Right to Repair Laws are Constitutional

"In light of the economic and environmental stakes, there is a strong case for demanding firms share information necessary to maintain and repair the products they sell regardless of claims of trade secrecy."[1]

Overview of Scholarly and Others Support for Right to Repair

Several noted experts, the US Department of Justice, and other authorities provide strong arguments in support of Agricultural Right to Repair. Below are a few highlights.

In 2012 Massachusetts enacted "AN ACT PROTECT MOTOR VEHICLE OWNERS AND SMALL BUSINESSES IN REPAIRING MOTOR VEHICLES[2]" that has not been challenged on constitutional grounds. Due to the passage of this legislation the Auto Industry[3] announced on 22-Janurary-2014 a "Powerful National Agreement," that extends the essential provisions of the above Act. This agreement successfully provided to Independent Service Organizations (ISOs) and owners "the same access to the information, tools, and software needed to service late model computer-controlled vehicles" as authorized dealers.

The Attorney General of the State of Nebraska issued an opinion, 23-Mar-2022,[4] on proposed legislation, The Agricultural Equipment Right-to-Repair Act where he concluded "A state law does not violate the constitutional prohibition against the impairment of contract . . ." and that "representations made on behalf of manufacturers and dealers that such information is already available, further reduce any claim of impairment to existing contracts." Finally, the opinion concludes that the Act Likely does not violate the Contract Clause."

George Slover, then a Senior Policy Counsel for Consumer Union submitted eleven pages of detailed legal analysis in his written Testimony to the Vermont State Assembly Right to Repair Task Force meeting of October 9, 2018,[5] supporting the idea because "It promotes competition, allowing the marketplace to give product owners more options, and more affordable options, for repairing the electronic products they own. It helps affordably preserve the useful life of the product. It helps give consumers the bedrock rights and incidents of product ownership that they have traditionally been able to expect – that once a product is purchased, and possession is transferred from the seller to the buyer, the buyer takes control along with possession."

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[1] The Right to Repair, Reclaiming the Things We Own, by Aaron Perzanowski, Cambridge Press, © copyright 2022, page 163-164.

[2] https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter368

[3] https://www.ssdgny.org/Portals/23/Skins/master/img/Right%20to-Repair-National-Agreement1.pdf

[4] https://ago.nebraska.gov/sites/ago.nebraska.gov/files/docs/opinions/22-003_2.pdf

[5] https://legislature.vermont.gov/Documents/2018.1/WorkGroups/RightToRepair/Testimony/W~George%20Slover~George%20Slover%20Written%20Comments~10-9-2018.pdf

The US Department of Justice Filed a Statement of Interest of the United States on 14-Feb-2023 in the Deere & Company Repair Services Antitrust Litigation[6] that "*Kodak*[7] should guide the court's analysis in this case," that "Deere's Proposed Presumption Contravenes *Kodak*," and that "Deere's other out-of-circuit citations are inapposite and unpersuasive."

Finally, The Federal Trade Commission has worked with the Repair Association (a.k.a. Repair.org) and CoPIRG to vet the Legislative Template8 which provided the foundation for Colorado's HB 1011.

Failed Attempts of Industry Solutions

In 2018 the Far West Equipment Dealers Association (FWEDA) signed an agreement with the California Farmers Bureau[8] but the promises were not and have not been kept. This failure resulted in the need for a new agreement between John Deere & Company, individually, with the American Farm Bureau Federation.[9] While the agreement explicitly states in Section II, B, 6 and Section II, B, 3, respectively . . .

> "Manufacturer shall provide Farmers and Independent Repair Facilities with an opportunity, on Fair and Reasonable terms, to acquire **any** Software integrally with or within a Tool, or subsequently as necessary for operation, maintenance, repair, or upgrade of Agricultural Equipment or a mechanical part." **[emphasis added]**
>
> and
>
> "Manufacturer shall make available, on Fair and Reasonable terms, Tools, Specialty Tools, Software and Documentation, inclusive of any updates to information or **Embedded** Software, for purposes of diagnosis, maintenance or repair of such Agricultural Equipment to any Farmer that owns or leases Agricultural Equipment manufactured by or on behalf of the Manufacturer." **[emphasis added]**
>
> and
>
> . . . "shall come into force as of January 8, 2023."

Yet there are software tools and embedded software files that are not available, such as a program called Parts Advisor in the case of John Deere. What is currently provided is incomplete and highly restricted.

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[6] https://www.justice.gov/atr/case-document/file/1568686/download
[7] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992),. passim
[8] https://www.vice.com/en/article/kz5qgw/california-farm-bureau-john-deere-tractor-hacking-right-to-repair
[9] https://www.fb.org/files/AFBF_John_Deere_MOU.pdf?ref=ambrook

Questions of Copyright Law

HB 1011 requires the software tools and embedded software on "Fair and Reasonable" terms and thus is not an infringement of copyrights. Given that only the manufacturer's software tools, and embedded software can practically repair the equipment fully and safely to manufacturer's specifications, certain provisions of the Clean Air Act, *(more on this in the following section*) and given that agriculture is a critical infrastructure[10] Right to Repair is a sufficiently compelling public interest for legislation that requires "Fair and Reasonable" trade of software tools and embedded software.

Since 2015 the Librarian of Congress has repeatedly ruled in their Digital Millennium Copyright Act (DMCA) 1201 proceedings that the "Proposed Class 21: This proposed class would allow circumvention of (Technical Protection Measures) TPMs protecting computer programs that control the functioning of a motorized land vehicle, including personal automobiles, commercial motor vehicles, and agricultural machinery, for purposes of lawful diagnosis and repair, or **aftermarket personalization, modification, or other improvement**. Under the exemption as proposed, circumvention would be allowed when undertaken by or on behalf of the lawful owner of the vehicle,"[11] This ruling has been affirmed in subsequent triennial proceedings. **[emphasis added]**

The Clean Air Act and US EPA Regulations

Statue language

42 USC 7521 (m) (5) in part says . . . "The Administrator, by regulation, shall require . . . manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with **any and all information** needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. **No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers** or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. **[emphasis added]**

and

42 USC 7522 in part says **. . . (a) Enumerated prohibitions** The following acts and the causing thereof are prohibited— . . .

[10] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/

[11] https://www.federalregister.gov/documents/2015/10/28/2015-27212/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control

(D) for any manufacturer to fail to make information available as provided by regulation under section 7521(m)(5) of this title;

and

42 USC 7541 (c) (3) (A) in part says . . . The manufacturer shall provide in boldface type on the **first page** of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual . . . **[emphasis added].**

The EPA has promulgated the following regulations . . .

40 CFR 1030.125 (f)[12] in part says . . . Source of parts and repairs. **State clearly in your written maintenance instructions that a repair shop or person of the owner's choosing may maintain, replace, or repair emission-control devices and systems.** Your instructions may not require components or service identified by brand, trade, or corporate name. Also, do not directly or indirectly condition your warranty on a requirement that the engine be serviced by your franchised dealers or any other service establishments with which you have a commercial relationship. **[emphasis added].**

Exhibit A is a list of 279 Operator's Manuals by John Deere & Company documenting the lack of compliance for 100% of the statue and with 47% of the above regulation in a comprehensive list of manuals.

40 CFR 1039.205 (w)[13] in part states that manufactures . . . "**Unconditionally certify** that all the engines in the engine family comply with the requirements of this part, other referenced parts of the CFR, **and the Clean Air Act**. **[emphasis added]**

40 CFR 1068.5 (a)[14] in part states manufactures . . . "**must use good engineering judgment** for decisions related to any requirements under this chapter." **[emphasis added]**

40 CFR 1068.101 (b) (6)[15] in part states . . . You must also provide emission-related installation and maintenance instructions as described in the standard-setting part. Failure to meet these obligations is prohibited. Also, except as specifically provided by regulation, you are prohibited from directly or indirectly communicating to the ultimate purchaser or a later purchaser that the emission-related warranty is valid only if the owner has service performed at authorized facilities or only if the owner uses authorized parts, components, or systems. We may assess a **civil penalty up to $44,539 for each engine** or piece of equipment in violation. **[emphasis added]**

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[12] https://www.ecfr.gov/current/title-40/chapter-I/subchapter-U/part-1039/subpart-B/section-1039.125
[13] https://www.ecfr.gov/current/title-40/chapter-I/subchapter-U/part-1039/subpart-C/section-1039.205
[14] https://www.ecfr.gov/current/title-40/chapter-I/subchapter-U/part-1068/subpart-A/section-1068.5
[15] https://www.ecfr.gov/current/title-40/chapter-I/subchapter-U/part-1068/subpart-B/section-1068.101

Computer Fraud and Abuse Act

All software required for repair to be provided by HB 1011 would be provided on "Fair and Reasonable" terms. Therefore, no fraud or abuse would be incured.

Applying the Computer Fraud and Abuse Act to equipment as currently configured would imply that manufactures shall be entitled to all data generated. Therefore, an owner is **required to surrender all information** to the manufacturer without exception. This would be analogous to Apple saying that all pictures taken with any iPhone are copyrightable by Apple. **[emphasis added]**

Dormant Commerce Clause

(See page 6 of Slover submission)[16]

Contract Clause

(See page 9 of Slover submission)[17]

Conclusion

HB 1011 is thoughtful, careful, and limited legislation that will contribute to the resiliency of food production. Agricultural Right to Repair legislation will change the landscape of agricultural equipment for the better by allowing competition to be reintroduced to the market.

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16 https://legislature.vermont.gov/Documents/2018.1/WorkGroups/RightToRepair/Testimony/W~George%20Slover~George%20Slover%20Written%20Comments~10-9-2018.pdf Page 6

17 https://legislature.vermont.gov/Documents/2018.1/WorkGroups/RightToRepair/Testimony/W~George%20Slover~George%20Slover%20Written%20Comments~10-9-2018.pdf Page 9

Exhibits

Required Emission-Related Information

Service Provider John Deere 5100ML, etc. Operator's Manual, page 161 of PDF

A qualified repair shop or person of the owner's choosing may maintain, replace, or repair emission control devices and systems with original or equivalent replacement parts. However, warranty, recall, and all other services paid for by John Deere must be performed at an authorized John Deere service center.

DX,EMISSIONS,REQINFO-19-12JUN15

Recommended Dealer Performed Service

Check Engine Coolant Properties

MAINTENANCE INTERVAL
Annually

Ask your John Deere dealer to check engine coolant properties. Use Cool-Gard™ II only if additional coolant is required.

Flush Cooling System and Replace Thermostat

MAINTENANCE INTERVAL
Every 4500 Hours if Cool-Gard™ II is used. Machine must be initially filled and only serviced with properly diluted Cool-Gard™ II coolant.
Every 2000 Hours if Cool-Gard™ II is not used.

Have your John Deere dealer flush the cooling system, replace thermostat, and fill the system with Cool-Gard™ II.

Drain and Flush Fuel Tank

MAINTENANCE INTERVAL
Every 300 Hours

If excessive amounts of water or dirt are found in the fuel filter and water separator, ask your John Deere dealer to drain and flush fuel tank.

GS25068,0005A0F-19-05OCT18

Check Engine and Exhaust Compartments for Debris

IMPORTANT: Directing pressurized water at electronic/electrical components, connectors, bearings and hydraulic seals, fuel injection pump or other sensitive components can cause product malfunctions. Reduce pressure and spray at a 45 to 90 degree angle.

Directing pressurized air at electronic/electrical components or connectors can cause buildup of static electricity and product malfunctions.

Never steam clean or pour cold water on an injection pump that is operating or hot. Pump could seize.

1. Shut off engine and allow to cool.
2. Open and raise engine hood.
3. Remove any crop or debris within engine and exhaust compartments, especially around turbocharger, exhaust manifold, and exhaust aftertreatment system.
4. Reinstall all shields. Close and securely latch hood.

DP51502,0002EA5-19-01NOV17

Clean Diesel Particulate Filter (DPF)

1. When exhaust filter and warning light indicators are illuminated, ensure that exhaust filter cleaning is set to “Auto”.
2. Operate machine above 1200 rpm to allow an automatic exhaust filter cleaning to occur.
3. If indicators remain illuminated after an automatic cleaning has occurred, additional cleaning is required. Perform parked exhaust filter cleaning (if system allows). (See Air, Fuel, Coolant, and Exhaust Operation section for procedure.)
4. If a parked exhaust filter cleaning has been performed and exhaust filter and warning light indicators are still illuminated, contact your John Deere dealer.

GS25068,0005A10-19-05OCT18

John Deere Equipment Models 1999+ and Ops Manuls

279 **Inclusive** *Note: There are multiple editions of manuals, most recent listed, North America versions, English editions* 0 130

