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March 3, 2022

Holly Vedova
Director, Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

VIA ELECTRONIC MAIL AND U.S. POSTAL SERVICE

Re: Complaint requesting investigation and action to enjoin unfair methods of competition and trade practices by Deere & Company

Dear Director Vedova:

Fairmark Partners, LLP submits the attached Complaint on behalf of National Farmers Union, Iowa Farmers Union, Missouri Farmers Union, Montana Farmers Union, Nebraska Farmers Union, Ohio Farmers Union, Wisconsin Farmers Union, Farm Action, the U.S. Public Interest Research Group, the Illinois Public Interest Research Group, the Digital Right to Repair Coalition, and iFixit (“Petitioners”). Petitioners respectfully request that the Commission investigate the repair restrictions Deere & Company (“Deere”) has imposed that prevent farmers and ranchers from repairing their own Deere equipment or obtaining repairs from independent repair providers. Petitioners allege that Deere’s policy of withholding from its customers diagnostic software and other information necessary to repair the Deere equipment they own violates the Sherman Act and constitutes an unfair and deceptive trade practice, and they request that the Commission enjoin Deere’s unlawful conduct.

Deere is the dominant force in the \$68 billion U.S. agricultural equipment market, controlling over 50% of the market for large tractors and combines. For many farmers and ranchers, they effectively have no choice but to purchase their equipment from Deere. Not satisfied with dominating just the market for equipment, Deere has sought to leverage its power in that market to monopolize the market for repairs of that equipment, to the detriment of farmers, ranchers, and independent repair providers.

As the Complaint details, Deere has deliberately restricted access to diagnostic software and other information needed to repair Deere equipment. Deere has designed its machines such that when a wide variety of malfunctions, errors, or breakdowns occur, or a new part is needed to be installed, the equipment owner cannot address the issue—indeed, in many cases, cannot even diagnose what the issue is—without using software that Deere only shares with Deere-authorized technicians. Thus, when an issue arises with Deere equipment, farmers and ranchers must contact their local Deere dealership, pay artificially inflated repair fees to Deere and its representatives, and often wait for days before the issue can be resolved.

This harms farmers and ranchers not only because Deere extracts supracompetitive prices for repairs, but also because long wait times and travel times to Deere dealerships can cause producers to lose precious harvest time during peak season. The Complaint gives examples of farmers losing tens of thousands of dollars in crop value due to Deere’s repair restrictions. Deere’s repair restrictions have also decimated the independent agricultural equipment repair industry, which used to employ thousands of workers throughout America’s heartland.

The Complaint alleges that by forcing all purchasers of Deere equipment to *also* purchase necessary repairs from Deere, Deere's repair restrictions constitute an unlawful tying scheme. Under longstanding Supreme Court and Commission precedent, Deere's tying scheme is an unreasonable restraint of trade that violates Sherman Act § 1, 15 U.S.C. § 1, under both the *per se* and rule of reason standards, given Deere's market power over the sale of large agricultural equipment. Deere's repair restrictions also constitute unlawful monopolization and/or attempted monopolization under Sherman Act § 2, 15 U.S.C. § 2, because Deere is leveraging its market power in the original equipment market to monopolize the separate market for repairs.

Furthermore, Deere has engaged in unfair and deceptive trade practices by falsely representing to its customers that it would soon change its policies and loosen its repair restrictions. In 2018 Deere, through industry associations, published a "Statement of Principles," which represented that beginning in January 2021 Deere would "make available through authorized dealers [tools] to empower farmers and ranchers to perform basic service, maintenance and repairs on their equipment." With 2021 having come and gone, Deere has failed to live up to these "principles." Instead, it offers necessary repair information to farmers and ranchers *only* if they pay Deere thousands of dollars in upfront and annual fees for a new service called "Customer Service ADVISOR." Moreover, even if farmers and ranchers do pay these hefty new fees, the information Deere provides through Customer Service ADVISOR *still* does not enable them to perform many common, necessary repairs without a Deere-authorized technician. Through these and other materially misrepresentations, Deere falsely implied to its customers that it would voluntarily do what it should have done all along: empower farmers and ranchers to repair their own equipment or hire less expensive independent repair shops to do so.

