed-planting_231-ar47375).

<sup>26</sup> *Id.*

<sup>27</sup> Steve Stein, *Tremont-based Precision Planting Remains One of Area's Most Prominent Agriculture Businesses*, PEORIA J. STAR (Apr. 21, 2016), <http://www.pjstar.com/lifestyle/20160421/tremont-based-precision-planting-remains-one-of-areas-most-prominent-agriculture-businesses>; Steve Stein, *Progress: Ag Products Maker Precision Planting has Become One of Region's Most Prominent Businesses*, PEORIA J. STAR (Apr. 22, 2015) <http://www.pjstar.com/article/20150422/NEWS/150429692>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See PRECISION PLANTING *supra* note 20.

<sup>31</sup> See *id.*

<sup>32</sup> *Monsanto Facilities Around the World*, MONSANTO (2017), <http://www.monsanto.com/whoware/pages/our-locations.aspx>.

Monsanto.<sup>33</sup> In 2012, the Climate Corporation purchased Precision Planting for \$250 million.<sup>34</sup> Monsanto then invested an additional \$25 million into Precision Planting.<sup>35</sup>

Deere & Company, more commonly known as John Deere, is a Delaware corporation headquartered in Moline, Illinois.<sup>36</sup> Deere manufactures implements and machinery for the construction, forestry, lawn care, and agricultural industries.<sup>37</sup> Furthermore, Deere is the leading seller of new seed planters in the United States.<sup>38</sup>

John Deere was the first company to develop high speed precision planting equipment.<sup>39</sup> In 2014, Deere released a new planter that utilized the metered delivery system for seed placement into the trench.<sup>40</sup> This allowed farmers to plant at speeds up to 10 miles per hour; double the speed of traditional planters.<sup>41</sup>

Shortly thereafter, Precision Planting released its own high speed planting system that could be retrofitted to an existing traditional planter.<sup>42</sup> This allowed for a farmer to retrofit his existing traditional planter to be just as efficient as the new John Deere planter at a fraction of the cost.<sup>43</sup> Precision Planting then partnered with Case-International Harvester and AGCO, two of Deere's major rivals in the agricultural manufacturing industry, and allowed them to offer Precision Planting technology on their new planters.<sup>44</sup>

---

<sup>33</sup> See *Company History*, MONSANTO (2017),

<http://www.monsanto.com/whoweare/pages/monsanto-history.aspx>.

<sup>34</sup> Steve Stein, *Area Agricultural Service Precision Planting Bought by Monsanto in 2012 Being Sold to John Deere*, PEORIA J. STAR (Nov. 22 2014), <http://www.pjstar.com/article/20151122/NEWS/151129863>.

<sup>35</sup> *Id.*

<sup>36</sup> See *World Headquarters*, JOHN DEERE (2017),

[https://www.deere.com/en\\_US/corporate/our\\_company/fans\\_visitors/tours\\_attractions/worldheadquarters.page](https://www.deere.com/en_US/corporate/our_company/fans_visitors/tours_attractions/worldheadquarters.page).

<sup>37</sup> See *History*, JOHN DEERE (2017),

[https://www.deere.com/en\\_US/corporate/our\\_company/about\\_us/history/history.page?](https://www.deere.com/en_US/corporate/our_company/about_us/history/history.page?).

<sup>38</sup> See Compl. at 4, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>39</sup> *2014 News Releases and Information: John Deere Revolutionizes Seed Delivery with New Row Units for 2015*, JOHN DEERE (Feb. 12, 2014),

[https://www.deere.com/en\\_US/corporate/our\\_company/news\\_and\\_media/press\\_releases/2014/agriculture/2014feb12\\_exactemerge\\_planter.page](https://www.deere.com/en_US/corporate/our_company/news_and_media/press_releases/2014/agriculture/2014feb12_exactemerge_planter.page).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Ike Brannon, *When Does Antitrust Activity Stifle Innovation*, 39 REG. 6, 6 (2016).