No.	Type	Model ID	Start Date	End Date	Ops Manual ID	Title - First line(s)	Choosing Page	Choosing First Page	Year Copyright
1	Sprayer	6700	1999	2009	OMN200815 Issue I0	6700 Self-Propelled Sprayer	None	No	2000
2	Tractor	990	2000	2007	OMLVU10907 C0	Compact Utility Tractor with Gear Transmission 990	None	No	2000
3	Tractor	5105	2000	2007	OMRE72817 Issue J5	5105 and 5205 Tractors	None	No	2005
4	Tractor	5205	2000	2007	OMRE72817 Issue J5	5105 and 5205 Tractors	None	No	2005
5	Tractor	4010	2002	2005	OMR30680 H1	4010 DIESEL AND GASOLINE WHEEL TRACTORS	None	No	None
6	Tractor	4110	2002	2005	OMLVU13326 I3	Compact Utility Tractors 4110 and 4115	None	No	2003
7	Tractor	4115	2002	2005	OMLVU13326 I4	Compact Utility Tractors 4110 and 4116	None	No	2004
8	Tractor	6220	2002	2006	OMAL162071 Issue G5	6120, 6120L, 6220, 6220L, 6320, 6320L, 6420, 6420L and 6520L Tractors	None	No	2005
9	Tractor	6603	2002	2007	OMRE226033 ISSUE H3	6403 and 6603 Tractors	None	No	2013
10	Tractor	9120	2002	2007	OMAR228220 Issue A7	9120, 9220, 9320, 9420, 9520 and 9620 Tractors	None	No	2007
11	Tractor	9420	2002	2007	OMAR228220 Issue A7	9120, 9220, 9320, 9420, 9520 and 9620 Tractors	None	No	2007
12	Tractor	9420T	2002	2007	OMAR228229 Issue H6	9320T, 9420T, 9520Tand 9620T Tractors	None	No	2006
13	Tractor	2210	2003	2005	OMLVU14661 G3	Compact Utility Tractor 2210	None	No	2002
14	Tractor	5103	2003	2008	OMRE268160 ISSUE L8	5103, 5203, 5303 and 5403 Tractors	None	No	2006
15	Tractor	5203	2003	2008	OMRE268160 ISSUE L8	5103, 5203, 5303 and 5403 Tractors	None	No	2006
16	Tractor	5303	2003	2008	OMRE268160 ISSUE L8	5103, 5203, 5303 and 5403 Tractors	None	No	2006
17	Tractor	7220	2003	2007	OMAR224647 Issue K6	7220, 7320, 7420 and 7520 Tractors	None	No	2006
18	Tractor	7320	2003	2007	OMAR224647 Issue K6	7220, 7320, 7420 and 7520 Tractors	None	No	2006
19	Tractor	7420	2003	2007	OMAR224647 Issue K6	7220, 7320, 7420 and 7520 Tractors	None	No	2006
20	Tractor	7520	2003	2007	OMAR224647 Issue K6	7220, 7320, 7420 and 7520 Tractors	None	No	2006
21	Combine	9560	2004	2006	OMH219418 Issue H5	9560 and 9660 Combines	None	No	2006
22	Combine	9560 STS	2004	2007	OMH225687 Issue B7	9560 STS Combine	None	No	2007
23	Sprayer	4920	2004	2006	OMN300349 Issue J5	4920 Self-Propelled Sprayer	None	No	2005
24	Tractor	4120	2004	2013	OMLVU17927 J7	Compact Utility Tractor 4120, 4320, 4520, 4720	None	No	2007
25	Tractor	4320	2004	2013	OMLVU17927 J8	Compact Utility Tractor 4120, 4320, 4520, 4721	None	No	2008
26	Tractor	4520	2004	2013	OMLVU17927 J9	Compact Utility Tractor 4120, 4320, 4520, 4722	None	No	2009
27	Tractor	4720	2004	2013	OMLVU17927 J10	Compact Utility Tractor 4120, 4320, 4520, 4723	None	No	2010
28	Tractor	7720	2004	2006	OMAR188670 Issue I5	7720, 7820 and 7920 Tractors	None	No	2005
29	Tractor	7820	2004	2006	OMAR188670 Issue I5	7720, 7820 and 7920 Tractors	None	No	2005
30	Sprayer	4720	2005	2007	OMN300549 Issue K6	4720 Self-Propelled Sprayer	None	No	2006
31	Tractor	3120	2005	2008	OMLVU19809 L8	Compact Utility Tractor 3120, 3320, 3520, 3720	None	No	2007
32	Tractor	3520	2005	2013	OMLVU19809 L10	Compact Utility Tractor 3120, 3320, 3520, 3722	None	No	2009
33	Tractor	3720	2005	2013	OMLVU19809 L11	Compact Utility Tractor 3120, 3320, 3520, 3723	None	No	2010
34	Tractor	5225	2005	2008	OMRE260579 ISSUE I0	5225, 5325, 5425, 5525 and 5625 Tractors	None	No	2020
35	Tractor	5325	2005	2008	OMRE260579 ISSUE I0	5225, 5325, 5425, 5525 and 5625 Tractors	None	No	2020
36	Tractor	5425	2005	2008	OMRE260579 ISSUE I0	5225, 5325, 5425, 5525 and 5625 Tractors	None	No	2020
37	Tractor	5525	2005	2008	OMRE260579 ISSUE I0	5225, 5325, 5425, 5525 and 5625 Tractors	None	No	2020
38	Tractor	2305	2006	2010	OMLVU23228 B0	Compact Utility Tractors 2305	None	No	2010
39	Tractor	2320	2006	2012	OMLVU16740 E2	Compact Utility Tractor 2320	None	No	2009
40	Tractor	2520	2006	2012	OMLVU19796 E2	Compact Utility Tractors 2520	None	No	2008
41	Tractor	3320	2006	2008	OMLVU19809 L9	Compact Utility Tractor 3120, 3320, 3520, 3721	None	No	2008
42	Tractor	8130	2006	2009	OMAR287583 ISSUE A9	8130, 8230, 8330, 8430 and 8530	None	No	2009
43	Tractor	8230	2006	2009	OMAR287583 ISSUE A9	8130, 8230, 8330, 8430 and 8530	None	No	2009
44	Tractor	8330	2006	2009	OMAR287583 ISSUE A9	8130, 8230, 8330, 8430 and 8530	None	No	2009
45	Tractor	8430	2006	2009	OMAR287583 ISSUE A9	8130, 8230, 8330, 8430 and 8530	None	No	2009
46	Tractor	8530	2006	2009	OMAR287583 ISSUE A9	8130, 8230, 8330, 8430 and 8530	None	No	2009
47	Tractor	8230T	2006	2009	OMAR287619 ISSUE L8	8230T, 8330T and 8430T Series Tractors	None	No	2008
48	Tractor	8330T	2006	2009	OMAR287619 ISSUE L8	8230T, 8330T and 8430T Series Tractors	None	No	2008
49	Tractor	8430T	2006	2009	OMAR287619 ISSUE L8	8230T, 8330T and 8430T Series Tractors	None	No	2008
50	Sprayer	4830	2007	2014	OMN405418 ISSUE L1	4730 and 4830 Self-Propelled Sprayer	None	No	2011
51	Sprayer	4930	2007	2011	OMN401971 ISSUE F0	4930 Self-Propelled Sprayer	None	No	2010
52	Tractor	5625	2007	2007	OMRE260579 ISSUE I0	5225, 5325, 5425, 5525 and 5625 Tractors	None	No	2020
53	Tractor	7430	2007	2012	OMAL171429 ISSUE A2	Premium Tractors 7130, 7230, 7330, 7430 and 7530	None	No	2012
54	Tractor	7730	2007	2011	OMRE325992 ISSUE C1	7630, 7730, 7830 and 7930 Tractors	None	No	2011
55	Tractor	7830	2007	2011	OMRE325992 ISSUE C1	7630, 7730, 7830 and 7930 Tractors	None	No	2011
56	Tractor	7930	2007	2011	OMRE325992 ISSUE C1	7630, 7730, 7830 and 7930 Tractors	None	No	2011
57	Tractor	9230	2007	2011	OMRE325893 ISSUE C1	9230, 9330, 9430, 9530 and 9630 Tractors	None	No	2011
58	Tractor	9330	2007	2011	OMRE325893 ISSUE C2	9230, 9330, 9430, 9530 and 9630 Tractors	None	No	2012
59	Tractor	9430	2007	2011	OMRE325893 ISSUE C2	9230, 9330, 9430, 9530 and 9630 Tractors	None	No	2012
60	Tractor	9530	2007	2011	OMRE325893 ISSUE C2	9230, 9330, 9430, 9530 and 9630 Tractors	None	No	2012
61	Tractor	9630	2007	2011	OMRE325893 ISSUE C2	9230, 9330, 9430, 9530 and 9630 Tractors	None	No	2012
62	Tractor	9430T	2007	2011	OMRE325897 ISSUE C1	9430T, 9530T and 9630T Tractors	None	No	2011
63	Tractor	9530T	2007	2011	OMRE325897 ISSUE C1	9430T, 9530T and 9630T Tractors	None	No	2011
64	Tractor	9630T	2007	2011	OMRE325897 ISSUE C1	9430T, 9530T and 9630T Tractors	None	No	2011
65	Combine	9570 STS	2008	2011	OMHXE13768 ISSUE G9	9570 STS Combine	None	No	2009
66	Combine	9670 STS	2008	2011	OMHXE22997 ISSUE G0	9670 STS and 9770 STS Combines	None	No	2010

John Deere Equipment Models 1999+ and Ops Manuls

279 **Inclusive** *Note: There are multiple editions of manuals, most recent listed, North America versions, English editions* 130

No.	Type	Model ID	Start Date	End Date	Ops Manual ID	Title - First line(s)	Choosing Page	Choosing First Page	Year Copyright
67	Combine	9770 STS	2008	2011	OMHXE22997 ISSUE G1	9670 STS and 9770 STS Combines	None	No	2011
68	Combine	9870 STS	2008	2011	OMHXE22999 ISSUE G0	9870 STS Combine	None	No	2010
69	Sprayer	4730	2008	2014	OMN405418 ISSUE L1	4730 and 4830 Self-Propelled Sprayer	None	No	2011
70	Tractor	2720	2008	2012	OMLVU19798 E2	Compact Utility Tractors 2720	None	No	2009
71	Tractor	3005	2008	2013	OMLVU19591 E2	Compact Utility Tractor 3005	None	No	2009
72	Tractor	4005	2008	2012	OMLVU19594 E2	Compact Utility Tractor 4005	None	No	2009
73	Tractor	4105	2008	2015	OMLVU23475 E2	Compact Utility Tractors 4105	None	No	2010
74	Tractor	6230	2008	2012	OMAL171426 ISSUE A2	Premium Tractors 6230, 6330 and 6430	None	No	2012
75	Tractor	6430	2008	2012	OMAL171426 ISSUE A2	Premium Tractors 6230, 6330 and 6430	None	No	2012
76	Tractor	7130	2008	2012	OMAL171429 ISSUE A2	Premium Tractors 7130, 7230, 7330, 7430 and 7530	None	No	2012
77	Tractor	7230	2008	2012	OMAL171429 ISSUE A2	Premium Tractors 7130, 7230, 7330, 7430 and 7530	None	No	2012
78	Tractor	7330	2008	2012	OMAL171429 ISSUE A2	Premium Tractors 7130, 7230, 7330, 7430 and 7530	None	No	2012
79	Tractor	6120L	2008	2008	OMAL162071 Issue G5	6120, 6120L, 6220, 6220L, 6320, 6320L, 6420, 6420L and 6520L Tractors	None	No	2005
80	Combine	T670	2009	2021	OMZ105768 Issue A9	Combines T670	None	No	2008
81	Tractor	6330	2009	2011	OMAL171426 ISSUE A2	Premium Tractors 6230, 6330 and 6430	None	No	2013
82	Tractor	7630	2009	2012	OMRE325992 ISSUE C1	7630, 7730, 7830 and 7930 Tractors	None	No	2011
83	Tractor	3032E	2009	2021	OMLVU31846 ISSUE H6	3025E, 3032E, and 3038E	87	No	2016
84	Tractor	3038E	2009	2021	OMLVU31846 ISSUE H6	3025E, 3032E, and 3038E	87	No	2016
85	Tractor	5045D	2009	2014	OMSJ301049 ISSUE L3	5045D and 5055D Tractors (North America, Mexico and Australia) (December 2013)	None	No	2013
86	Tractor	5045E	2009	2021	OMSJ42016 ISSUE E1	5045E, 5055E, 5065E and 5075E FT4 (MY18-) Tractors	None	No	2021
87	Tractor	5055D	2009	2014	OMSJ301049 ISSUE L4	5045D and 5055D Tractors (North America, Mexico and Australia) (December 2013)	None	No	2014
88	Tractor	5055E	2009	2021	OMSJ42016 ISSUE E1	5045E, 5055E, 5065E and 5075E FT4 (MY18-) Tractors	None	No	2021
89	Tractor	5065E	2009	2021	OMSJ42016 ISSUE E1	5045E, 5055E, 5065E and 5075E FT4 (MY18-) Tractors	None	No	2021
90	Tractor	5065M	2009	2012	OMSJ10032 ISSUE I0	5065M and 5075M (IT4), 5085M, 5095M, 5095MH, 5105M and 5105ML (Tier 3) Tractors	None	No	2020
91	Tractor	5075E	2009	2021	OMSJ42016 ISSUE E1	5045E, 5055E, 5065E and 5075E FT4 (MY18-) Tractors	None	No	2021
92	Tractor	5075M	2009	2021	OMSJ14569 ISSUE H5	5065M and 5075M (IT4)	None	No	2015
93	Tractor	5083E	2009	2012	OMSJ12914 ISSUE C4	5083E Limited, 5093E Limited and 5101E Limited (Tier 3) Tractors	None	No	2011
94	Tractor	5085M	2009	2014	OMSU43612 ISSUE H5	5085M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	None	No	2015
95	Tractor	5093E	2009	2012	OMSJ12914 ISSUE C4	5083E Limited, 5093E Limited and 5101E Limited (Tier 3) Tractors	None	No	2011
96	Tractor	5095M	2009	2013	OMTR124423 ISSUE H2	5095M, 5105M, 5120M, and 5130M (FT4) Tractors	198	No	2022
97	Tractor	5101E	2009	2013	OMSJ12914 ISSUE C4	5083E Limited, 5093E Limited and 5101E Limited (Tier 3) Tractors	None	No	2011
98	Tractor	5105M	2009	2012	OMTR124423 ISSUE H2	5095M, 5105M, 5120M, and 5130M (FT4) Tractors	198	No	2022
99	Tractor	6100D	2009	2012	OMRE283529 ISSUE K0	6100D, 6110D, 6115D, 6125D, 6130D and 6140D Tractors	None	No	2010
100	Tractor	6115D	2009	2015	OMSU38638 ISSUE H4	6105D, 6115D, 6130D and 6140D Interim Tier IV Tractors,	None	No	2013
101	Tractor	6130D	2009	2015	OMSU38638 ISSUE H4	6105D, 6115D, 6130D and 6140D Interim Tier IV Tractors,	None	No	2014
102	Tractor	6140D	2009	2015	OMSU38638 ISSUE H4	6105D, 6115D, 6130D and 6140D Interim Tier IV Tractors,	None	No	2014
103	Sprayer	4630	2010	2015	OMKK19656 ISSUE C4	4630 Self-Propelled Sprayer	None	No	2014
104	Tractor	8245R	2010	2010	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
105	Tractor	8270R	2010	2010	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
106	Tractor	8295R	2010	2010	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
107	Tractor	8295RT	2010	2010	OMAR276060 ISSUE C1	8295RT, 8320RT and 8345RT Tractors	None	No	2011
108	Tractor	8320R	2010	2010	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
109	Tractor	8320RT	2010	2010	OMAR276060 ISSUE C1	8295RT, 8320RT and 8345RT Tractors	None	No	2011
110	Tractor	8345R	2010	2010	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
111	Tractor	8345RT	2010	2010	OMAR276060 ISSUE C1	8295RT, 8320RT and 8345RT Tractors	None	No	2011
112	Tractor	1023E	2011	2021	OMLVU24604	Compact Utility Tractors 1023E, 1026R	None	No	2011
113	Tractor	7215R	2011	2013	OMRE560402 ISSUE B3	7200R, 7215R, 7230R, 7260R and 7280R Tractors	None	No	2013
114	Tractor	7230R	2011	2020	OMRE560402 ISSUE B3	7200R, 7215R, 7230R, 7260R, and 7280R	None	No	2013
115	Tractor	8235R	2011	2014	OMRE564172 ISSUE B3	8235R, 8260R, 8285R, 8310R, 8335R and 8360R Tractors	None	No	2013
116	Tractor	8260R	2011	2014	OMRE564172 ISSUE B3	8235R, 8260R, 8285R, 8310R, 8335R and 8360R Tractors	None	No	2013
117	Tractor	8310R	2011	2014	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
118	Tractor	8310RT	2011	2014	OMRE560341 ISSUE A3	8310RT, 8335RT and 8360RT Tractors	None	No	2013
119	Tractor	8335R	2011	2014	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
120	Tractor	8335RT	2011	2014	OMRE560341 ISSUE A3	8310RT, 8335RT and 8360RT Tractors	None	No	2013
121	Tractor	8360R	2011	2014	OMRE564172 ISSUE B3	8235R, 8260R, 8285R, 8310R, 8335R and 8360R Tractors	None	No	2013
122	Tractor	8360RT	2011	2014	OMRE560341 ISSUE A3	8310RT, 8335RT and 8360RT Tractors	None	No	2013
123	Combine	S660	2012	2017	OMHXE75764 (G4)	S650, S660, S670, S680 and S690 Combines	None	No	2014
124	Combine	S670	2012	2017	OMHXE75764 (G4)	S650, S660, S670, S680 and S690 Combines	None	No	2014
125	Combine	S680	2012	2017	OMHXE75764 (G4)	S650, S660, S670, S680 and S690 Combines	None	No	2014
126	Combine	S690	2012	2017	OMHXE75764 (G4)	S650, S660, S670, S680 and S690 Combines	None	No	2014
127	Sprayer	4940	2012	2014	OMKK13308 ISSUE B3	4940 Self-Propelled Sprayer	None	No	2013
128	Tractor	5100M	2012	2021	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
129	Tractor	6115R	2012	2015	OMAL212532 ISSUE K3	6105R, 6115R and 6125R Tractors	None	No	2013
130	Tractor	6125R	2012	2015	OMAL212532 ISSUE K3	6105R, 6115R and 6125R Tractors	None	No	2013
131	Tractor	6140R	2012	2015	OMAL211531 ISSUE F4	Tractors 6140R, 6150R, 6150RH, 6170R, 6190R and 6210R	None	No	2014
132	Tractor	6170R	2012	2014	OMAL211531 ISSUE F4	Tractors 6140R, 6150R, 6150RH, 6170R, 6190R and 6210R	None	No	2014