Because Deere has proven that it will continue to enforce its anticompetitive repair restrictions and extract unlawful rents from farmers and ranchers until it is ordered to change course, the Petitioners respectfully request that the Commission investigate Deere's conduct and order it to cease and desist these unlawful practices.

We appreciate your prompt attention to this matter and are available to assist your office in any review of this Complaint.

Sincerely,



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BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

NATIONAL FARMERS UNION, IOWA FARMERS UNION, MISSOURI FARMERS UNION, MONTANA FARMERS UNION, NEBRASKA FARMERS UNION, OHIO FARMERS UNION, WISCONSIN FARMERS UNION, FARM ACTION, U.S. PUBLIC INTEREST RESEARCH GROUP, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, DIGITAL RIGHT TO REPAIR COALITION, and iFIXIT,
Petitioners;

DEERE & COMPANY,
Proposed Respondent.

COMPLAINT FOR ACTION TO STOP UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE TRADE PRACTICES

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National Farmers Union, Iowa Farmers Union, Missouri Farmers Union, Montana Farmers Union, Nebraska Farmers Union, Ohio Farmers Union, Wisconsin Farmers Union, Farm Action, the U.S. Public Interest Research Group, the Illinois Public Interest Research Group, the Digital Right to Repair Coalition, and iFixit (collectively, “Petitioners”) submit this Complaint to request that the Federal Trade Commission (“FTC” or “Commission”) investigate and take appropriate action to enjoin certain anticompetitive behavior and unfair and deceptive trade practices by Deere & Company (“Deere”).

INTRODUCTION

Pursuant to Sections 2.1 and 2.2 of the FTC regulations,¹ Petitioners hereby submit this Complaint to request that the Commission investigate and commence an enforcement action against Deere for engaging in unfair methods of competition and unfair and deceptive trade practices in violation of Section 5 of the FTC Act.²

In its May 2021 report to Congress entitled *Nixing the Fix*, the Commission identified several ways in which “many manufacturers restrict independent repair and repairs by consumers.”³ These included, among other things:

- Product designs that complicate or prevent repair;
- Unavailability of parts and repair information;
- Policies or statements that steer consumers to manufacturer repair networks;
- Disparagement of non-OEM [original equipment manufacturer] parts and independent repair;
- Software locks and firmware updates;
- End User License Agreements.⁴

¹ 16 C.F.R. §§ 2.1, 2.2.

² 15 U.S.C. § 45(a).

³ *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, at 6, Fed. Trade Comm’n (May 2021), available at perma.cc/KSZ3-CFX8.

⁴ *Id.* (listing these and two other ways in which OEMs attempt to restrict independent and self-repair).

As described herein, Deere has used these precise restrictions to inhibit and in many cases prevent its customers from making important repairs to their own Deere equipment or obtaining repairs of their Deere equipment from independent dealers or repair shops. Because these anticompetitive restrictions can impose huge costs on farmers and shut out independent repair shops—and because Deere’s proffered justifications for imposing them fail under the most basic scrutiny—the Commission should investigate Deere’s practices and enjoin it from continuing to impose the restrictions described in this Complaint.

For years, Deere has deliberately imposed access and information restrictions on its large farm equipment, such as tractors and combines, leveraging its market power in the equipment market to expand its market power in the market for repair services. Deere, which accounts for more 50% of all sales of large tractors and more than 60% of the market for combines in North America,⁵ retains strict control over the proprietary software necessary to diagnose and repair issues on its equipment, allowing full access only to its authorized technicians and not to farmers who purchase the equipment. When a wide variety of malfunctions, errors, or breakdowns occur, or a new part is needed to be installed for another reason, farmers are left in limbo until a Deere-authorized technician accesses the machine and uses Deere’s proprietary software “key” to address the issue. The Deere-authorized technician must provide Deere sufficient information, including Personally Identifiable Information and specific machine serial number, so that Deere can create an encrypted software file (“Payload”). Only after Deere has created and sent the file to the technician can certain important repairs be completed.