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

On November 3, 2015, Deere agreed to purchase Precision Planting for \$190 million from Monsanto.<sup>45</sup> On August 31, 2016, the Justice Department sued to stop Deere's acquisition of Precision Planting under Article 7 of the Clayton Act.<sup>46</sup> The government argued that the transaction violated Article 7 of the Clayton Act because the deal would bring together the two largest manufacturers of high speed precision planting products.<sup>47</sup> The government further alleged that this merger would substantially reduce competition and result in higher prices for farmers and consumers.<sup>48</sup>

John Deere responded that the merger would increase innovation and that competition was already intense in the planter market.<sup>49</sup> Deere also proposed to license Precision Planting technology to Ag Leader.<sup>50</sup> Ag Leader, a competitor of Deere, would then be allowed to develop, improve, and sell this technology to other competitors.<sup>51</sup> This deal with Ag Leader, however, was contingent upon the Justice Department confirming the acquisition of Precision Planting by John Deere.<sup>52</sup>

### III. ANALYSIS

#### A. Antitrust Law Generally

Antitrust law in the United States is primarily governed by three statutes: the Sherman Antitrust Act, the Federal Trade Commission Act, and the Clayton Act.<sup>53</sup> The Sherman Act generally proscribes agreements that

---

<sup>45</sup> *Id.*

<sup>46</sup> Compl. at 34, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>47</sup> Jessie Scott, *After Acquisition, Deere and AG Leader Will Sell Precision Planting Products*, SUCCESSFUL FARMING (Oct. 12 2016), <http://www.agriculture.com/news/machinery/after-acquisition-deere-and-ag-leader-will-sell-precision-planting-products>.

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> 2016 News Releases and Information: *Deere Plans to Further Expand Customer Choice in Planter Market*, JOHN DEERE (Oct. 12, 2016), [https://www.deere.com/en\\_US/corporate/our\\_company/news\\_and\\_media/press\\_releases/2016/corporate/2016oct12-corporaterelease.page](https://www.deere.com/en_US/corporate/our_company/news_and_media/press_releases/2016/corporate/2016oct12-corporaterelease.page).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Arjun Mishra, *History of Antitrust Laws*, JURIST (Dec. 30, 2013), <http://www.jurist.org/feature/2013/12/a-history-and-the-main-acts.php> (for the history of antitrust legislation see Barak Orbach, *The Antitrust Curse of Bigness*, 85 S. CALIF. L. REV. 605 (2012); Richard B. McDermott, *History and Identity of the Relevant Antitrust Statutes*, 5 TULSA L. REV. 265 (1968); Rush H. Limbaugh, *Historic Origins of Anti-Trust Legislation* 18 MO. L. REV. 215 (1953)).

unreasonably restrain trade<sup>54</sup> and organizations that become or attempt to become monopolies.<sup>55</sup> The Federal Trade Commission Act created the Federal Trade Commission and generally prohibits unfair methods of competition or deceptive business practices.<sup>56</sup> The Clayton Act prohibits price discrimination that may substantially lessen competition<sup>57</sup> and exclusive dealing that may tend to lessen competition.<sup>58</sup> Additionally, Section 7 of the Clayton Act proscribes mergers and acquisitions where the effect may substantially lessen competition.<sup>59</sup>

#### B. Applicable Antitrust Law

For the facts of this case, Section 7 of the Clayton Act is the applicable antitrust law.<sup>60</sup> Section 7 is primarily concerned with mergers and acquisitions that may substantially lessen competition or tend to create a monopoly.<sup>61</sup> Section 7 therefore empowers the Department of Justice to prohibit pending mergers and acquisitions of companies that may reduce competition or to undo completed mergers via forced divestiture of stock, compulsory sharing of technology, or corporate spin offs.<sup>62</sup>

To satisfy Section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future.<sup>63</sup> A horizontal merger is a merger that occurs between two competing firms.<sup>64</sup> As mentioned above, Precision Planting and Deere are competitors, so the acquisition of the former by the latter would be a horizontal merger.<sup>65</sup> To satisfy Section 7 in a horizontal merger, the government must identify the relevant product and geographic market.<sup>66</sup> The relevant product market generally includes the products at issue, substitute products, and other

---

<sup>54</sup> 15 U.S.C. § 1 (2012).

<sup>55</sup> 15 U.S.C. § 2 (2012).

<sup>56</sup> 15 U.S.C. §§ 41–58 (2012).

<sup>57</sup> 15 U.S.C. § 13 (2012).

<sup>58</sup> 15 U.S.C. § 14 (2012).

<sup>59</sup> 15 U.S.C. § 18 (2012).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> WILLIAMS C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 9:1 (2016).