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133	Tractor	6190R	2012	2014	OMAL211531 ISSUE F4	Tractors 6140R, 6150R, 6150RH, 6170R, 6190R and 6210R	None	No	2014
134	Tractor	6210R	2012	2014	OMAL211531 ISSUE F4	Tractors 6140R, 6150R, 6150RH, 6170R, 6190R and 6210R	None	No	2014
135	Tractor	9360R	2012	2014	OMRE560318 ISSUE B3	9360R, 9410R, 9460R, 9510R and 9560R Tractors	None	No	2013
136	Tractor	9410R	2012	2014	OMRE560318 ISSUE B3	9360R, 9410R, 9460R, 9510R and 9560R Tractors	None	No	2013
137	Tractor	9460R	2012	2014	OMRE560318 ISSUE B3	9360R, 9410R, 9460R, 9510R and 9560R Tractors	None	No	2013
138	Tractor	9460RT	2012	2014	OMRE560321 ISSUE B3	9460RT, 9510RT and 9560RT Scraper Tractors	None	No	2013
139	Tractor	9510R	2012	2014	OMRE560318 ISSUE B3	9360R, 9410R, 9460R, 9510R and 9560R Tractors	None	No	2013
140	Tractor	9510RT	2012	2014	OMRE560321 ISSUE B3	9460RT, 9510RT and 9560RT Scraper Tractors	None	No	2013
141	Tractor	9560R	2012	2014	OMRE560318 ISSUE B3	9360R, 9410R, 9460R, 9510R and 9560R Tractors	None	No	2013
142	Tractor	9560RT	2012	2014	OMRE560321 ISSUE B3	9460RT, 9510RT and 9560RT Scraper Tractors	None	No	2013
143	Tractor	1025R	2013	2021	OMLVU28480 ISSUE H5	1023E and 1025R Compact Utility Tractos	74	No	2015
144	Tractor	2025R	2013	2021	OMLVU28128 ISSUE I5	2025R and 2032R Compact	78	No	2015
145	Tractor	2032R	2013	2021	OMLVU28128 ISSUE I5	2025R and 2032R Compact	78	No	2015
146	Tractor	5085E	2013	2017	OMSJ14615 ISSUE H5	5085E and 5100E (IT4)	158	No	2015
147	Tractor	5100E	2013	2021	OMSJ14615 ISSUE H5	5085E and 5100E (IT4)	158	No	2015
148	Tractor	6105D	2013	2015	OMSU38638 ISSUE H4	6105D, 6115D, 6130D and 6140D Interim Tier IV Tractors,	None	No	2013
149	Combine	S650	2014	2017	OMHXE75764 (G4)	S650, S660, S670, S680 and S690 Combines	None	No	2014
150	Sprayer	R4030	2014	2021	OMKK41820 ISSUE H8	R4030, R4038, and R4045 Self-Propelled Sprayer/Spreader	658	No	2018
151	Sprayer	R4038	2014	2021	OMKK41820 ISSUE H8	R4030, R4038, and R4045 Self-Propelled Sprayer/Spreader	658	No	2018
152	Tractor	6105M	2014	2016	OMAL213158 ISSUE F4	6105M, 6115M, 6125M, and 6140M	None	No	2014
153	Tractor	6105R	2014	2015	OMAL212532 ISSUE K3	6105R, 6115R and 6125R Tractors	None	No	2013
154	Tractor	6115M	2014	2016	OMAL213158 ISSUE F4	6105M, 6115M, 6125M, and 6140M	None	No	2014
155	Tractor	6125M	2014	2016	OMAL213158 ISSUE F4	6105M, 6115M, 6125M, and 6140M	None	No	2014
156	Tractor	6140M	2014	2015	OMAL229717 ISSUE J2	Tractors 6130M, 6140M, and 6145M	490	No	2022
157	Tractor	6170M	2014	2015	OMAL213190 ISSUE F4	6150M and 6170M Tractors	None	No	2013
158	Tractor	7210R	2014	2020	OMRE592218 ISSUE H8	7R Tractors	521	No	2018
159	Tractor	7250R	2014	2020	OMRE592218 ISSUE H8	7R Tractors	521	No	2018
160	Tractor	7270R	2014	2020	OMRE592218 ISSUE H8	7R Tractors	521	No	2018
161	Tractor	7290R	2014	2020	OMRE592218 ISSUE H8	7R Tractors	521	No	2018
162	Sprayer	R4045	2015	2021	OMKK41820 ISSUE H8	R4030, R4038, and R4045 Self-Propelled Sprayer/Spreader	658	No	2018
163	Tractor	6110M	2015	2017	OMAL219620 ISSUE D0	6110M, 6120M, 6130M and 6145M Tractors	610	No	2020
164	Tractor	6110R	2015	2021	OMAL225932 ISSUE L1	6110R, 6120R and 6130R Tractors	574	No	2021
165	Tractor	6120M	2015	2017	OMAL219620 ISSUE D0	6110M, 6120M, 6130M and 6145M Tractors	610	No	2020
166	Tractor	6120R	2015	2021	OMAL225932 ISSUE L1	6110R, 6120R and 6130R Tractors	574	No	2021
167	Tractor	6130M	2015	2017	OMAL219620 ISSUE D0	6110M, 6120M, 6130M and 6145M Tractors	610	No	2020
168	Tractor	6130R	2015	2021	OMAL225932 ISSUE L1	6110R, 6120R and 6130R Tractors	574	No	2021
169	Tractor	6145M	2015	2017	OMAL219620 ISSUE D0	6110M, 6120M, 6130M and 6145M Tractors	610	No	2020
170	Tractor	6145R	2015	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
171	Tractor	6155M	2015	2017	OMAL219652 ISSUE D0	6155M, 6175M and 6195M Tractors	483	No	2020
172	Tractor	6155RH	2015	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
173	Tractor	6175M	2015	2021	OMAL219652 ISSUE D0	6155M, 6175M and 6195M Tractors	483	No	2020
174	Tractor	6175R	2015	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
175	Tractor	6195M	2015	2021	OMAL219652 ISSUE D0	6155M, 6175M and 6195M Tractors	483	No	2020
176	Tractor	6215R	2015	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
177	Tractor	8245R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
178	Tractor	8270R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
179	Tractor	8295R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
180	Tractor	8320R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
181	Tractor	8320RT	2015	2020	OMRE591961 (H8)	8RT Series Tractors (Serial No. 920001-)	381	No	2018
182	Tractor	8345R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
183	Tractor	8345RT	2015	2020	OMRE591961 (H8)	8RT Series Tractors (Serial No. 920001-)	381	No	2018
184	Tractor	8370R	2015	2020	OMRE592061 (H8)	8245R, 8270R, 8295R, 8320R, 8335R, 8345R and 8370R Tractors	504	No	2018
185	Tractor	8370RT	2015	2020	OMRE591961 (H8)	8RT Series Tractors (Serial No. 920001-)	381	No	2018
186	Tractor	9370R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
187	Tractor	9420R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
188	Tractor	9470R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
189	Tractor	9470RT	2015	2021	OMRE596897 (H0)	9RT Tractors (Serial No. 921001-)	366	No	2020
190	Tractor	9520R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
191	Tractor	9520RT	2015	2021	OMRE596897 (H0)	9RT Tractors (Serial No. 921001-)	366	No	2020
192	Tractor	9570R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
193	Tractor	9570RT	2015	2021	OMRE596897 (H0)	9RT Tractors (Serial No. 921001-)	366	No	2020
194	Tractor	9620R	2015	2021	OMRE569049 (H5)	9370R, 9420R, 9470R, 9520R, 9570R AND 9620R tractors	542	No	201?
195	Sprayer	R4023	2016	2021	OMKK32686 ISSUE F6	R4023 Self-Propelled Sprayer	362	No	2016
196	Tractor	6155R	2016	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
197	Tractor	6195R	2016	2021	OMAL218252 ISSUE K6	6145R, 6155R, 6155RH, 6175R, 6195R and 6215R Tractors	595	No	2016
198	Tractor	7310R	2016	2020	OMRE592218 ISSUE H8	7R Tractors	521	No	2018

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199	Tractor	9470RX	2016	2021	OMRE596861 (H0)	9RX Tractors (Serial No. 811001-)	362	No	2020
200	Tractor	9520RX	2016	2021	OMRE596861 (H0)	9RX Tractors (Serial No. 811001-)	362	No	2020
201	Tractor	9570RX	2016	2021	OMRE596861 (H0)	9RX Tractors (Serial No. 811001-)	362	No	2020
202	Tractor	9620RX	2016	2021	OMRE584633	9RX Tractors (Serial No. 800000-)	495	No	2016
203	Tractor	2038R	2017	2021	OMLVU31185 ISSUE H8	2032R and 2038R	92	No	2018
204	Tractor	3025E	2017	2021	OMLVU31846 ISSUE H6	3025E, 3032E, and 3038E	87	No	2016
205	Tractor	3033R	2017	2021	OMLVU29135 ISSUE E4	3033R, 3039R and 3046R	116	No	2014
206	Tractor	3039R	2017	2021	OMLVU29135 ISSUE E4	3033R, 3039R and 3046R	116	No	2015
207	Tractor	3046R	2017	2021	OMLVU29135 ISSUE E4	3033R, 3039R and 3046R	116	No	2016
208	Tractor	4044M	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
209	Tractor	4044R	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
210	Tractor	4052M	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
211	Tractor	4052R	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
212	Tractor	4066M	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
213	Tractor	4066R	2017	2021	OMLVU32267 ISSUE H6	4044M, 4044R, 4052M, 4052R, 4066M, and 4066R	144	No	2016
214	Tractor	5075GN	2017	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
215	Tractor	5075GV	2017	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
216	Tractor	5090GN	2017	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
217	Tractor	5090GV	2017	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
218	Tractor	5090M	2017	2021	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
219	Tractor	5090R	2017	2021	OMSU53451 ISSUE D8	5090R, 5100R, 5115R, and 5125R (FT4)	192	No	2018
220	Tractor	5100GN	2017	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
221	Tractor	5100ML	2017	2021	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
222	Tractor	5100R	2017	2021	OMSU53451 ISSUE D8	5090R, 5100R, 5115R, and 5125R (FT4)	192	No	2018
223	Tractor	5115M	2017	2021	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
224	Tractor	5115ML	2017	2021	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
225	Tractor	5115R	2017	2021	OMSU53451 ISSUE D8	5090R, 5100R, 5115R, and 5125R (FT4)	192	No	2018
226	Tractor	5125R	2017	2021	OMSU53451 ISSUE D8	5090R, 5100R, 5115R, and 5125R (FT4)	192	No	2018
227	Tractor	8400R	2017	2020	OMRE591961 (H8)	8RT Series Tractors (Serial No. 920001-)	381	No	2018
228	Combine	S760	2018	2021	OMDXE11176 (F1)	S760, S770, S780, and S790 Combines	604	No	2021
229	Combine	S770	2018	2021	OMDXE11176 (F1)	S760, S770, S780, and S790 Combines	604	No	2021
231	Combine	S790	2018	2021	OMDXE11176 (F1)	S760, S770, S780, and S790 Combines	604	No	2021
232	Sprayer	DTS10	2018	2020	(UNAVAILABLE)	"Error downloading content file"	(N/A)	(N/A)	(N/A)
233	Sprayer	STS10	2018	2020	(UNAVAILABLE)	Technical Manual - All inclusive	(N/A)	(N/A)	(N/A)
234	Sprayer	STS12	2018	2020	OMKK90551	STS12, STS16, STS20 Self-Propelled	383	No	2021
235	Sprayer	STS14	2018	2020	OMKK90551	STS12, STS16, STS20 Self-Propelled	383	No	2021
236	Sprayer	STS16	2018	2020	OMKK90551	STS12, STS16, STS20 Self-Propelled	383	No	2021
237	Tractor	5090EL	2018	2021	OMSU54538 ISSUE C1	5090E, 5090EL, and 5100E (FT4) Tractors	169	No	2021
238	Tractor	5100MH	2018	2019	OMSU54598 ISSUE I7	5075M, 5090M, 5100M, 5100MH, 5100ML, 5115M, and 5115ML (FT4) Tractors	242	No	2017
239	Tractor	9420RX	2018	2021	OMRE596861 (H0)	9RX Tractors (Serial No. 811001-)	362	No	2020
240	Sprayer	R4044	2019	2021	OMKK51056 ISSUE H8	R4030, R4038, R4044, and R4045 Self-Propelled Sprayer/Spreader	477	No	2018
241	Tractor	5090E	2019	2021	OMSU54538 ISSUE C1	5090E, 5090EL, and 5100E (FT4) Tractors	169	No	2021
242	Tractor	6135E	2019	2019	OMSU65872 ISSUE C2	6105E, 6120E, 6120EH and 6135E Final Tier IV Tractors	170	No	2022
243	Tractor	3025D	2020	2021	OMSJ32078 ISSUE A1	3025D, 3035D and 3043D Tractors,	None	No	2021
244	Tractor	3035D	2020	2021	OMSJ32078 ISSUE A1	3025D, 3035D and 3043D Tractors,	None	No	2021
245	Tractor	6230R	2020	2021	OMAL228760 ISSUE L1	6230R and 6250R	407	No	2021
246	Tractor	6250R	2020	2021	OMAL228760 ISSUE L1	6230R and 6250R	407	No	2021
247	Tractor	7R210	2020	2021	OMTA22619 ISSUE G1	7R Tractors	451	No	2021
248	Tractor	7R230	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
249	Tractor	7R250	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
250	Tractor	7R270	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
251	Tractor	7R290	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
252	Tractor	7R310	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
253	Tractor	7R330	2020	2021	OMTA17289 ISSUE H0	7R 210, 7R 230, 7R 250, 7R 270, 7R 290, 7R 310, 7R 330	453	No	2020
254	Tractor	8R230	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
255	Tractor	8R250	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
256	Tractor	8R280	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
257	Tractor	8R310	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
258	Tractor	8R340	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
259	Tractor	8R370	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
260	Tractor	8R410	2020	2021	OMRE593195 (J1)	8R Tractors (Serial No. 200001-)	475	No	2021
261	Tractor	8RT310	2020	2021	OMRE593061 (J1)	8RT Series Tractors (Serial No. 927001-)	347	No	2021
262	Tractor	8RT340	2020	2021	OMRE593061 (J1)	8RT Series Tractors (Serial No. 927001-)	347	No	2021
263	Tractor	8RT370	2020	2021	OMRE593061 (J1)	8RT Series Tractors (Serial No. 927001-)	347	No	2021
264	Tractor	8RT410	2020	2021	OMRE593061 (J1)	8RT Series Tractors (Serial No. 927001-)	347	No	2021
265	Tractor	8RX310	2020	2021	OMRE593193 (J1)	8RX Tractors (Serial No. 804001-)	372	No	2021

John Deere Equipment Models 1999+ and Ops Manuls

	279		Inclusive		*Note: There are multiple editions of manuals, most recent listed, North America versions, English editions*		0 130		
No.	**Type**	**Model ID**	**Start Date**	**End Date**	**Ops Manual ID**	**Title - First line(s)**	**Choosing Page**	**Choosing First Page**	**Year Copyright**
266	Tractor	8RX340	2020	2021	OMRE593193 (J1)	8RX Tractors (Serial No. 804001-)	372	No	2021
267	Tractor	8RX370	2020	2021	OMRE593193 (J1)	8RX Tractors (Serial No. 804001-)	372	No	2021
268	Tractor	8RX410	2020	2021	OMRE593193 (J1)	8RX Tractors (Serial No. 804001-)	372	No	2021
269	Combine	X91000	2021	2021	OMHXE162878 ISSUE L0	X9 1000 and X9 1100 Combines	512	No	2020
270	Combine	X91100	2021	2021	OMHXE162878 ISSUE L0	X9 1000 and X9 1100 Combines	512	No	2020
271	Tractor	5075GL	2021	2021	OMER444695 ISSUE B9	5075GV, 5090GV, 5075GN, 5090GN, 5100GN, and 5075GL Tractors	None	No	2019
272	Tractor	5125ML	2021	2021	OMSU55509 ISSUE F0	5100ML, 5115ML, and 5125ML	161	No	2020
273	Tractor	7R 350	2021	2021	OMTA28704 ISSUE G2	7R Tractors	438	No	2022
274	Tractor	9R390	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021
275	Tractor	9R440	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021
276	Tractor	9R440	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021
277	Tractor	9RT470	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021
278	Tractor	9RT520	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021
279	Tractor	9RT570	2021	2021	OMTR118884	9RT Tractors (Serial No. 925011-)	332	No	2021

20 September, 2022

Dear Governor Hochul:

We write to you as experts in intellectual property (IP) law to explain why manufacturers are incorrect when they claim that New York's Digital Fair Repair Act (A7006B and S4104A) conflicts with their IP rights.