⁵ Jennifer Reibel, *Manufacturer Consolidation Reshaping the Farm Equipment Marketplace*, Farm Equipment (Aug. 2018), available at perma.cc/A65B-FN53. (stating that Deere controls 53 percent of the North American market for large tractors and 63 percent of the North American market for combines); see also Peter Waldman & Lydia Mulvany, *Farmers Fight John Deere Over Who Gets to Fix an \$800,000 Tractor*, Bloomberg (March 5, 2020) (Deere “account[s] for more than half of all farm machinery sales in the U.S. and more than a third of equipment revenue worldwide”), available at perma.cc/Z8JX-3DJJ.

Deere thus forces farmers who buy Deere equipment to also purchase repair services from Deere technicians, and the company receives a share of the fees Deere-authorized technicians charge. By unlawfully tying repair services to sales of its equipment, and by attempting in doing so to leverage its market power in the equipment market into the repair market, Deere has engaged in anticompetitive conduct in violation of Sections 1 and 2 of the Sherman Act,⁶ and unfair and deceptive business practices Section 5 of the FTC Act.⁷ In addition, Deere has regularly issued false or deceptive statements that materially mislead its primary consumer base—farmers and ranchers—and that constitute unfair or deceptive trade practices in violation of Section 5 of the FTC Act. Deere advertises that it is committed to giving farmers “repairability” and that it is taking measures to ensure farmers have access to the tools they need to repair their own equipment. For instance, in 2018, as multiple state legislatures were considering “right to repair” legislation that would force Deere to allow farmers access to the software tools necessary to repair their own equipment, Deere, through industry associations it affiliates with, issued a “Statement of Principles” promising that by January 1, 2021 Deere would “make available through authorized dealers [tools] to empower farmers and ranchers to perform basic service, maintenance and repairs on their equipment.”⁸ The associations said that their taking this action would “stri[k]e the right balance in the way ‘Right to Repair’ legislation would not.”⁹

With 2021 having come and gone, neither the associations nor Deere has lived up to these representations. Deere has made additional diagnostic tools available only through dealerships that often resist selling the tools and only when farmers pay a separate, costly fee; even then, Deere

⁶ 15 U.S.C. §§ 1, 2.

⁷ *Id.* § 45(a); *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 (1948).

⁸ *AEM, EDA Announce Statement of Principles on ‘Right to Repair,’* Ass’n of Equipment Manufacturers & Equipment Dealers Ass’n (Feb. 1, 2018), available at perma.cc/8XBD-4ZHR.

⁹ *Id.*

withholds many of the most crucial tools required to implement key repairs, such as even simply replacing certain necessary parts. Thus, while Deere has successfully staved off state legislation that would enable farmers to repair their own equipment, it did so by materially misleading consumers. Deere also deceptively represents to consumers that its onerous repair restrictions are required by various federal laws and regulations, when in fact they are not. Through these and other misleading actions described herein, Deere has engaged in unfair and deceptive business practices that have directly harmed farmers and ranchers who relied on these representations.

In July of 2021, President Biden issued an executive order calling for agency action to enhance competition across the American economy.¹⁰ The order specifically recommended that the FTC investigate “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”¹¹ The same month, the FTC voted unanimously to “scrutinize repair restrictions for violations of the antitrust laws,” and to “assess whether repair restrictions constitute unfair acts or practices.” The Commission “urge[d]” the public to submit complaints regarding such restrictions and committed that it “will devote more enforcement resources to combat these practices.”¹² And in September of 2021, the Commission issued a compulsory process resolution to aid its investigation into potentially unlawful repair restrictions.¹³ Therefore, Petitioners submit this Complaint to aid the FTC in its important work. Petitioners further respectfully request that the Commission (1) investigate Deere’s anticompetitive tying scheme, as well as its monopolization and/or attempted monopolization of the market for repairs to Deere equipment;

¹⁰ Executive Order, *Promoting Competition in the American Economy*, E.O. 14,036 (July 9, 2021), available at <https://perma.cc/36XD-SV6T>.

¹¹ *Id.*, § 5(h)(ii).

¹² *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers*, Matter P194400, F.T.C. (July 21, 2021), available at perma.cc/4YQS-UGBE.

¹³ *Resolution Directing Use of Compulsory Process Regarding Repair Restrictions*, File No. 212 3126, F.T.C. (Sept. 2, 2021), available at perma.cc/R5VE-EWJQ.