<sup>63</sup> *Id.*; see *F.T.C. v. Warner Commc's Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984); see also HOLMES, *supra* note 62.

<sup>64</sup> *Horizontal Merger*, INVESTOPEDIA (2017), <http://www.investopedia.com/terms/h/horizontalmerger.asp>.

<sup>65</sup> *Id.*

<sup>66</sup> *F.T.C. v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016); see also *Brown Shoe Co. v. United States*, 370 U.S. 1502, 1530 (1962).



products that are reasonably interchangeable with the product at issue.<sup>67</sup> The relevant geographic market is where the effect of the merger on competition will be direct and immediate.<sup>68</sup> If the government makes this showing, a presumption of illegality exists.<sup>69</sup>

The burden then shifts to the defendant to rebut this presumption.<sup>70</sup> To rebut the presumption of illegality, the defendant must produce evidence that the evidence offered by the government gives an inaccurate description of the competition in the relevant market.<sup>71</sup> This can be done by showing that barriers to enter the market are low, that both of the merging parties are weak market participants, or that the remaining competition by third parties should remain intense.<sup>72</sup> Lastly, if the defendant rebuts the presumption of illegality, the burden returns to the government to present other evidence sufficient to show a reasonable probability that the transaction would substantially lessen competition.<sup>73</sup>

### C. Party Arguments

#### 1. *The U.S. Department of Justice*

The government alleges that the proposed buyout of Precision Planting by John Deere violates Section 7 of the Clayton Act.<sup>74</sup> The government defines the relevant geographic market as the United States.<sup>75</sup> It defines the relevant product market as high-speed precision planting systems that are factory-installed on new planters and systems that can be retrofitted onto new and used conventional planters.<sup>76</sup> As defined, the government argues that Deere is 44% of the high speed precision planting market and Precision Planting is 42% of the precision planting market.<sup>77</sup> The government concedes that Kinze and Horsch represent 12% and 2% of the high speed planting market, respectively.<sup>78</sup> The government further argues that no

---

<sup>67</sup> F.T.C. v. Advocate Health Care Network, 841 F.3d 460, 467 (7th Cir. 2016).

<sup>68</sup> *Id.*; see also United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963).

<sup>69</sup> *Id.*

<sup>70</sup> See Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975); see also HOLMES, *supra* note 62.

<sup>71</sup> Citizens & S. Nat'l Bank, 422 U.S. at 120.

<sup>72</sup> F.T.C. v. Univ. Health, Inc. 938 F.2d 1206, 1218 (11th Cir. 1991); See generally United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975); see also HOLMES, *supra* note 62.

<sup>73</sup> F.T.C. v. Univ. Health, Inc. 938 F.2d 1218.

<sup>74</sup> Compl. at 4, United States v. Deere & Co., No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>75</sup> *Id.* at 12.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 13.

<sup>78</sup> *Id.*

reasonably interchangeable substitutes exist in this market because conventional planters, which are both slower and less efficient than high speed precision planting systems, are not effective substitutes for high-speed precision planting systems.<sup>79</sup> Thus, the government argued that a presumption of illegality arose because of the perceived lack of substitute products and the high degree of market concentration.<sup>80</sup>

The government further argued that John Deere could not rebut this presumption of illegality.<sup>81</sup> First, they argued that barriers of entry into the high speed planter market were high since it would take years and large amounts of capital for a company to develop high speed precision planting technology comparable to John Deere or Precision Planting.<sup>82</sup> Furthermore, the government noted that the barriers to entry were especially high since John Deere and Precision Planting owned most of the intellectual property rights required to develop high speed precision planting technology.<sup>83</sup>

Second, the government argued that competition would not remain intense because Kinze and Horsh were not large competitors and constituted a small market share.<sup>84</sup> Additionally, the government argued that Kinze and Horsh did not offer technology that was on par with Deere or Precision Planting.<sup>85</sup> As such, the government requested that the acquisition of Precision Planting by John Deere be permanently enjoined under Section 7 of the Clayton Act.<sup>86</sup>

## 2. *John Deere*

John Deere responded that the government did not meet their burden of showing that a presumption of illegality existed.<sup>87</sup> First, they denied that the government adequately defined an antitrust product market or geographic market.<sup>88</sup> More specifically, Deere rejected the idea that there is a narrow “market” for high speed precision planters.<sup>89</sup> Rather, they argued that there is only a broad planter market generally; of which Deere does not constitute

---

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.* at 18.