As early as 1901, courts have recognized a "right of repair or renewal" under U.S. copyright law. Doan v. American Book Co., 105 F. 772 (7th Cir. 1901). Since then, courts have repeatedly brushed back efforts to use copyright law to control the markets for repair parts and information. *See* ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 703 (6th Cir. 2005) (holding part numbers and technical illustrations unoriginal); *see also* Southco, Inc. v. Kanebridge Corp., 258 F.3d 148 (3d Cir. 2001) (part numbers unprotectable); Toro Co. v. R & R Prod. Co., 787 F.2d 1208, 1213 (8th Cir. 1986) (part numbering system unoriginal).

It's not just the courts that have rejected these efforts. In amending § 117 of the Copyright Act, Congress explicitly embraced repair. *See* § 17 U.S.C § 117(c). And more recently, the Copyright Office has recognized that repairing a range of software-enabled devices, from smartphones to tractors, is non-infringing activity. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 86 Fed. Reg. 206, 59627 (October 28, 2021).

Facilitating the repair of consumer devices is consistent with federal copyright law and policy. The Fair Repair Act is in no way preempted by the Copyright Act, which merely prohibits states from enacting exclusive rights "equivalent" to those provided under federal law. 17 U.S.C. § 301(a). Since the Fair Repair Act does not authorize any third parties to reproduce, distribute, or prepare derivative works based on copyrighted works, it is fully consistent with the express preemption provision of the Copyright Act.

Nor is the Fair Repair Act vulnerable under an implied preemption theory. If "it is impossible for a private party to comply with both state and federal law," or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," a law may be preempted. Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-3 (2000). Here, manufacturers face no difficulty in simultaneously complying with federal copyright law and the Fair Repair Act. Copyright law creates no barrier to making software tools available to consumers and repair providers. See PLIVA, Inc. v. Mensing, 564 U.S. 604, 620 (2011) ("The question for 'impossibility' [preemption] is whether the private party could independently do under federal law what state law requires of it.").

The provisions of the Fair Repair Act are aligned with the purposes and objectives of federal copyright law, which seeks to encourage the production of creative works and facilitate public access to them. Copyright law balances those dual goals not by granting copyright holders unassailable rights to control the use of their works, but by tempering copyright protection with fundamental exceptions and limitations. Understanding those limitations as central to the copyright scheme reveals that there is no irreconcilable conflict between federal law and the Fair Repair Act.

First, vehicle repair and diagnostic information is not subject to copyright protection. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–45 (1991); CDK Glob. LLC v. Brnovich, 16 F.4th 1266, 1278 (9th Cir. 2021). Second, the use of software tools to gain access to that information constitutes a fair use under many circumstances. See Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 644 (7th

Cir. 2003); Association of Am. Med. Colls. v. Cuomo, 928 F.2d 519, 523 (2d Cir. 1991) (noting the relevance of fair use to conflict preemption analysis); Exemption to Prohibition on Circumvention, 86 Fed. Reg. 206, 59627. Third, to the extent any preemption claim is based on loading software into the memory of a computer operated by consumers or repair providers, there is good reason to doubt those instantiations count as reproductions under the Copyright Act, given their limited duration. See CDK, 16 F.4th at 1266 (noting that "the Copyright Act does not provide copyright owners the exclusive right to *use* their works"); Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

Moreover, the Fair Repair Act does not conflict with § 1201 of the Copyright Act. Some devices may not yet be subject to an exemption permitting the circumvention of technological protection measures for repair purposes. But the Fair Repair Act does not require, authorize, or even contemplate circumvention. To the extent those activities are unlawful under federal law, they will remain so after the enactment of the Fair Repair Act. Taken together, these considerations support the conclusion that the Fair Repair Act's requirements are consistent with federal copyright policy. And "in the absence of irreconcilability [between state and federal law], there is no conflict preemption." United States v. California, 921 F.3d 865, 882 (9th Cir. 2019).

If anything, the rules favoring repair under patent law are even clearer. Under the exhaustion doctrine, when a patentee sells a particular device to a consumer, it loses the right to control the use or subsequent transfer of that device. Exhaustion is why you can sell your used car without the manufacturer's permission. It's also why you can repair it free from any risk of patent liability. So long as you don't "reconstruct" the patented article—that is, rebuild it entirely—there is simply no infringement. *See* Aro Mfg. Co., Inc. v. Convertible Top Co., 365 U.S. 336 (1961). More recently, the Supreme Court made clear that manufacturers cannot leverage their patent rights to restrict the repair of the devices they sell. Impression Prods., Inc. v. Lexmark Int'l, Inc., 581 U.S. ___ (2017).

Nor does the Fair Repair Act jeopardize manufacturers' trade secret rights insofar as it would enable access to information, replacement parts, or tools. First, the Fair Repair Act specifically exempts trade secrets. Section 3(a) provides that "nothing in this section shall be construed to require an original equipment manufacturer to divulge any trade secret to any owner or independent service provider." Second, repair information is frequently shared with authorized repair providers, who may or may not be under any legal obligation to maintain its secrecy. In other instances, the information may be generally known or readily ascertainable through other means, in which case it is not a protected trade secret under the law. To the extent there are truly valuable secrets at stake, the language in the bill is more than sufficient to preserve their legal protection.

Finally, there is no reason to believe that the Fair Repair Act exposes manufacturers to any additional risks that their products will be counterfeited or otherwise reproduced. Determined counterfeiters already have access to devices, either on the open market or directly from device makers' own suppliers. The idea that an act designed to empower consumers and increase competition in the repair market would contribute to the problem of counterfeiting in any material way is implausible.

The right to repair our devices is crucial, not only to our autonomy as individuals, but to our collective obligations to the planet. This bill would provide the citizens of New York with tools to regain control over the devices they rely on every day and to stem the environmental harms of a throwaway consumer culture. As consumers as well as IP experts, we think that allowing people to repair the things they own makes common sense. It saves money by making the products we buy last longer. It eliminates waste in the form of discarded devices. And it reduces the need to extract raw materials from the earth.

Device makers now assert exclusive control over the supply of replacement parts, tools, software, and diagnostic information necessary for consumers to repair devices themselves or to rely on independent repair providers. As a result, independent repair shops are being driven out of business, which only reinforces the dominance of device makers and their authorized repair partners. Faced with monopoly pricing in the repair market, consumers are often persuaded to replace their devices rather than repair them. We think the people of New York would benefit from the existence of more competition and the opportunity to do repairs themselves.

Thank you for your leadership on this critically important issue. We are happy to offer any additional information that you may find useful. Please reach out if we can be of any help.

Sincerely,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In re: Deere & Company Repair Services Antitrust Litigation	)	No. 3:22-cv-50188 MDL No. 3030 Hon. Iain D. Johnston

MOTION FOR LEAVE TO FILE 23-PAGE
STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America, by its undersigned attorneys, moves to submit a Statement of Interest in this case pursuant to 28 U.S.C. § 517, and in support states as follows:

1. On December 8, 2022, Defendant Deere & Company moved for judgment on the pleadings in this multidistrict litigation, ECF No. 105. Plaintiffs filed their opposition on January 27, 2023, ECF No. 113. Deere's reply is due February 22, 2023. The United States hereby submits this Statement of Interest to address the proper application of the Sherman Act to repair aftermarkets.

2. The United States has the authority to file this Statement of Interest under 28 U.S.C. § 517, which authorizes the Attorney General of the United States or an officer of the Department of Justice to "attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." *See also, e.g.*, *Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 664 (7th Cir. 2012) (noting that a "Statement of Interest deserves the respect of the district court and this court"); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1317 (S.D. Fla. 2017) (agreeing that "28 U.S.C. § 517 . . . contains no time limitation and does not require the Court's leave"). The United States also believes its participation in this case will assist the Court in adjudicating the pending Rule 12 motion.

3. This Statement of Interest is 23 pages long, which exceeds the 15-page limit set forth in Local Rule 7.1 for most briefs. To the extent Local Rule 7.1 applies to this Statement of Interest, the United States respectfully requests an extension of the page limit. The United States believes that additional pages of analysis are warranted for this complex multidistrict litigation in which the parties' Rule 12 briefing also exceeds the ordinary page limits.

4. Counsel for both Plaintiffs and Deere have informed the United States that they would not oppose a motion for leave to file a Statement of Interest.

WHEREFORE, pursuant to Local Rule 5.6, the United States hereby requests leave to file its Statement of Interest in this matter. *See* Ex. A.

Respectfully submitted,

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Dated: February 13, 2023

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Exhibit A

Proposed Statement of Interest of the United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In re: Deere & Company Repair Services Antitrust Litigation	)	No. 3:22-cv-50188 MDL No. 3030 Hon. Iain D. Johnston

STATEMENT OF INTEREST OF THE UNITED STATES

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INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement under 28 U.S.C. § 517, which permits the Attorney General to direct "any officer of the Department of Justice . . . to attend to the interests of the United States in a suit pending in a court of the United States." *Id.* This suit affects the United States' interest in promoting a correct interpretation of the federal antitrust laws. The Department of Justice's Antitrust Division enforces these laws to protect economic freedom and competition in the marketplace.

Most relevant here, the United States has a strong interest in the correct application of the Sherman Antitrust Act. Plaintiffs' putative class action arises under Sherman Act §§ 1 and 2 (15 U.S.C. §§ 1–2). Plaintiffs allege that Deere & Company's anticompetitive conduct has prevented farmers and independent repair shops from performing certain repairs on Deere-branded agricultural equipment. *See, e.g.*, Compl. ¶¶ 4, 72–87, 237, ECF No. 85.[1]

Consistent with Supreme Court precedent, the policy of the United States is "to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in . . . agricultural markets, . . . repair markets," and elsewhere too. Exec. Order No. 14,036, § 1, 86 Fed. Reg. 36987 (July 9, 2021); *see also United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 558 (1944) (holding that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" with the Sherman Act). The United States thus

[1] The United States files this Statement of Interest in response to Deere's motion for judgment on the pleadings. To resolve this motion, the Court will "tak[e] the facts alleged in the complaint as true and draw[] all reasonable inferences in favor of the plaintiff." *E.g.*, *Matrix IV, Inc. v. Am. Nat. Bank & Tr. Co. of Chicago*, 649 F.3d 539, 547 (7th Cir. 2011). Thus, for the limited purpose of this Statement, the United States also assumes the facts in the complaint to be true.

submits this Statement of Interest to ensure that repair aftermarkets are analyzed under the correct legal framework to protect against anticompetitive abuses of market power in repair aftermarkets.

BACKGROUND

A. Background on the Right to Repair

There is a growing body of economic literature and consumer effort to protect consumers' freedom to repair their own products. This recognition, which is often styled around a "right to repair," is rooted in consumers' seeming lack of options for maximizing the value of products they already own. Increasingly, product manufacturers have made products harder to fix and maintain. For example, manufacturers have (1) hindered access to internal components; (2) monopolized parts, manuals, and diagnostic tools; and (3) used software to impede repairs with substantially identical aftermarket[2] parts. *See* Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* at 18–24 (May 2021), https://www.ftc.gov/reports/nixing-fix-ftc-report-congress-repair-restrictions (congressionally mandated report based on public comments, third-party empirical research, and FTC research). There is an important role for competition in these markets.

Repair restrictions like these can harm consumers, and the public more broadly, in at least three related ways. First, repair restrictions can drive independent repair shops out of business by raising their costs or denying them key inputs, which, in turn, leaves consumers with fewer choices. *See id.* at 42–44; *see also, e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 458, 465 (1992) (crediting this harm and denying summary judgment).

[2] The term "aftermarket" often refers to goods or services affecting a product that a consumer already owns, such as repairs of durable equipment—like tractors in this case or photocopiers in *Kodak*—while the corresponding term "foremarket" often refers to the initial acquisition of that good or equipment. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466, 497 (1992).

Second, manufacturers' restrictions can delay repairs. FTC, *supra*, at 39. To start, by forcing independent repair shops from the market, these restrictions can cut the number of repair shops available to consumers. Consumers (including farmers) then have fewer options for their time-sensitive repairs. *See id.* And even if a farmer finds an available independent shop, repair restrictions can stymie its work. For instance, proprietary software may prevent a tractor's central computer from recognizing a replacement part until an *authorized* technician essentially "unlocks" the tractor. *See id.* at 23, 39. Needless delay results if technicians are scarce or demand is high. And during harvest season, time is of the essence.

Third, restrictions on repair aftermarkets can raise prices and reduce quality.[3] For example, automotive collision repair parts can be twice as expensive to repair through manufacturers versus independent servicers. *See* FTC, *supra*, at 40 n.219. Medical imaging equipment is about three times as expensive. *See id.* at 40 ($150–$250 per hour vs. $500–$600 per hour). As to quality, surveys suggest that "consumers who used independent repair shops were more satisfied with the repairs than those who used factory service." *Id.* at 38 & n.206 (quoting Consumer Reports, *Should you repair or replace that product?* (Jan. 2014)) (surveying 29,281 people on home appliances, electronics, and yard equipment). About 75% of car owners use independent servicers, for instance. *Id.* at 38. Yet manufacturers can impose restrictions that prevent independent repairs.

These repair restrictions can worsen the pressures that farmers increasingly face. For the past three decades, for instance, U.S. agriculture has required growing investment in equipment—

[3] Price and quality are two sides of the same coin. A decrease in quality can harm consumers like an increase in price. Thus, "[e]conomists commonly say that when they use the term 'price,' it is a shorthand for the relevant price/quality and price/variety combinations." Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175, 185 (2007).

a substantial fixed cost that can be hard to defray.[4] And since 2014, falling commodity and farmland prices have forced a historic uptick in family farmer bankruptcies nationwide.[5]

The leading Supreme Court precedent addressing aftermarkets is *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In *Kodak*, the defendant manufactured and sold photocopiers and micrographic equipment, and also offered repair services and replacement parts for its equipment. *Id.* at 456. The plaintiffs—a number of "independent service organizations" (ISOs)—offered repair services for Kodak machines in competition with Kodak. *Id.* at 457. To block competition from ISOs, Kodak "implemented a policy of selling replacement parts . . . only to buyers of Kodak equipment who use Kodak service or repair their own machines," which drove many ISOs out of business. *Id.* at 458, 465. The ISOs sued under the Sherman Act, raising theories similar to those raised by Plaintiffs here: tying under § 1 of the Sherman Act; and monopolization under § 2. *Id.* at 479 (§ 1 tying), 485–86 (§ 2 monopolization and attempted monopolization); *accord* Compl. ¶¶ 221–32 (§ 1 tying), 233–66 (§ 2 monopolization, monopoly leveraging, attempted monopolization in the alternative, and conspiracy to monopolize). As discussed in more detail in the Discussion below, the Supreme Court held that the ISOs were entitled to a trial because they had shown that "Kodak's control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service." *Id.* at 465.

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[4] James M. MacDonald, Robert A. Hoppe, and Doris Newton, *Three Decades of Consolidation in U.S. Agriculture* at 40, U.S. Dept. of Agriculture (2018), https://www.ers.usda.gov/webdocs/publications/88057/eib-189.pdf.

[5] *See* Nigel Key, Jonathan Law, and Christine Whitt, *Chapter 12 Bankruptcy Rates Have Increased in Most Agricultural States*, USDA Economic Research Service (Nov. 30, 2021), https://www.ers.usda.gov/amber-waves/2021/november/chapter-12-bankruptcy-rates-have-increased-in-most-agricultural-states/.

B. Allegations in This Case

American farmers spend roughly $17.6 billion per year on tractors and other self-propelled farm machinery.[6] *See* Compl. ¶ 154 ("multi-billion-dollar" repair market). And John Deere equipment accounts for more than half of this spend, according to some estimates.[7]

In this case, Plaintiffs are a putative class of farms and farmers that own and use equipment manufactured by Deere & Company (Deere). Compl. ¶¶ 42–50. They allege that Deere has violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1–2) by preventing them from performing certain repairs on Deere-branded agricultural equipment. *See, e.g.*, *id.* ¶¶ 4, 72–87, 237. Plaintiffs allege that Deere's conduct has restrained trade in, and monopolized, an aftermarket for "Deere Repair Services." *Id.* ¶¶ 58–63.