(2) take appropriate action to enjoin Deere from continuing to withhold information in its possession that is necessary for the repair and maintenance of Deere equipment; and (3) take appropriate action to afford any other relief necessary to remedy Deere's unlawful practices described herein.

PARTIES

I. PETITIONERS

National Farmers Union. National Farmers Union advocates on behalf of nearly 200,000 American farm families and their communities. It envisions a world in which farm families and their communities are respected, valued, and enjoy economic prosperity and social justice. National Farmers Union is headquartered in Washington, D.C.

Iowa Farmers Union. Since 1915, Iowa Farmers Union members have worked together to strengthen the independent family farm through education, legislation, and cooperation and to provide Iowans with sustainable production, safe food, a clean environment and healthy communities. Iowa Farmers Union is a grassroots member organization of family farmers and ranchers, advocates, and consumers committed to promoting family agriculture in Iowa. It is headquartered in Ames, Iowa.

Missouri Farmers Union. Missouri Farmers Union's membership includes grain farmers, vegetable growers, fruit growers, livestock farmers, and dairy farmers. Its members play a role in bringing the issues that matter most to lawmakers in Missouri and fighting for family farmers' rights. Missouri Farmers Union is headquartered in Clarence, Missouri.

Montana Farmers Union. Montana Farmers Union represents 11,900 members and is the only farm organization in Montana that represents family farmers. Montana Farmers Union works for family farms, ranches, rural communities, and supports its members through education

programs for both youth and adults, by advocating member-driven policies and legislation at the state and federal level, and through cooperation through producer-owned co-ops. Montana Farmers Union is headquartered in Great Falls, Montana.

Nebraska Farmers Union. Founded in 1913, Nebraska Farmers Union is dedicated to protecting and enhancing the quality of life and economic well-being of family farmers and ranchers, and their rural communities. With over 4,000 family farm and ranch families as members, Nebraska Farmers Union is dedicated to the farm income issues which matter most to rural families. Nebraska Farmers Union is headquartered in Lincoln, Nebraska.

Ohio Farmers Union. Founded in 1934, Ohio Farmers Union is Ohio's membership organization advocating on behalf of the rights and needs of Ohio's family farmers, rural residents, and consumers through its program of lobbying and education. Ohio Farmers Union is headquartered in Ottawa, Ohio.

Wisconsin Farmers Union. Wisconsin Farmers Union is a member-driven organization that is committed to enhancing the quality of life for family farmers, rural communities, and all people through educational opportunities, cooperative endeavors, and civic engagement. Wisconsin Farmers Union is headquartered in Chippewa Falls, Wisconsin.

Farm Action. Farm Action leverages its research, policy development, advocacy campaigns, and political expertise to create a food and agriculture system that works for everyday people rather than a handful of powerful corporations. Farm Action is joined in its movement by farmers, ranchers, rural communities, food system workers, policymakers, advocates, and anyone who eats.

The U.S. Public Interest Research Group. The U.S. Public Interest Research Group, also known as U.S. PIRG, is a federation of independent, state-based, citizen-funded Public

Interest Research Groups. U.S. PIRG is an advocate for the public interest that speaks out for a healthier, safer world in which people are freer to pursue our own individual well-being and the common good.

The Illinois Public Interest Research Group. The Illinois Public Interest Research Group, also known as Illinois PIRG, is the Illinois chapter of U.S. PIRG.

The Digital Right to Repair Coalition. The Digital Right to Repair Coalition is a trade association incorporated in New Jersey and headquartered in New York. Also known as “The Repair Association,” it hosts the website repair.org. The Repair Association’s over 400 coalition members perform all the “Rs” for electronics—repair, reconfiguration, reuse, remanufacturing, resale, and recycling—as businesses and nonprofits from cradle to grave.

iFixit. iFixit is the free repair manual that you can edit. Founded in 2003 when you couldn’t find an iBook repair manual and iFixit decided to write our own, the iFixit repair community has grown to millions of users across the world. Together, iFixit has written over 80,000 repair guides in a dozen languages teaching people how to fix everything from iPhones to toasters to tractors.