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* at 16.

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 13.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.* at 18.

<sup>87</sup> Resp. at 34, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

44% of sales because rivals such as Case International Harvester and AGCO would also be included.<sup>90</sup> Deere also argued that so called traditional planters offer an effective substitute to high speed precision planters.<sup>91</sup>

Deere also argued that it could rebut a presumption of illegality if one was found to exist.<sup>92</sup> First, Deere committed to licensing Precision Planting's technologies to a competitor so long as their acquisition of Precision Planting was approved.<sup>93</sup> Such a move, according to Deere, would substantially lessen the barriers to create a high speed precision planter because the intellectual property rights for them were available for purchase.<sup>94</sup> In fact, Deere argued that this arrangement would actually increase competition and choice for American farmers.<sup>95</sup> Deere also argued that the potential for market entry or expansion in this evolving area would prevent any anticompetitive effects.<sup>96</sup>

#### D. Analysis of Arguments

##### *1. Did the Government Show a Presumption of Illegality?*

For the government to show a presumption of illegality, it must define the relevant product market and the relevant geographic market.<sup>97</sup> The government was essentially correct when it determined the whole United States to be the relevant geographic market because the vast majority of states produce soybeans and corn that is planted by planters.<sup>98</sup> However, the issue remains of whether it accurately defined the product market. In determining the relevant product market, courts pay particular attention to (1) evidence of cross-elasticity of demand and (2) reasonably interchangeable products.<sup>99</sup> Although submarkets may exist within a larger market, relevant markets must

---

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 28.

<sup>92</sup> *Id.* at 34.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1.

<sup>96</sup> *Id.*

<sup>97</sup> *F.T.C. v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016); *see also Brown Shoe Co. v. United States*, 382 S.Ct. 1502, 1530 (1962).

<sup>98</sup> *See* Compl. at 12, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016); Rob Cook, *States That Produce The Most Corn*, BEEF2LIVE (2014), <http://beef2live.com/story-states-produce-corn-0-107129> (last visited Feb. 26, 2017); Rob Cook, *Soybeans: Ranking Of Production By State (2012 vs. 2013)*, BEEF2LIVE (2014), <http://beef2live.com/story-soybeans-ranking-production-state-2012-vs-2013-0-110116> (last visited Feb. 26, 2017).

<sup>99</sup> *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 412 (5th Cir. 2010).

be drawn “with sufficient breadth” to include the competing products of other companies and recognize competition where it exists.<sup>100</sup>

a. Cross-Elasticity

Cross elasticity of demand measures the responsiveness in the quantity demanded of one good when a change in price takes place in another good.<sup>101</sup> If a decrease in the price of traditional planters causes a considerable number of farmers to purchase traditional planters rather than high speed precision planters, it would be an indication that a high degree of cross elasticity of demand exists between them and that they compete in the same market.<sup>102</sup> Conversely, if a large increase in the price of high speed precision planters does not increase demand for traditional planters, then a low degree of cross elasticity exists between them and they are unlikely to compete in the same market.<sup>103</sup>

As applied to planters, there should be some elasticity between high speed precision planters and traditional planters based on price. This is because, if the price of high speed precision planters increases unreasonably, it is inferable that there will be an increase in the demand for traditional planters because they perform the same function.<sup>104</sup> Additionally, with the current surplus of used farm equipment, it is inferable that there will be an increase in the demand for used planters if the price of new high speed precision planters increases.<sup>105</sup> Further, although planters are a basic necessity for farming, high speed precision planters should be viewed more as a luxury product due to their recent arrival on the market; leading to the conclusion that demand would be elastic.<sup>106</sup> However, because this is a new and developing product line, the necessary information to confirm this analysis is unavailable. Nevertheless, due to the practicality and thriftiness of the American farmer as a self-interested rational economic actor, it is assumable

---

<sup>100</sup> Brown Shoe, 370 U.S. at 326.

<sup>101</sup> See Matt McMurrer, *Exclusive Gadget: Apple & AT&T Antitrust Litigation and the iPhone Aftermarkets*, 36 J. CORP. L. 495, 498 (2011); *Cross Elasticity of Demand*, INVESTOPEDIA (2017), <http://www.investopedia.com/terms/c/cross-elasticity-demand.asp> (last visited Feb. 23, 2017).