Plaintiffs allege that Deere has denied customers the freedom to perform certain repairs without the use of Deere's authorized network, even when the repair could efficiently be performed by the farmer or by lower-cost or more convenient independent mechanics. *See, e.g.*, *id.* ¶¶ 4–5, 7–16, 72–92. Specifically, Plaintiffs allege that "Deere has deliberately designed its tractors so that both the diagnosis and the completion of a repair frequently requires [Deere] software tools and other Dealership-only resources." *Id.* ¶ 79. Without this proprietary software and accompanying instructions, farmers (or independent servicers) cannot troubleshoot the computers on each tractor that determine how—and if—the tractor functions. *See id.* ¶¶ 13, 73. Nor may farmers or independent servicers replace any such computers that break. *Id.* ¶ 86. These computers, or Engine Control Units (ECUs), monitor many sensors. *See, e.g.*, *id.* ¶ 82 (125

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[6] USDA, *Farm Production Expenditures: 2021* at 7 (July 2022), https://www.nass.usda.gov/Publications/Highlights/2022/2021_FarmExpenditures.pdf.

[7] Peter Waldman & Lydia Mulvany, *Who Really Owns a John Deere?* at 43, Bloomberg Businessweek (Mar. 9, 2020); *see also* Compl. ¶ 187 (Deere's billions in income growth).

different sensors for a combine harvester). If a sensor notices a problem, such as a broken part, an ECU can throttle the tractor (also known as forcing the tractor into "limp mode"). *Id.* ¶¶ 82–83. The same happens if an ECU experiences even a software glitch. *Id.* In some cases, a tractor can even become inoperable. *Id.* ¶ 86.

Restoring the tractor's functionality can be difficult and expensive. A farmer cannot simply replace the broken part. *Id.* ¶¶ 87, 147 (*e.g.*, faulty moisture meter and exhaust filters). Nor can a farmer ask a local independent repair shop to service the tractor, like someone might ask that shop to fix their car. *Id.* ¶¶ 94, 175. Instead, farmers must pay—and wait for—a technician authorized by Deere. Only Deere technicians have the proprietary software that can fully access an ECU. *Id.* ¶¶ 4, 11. Thus, only they can command the ECU to, say, recognize a replacement part or reset an overzealous sensor. *Id.* ¶¶ 82, 147. The only software available to farmers and third-parties, by contrast, has limited functionality despite Deere charging about $3,000 per year (originally $8,500 per year before the filing of this lawsuit). *Id.* ¶¶ 158–162.

The repair restrictions at issue here affect Deere agricultural equipment that are important, costly investments to the workings of a farm. *See* Compl. ¶ 1 n.1 (list of equipment), ¶¶ 28, 99 (alleging that tractor prices can "run up to nearly a million dollars"). These various machines, or "tractors" for short, enable American agriculture. When they break or fail to operate and repair markets function poorly, agriculture suffers. Crops waste. Land lies fallow. *See id.* ¶¶ 83, 95. Even a short delay can result in farmers "watch[ing] their crops rot." *Id.* ¶¶ 83, 143.[8] Farmers thus place significant value on not only the quality but also the timeliness of repair services. Yet

[8] *See also* Waldman & Mulvany, *supra*, at 44 (according to one farmer, "the five-hour wait for someone to show up and do a half-hour software fix contributed to a loss of at least 15% of the crop").

waits for repair can stretch for valuable hours, if not days or weeks. *Id.* ¶¶ 87, 117.[9] And, as of 2022, the cost for Deere's repair services was $150–$180 per hour for labor alone, with extra charges for travel and parts. *Id.* ¶ 93. Plaintiffs allege that they "are forced to use Deere-affiliated Dealerships for Repair Services when they would otherwise fix the Tractor themselves or utilize the services of a lower-cost and/or more convenient independent mechanic." *Id.* ¶ 5.

Deere has offered various responses to these allegations. In public, Deere has largely attributed complaints about repair restrictions to consumers' unawareness of their right to repair. *See, e.g.*, Compl. ¶¶ 142–143. In the words of Deere's Chief Technology Officer, "98 percent of the repairs that customers want to do on John Deere products today, they can do."[10] *See id.* ¶ 142 & n.53. Similarly, in this case, Deere's pending motion for judgment on the pleadings (filed on December 8, 2022) claims that only "a small subset" of repairs are restricted to Deere-authorized dealerships. Deere's Mem. in Support of its Mot. for Judgment on the Pleadings at 1, ECF No. 105 (Mot.). Deere further argues that farmers have long known about those restricted repairs. *See id.* at 18–19. In short, Deere claims that it has neither deceived nor surprised farmers with its longstanding repair restrictions.

C. Procedural Posture and Deere's Pending Rule 12(c) Motion

Deere has filed a motion under Rule 12(c) asking this Court to "dismiss this case on the pleadings." Mot. at 2. Most relevant here, Deere asks this Court to apply a factual presumption: unless Deere had deceived or surprised its customers, competition in the tractor foremarket *must*

[9] *See also* Mae Anderson, *Without 'right to repair,' businesses lose time and money* (Aug 10, 2021), https://apnews.com/article/technology-business-9f84a8b72bb6dd408cb642414cd28f5d (cited at Compl. ¶ 87) (four hours for a controller, and a day for installation).

[10] Nilay Patel, *John Deere Turned Tractors Into Computers – What's Next?*, The Verge (June 15, 2021), https://www.theverge.com/22533735/john-deere-cto-hindman-decoder-interview-right-to-repair-tractors (cited at Compl. ¶ 142 n.53) (interviewing CTO Jahmy Hindman).

have negated any power Deere had in its repair aftermarkets. *See* Mot. at 18. According to Deere, "[t]o overcome this presumption—and proceed on a single-brand aftermarket theory—Plaintiffs must plausibly allege that Deere either [1] hid its repair policies from customers before they bought a Tractor, or [2] changed those policies after the fact." *Id.* This is incorrect.

The United States respectfully submits this Statement of Interest to oppose Deere's Rule 12(c) motion on this issue.[11]

DISCUSSION

The federal antitrust laws have long protected competition in aftermarkets. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). But Deere asks this Court to nullify that protection unless two narrow circumstances are shown. Namely, Deere argues that its repair restrictions are effectively immune from antitrust scrutiny unless Deere either (1) *deceived* Plaintiffs by hiding the restrictions before Plaintiffs bought their tractors; or (2) *surprised* Plaintiffs by imposing the restrictions after Plaintiffs' purchases. *See* Mot. at 15, 18. Deere proposes a safe harbor where the law provides none. Deere would have the Court presume that, in every other circumstance, a competitive foremarket (as Deere argues the tractor market to be) necessarily shields consumers from any possible market power or monopoly power in a single-brand aftermarket (such as the market for Deere repair services).

Deere is wrong. As detailed below, Deere's proposed presumption contravenes the Supreme Court's decision in *Kodak* and the weight of circuit court authority. Although deception or surprise can be relevant to a proper *Kodak* analysis, they are not alone dispositive or required. Indeed, Deere's requested presumption is very similar to the one sought by the defendant in *Kodak*

[11] The United States takes no position on other issues, such as whether Plaintiffs are direct or indirect purchasers. *See, e.g.*, Mot. at 6–14.

and rejected by the Court in favor of a fact-specific analysis of "actual market realities." *Kodak*, 504 U.S. at 466–67.

I. SUPREME COURT PRECEDENT DOES NOT SUPPORT DEERE'S PROPOSED PRESUMPTION

The Supreme Court's decision in *Kodak* controls here. Yet, tellingly, in asking this Court to dismiss this case on the pleadings, Deere fails to even cite it. Far from supporting Deere's proposed presumption disfavoring single-brand aftermarkets, *Kodak* analyzed and protected those markets much like any other. Among other things, *Kodak* defined single-brand aftermarkets based on traditional economic principles, not a formulaic fixation on whether plaintiffs had shown deception or surprise.

A. *Kodak* Should Guide the Court's Analysis in This Case

A "relevant market" or "relevant product market" in antitrust cases refers to the set of products or services that customers would switch to in the event of a price increase or quality decrease. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) ("Th[e] market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.").

In a case involving aftermarket parts or repairs for durable equipment, the "relevant market" or "market definition" analysis also begins with the choices or reasonably interchangeable "substitutes" available to the owner of that equipment. *Kodak*, 504 U.S. at 481–82 ("The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners.") In *Kodak*, the Supreme Court explained that "[b]ecause service and parts for Kodak equipment are

not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines." *Id.* at 482. Plaintiffs in this case have followed these traditional principles in alleging that repair services and tools for Deere equipment are not interchangeable with services and tools for equipment from other manufacturers. Compl. ¶¶ 60, 65.

B. Deere's Proposed Presumption Contravenes *Kodak*

In *Kodak*, the plaintiffs' claims required the defendant to have market power in the aftermarket for replacement parts, 504 U.S. at 464 (§ 1 tying claim), and monopoly power in aftermarkets for parts and service, *id.* at 480–82 (§ 2 monopolization claim). As the Supreme Court explained, "[m]arket power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Id.* at 464 (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)). The plaintiffs had presented sufficient evidence of Kodak's market power by showing that Kodak's conduct had "excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service" which "was of higher price and lower quality than the preferred [independent] service." *Id.* at 465; *see id.* at 481 (explaining that this evidence was also sufficient to show monopoly power); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (explaining that market power can be established through evidence of "actual, sustained adverse effects on competition").

Plaintiffs here have made a variety of similar allegations. Plaintiffs allege, for example, that they are "forced to use Deere-affiliated Dealerships for Repair Services when they would otherwise fix the Tractor themselves or utilize the services of a lower-cost and/or more convenient independent mechanic." Compl. ¶ 5. What's more, repairs through Deere's authorized network are "frequently" performed incorrectly, only after "extensive waits," and at "exorbitant" cost. *Id.*

¶ 27; *see id.* at ¶¶ 115–23 (detailing aspects of poor service and higher costs for customers compared to "what would be offered in a competitive market"); *id.* at ¶¶ 186–89 (alleging Deere earns supra-competitive profits from withholding Repair Tools).

Rather than grapple with Plaintiffs' allegations relevant to Repair Services, Deere argues that the complaint fails because it does not "plausibly allege that consumers who bought Deere Tractors did not realize that some Repair Services for their Tractors would need to be performed by dealers." Mot. at 18. It may be true that tractor customers will weigh the information they know about aftermarket parts or repairs at the time they purchase the tractor, and that this may reduce the manufacturer's incentive to charge high prices for repairs or replacement parts in the first place. But to presume this without factual analysis violates *Kodak*. As the Supreme Court explained, a "theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods." *Kodak*, 504 U.S. at 473. *Kodak* claims therefore require an actual "case-by-case" [] focus[] on the 'particular facts disclosed by the record." *Id.* at 467 (quoting *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579 (1925)).

For example, Kodak had argued that it "[could not] actually exercise the necessary market power for a Sherman Act violation" because once customers realized that their service costs were increasing, Kodak would suffer a "loss in profits from lower equipment sales." *Kodak*, 504 U.S. at 451. But Kodak had not presented any "actual data" to support this claim. *Id.* at 466. And given the Supreme Court's insistence on a fact-bound approach, the *Kodak* Court rejected the idea that "competition in the equipment market *necessarily* prevents market power in the aftermarkets" as a matter of law. *Id.* at 470 (emphasis added). As the Supreme Court explained then and since reaffirmed, "[l]egal presumptions that rest on formalistic distinctions rather than actual market

realities are generally disfavored in antitrust law." *Id.* at 466–67; *see also Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (quoting *Kodak* on this point); *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2158 (2021) (noting, in a rule of reason case, that "[w]hether an antitrust violation exists necessarily depends on a careful analysis of market realities").

Furthermore, Kodak's argument assumed that price increases in the aftermarket "above competitive levels" would mean "potential customers would simply stop buying" equipment in a foremarket. 504 U.S. at 470. But the Court reasoned that there could "easily" be a price increase in an aftermarket that "would more than compensate for the lower revenues" in the foremarket, *id.* at 471, and thus the claim "may not accurately explain the behavior of the primary and derivative markets for complex durable goods," *id.* at 473. In other words, to understand the defendant's ability and incentives to exercise market power or monopoly power, the court must understand all the relevant underlying facts.

A firm's ability to exercise market power or monopoly power in an aftermarket can depend on whether there is a "responsive connection" between the aftermarket and the foremarket. *Kodak*, 504 U.S. at 473. As the Supreme Court explained, "[f]or the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the 'package'—equipment, service, and parts—at the time of purchase; that is, consumers must engage in *accurate lifecycle pricing*." *Id.* (emphasis added). "Accurate lifecycle pricing," in turn, requires a "sophisticated analysis" based on a wealth of information, and the calculation "is likely to be customer-specific." *See id.* at 473–74 (listing over a dozen pieces of necessary information). "Much of this information is difficult—some of it impossible—to acquire at the time of purchase." *Id.* at 473. And even where the information is technically available, some customers may "choose not" to perform the necessary calculations because doing so may not be cost efficient or may be

inconsistent with a customer's procurement practices. *Id.* at 474–75. Thus, in situations where customers cannot or do not engage in accurate lifecycle pricing, a competitive foremarket may not discipline anticompetitive conduct in an aftermarket, regardless of whether a defendant may have "conspicuously made its repair policies known to consumers." Mot. at 18. *Kodak* requires this Court to resolve Plaintiffs' claims by "examin[ing] closely the economic reality of the market at issue" and rejecting formalistic distinctions such as whether a defendant made a particular disclosure. *Id.* at 466–67.

The Supreme Court's concern with information costs does not square with Deere's proposed requirement of deception or surprise. Indeed, in *Kodak*, customers had made the "vast bulk" of equipment purchases *after* Kodak had stopped selling parts to independent service organizations in 1985. *See id.* at 492 (Scalia, J., dissenting) (quoting factual proffer). So "at least all post-1985 purchasers of micrographic equipment, like all post-1985 purchasers of new Kodak copiers, *could have been aware of Kodak's parts practices*." *Id.* (emphasis added). Yet the Court held that information costs made purchasers' awareness of Kodak's policies merely theoretical, and thus permitted plaintiffs' claims to proceed.

Deere's deception-or-surprise requirement is not just an unduly narrow lens for assessing information costs. It also is blind to equipment owners' switching costs, as the *Kodak* Court's analysis shows. The Supreme Court explained that "consumers who already have purchased the equipment, and are thus 'locked in,' will tolerate some level of service-price increases before changing equipment brands." *Id.* at 476. Again, there was no insistence on deception or surprise: high sunk costs sufficed. *See id.* at 476–77. Namely, "the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, ma[de] switching costs very high for existing Kodak customers." *Id.* at 477. This Court's analysis

of market realities should give due consideration to Plaintiffs' allegations of switching costs. *See, e.g.,* Compl. ¶ 28.

More fundamentally, Deere is asking for a version of the type of *factual* presumption that the Supreme Court emphatically rejected in *Kodak*. The defendant in *Kodak* argued for a presumption that its "lack of power in the equipment market necessarily precludes power in the aftermarkets." *Kodak*, 504 U.S. at 469. In ruling for plaintiffs, the *Kodak* Court instead demanded a fact-bound analysis of the relationship between the market for equipment and the aftermarkets for parts and service. *See id.* ("The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another."). Deere would have this Court presume that competition in the foremarket is sufficient to discipline anticompetitive conduct in the aftermarket, *unless* Plaintiffs "plausibly allege that Deere either hid its repair policies from customers before they bought a Tractor, or changed those policies after the fact." Mot. at 18. This is precisely the type of formalistic legal distinction that is not only inappropriate in antitrust cases generally, but also forbidden by *Kodak* itself.

II. CIRCUIT COURT PRECEDENT DOES NOT SUPPORT DEERE'S PROPOSED PRESUMPTION

Deere's proposed presumption also fails to find support in Seventh Circuit precedent. And Deere ignores precedent correctly applying *Kodak*, while relying on out-of-circuit cases that are inapposite or wrong.

A. Seventh Circuit Precedent Does Not Support Deere's Proposed Presumption

Deere is wrong in claiming that two Seventh Circuit cases—*Digital Equipment Corporation v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) and *Schor v. Abbott Laboratory*,

457 F.3d 608, 614 (7th Cir. 2006)—require Plaintiffs to show that they were deceived or surprised. *See* Mot. at 15 n.3, 19. Neither case does.