II. DEERE & COMPANY

Deere is incorporated in Delaware and has its principal place of business in Moline, Illinois. As relevant here, Deere manufactures and distributes agricultural machinery and parts for that machinery, and it also provides parts, service, and repairs for Deere equipment, primarily through Deere-authorized technicians.

FACTUAL BACKGROUND

I. THE MARKET FOR LARGE AGRICULTURAL EQUIPMENT

Farmers require agricultural machinery to complete each aspect of the farming cycle: soil preparation, seeding/planting, crop management, and harvesting. This equipment, which includes combines, harvesters, pickers, and sprayers, is a major investment for farmers. In particular, tractors and self-propelled combines used for harvesting are vital pieces of farm equipment. They are specifically designed for farming because of their high torque, speed, and ability to carry, mount, or pull additional large implements such as planters. Such equipment represents a huge capital investment for farmers, with a single piece often costing hundreds of thousands of dollars. A new Deere tractor, for instance, can cost a farmer \$350,000, or more. The high cost of replacing the equipment results in customers being unable to use another vendor, contributing to customer lock-in.

Deere is the dominant force in the \$68 billion U.S. agricultural equipment market.¹⁴ Best estimates place Deere's share of the U.S. market for tractors and combines at more than 50 percent.¹⁵ Deere also sells a wide range of other large agricultural equipment, such as high-speed precision planters, balers, sprayers, and seeders. Deere is similarly dominant in the market for these other large pieces of equipment. Worldwide, Deere accounts for a third of all farm machinery sales, with more market share than the next two largest agricultural equipment makers, Case New Holland and Kubota Corporation, combined.¹⁶ In many regions in the U.S., farmers and other

¹⁴ *Farmers Fight John Deere Over Who Gets to Fix an \$800,000 Tractor*, *supra* n.5.

¹⁵ *Id.* (Deere "account[s] for more than half of all farm machinery sales in the U.S."); *Manufacturer Consolidation Reshaping the Farm Equipment Marketplace*, *supra* n.5 (stating that Deere controls 53 percent of the North American market for large tractors and 63 percent of the North American market for combines).

¹⁶ *Id.*

people and businesses in the supply chain (such as equipment dealers and repair shops) have little to no choice but to work with Deere products

While historically Deere has outcompeted rivals to win farmers' and ranchers' business, in recent years it has resorted to leveraging its monopoly power in the market for large agricultural equipment to dominate the repair market for its equipment. A farmer who purchases Deere equipment today may not realize that Deere, under the guise of technological advancement, has made it impossible for farmers to make important repairs themselves or to go to an independent repair shop. Even where purchasers of Deere equipment are aware that Deere requires important repairs to be performed only by Deere-authorized technicians, Deere's market dominance leaves these purchasers little to no choice but to submit to Deere's terms. Additionally, Deere has attempted to lock in consumers by offering data services that incentivize using exclusively Deere equipment, while at the same time using that data to pad its own profits.

II. DEERE RESTRICTS FARMERS' ABILITY TO DO IMPORTANT REPAIRS ON THEIR OWN EQUIPMENT OR RECEIVE THOSE REPAIRS FROM INDEPENDENT REPAIR SHOPS

Deere tractors and combines have become increasingly technologically complicated, incorporating complex software that relays, among other things, diagnostic and performance information back to Deere.¹⁷ While this software can provide useful data to assist farmers with decision-making on how to farm their land, the increasing reliance of Deere equipment on this software has also allowed Deere an unprecedented amount of control over farmers' lives by effectively preventing them from repairing their own machinery or from obtaining important repairs from an independent, more cost-effective repair shop.

¹⁷ See Kyle Wiens, *New High-Tech Farm Equipment Is a Nightmare for Farmers*, *Wired* (Feb. 2, 2015), available at perma.cc/H4FQ-4S76.