<sup>102</sup> United States v. Du Pont, 351 U.S. 377, 400 (1956); see also Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 398-401 (1998).

<sup>103</sup> See *id.*

<sup>104</sup> See generally *id.*

<sup>105</sup> See Bob Tita, *Deere Profit Tumbles Amid Glut of Used Farm Equipment at Dealers*, WALL ST. J. (Aug. 21, 2015, 2:05 PM), <https://www.wsj.com/articles/deere-reports-decline-in-profit-as-sales-tumble-1440158935>.

<sup>106</sup> *Cross Elasticity of Demand*, *supra* note 101.

that traditional planters and high speed precision planters are substitute products and that there would be a medium to large amount of cross elasticity between them.<sup>107</sup> However, more research would be needed by agricultural economists as data becomes available to confirm this hypothesis.

b. Traditional Planters and High Speed Precision Planters are Reasonably Interchangeable Products

The crux of this case is deciding the relevant market. The government views precision planters as a unique submarket within the market for all planters.<sup>108</sup> John Deere refutes this and believes that there is no submarket for precision planters and that the government failed to allege any relevant product market for the purposes of this litigation.<sup>109</sup> Rather, they believe there is only one large market that includes both so-called traditional planters and high-speed planters.<sup>110</sup> If the government can prove that precision planters indeed are a submarket, the government can easily meet the presumption of illegality because Deere and Precision Planting constitute 86% of precision planter sales.<sup>111</sup> Conversely, if the government fails to prove that a submarket exists, then a presumption of illegality will not be found because many other companies sell planters generally.<sup>112</sup>

A properly defined relevant market must take into account products which compete with the producer's product and must include reasonably interchangeable substitute products that limit the producer's ability to sustain an increase in price above competitive levels.<sup>113</sup> Interchangeability refers to the use or function of the given product compared to other products.<sup>114</sup> Reasonable interchangeability only requires that the product is roughly equivalent to another product.<sup>115</sup>

---

<sup>107</sup> See Bob Tita, *supra* note 105.

<sup>108</sup> Compl. at 10-11, United States v. Deere & Co., No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>109</sup> Resp. at 33-34, United States v. Deere & Co., No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>110</sup> See *id.* at 20.

<sup>111</sup> Compl. at 13, United States v. Deere & Co., No. 1:16-cv-08515 (N.D. Ill. 2016). See generally Robert G. Harris and Thomas M. Jorde, *Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement*, 71 CALIF. L. REV. 464, 464 (1983).

<sup>112</sup> See *id.*

<sup>113</sup> Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 767 (9th Cir. 2001); see also JOHN BOURDEAU, 54 AM. JUR. 2D MONOPOLIES AND RESTRAINTS OF TRADE § 164 (2016).

<sup>114</sup> In re AMR Corp., 527 B.R. 874, 884 (Bankr. S.D. N.Y. 2015); see also BOURDEAU, *supra* note 113.

<sup>115</sup> Navarra v. Marlborough Gallery, Inc., 820 F. Supp. 2d 477, 485-86 (S.D. N.Y. 2011); see also BOURDEAU, *supra* note 113.

However, within a broad market, a well-defined submarket may exist which may constitute a product market for antitrust purposes.<sup>116</sup> If there is a reasonable probability that a merger would substantially lessen competition in a submarket, Section 7 of the Clayton Act prohibits the merger.<sup>117</sup> The boundaries of such submarket can be determined by examining practical indications such as industry or public recognition of the submarket, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.<sup>118</sup> However, mere price or grade distinctions are not a proper basis for distinguishing between submarkets.<sup>119</sup>

The government argues that traditional planters are not a reasonably interchangeable substitute to high speed precision planters because they are much slower.<sup>120</sup> To reach the same efficiency, the government argues, would require a traditional planter that is twice as large as a high speed precision planter or purchasing two traditional planters.<sup>121</sup> However, traditional planters perform the exact same function as high speed planters. They only differ slightly in their mechanics, although there is, as a result, a considerable difference in speed and efficiency.<sup>122</sup> Nonetheless, the court should still find that traditional and high speed planters are reasonably interchangeable because they still perform the same function in a reasonable manner. As such, the court should find that the market for planters is large enough to include traditional planters and high speed planters. If the court so rules, the government would fail to meet their presumption of illegality because Deere and Precision Planting would not constitute an especially large market share.<sup>123</sup>

However, it is still possible that a court could determine that high speed planters are a submarket within the larger planter market for the purposes of product market definition. On the one hand, precision planters wouldn't seem to be a unique submarket because they do not have distinct customers or specialized vendors. Rather, John Deere plans to sell these planters to regular farmers, presumably, through their normal distribution chain.