Deere's reliance on *Digital Equipment* is misplaced as the case did not involve an alleged aftermarket. *Digital Equipment* was a "mundane commercial case" in which a computer manufacturer sued a distributor in diversity for money owed, and the distributor filed an antitrust counterclaim that "charged [the manufacturer] with attempting to monopolize the market for operating systems for [its] own computers." 73 F.3d at 758, 763. The Seventh Circuit "could hardly imagine a weaker case" for applying *Kodak*. *Id.* at 763. The manufacturer was "selling a fungible commodity" in a rapidly-expanding market with easy substitution, and "[n]othing in th[e] record suggest[ed] that [the manufacturer] was able to raise prices, or exploit any customer, by deciding to include an [operating system] with every machine." *Id.* Customers "c[ould] substitute brands [of computer] without changing operating systems." *Id*. Thus, *Kodak* was readily distinguishable from the facts at issue.

Digital Equipment nevertheless addressed *Kodak* and observed that "competition among manufacturers fully protects buyers who accurately calculate life-cycle costs." *Digital Equip.*, 73 F.3d at 762. This observation acknowledges that these calculations may not always be possible. Indeed, *Digital Equipment* stated that "not all customers do this [*i.e.*, 'accurately calculate life-cycle costs']." *Id.* *Digital Equipment* also did not purport to ignore that buyers may not be protected when there is insufficient "competition among manufacturers," such as when "customer[s are] locked in to [their] equipment." *Id.* at 762–63. The Seventh Circuit therefore appreciated that various market imperfections missing from *Digital Equipment* can support *Kodak* claims. Here, for example, Plaintiffs' case involves expensive and complex equipment, with

uncertain and variable repair costs over its useful life, and customers who are allegedly locked-in. *See, e.g.*, Compl. ¶¶ 3, 15, 99–100.

Applying *Digital Equipment* in an MDL in this District, then-District Judge St. Eve found that aftermarkets are not limited to cases in which deception or surprise are alleged. *See In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 962, 964 (N.D. Ill. 2018). In *In re Dealer Management*, plaintiffs survived a motion to dismiss against not only a defendant whose alleged conduct could satisfy a deception/surprise requirement, *see id.* at 963–64 (defendant CDK), but also a defendant whose conduct could not, *id.* at 964 (defendant Reynolds). As the court explained, these rulings flowed from precedent. Quoting *Digital Equipment*, Judge St. Eve reasoned that whenever customers cannot "*accurately* calculate life-cycle costs"—whether because of information costs or other "market imperfections"—a supplier-defendant can charge supracompetitive prices in the aftermarket. *Id.* at 964 (quoting *Digital Equip.*, 73 F.3d at 762). Accordingly, just as the *Kodak* suit withstood summary judgment, a complaint may survive a Rule 12 motion even if it "affirmatively pleads that [defendant]'s closed architecture was *generally known* to customers *before* they purchased the product." *Id.* (emphasis added). It would turn the law on its head to suggest that the act of disclosure by a dominant firm would render an otherwise anticompetitive and exclusionary act lawful.

Deere's reliance on *Schor* is likewise misplaced. The case involved the sale of pharmaceutical products that could be purchased standalone or in combination with complementary products, not aftermarkets. *See Schor*, 457 F.3d at 609–10. And *Schor* did not address market definition under *Kodak* for single-brand aftermarkets. *Schor* only discussed *Kodak* to explain why the decision was not relevant, principally because the *Schor* plaintiff's theory of monopoly leveraging was not addressed in *Kodak*. *See id.* at 614 (declining to "generalize" *Kodak*

to "a rule against selling products that complement those in which the defendant has market power").

B. Deere Ignores Circuit Court Precedents Correctly Applying *Kodak*

The weight of authority has recognized that *Kodak* requires a fact-specific inquiry, not bright-line tests. In addition to this District in *In re Dealer Management Systems*, courts in at least three more circuits have correctly recognized that *Kodak* requires a fact-specific inquiry, not bright-line tests.

The Third Circuit has "emphasize[d] [] that an 'aftermarket policy change' is *not* the *sine qua non* of a *Kodak* claim. An aftermarket policy change is an important consideration, *but only one of several relevant factors*." *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 384 (3d Cir. 2005) (emphasis added); *accord Avana Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 404 (3d Cir. 2016). In addition to any surprise or deception, a court should also consider "evidence of (1) supracompetitive pricing, (2) [a defendant]'s dominant share of the relevant aftermarket, (3) significant information costs that prevented lifecycle pricing, and (4) high 'switching costs' that served to "lock in" [a defendant]'s aftermarket customers." *Harrison Aire*, 423 F.3d at 384; *see also* Section I, *supra* (summarizing *Kodak*).

Similarly, the Ninth Circuit has never "identif[ied] Kodak's policy change as an essential element of the plaintiffs' aftermarket claim." *Red Lion Med. Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218, 1231 & n.12 (E.D. Cal. 1999) (Levi, J.). This is apparent not only in the Ninth Circuit's opinion reviewed in *Kodak*, but also in the Ninth Circuit's analysis on remand from the Supreme Court. *See Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 614 (9th Cir. 1990) (*Kodak I*), *aff'd*, 504 U.S. 451; *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) (*Kodak II*) (review after jury trial). In *Kodak I*, the Ninth Circuit relied

primarily on evidence of supracompetitive repair prices. *See* 903 F.2d at 617 (Kodak prices "up to twice as much" despite "lower quality"); *see also Kodak*, 504 U.S. at 457, 469 (likewise noting that Kodak's prices were substantially higher and had increased). Similarly, in *Kodak II*, the Ninth Circuit affirmed that Kodak was a liable monopolist[12] without mentioning—let alone requiring—specific timing for Kodak's policy change. *See* 125 F.3d at 1212; *see also Kodak*, 504 U.S. at 492 (Scalia, J., dissenting) (arguing unsuccessfully that timing favored Kodak). And between *Kodak I* and *II*, the Ninth Circuit reversed summary judgment on a *Kodak* tying claim—again without analyzing the timing of repair restrictions. *See Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1426–27 (9th Cir. 1995). *Datagate* instead considered deposition testimony that (1) the manufacturer's tying arrangement deterred a customer from considering a competing option; and (2) the independent servicer's prices were lower than the manufacturer's. *Id.* at 1426.

In focusing on deception or surprise, Deere has the analysis "backwards." *Red Lion*, 63 F. Supp. 2d at 1230. As a district court in the Ninth Circuit explained correctly, "[Kodak's] policy change did not create lock-in; instead, the existence of lock-in—high switching costs—made it both possible and economically desirable for Kodak to change its policy and exploit aftermarket consumers." *Id.* Thus, there is not "an implicit limitation on aftermarket antitrust claims to situations involving a change of policy or pricing as to after[]market parts and services." *Id.* Such an interpretation of *Kodak*, Judge Levi explained, "is not supported by the text or reasoning of that opinion." *Id.* "*Kodak* [] d[id] not hold that an aftermarket claim is contingent on a change in a manufacturer's parts or service policy; it simply acknowledge[d] that Kodak's *ability* to make a

[12] In *Kodak II*, the Ninth Circuit reviewed only monopolization claims under Sherman Act § 2. "Before closing arguments, the [independent servicers] withdrew their § 1 tying and conspiracy claims." *Kodak II*, 125 F.3d at 1201.

policy change without suffering losses in the equipment market was *evidence* that the service market was not disciplined by competition in the equipment market." *Id.* (citing *Kodak*, 504 U.S. at 477) (emphasis added). *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008), cited by Deere, is not to the contrary. The *Newcal* decision analyzed factors beyond surprise and deception; it held that plaintiffs' allegations of repair and service aftermarkets for customers with specific photocopier equipment were sufficient to survive a Rule 12 motion. *See id.* at 1045–46, 1050.

More recently, the Second Circuit analyzed a *Kodak* claim based on the economic realities alleged in the complaint, rather than deception, surprise, or other formalistic distinctions. In *US Airways, Inc. v. Sabre Holdings Corp.*, the plaintiff claimed that the defendant had "monopoliz[ed] the Sabre travel agent sub-market," defined as "the distribution of [global distribution system] services to Sabre subscribers." 938 F.3d 43, 64 (2d Cir. 2019). The plaintiff "alleged that travel agents are locked into the Sabre platform because of the prohibitively high costs of switching to alternative booking channels and incentive payment structures." *Id.* at 66. Applying *Kodak*, and without mentioning deception or surprise, the court held that the plaintiff had pled a valid "Sabre-only market" that was "capable of being monopolized under Section 2 of the Sherman Act." *Id.*

In sum, in-circuit and out-of-circuit precedent follows *Kodak* itself in "emphasiz[ing] [] that an 'aftermarket policy change' is not the *sine qua non* of a *Kodak* claim." *Harrison Aire*, 423 F.3d at 384. What Deere calls "lock-in" is not needed for Plaintiffs' antitrust claims to proceed.

C. Deere's Other Out-of-Circuit Citations are Inapposite and Unpersuasive

Deere's remaining authority is from the First, Fifth, and Sixth Circuits. *See* Mot. at 15 n.3. None is persuasive.

To start, Deere's cited Fifth Circuit case is inapposite. In *United Farmers Agents Association v. Farmers Insurance Exchange*, the court found that plaintiffs' alleged aftermarket was "essentially an *intracompany* dispute over how to run a computer system." 89 F.3d 233, 236 (5th Cir. 1996) (emphasis added). At issue was how much Farmers could charge its insurance agents for computers to access its systems with policyholder information. But Plaintiffs here do not work for Deere, nor are they agents or franchisees of Deere. Moreover, the Fifth Circuit found that plaintiffs "cited no evidence that information or switching costs were high for most agents." *Id.* at 237. The allegations here are different. *See, e.g.*, Compl. ¶¶ 99–101, 141–154.

The First and Sixth Circuits' cases have addressed inapposite facts and pronounced holdings broader than necessary to resolve the claims at hand. Respectfully, to the extent those circuits' cases can be said to undercut *Kodak*, they have misinterpreted *Kodak* and taken the wrong side of a circuit split. *See, e.g.*, *In re Dealer Mgmt. Sys.*, 313 F. Supp. 3d at 964 (analyzing *Harrison Aire*, 423 F.3d at 384). They purport to demand that plaintiffs show a bait-and-switch—namely, that a manufacturer's repair restrictions would have been unknown to a perfectly rational consumer at the time of her purchase—but this demand contravenes *Kodak*.

The First Circuit instigated the doctrinal clash in a tying case about college health insurance, *Lee v. Life Insurance Co. of North America*, 23 F.3d 14 (1st Cir. 1994). *See also SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 19 (1st Cir. 1999) (citing *Lee* for "bait and switch" requirement); Mot. at 15 (quoting *SMS Sys.*). *Lee* stated that "the *timing* of the 'lock-in' at issue in *Kodak* was central to the Supreme Court's decision." 23 F.3d 14 at 20. That is, the First Circuit assumed that *Kodak* would have been decided differently "[h]ad previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy." *Id.* Later, in *SMS Systems*, the First Circuit relied on *Lee* in rejecting an

"odd" claim against warranties bundled with equipment—warranties which did *not* stop consumers from using independent servicers. 188 F.3d at 14. In *SMS Systems* too, part of the First Circuit's reasoning was the timing of any policy change. *See id.* at 19.

The First Circuit's timing assumption was wrong. It stemmed from the dissent in *Kodak*, *Lee*, 23 F.3d at 20 (citing *Kodak*, 112 S. Ct. at 2095–96 (Scalia, J., dissenting)), not the majority opinion. But in the controlling view of the *Kodak* Court, the dissent "urge[d] a radical departure in th[e] Court's antitrust law." *Kodak*, 504 U.S. at 479 n.29. This Court is bound by the majority opinion "unless and until the Supreme Court explicitly overrules a case." *United States v. Krieger*, 628 F.3d 857, 869 (7th Cir. 2010).

Indeed, the *Kodak* majority rejected timing as dispositive. Specifically, the dissent had argued that "the only thing lacking" from Kodak's defense was "concrete evidence that the restrictive parts policy was announced or generally known." *Compare Kodak*, 504 U.S. at 492 (Scalia, J., dissenting), *with id.* at 477 n.24 (opinion of the Court). The Supreme Court majority vigorously disagreed. Kodak needed to "provide evidence" on the multifaceted factual question of "whether the equipment market prevents the exertion of market power in the parts market." *Id.* at 477 n.24. Such evidence would compel "careful consideration . . . give[n] to the particular facts." *See id.* at 467 n.13.

In addition, most consumers in *Kodak* bought their equipment *after* Kodak stopped selling parts to independent servicers in 1985. *See id.* at 492 (Scalia, J., dissenting) (quoting servicers' factual proffer). Thus, "at least all post-1985 purchasers of micrographic equipment, like all post-1985 purchasers of new Kodak copiers, *could have been aware of Kodak's parts practices*." *Id.* (emphasis added); *accord In re Dealer Mgmt. Sys.*, 313 F. Supp. 3d at 937, 964 (denying Rule 12 motion despite defendant's "long-standing" policy predating the lawsuit by at least 8 years). Even

so, the Supreme Court denied summary judgment for Kodak. Summary judgment would have at least required evidence of actual widespread consumer awareness—not merely the public timing of repair restrictions. *See, e.g.*, *Kodak*, 504 U.S. at 473–75 (analyzing the nature of consumer knowledge and "the number of sophisticated customers"). All told, the First Circuit's reasons for limiting *Kodak* were wrong in many respects.

Deere's reliance on *PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811 (6th Cir. 1997), is unavailing for similar reasons. There, to apply *Kodak* at summary judgment, the Sixth Circuit relied on the fact that "*nothing* in the record or [plaintiff's] brief" suggested that Honeywell exploited any information asymmetries or charged supracompetitive prices. *Id.* at 820–21 (emphasis added). To the contrary, Honeywell empowered customers to "more accurately [] estimate the cost of the equipment" and engaged them in "lengthy negotiations" before sale. *Id.* at 820.

Despite these factual defects in the *Honeywell* plaintiffs' claims, the Sixth Circuit unnecessarily tried to go further. It relied on *Lee* to prescribe a bright-line test like Deere's: "an antitrust plaintiff cannot succeed on a *Kodak*-type theory when [1] the defendant has not changed its policy after locking-in some of its customers, and [2] the defendant has been otherwise forthcoming about its pricing structure and service policies." *Id.* at 820. This statement is best read in the context of the case, where "[plaintiff] ha[d] not alleged or shown that Honeywell ha[d] market power in the relevant market." *Id.* at 821. To read it more broadly would risk defying *Kodak*. Out of context, the first prong ignores that, in *Kodak*, the company had imposed its repair restrictions *before* consumers made most of their purchases. *See supra* Discussion I-B. The other prong ignores the *Kodak* Court's admonition that "even if consumers were capable of acquiring and processing the complex body of [lifecycle] information, they may not choose to do so" for

various reasons. *Kodak*, 504 U.S. at 474. And overall, the test wrongly sacrifices "actual market realities" for "legal presumptions that rest on formalistic distinctions." *E.g.*, *Am. Express Co.*, 138 S. Ct. at 2285 (quoting *Kodak*, 504 U.S. at 466–467).

CONCLUSION

This Court should reject Deere's argument that deception or surprise is required to delineate a repair aftermarket.

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SUBJECT: Constitutionality of LB 543 – The Agricultural Equipment Right-to-Repair Act

REQUESTED BY: Senator Julie Slama
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

LB 543, as amended by AM1800, proposes to create the Agricultural Equipment Right-to-Repair Act ["Act"]. The Act would require an original equipment manufacturer ["OEM"] of electronics-enabled agricultural equipment to "make available, for purposes of diagnosis, maintenance, or repair of such equipment, to any independent repair provider, or to the owner of electronics-enabled agricultural equipment manufactured by or on behalf of, or sold or otherwise supplied by, the [OEM], on fair and reasonable terms, documentation, parts, and tools, inclusive of any updates to information or embedded software." LB 543, § 3. OEMs would not be required "to divulge a trade secret to an owner or an independent service provider except as necessary to provide documentation, parts, and tools on fair and reasonable terms." LB 543, § 5(1). Arrangements between OEMs and authorized repair providers, including warranty and recall provisions, would not be altered by the Act. LB 543, § 5(2). The Act would apply "to equipment sold or in use on or after" its effective date. LB 543, § 6. Violations of the Act would be enforceable by the Attorney General under the Uniform Deceptive Trade Practices Act. LB 543, § 4.