Deere claims that it “supports a customer’s right to safely maintain, diagnose and repair their own equipment” but “does not support the right to modify embedded software due to risks associated with the safe operation of the equipment, emissions compliance and engine performance.”¹⁸ Deere claims that “customers can conduct approximately 98% of repairs without the need for licensed dealer assistance”¹⁹ because “access to software for purposes of reprogramming is needed in less than two percent of all repairs.”²⁰ Deere also claims that software reprogramming “can increasingly be done remotely” alleviating “the need for an authorized technician to manually perform the reprogramming in person.”²¹

As set forth below, what Deere effectively conceals with these statements is that these supposed two percent of repairs that require software reprogramming are vitally important, including common, necessary repairs involving the engine.²² Moreover, while Deere claims that it is merely trying to comply with the Clean Air Act, which prohibits tampering with emissions controls on non-road equipment,²³ Deere’s explanations and excuses do not justify the broad restrictions placed on farmers’ and independent repair shops’ ability to repair equipment.

A. Deere Equipment Has Become Increasingly Technologically Complex

Deere’s tractors and combines incorporate a vast array of sensors and control systems. The larger systems used primarily in agriculture have several dozen “controllers” and up to 400 sensors. These electrical components are used to collect information that, among other things, assists the

¹⁸ Mae Anderson, *Without ‘right to repair,’ businesses lose time and money*, PBS Newshour (Aug. 10, 2021), available at perma.cc/8FML-ULCV.

¹⁹ Letter from Todd E. Davies to Securities and Exchange Commission, *Shareholder Proposal to Deere & Company by the Green Century Funds*, at 10 (Oct. 15, 2021) [hereinafter “Oct. 15, 2021 SEC letter”].

²⁰ Letter from Cory J. Reed to Federal Trade Commission, *Right to Repair and July 21 Open Commission Meeting* (July 18, 2021) [hereinafter “July 18, 2021 FTC letter”]. Deere does not offer any insight into how it calculates these percentages. There does not seem to be any weighing for the cost or importance of the repair.

²¹ *Id.*

²² Oct. 15, 2021 SEC letter, *supra* n.19, at 5.

²³ July 18, 2021 FTC letter, *supra* n.20.

machine in performing its functions.²⁴ One Deere combine can carry up to 125 sensors, each connected to a controller network.²⁵ If any one of the controller networks encounters an error that relates to the safety or environmental system, the software system may cause the machine to go into “limp mode,” which disables most of the equipment’s functionality until a repair is authorized and the diagnostic error code is cleared.²⁶ “According to agricultural equipment experts, these sensors and their associated controller network are now the highest point of failure on the product.”²⁷

Typically, when a Deere piece of equipment goes “limp,” all that is visible to the farmer in the tractor is a numeric error code. In order to complete a repair, a farmer must (1) diagnose the problem (i.e., figure out what the diagnostic error code means), and (2) fix the problem. In recent years, Deere has deliberately designed its equipment so that a farmer must use expensive software tools—tools that Deere can withhold if it likes—for *both* of these steps.²⁸ First, certain diagnostic software is needed to figure out what the diagnostic error code means and what repair is required. Then, for at least some repairs, once the repair is made, a *separate* software tool is needed to authorize the repair, “pair” the new part to the machine, and get the machine running again.²⁹ For many parts that are commonly replaced, the equipment will not function with a new part installed until the equipment’s software system is given the “pairing” code that will “clear” any error message and allow the equipment to function again.

Deere claims that its diagnostic error codes are all published and that a farmer can look the codes up when he needs to diagnose an issue. But the Diagnosis and Tests Service Manual for

²⁴ Kevin O’Reilly, *Deere in the Headlights* at 5–6, U.S. PIRG (Feb. 2021), available at perma.cc/42GB-TJ4B.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; Nilay Patel, *John Deere Turned Tractors Into Computers – What’s Next?*, The Verge (June 15, 2021), available at perma.cc/G3XJ-RLNU.

Deere’s 8130, 82390, 8330, 8430, and 8530 machines tells a very different story. Of the 706 diagnostic error codes the Manual lists, 627—more than 89%—state that to solve the issue the farmer should “Have your John Deere dealer repair as soon as possible.” The Manual offers little or no guidance on how a farmer could repair the machine. Deere charges \$149 to provide farmers with the Manual.