---

<sup>116</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Haagen-Dazs Comp, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 691 F.Supp. 1262, 1268 (N.D. Cal. 1988); *Ron Tonkin Grand Turismo v. Fiat*, 637 F.2d 1376, 1379-80 (9th Cir. 1981).

<sup>120</sup> Compl. at 11-12, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.* at 13.

Nonetheless, precision planters do have peculiar characteristics in how they are designed. Moreover, the agriculture industry recognizes precision planters as a unique subtype of planter.<sup>124</sup> Thus, it is possible, although not probable, that a court could determine that high speed precision planters are a submarket within the larger planter market. If the court so determined, the government would meet their presumption of illegality because Deere and Precision Planting constitute 86% of the high speed precision planters sold.<sup>125</sup> Nonetheless, it is still more likely that the court will rule that the government did not meet its burden.

*2. If the Government meets their burden, John Deere will likely rebut the presumption of illegality*

Assuming, for the moment, that the government met its presumption of illegality, John Deere could still rebut this presumption. This can be accomplished by showing that barriers to enter the market are low, that both of the merging parties are weak market participants, or that the remaining competition by third parties should remain intense.<sup>126</sup> Deere and Precision Planting are not weak participants, so the analysis will focus on barriers to entry and the level of remaining competition if this deal were approved.

*a. Are Barriers to Entry Low?*

The government alleged that entry into the high speed precision planting market would be very high because John Deere and Precision Planting own most of the intellectual property rights to produce high speed planters as they are currently known.<sup>127</sup> Thus, according to the government, a merger between these two competitors would effectively cut off the ability for other companies to develop high speed planters.<sup>128</sup>

Nonetheless, in response to the government's complaint, Deere offered to license Precision Planting's technology to Ag Leader if the government allowed Deere to acquire Precision Planting.<sup>129</sup> This would allow Ag Leader

---

<sup>124</sup> See, e.g., Mike Wiles, *How Fast Can We Plant*, FARM EQUIPMENT (Apr. 10, 2015), <https://www.farm-equipment.com/articles/11547-how-fast-can-we-plant>.

<sup>125</sup> Compl. at 13, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>126</sup> *F.T.C. v. Univ. Health, Inc.* 938 F.2d 1206, 1218 (11th Cir. 1991); See generally *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); see also HOLMES, *supra* note 62.

<sup>127</sup> Compl. at 11, 13, 16, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>128</sup> See *id.*

<sup>129</sup> See Jessie Scott, *After Acquisition, Deere and AG Leader Will Sell Precision Planting Products*, SUCCESSFUL FARMING (Oct. 12, 2016),

to develop its own series of high speed precision planters, and sell aftermarket Precision Planting equipment that can retrofit a traditional planter into a high speed planter to other competitors.<sup>130</sup> These retrofit packages would allow other competitors, such as Case IH or AGCO, to develop high speed planters.<sup>131</sup>

Although this agreement needs to be studied in detail, this agreement to license Precision Planting technology Deere's competitors should ameliorate most of the government's concerns about high barriers of entry into the high speed precision planting market. Additionally, the court should recognize that high speed planters are a relatively new development and that two companies independently invented ways to create them.<sup>132</sup> As such, innovation from a competitor could be just around the corner and it could be too early to tell how high the barriers truly are into the high speed precision planting market.<sup>133</sup> Thus, Deere should be able to show that barriers to enter into the market are not unreasonably high.