You have requested our opinion whether the Act would conflict with the prohibition against the impairment of contracts in the Nebraska Constitution. You have not identified any specific contracts which may be impaired by the Act. We assume your concern is directed to the Act's potential impact on End User License Agreements ["EULAs"] governing the use of embedded software in electronics-enabled agricultural equipment. "An EULA is a type of 'contract[ ] between software publishers and end users, which govern[s] the end user's right to use software,' and are thus extremely important as they prescribe what consumers may and may not do with the product."[1] While our analysis considers an EULA utilized by a major manufacturer of agricultural equipment widely discussed in available literature, it would be inappropriate for us to opine on whether the Act may impair any specific EULA, as this would require consideration of myriad facts not before us.

ANALYSIS

Article I, § 16 of the Nebraska Constitution provides that "[n]o...law impairing the obligation of contracts...shall be passed." "A three-part test is applied to determine whether a contract has been unconstitutionally interfered with." *Big John's Billiards, Inc. v. State,* 288 Neb. 938, 953, 852 N.W.2d 727, 740 (2014). "Pursuant to that test, a court must examine (1) whether there has been an impairment of the contract; (2) whether the governmental action, in fact, operated as a substantial impairment of the contractual relationship; and (3) whether the impairment was nonetheless a permissible, legitimate exercise of the government's sovereign powers." *Id.* "'Impair'" means "'to make worse.'" *Miller v. City of Omaha,* 253 Neb. 798, 806, 573 N.W.2d 121, 127 (1998) (quoting *Caruso v. City of Omaha,* 222 Neb. 257, 260, 383 N.W.2d 41, 44 (1986)). "[I]n order for there to be an impairment, the change must take away something and not work to the party's benefit." *Id.*

The United States Constitution also prohibits state laws which impair the obligation of contracts. Article I, § 10 of the United States Constitution provides that "[n]o State...shall...pass any ...Law impairing the Obligation of Contracts." While the Contract Clause is "facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 410 (1983) ["*Energy Reserves*"] (quoting *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434 (1934)). "The threshold inquiry" in assessing if a state law violates the Contract Clause "is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves,* 459 U.S. at 411. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation,...such as the remedying of a broad and general social or economic problem." *Id.* at 411-412. "Once a legitimate public purpose has been identified, the next inquiry is

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[1] Mirr, Nicholas A., *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair,* 105 Iowa L. Rev. 2393, 2397 (2020) ["Mirr"] (quoting Michael L. Rustad, Software Licensing: Principles and Practical Strategies 35 (2010)).

whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22 (1977) ["*United States Trust*"]). "Unless the State itself is a contracting party,...'[a]s is customary in reviewing economic and social regulation,...courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves,* 459 U.S. at 412-413 (quoting *United States Trust,* 431 U.S. at 22-23).

Given the overlap between the standards applied to judging Contract Clause claims under both the Nebraska and U.S. Constitutions, we will combine our analysis of these factors in discussing whether the Act impairs the obligation of existing contracts.

A. Does the Act Substantially Impair Existing Contracts?

In considering whether a state law operates to substantially impair a contractual relationship, a court will "consider[ ] the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin,* 138 S. Ct. 1815, 1822 (2018). "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves,* 459 U.S. at 411. "[T]he governing rule is akin to a question of reasonable foreseeability: 'if the party to the contract who is complaining could have seen it coming, it cannot claim that its expectations were disappointed.'" *Association of Equipment Manufacturers v. Burgum,* 932 F.3d 727, 730 (8th Cir. 2019) ["*Association of Equipment Manufacturers*"] (quoting *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385 (8th Cir. 1994)). "[W]hether the industry the complaining party has entered has been regulated in the past" is also considered "[i]n determining the extent of the impairment." *Energy Reserves,* 459 U.S. at 411.

Because assessing the validity of a Contract Clause claim "begin[s] by identifying the precise contractual right that has been impaired...," *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 504 (1987), assessing the substantial impairment element is impossible absent reference to the terms of a specific contract. As noted previously, we are not able to draw conclusions based on any specific EULA or other contractual relationship which may be impacted by the Act. To the extent such an agreement includes prohibitions or limitations on access to or use of embedded software by an owner of electronics-enabled agricultural equipment for purposes of diagnosis, maintenance, or repair, or access to or use of such software by any independent repair provider, the Act would appear to alter those contractual terms. Such a change could be a substantial impairment of the parties' contractual relationship which would undermine the OEM's ability to safeguard its contractual rights.

On the other hand, the Act requires that owners or independent repair providers be given access to "documentation, parts, and tools, inclusive of any updates to information or embedded software" only "for purposes of diagnosis, maintenance, or repair" of electronics-enabled agricultural equipment. LB 543, § 3. The definition of

"repair" specifically excludes "performing any activities that result in the machine being modified outside of the original equipment manufacturers specifications." LB 543, § 2(12). Further, "repair does not include the ability to: (a) Reset security-related electronic modules; (b) Reprogram any electronic processing units or engine control units and parameters; (c) Change any equipment or engine settings that negatively affect emissions or safety compliance; and (d) Download or access the source code of any proprietary embedded software or code...." *Id.* The Act also provides an OEM is not required "to divulge a trade secret to an owner or independent service provider except as necessary to provide documentation, parts, and tools on fair and reasonable terms." LB 543, § 5.

A commonly referenced EULA utilized by a large agricultural equipment manufacturer has been said to "prevent[ ] consumers from accessing the software embedded in the equipment and prohibits any repairs other than those made by authorized repair providers."[2] This EULA identifies the licensor's right to protect its proprietary licensed materials under copyright and trade secret law, and restricts the licensee from attempting to "modify" licensed material, or to "reverse engineer" or "attempt to create the source code from the object code for the Software."[3] The Act's limitation to access only for purposes of diagnosis, maintenance, and repair, and preservation of trade secret rights, appear to be consistent with these contractual terms protecting trade secrets and prohibiting modification or recreation of source codes. These considerations could be construed to lessen any impairment of such agreements created by the Act.

Another factor which may favor finding lack of substantial impairment is the foreseeability of legislation such as the Act impacting EULAs for electronics-enabled agricultural equipment. "In 2012, Massachusetts became the first state to take action preserving right to repair" by enacting a bill which covered only automotive repairs.[4] "In 2014, the Automotive Aftermarket Industry Association, the Coalition for Auto Repair Equality, the Alliance of Automobile Manufacturers, and the Association of Global Automakers entered into a memorandum of understanding concerning the automotive Right to Repair movement. This memorandum of understanding effectively made the Massachusetts automotive right to repair legislation apply nationwide...."[5] Since 2015, numerous states have introduced legislation to enact right-to-repair laws in various

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2 Chan Grinvald, Leah, and Tur-Sinai, Ofer, *Smart Cars, Telematics and Repair,* 54 U. Mich. J. L. Reform 283, 321 (2021) ["Chan Grinvald and Tur-Sinai"] (citing Jason Bloomberg, *John Deere's Digital Transformation Runs Afoul of Right-to-Repair Movement,* Forbes (Apr. 30, 2017)), https://www.forbes.com/sites/jasonbloomberg/2017/04/30/john-deeres-digital-transformation-runs-afoul-of-right-to-repair-movement/?sh=72ba41fe5ab9

3 *https://www.deere.com/assets/pdfs/common/privacy-and-data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf*

4 Mirr, *supra* note 1 at 2399.

5 *Id.*

forms.[6] "During the legislative sessions following the 2016 elections, almost half of the country's state legislatures considered right-to-repair laws."[7] Right-to-Repair bills have taken several forms, including legislation addressing repair of: (1) Farm equipment (Wyoming); (2) Farm equipment and consumer electronics, but not motor vehicles (California); and (3) "Digital electronic products" (Iowa).[8] In 2017, right-to-repair legislation was introduced in Nebraska to adopt the Fair Repair Act which would have applied to all equipment other than motor vehicles. 2017 Neb. Laws LB 67.

The Act under review would affect existing agreements as it applies to agricultural equipment "in use" after its effective date. LB 543, § 6. As right-to-repair legislation dates back to 2012, and has been introduced and considered in many states since 2015, OEMs of electronics-enabled agricultural equipment should have recognized that their EULAs or similar agreements could be impacted by such legislation. While legislative action was certainly foreseeable, it is less evident that OEMS could reasonably expect that right-to-repair laws would be applied retroactively to alter existing agreements. The widespread consideration of right-to-repair legislation in several states may play a role in evaluating the question of substantial impairment, but it is unclear whether OEMS "can[ ] reasonably be said to have had a fair and appreciable warning of an impending intervention into their agreements." *Association of Equipment Manufacturers,* 932 F.3d at 730 (*quoting Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385 (8th Cir. 1994)).

Testimony at the committee hearing on LB 543 from representatives of agricultural equipment manufacturers and dealers in opposition to the bill may also be relevant to the impairment issue. Several of these testifiers represented that the legislation was unnecessary because the information and tools required to allow repairs by equipment owners or independent repair providers is already readily available. Grant Suhre, manager of customer support for John Deere in the U.S. and Canada, stated "we support customers' ability to repair their machines...[a]nd we certainly provide all the tools that are required." Committee Records on LB 543, 107th Neb. Leg., 2nd Sess. 51 (Feb. 25, 2021) ["Committee Records"]. He further stated "we don't believe we need legislation to enable customers to repair their machines. We've already enabled that." *Id.* at 52. Kevin Clark, CEO of AKRS Equipment Solutions, a large agricultural equipment dealer with twenty-six John Deere stores in Nebraska, noting that customers have online availability through a subscription service to diagnostic tools, software codes, and parts, stated: "[I]f it's a matter of right to repair, that already exists." *Id.* at 59. Scott Raber of Titan Machinery, a Case IH, New Holland, and Case Construction dealer representing dealerships across Nebraska, testified a "service tool is available from Case IH or New Holland...for consumers to purchase, whether that be a farmer or an independent repair shop." *Id.* at 62. Mark Hennessey, President and CEO of the Iowa Nebraska Equipment

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6 Moore, Daniel, *You Gotta Fight for Your Right to Repair: The Digital Millennium Copyright Act's Effect on Right-to-Repair Legislation,* 6 Texas A&M L. Rev. 509, 515 (2019).

7 *Id.*

8 Mirr, *supra* note 1 at 2401-402.

Dealers Association, referring to this earlier testimony regarding the availability of information needed for producers and independent repair providers to repair equipment, stated:

> [Y]ou heard about the products that are currently available in the market today, producers can buy diagnostic tools, equipment software subscriptions, much the same as an independent repair or a dealer themselves procure. This is available for them to be able to do themselves if they so wish. The question becomes, why aren't they doing it? Well, they can if they desire. It really boils down to an awareness issue. Are they aware that these tools exist? Why are we needing to have legislation for something that's currently on the market today?...We don't believe we need to have legislation to accomplish the ability to right to repair because the products are available on the market today. *Id.* at 65-66.

The testimony on behalf of manufacturers and dealers representing that the information and tools needed for owners or independent repair providers to repair agricultural equipment is already widely available seems incongruous to any claim that providing access to that information impairs current contracts. Those entities' primary objection to the Act was not to users' ability to repair equipment but to their ability to modify equipment. Committee Records at 51 ("The challenge comes when we talk about right to repair versus right to modify.") (Statement of Grant Suhre)); 58 ("[W]hile we support the ability of customers to repair their own equipment, we do not support the ability for them to be able to modify the equipment....") (Statement of Kevin Clark)). The Act's definition of "repair" is consistent with this concern, as it excludes "any activities that result in the machine being modified outside of the original equipment manufacturer specifications." LB 543, § 2(12). Ready access to necessary information and tools required to perform repairs, and the Act's prohibition of modification of equipment, appears to lessen any claim of impairment of existing contracts.[9]

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[9] In 2018, the Association of Equipment Manufacturers, a trade and lobbying group representing John Deere and other manufacturers, and the Equipment Dealers Association, committed that manufacturers would make repair tools, software, and diagnostics available beginning January 1, 2021. Jason Koebler and Matthew Gault, *John Deere Promised Farmers It Would Make Tractors Easy to Repair. It Lied,* Vice Motherboard (Feb. 18, 2021), https://www.vice.com/en/article/v7m8mx/john-deere-promised-farmers-it-would-make-tractors-easy-to-repair-it-lied. Proponents of LB 543 noted this commitment and claimed it had not been fulfilled. Committee Records at 30-31 ("Three years ago, OEMs said that by January 2021 farmers would have access to everything they need for equipment repairs. OEM[s] staved off right to repair legislation around the country by promising to deliver access. And here we are three years later and the farmers are still struggling to get the tools promised in the agreement.") (Statement of Sen. Brandt); *id.* at 40 ("In late 2018, John Deere and other manufacturers did promise to provide these tools by January 1, 2021, and they have not held up their end of this bargain.") (Statement of Jacob Bish). While opponents of the bill testified that such information and tools were in fact available, this further demonstrates that OEMs may be hard pressed to challenge the Act's requirement that they provide access to software solely for diagnosis, maintenance, or repair of equipment impairs any contractual rights.

In sum, it is not clear that the Act would substantially impair existing contracts. If agreements between OEMs and equipment owners include prohibitions or limitations on access to or use of embedded software for purposes of diagnosis, maintenance, or repair, or access to or use of such software by any independent repair provider, the Act would alter those contractual terms. Such a change could operate as a substantial impairment of the parties' contractual relationship which would undermine an OEM's ability to safeguard its contractual rights. The question of impairment, however, may be impacted by consideration of other factors, including the reasonable foreseeability of legislation impacting those agreements, and the access to information and tools required to provide repairs to electronics-enabled agricultural equipment currently made available by manufacturers and dealers. These factors may support finding that any impairment of current agreements is not substantial.

B. Does the Act Have a Significant and Legitimate Public Purpose?

"If there is no substantial impairment on contractual relationships, the law does not violate the Contract Clause." *Equipment Manufacturers Inst. v. Janklow,* 300 F.3d 842, 850 (8th Cir. 2002) ["*Equipment Manufacturers Inst.*"]. Thus, a court "may stop after step one" if a "statute does not substantially impair pre-existing contractual arrangements." *Sveen v. Melin,* 138 S. Ct. 1815, 1822 (2018). As it is unclear if the Act would substantially impair existing contractual obligations, we will proceed to address the second step of the Contract Clause analysis, i.e., whether the Act has a significant and legitimate public purpose.

To demonstrate a significant and legitimate public purpose, "[t]he State must show that the regulation protects a 'broad societal interest rather than a narrow class.'" *Equipment Manufacturers Inst.,* 300 F.3d at 859 (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 249 (1978)). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves,* 459 U.S. at 412. "[T]he public purpose need not be addressed to an emergency or temporary situation." *Id.*

Two Eighth Circuit decisions involving Contract Clause challenges to South Dakota's and North Dakota's statutes regulating relationships between agricultural equipment manufacturers and dealers inform the public purpose analysis. The first case, decided in 2002, held the South Dakota statutes substantially impaired existing contracts between manufacturers and dealers, and rejected the claim that the regulation served a significant and legitimate public purpose. *Equipment Manufacturers Inst.*, 300 F.3d at 859-862. The state argued the act "benefit[ed] a broad social interest: serving the farmer and rural communities in South Dakota." *Id.* at 860. The court noted "[s]uch an interest is unquestionably significant and legitimate," and it "would be compelled to uphold the Act if [it] credited the State's rationale for the Act." *Id.* The statutes, however, included "no statement of legislative intent or any other legislative history from which to directly ascertain the purpose of the Act." *Id.* In fact, "[t]he State's evidence contradict[ed] this asserted broad societal interest...in several respects." *Id.* It was conceded that the statutory purpose was "to level the playing field between manufacturers and dealers,"

which "is expressly prohibited as a significant and legitimate public purpose." *Id.* at 860-861. The "sparse legislative history" also showed that "only implement dealers and manufacturers attended committee hearings on the Act," and there was "no evidence of farmers' participation." *Id.* at 861. Because "the only real beneficiaries under the Act [were] the narrow class of dealers of agricultural machinery," the court found "such special interest legislation [ran] afoul of the Contract Clause when it impair[ed] pre-existing contracts." *Id.*

In 2019, the Eighth Circuit found that a similar North Dakota statutory scheme violated the Contract Clause. Initially, the court concluded that manufacturers could not have reasonably foreseen the statutory alteration of their contract rights. *Association of Equipment Manufacturers,* 932 F.3d at 730-31. Noting it had "previously held that a similar retroactive law governing agreements between farm equipment dealers and manufacturers in South Dakota violated the Contract Clause," the court proceeded to consider North Dakota's claim that the statute "further[ed] a significant public interest in serving farmers and rural communities." *Id.* at 731. Because "[t]he state legislature declined to...include[ ] well-supported findings or purposes within their...laws...any significant and legitimate public purpose" had to "be discerned from the design and operation of the legislation itself." *Id.* at 733. "[T]he Contract Clause prohibits special-interest redistributive laws, even if the legislation might have a conceivable or incidental public purpose." *Id.* at 732. The court found the statutes had "a narrow focus: restricting the contractual rights of farm equipment manufacturers," and "primarily benefit[ed] a particular economic actor in the farm economy—farm equipment dealers." *Id.* at 733. The court reasoned that "[e]ven if the law indirectly might benefit farmers and rural communities, the Contract Clause demands more than incidental public benefits." *Id.*

LB 543 contains no legislative findings or statement of purpose. The bill's introducer described the bill as "narrowly tailored, commonsense legislation meant to address repairs that farmers can do themselves and will save our farmers time and money and break the monopoly that manufacturers have over repairs." Committee Records at 32 (Statement of Sen. Brandt). He further noted that the significant reliance on software to operate agricultural equipment "allow[ed] manufacturers to take increasing control of the repair process by restricting access to authorized dealers." *Id.* at 30. Further, "[w]hen breakdowns happen during the narrow window of planting or harvest, they have a detrimental effect on the ag operation. Dealership mechanics can be swamped with work, and it can sometimes take days to make it out to the farm for what in many situations is a simple repair that could be performed by the customer, while precious time is lost." *Id.* The adverse impact of time lost waiting for dealer repairs was also noted by testifying producers. *Id.* at 37 ("We work in an unforgiving industry where weather rules our lives. A crop that's ready to harvest today may not be there tomorrow. Farmers and ranchers need the ability to have local mechanics help them with their equipment repairs.") (Statement of Tom Schwarz); at 49 ("[D]owntime is money lost during planting and harvesting operations.") (Statement of Vern Jantzen). While it would be preferable for the Act to contain findings and a declaration of purpose, this history is some evidence to establish the significant and legitimate legislative purposes served by the Act.

The Act is also broader than the narrow, special interest legislation struck down in *Equipment Manufacturers Inst.* and *Association of Equipment Manufacturers*. Beyond the Act's impact on agreements between OEMs and owners of electronics-enabled agricultural equipment, as well as dealers currently performing repairs and prospective independent repair providers, it also serves broader significant and legitimate public purposes. Agriculture is of vital importance to Nebraska's economy. Ensuring the ability of agricultural producers to repair their equipment in a timely manner facilitates the broader purpose of strengthening our farms and businesses in rural communities. It would also address concerns regarding monopolistic practices in the market for repair of agricultural machinery.[10] At least one commentator has noted that limiting right-to-repair legislation to agricultural equipment is "appropriate considering the large size and difficulty of transporting farming equipment to repair facilities, the expertise farmers possess with regards to the equipment they operate daily, and the reliance farmers have on their equipment to earn a living."[11] On balance, it appears the Act serves a significant and legitimate public purpose.

C. Is the Act a Reasonable and Appropriate Measure to Serve a Legitimate Public Purpose?

The final step in the Contract Clause analysis is "[o]nce a legitimate public purpose has been identified,...whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves,* 459 U.S. at 412 (quoting *United States Trust,* 431 U.S. at 22). Because the state is not a contracting party, deference is due the legislative judgment of the reasonableness and necessity of the Act.

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10 "[C]ertain contractual restrictions that seek to inhibit competition in markets for diagnostic tools and repairs could run afoul of federal antitrust law as agreements in unlawful restraint of trade." Chan Grinvald and Tur-Sinai, *supra* note 2 at 321-22. "The collective purpose of [right-to-repair] legislation is to prevent a monopoly by compelling manufacturers to make parts, diagnostic software, and repair tools freely available to individuals and independent repair shops." Daniel Cadia, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. Davis L. Rev. 1701, 1704 (2019). Two recently filed federal lawsuits claim John Deere's repair service practices violate the anti-monopoly provisions of the Sherman Act. *Forest River Farms v. Deere & Co.,* No. 1:22CV188 (N.D. Ill. 2022) ["*Forest Farms*"]; *Underwood v. Deere & Co.,* No. 4:22CV00005 (E.D. Tenn. 2022). The *Forest Farms* complaint alleges Deere has violated the Sherman Act by "monopolization of the repair service market for [its] agricultural equipment with onboard central computers known as engine control units, or 'ECUs.'" *Forest Farms* Complaint at 1 ¶ 1. The Complaint alleges that, "in newer generations of agricultural equipment, Deere has deliberately monopolized the market for repair and maintenance services of its agricultural equipment with ECUs...by making crucial software and repair tools inaccessible to farmers and independent repair shops." *Id.* While we express no view on the merits of these allegations, legislation intended to curb anticompetitive and monopoly practices plainly furthers a significant and legitimate public purpose.

11 MacAneney, Marissa, *If It is Broken, You Should Not Fix It: The Threat Fair Repair Legislation Poses to the Manufacturer and the Consumer,* 92 St. John's L. Rev. 2, 331, 353 (2018)).

A state's "'economic interests...may justify the exercising of its continuing and dominant protective power notwithstanding interference with contracts.' ... Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *City of El Paso v. Simmons,* 379 U.S. 497, 508-09 (1965) (quoting *Home Bldg. & Loan Assn. v. Blaisdell,* 290 U.S. 398, 437 (1934)). As noted above, the Act serves the substantial and legitimate public purposes of: (1) Ensuring agricultural producers and independent repair providers have the right to repair agricultural equipment in a timely manner, which will benefit farmers and businesses in rural communities; and (2) Promoting competition and removing monopolistic practices in the market for repair of agricultural machinery. Given the substantial deference due the Legislature to establish "the means chosen to implement these purposes," *Energy Reserves,* 459 U.S. at 418, the Act is a reasonable and appropriate measure to serve those legitimate public purposes.

CONCLUSION

A state law does not violate the constitutional prohibition against the impairment of contracts under the Nebraska and United States Constitutions unless the impairment is substantial. Even if a law substantially impairs contractual rights, it is permissible if it has a significant and legitimate public purpose and is a reasonable and appropriate measure to serve that purpose. The Act requires that OEMs of electronics-enabled agricultural equipment make available to owners and independent repair providers, on fair and reasonable terms, access to information and tools, including embedded software, for purposes of diagnosis, maintenance, and repair of such equipment. This requirement may well impact existing EULAs or other contractual arrangements. The Act, however, defines "repair" to exclude modifications, including changes affecting equipment or engine settings, and prohibits accessing any proprietary software code. These limitations on access and use of repair information would lessen any impairment of such agreements. Other factors, including the foreseeability of the enactment of right-to-repair legislation impacting those agreements, and representations made on behalf of manufacturers and dealers that such information is already readily available, further reduce any claim of impairment to existing contracts. Accordingly, we cannot definitively say the Act substantially impairs existing contractual obligations. Even if substantial impairment exists, the Act serves significant and legitimate public purposes, including: (1) ensuring the ability of agricultural producers to repair their equipment in a timely manner, which facilitates the broader purpose of strengthening farms and businesses in rural communities; and (2) reducing monopolistic practices in the market for repair of agricultural machinery. Finally, the Act is a reasonable and appropriate means to serve these purposes. We therefore conclude that the Act likely does not violate the Contract Clause.

Very truly yours,

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YouTuber Channel: DeereFacts
Educational content about Right to Repair so Producers own their equipment and it doesn't own them. (https://www.youtube.com/channel/UCL8mrwisvetDcBG7cy4wiSw)

Voting member of several electronic sustainability standards.
Actively participating in the creation of ULE 110 3.0. Have participated in 3 other sustainability focus consensus standards, R2, NSF 487 and IEEE 1601.1.

Founder and Chief Executive Officer PC Rebuilders & Recyclers (Founded in 2000) home of the Computers for Schools Program
Mission: To contribute to sustainability and to bridge the digital divide by reusing or recycling used computing equipment. Business closed June 2017

Original Microsoft Authorized Refurbisher (MAR):
Chosen by Microsoft as one of the first Community Microsoft Authorized Refurbisher of five in the United States.

Conference founder
Electronics Reuse Conference: ERC (formerly: International Computer Refurbisher Summit) since 2004. In 2012 ERC expanded internationally.

P.A.C.E. Stakeholder and Co-Chair of Environmentally Sound Testing, Refurbishment and Repair of Used Computing Equipment Project Group
The Partnership for Action on Computing Equipment of the Secretariat of the Basel Convention of the United Nations Environmental Program.

Adjunct Faculty, University of Illinois Urbana/Champaign
Designed and taught "Sustainable Life Cycle Design" in the Department of Art and Design. Co-Principal investigator on several National Science Foundation grants.

Provided testimony before the House Committee on Science and Technology for the 111th Congress on electronic reuse

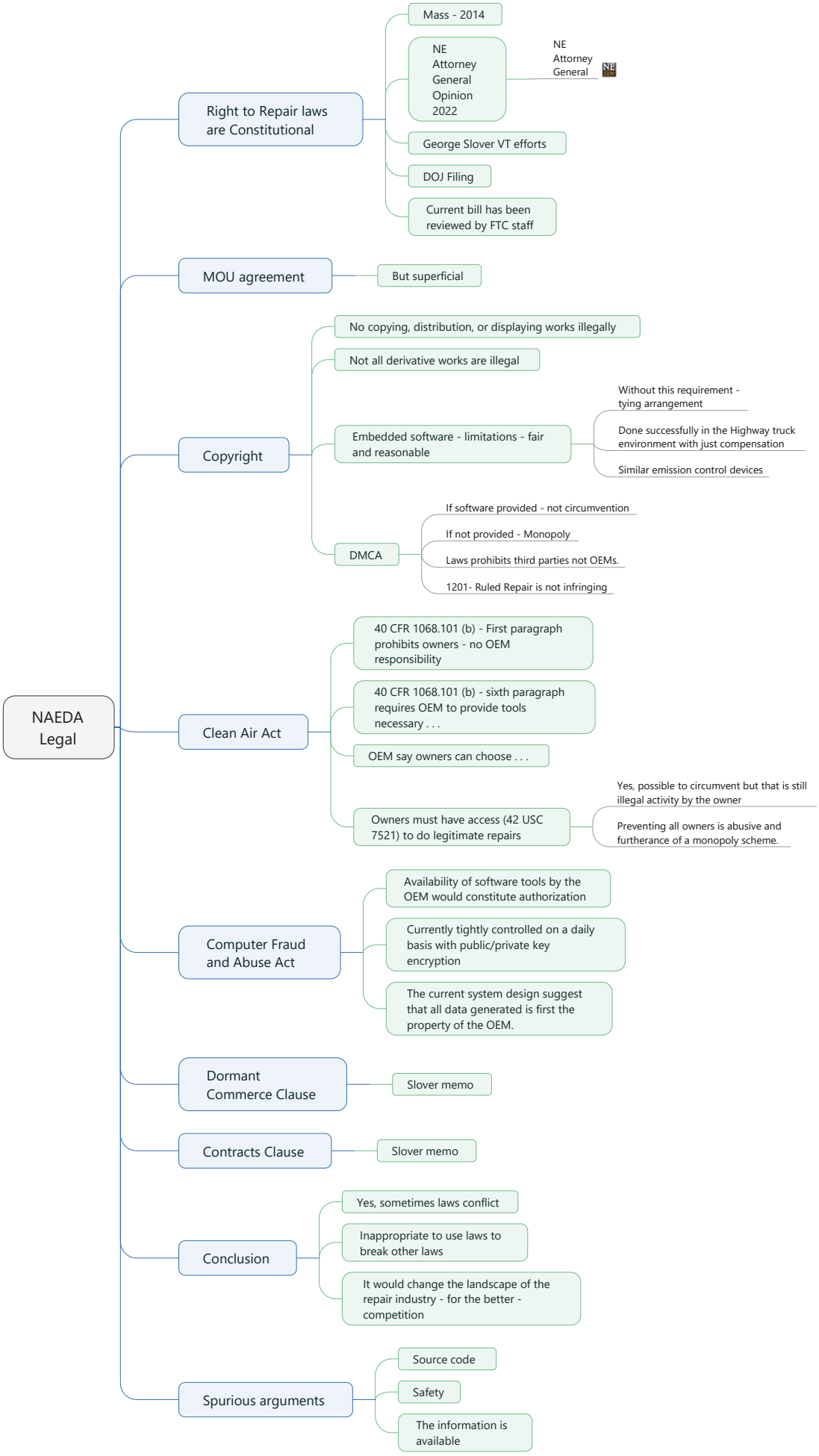
Winner of the Jim Lynch award
The computer refurbishment industry's highest honor.

Appointee to Caterpillar's external sustainability advisory board, (retired)
Advisor to promote their mission of enabling economic growth through infrastructure and energy development, and to provide solutions that support communities and protect the planet. Participated in the creation of Caterpillar's 5th value; sustainability.

Co-author of 9 academic papers on Sustainability of Used Electronics. Our first publication was in 2015. We have also submitted 4 additional full conference papers. Researcher of software vulnerabilities.

Chair of the Board of Montgomery Place (retired). A retirement facility owned by the Episcopal Diocese of Chicago. After first year of membership I was name treasure and then became Chairman. (I forgot **not** to ask questions)

Personal
Education: BS Chemistry with honors, University of Hawaii—Manoa, Language studies at La Sorbonne Université—Paris, Amateur standup comedian, President-elect (aka Junior Warden) of Church of Our Saviour—Epispical, and Level 1 WISE certified Cell repair tech. Grandson of Theo Brown famed John Deere engineer who accumulate 158 patients and served on the board of directors of John Deere for 30 years. Auctioneer for charity fund raisers. Parent to four grown children, and very proud grandfather of two. A granddaughter and grandson. Married to Carol Cade for 45+ years.


NAEDA Legal
Right to Repair laws are Constitutional
Mass - 2014
NE Attorney General Opinion 2022
NE Attorney General
George Slover VT efforts
DOJ Filing
Current bill has been reviewed by FTC staff
MOU agreement
But superficial
Copyright
No copying, distribution, or displaying works illegally
Not all derivative works are illegal
Embedded software - limitations - fair and reasonable
Without this requirement - tying arrangement
Done successfully in the Highway truck environment with just compensation
Similar emission control devices
DMCA
If software provided - not circumvention
If not provided - Monopoly
Laws prohibits third parties not OEMs.
1201- Ruled Repair is not infringing
Clean Air Act
40 CFR 1068.101 (b) - First paragraph prohibits owners - no OEM responsibility
40 CFR 1068.101 (b) - sixth paragraph requires OEM to provide tools necessary . . .
OEM say owners can choose . . .
Owners must have access (42 USC 7521) to do legitimate repairs
Yes, possible to circumvent but that is still illegal activity by the owner
Preventing all owners is abusive and furtherance of a monopoly scheme.
Computer Fraud and Abuse Act
Availability of software tools by the OEM would constitute authorization
Currently tightly controlled on a daily basis with public/private key encryption
The current system design suggest that all data generated is first the property of the OEM.
Dormant Commerce Clause
Slover memo
Contracts Clause
Slover memo
Conclusion
Yes, sometimes laws conflict
Inappropriate to use laws to break other laws
It would change the landscape of the repair industry - for the better - competition
Spurious arguments
Source code
Safety
The information is available