#### b. Competition Will Remain Competitive

Second, assuming the court finds that high speed precision planters are a submarket, Deere can still show that competition will remain competitive within this submarket. First, they have already agreed to license their technology to their competitors.<sup>134</sup> This will prevent Deere from unreasonably increasing its prices, provided that there are no price-fixing components in the licenses.<sup>135</sup>

Additionally, other manufactures are already entering the so-called high speed precision planting market. Case International Harvester has recently unveiled a new, high-speed planter that can reach up to 10 miles per hour.<sup>136</sup> AGCO has just announced that they are introducing a high-speed planter

---

<http://www.agriculture.com/news/machinery/after-acquisition-deere-and-ag-leader-will-sell-precision-planting-products>.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> Brannon, *supra* note 42.

<sup>133</sup> *See id.* at 7. Note that this is still assuming that a court found that high speed precision planters constituted a market for antitrust purposes.

<sup>134</sup> *See* Scott, *supra* note 129.

<sup>135</sup> *See generally id.*

<sup>136</sup> *See* Dave Mowitz, *Case IH Unveils New High-Speed Planter*, SUCCESSFUL FARMING (Nov. 23, 2015), [http://www.agriculture.com/machinery/farm-implements/planters/case-ih-unveils-new-highspeed-plter\\_231-ar51246](http://www.agriculture.com/machinery/farm-implements/planters/case-ih-unveils-new-highspeed-plter_231-ar51246).



that can plant at speeds above 9 miles per hour.<sup>137</sup> Finally, Vaderstad, which has intentions to become a larger player in the United States, has recently developed a high-speed planter than can plant at approximately 10 miles per hour.<sup>138</sup> This does not even include Kinze and Horsch which are already participants in the so-called high speed precision planting market.<sup>139</sup> Therefore, between licensing its intellectual property and the entrance of new competitors, Deere will be able to show that competition in the high speed precision planting market will remain intense. As such, between this high level of competition and the relatively low barriers to entry, Deere should be able to rebut any presumption of illegality.

3. *If Deere Rebutts the Presumption of Illegality, the Government Won't Be Able to Meet Their New Burden*

If Deere rebuts the presumption of illegality, the government can still introduce other evidence sufficient to show a reasonable probability that the transaction would substantially lessen competition.<sup>140</sup> However, if Deere is able to show that competition will increase within the high speed precision planter market and that barriers to entry are reasonable, then it is very unlikely that the government could come back and show that the merger would substantially lessen competition. To that point, the government did not even address this contingency.<sup>141</sup>

#### IV. CONCLUSION

Overall, Deere has a stronger case and will likely prevail if the matter is decided in court. The government may fail to prove a presumption of illegality because it may have difficulty establishing that high speed precision planters are a submarket. Additionally, even if the government could prove a presumption of illegality, Deere would likely rebut this presumption by their agreement to license their intellectual property to competitors and by

---

<sup>137</sup> Ben Potter, *AGCO Introduces New High-Speed Planters* FARM JOURNAL'S AG PRO (Feb. 9, 2017, 6:29 AM), <http://www.agprofessional.com/news/new-high-speed-planter-comes-marketplace>.

<sup>138</sup> Scott Gavely, *Two New Tempo planters*, GRAINEWS (April 15, 2016), <http://www.grainews.ca/2016/04/15/vaderstad-adds-new-models-to-its-high-speed-planter-line/>.

<sup>139</sup> See Compl. at 13, *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

<sup>140</sup> *F.T.C. v. Univ. Health, Inc.* 938 F.2d 1206, 1218 (11th Cir. 1991); See generally *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); see also HOLMES, *supra* note 62.

<sup>141</sup> See Compl., *United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. 2016).

showing that competition in the so called high speed precision planting submarket is already intensifying.

#### V. RECOMMENDATION

Although the acquisition of Precision Planting by John Deere is probably legal, more aggressive action is still required by the Federal Trade Commission and the U.S. Attorney's Office to prevent further concentration in the agricultural manufacturing sector. Failure to prevent further concentration will likely result in stagnated technological innovation, lower profitability for American farmers, and higher food prices for consumers.

Moreover, although this merger will likely be found to be legal, the actions of the government should still be viewed as a success. Without threatening to block this proposed merger, it is much less likely that Deere would have offered to license Precision Planting's products to their competitors. Thus, even the threat of meritorious litigation can be enough to increase competition or at least stifle potentially anticompetitive effects. As such, the Federal Trade Commission and the U.S. Attorney's Office should continue their strong enforcement of antitrust laws when there is a reasonable probability of antitrust violations.