B. Deere Forces Equipment Owners to Use Deere Technicians for Repairs

The problem for farmers is that Deere provides access to the necessary software tools to diagnose and authorize repairs *only* to technicians at Deere-authorized dealers.³⁰ Thus, farmers whose equipment suffers breakdowns must wait for, and work around the schedule of, an authorized Deere technician to get their equipment fixed.³¹ This represents a sea change for farmers—who have long been able to repair their own equipment—that threatens their ability to make a living.³² Additionally, by restricting access to necessary software tools to authorized technicians at dealerships, Deere has decimated the market for independent repair services.³³ Thus, not only are farmers unable to fix their own equipment—they also now cannot compare multiple repair quotes from independent mechanics.

Deere claims that it doesn’t impose undue restrictions on farmers and independent repair shops. The company notes that “Deere customers and independent service organizations today can acquire service parts, operating and repair manuals, product guides, service demonstrations, fleet management information, on-board diagnostics, and electronic field diagnostic tools from a

³⁰ *Deere in the Headlights*, *supra* n.24 at 5–6.

³¹ *Id.*

³² Elizabeth Chamberlain & Kyle Wiens, *John Deere Just Swindled Farmers out of Their Right to Repair*, *Wired* (Sept. 2018), available at perma.cc/K49D-P9BW.

³³ See Greta Moran, *Farmers Will Soon Have the Right to Repair their Tractors*, *Civil Eats* (July 13, 2021), available at perma.cc/YBM8-Z8T3; Ryan Suppe, *FIGHT TO REPAIR: Independent repair shops want the right to repair major manufacturers’ electronics*, Associated Press (May 1, 2019), available at t.ly/piZ5.

vast network of over 2000 authorized John Deere dealers.”³⁴ These parts, manuals, and guides, however, still must be acquired *through a Deere dealer*. Moreover, even acquiring all of the software and diagnostics Deere makes available to outside technicians would not allow an independent repair shop (or farmer) to clear some diagnostic error codes; a Deere technician would still need to pair the part so the equipment will work. In this manner, Deere has made it impossible to carry out routine repairs without the involvement of their technicians.

Deere claims that it supports customers’ right to repair equipment but “does not support the right to modify embedded software due to risks associated with the safe operation of the equipment, emissions compliance and engine performance.”³⁵ Deere justifies withholding the ability to pair parts and clear diagnostic error codes to complete repairs from farmers and independent repair shops on this basis. In fact, the license agreement farmers must sign to be granted a license to the embedded software forbids farmers from repairing or modifying the equipment where it involves the embedded software, instead permitting only Deere-authorized dealerships and technicians to do so.³⁶

Deere claims that its aggressive protection of its embedded software is necessary because rivals could potentially steal and modify the source code in Deere software. This claim is unjustified, because it is practically impossible for even the most motivated rival to acquire source code from embedded software. Source code consists of instructions written in a software language that a person could read, modify, and use in competing equipment. Before the source code is turned into the software that consumers use, it is compiled into embedded code, binary 1’s and 0’s that a computer can read. It is virtually impossible for embedded, computer-legible code to be

³⁴ July 18, 2021 FTC letter, *supra* n.20.

³⁵ *Without ‘Right to Repair,’ Businesses Lose Time and Money*, *supra* n.18.

³⁶ John Deere Shared Services, *License Agreement for John Deere Embedded Software* (Oct. 28, 2016) available at perma.cc/BB45-FE36.

translated back into source, human-legible code.³⁷ Deere could readily provide farmers and independent repair shops with the embedded software required for diagnosis and repair without any concern that a bad actor could use that embedded software to steal Deere's source code.³⁸

C. Deere's Requirement That Farmers Use Deere Technicians for Repairs Harms Farmers' Livelihoods and Drives up the Prices of Older Models

Waiting for an authorized technician to come to a farm and fix a tractor or combine can be devastating to a farmer's business.³⁹ Farming is a precise profession: Any failure of agricultural equipment can cause delays in planting, tending, or harvesting, any of which can severely impact a farm's seasonal output and economic viability. Deere seemingly recognizes that farmers' livelihoods are now dependent on the company providing timely repairs: Deere disclaims liability for crop loss, lost profits, and potential loss of business resulting from their systems and the company's failure to timely repair them.⁴⁰

For farmers who use Deere equipment, these are not abstract or theoretical concerns. For example, Jared Wilson, a farmer near Butler, Missouri, blew a mechanical valve on a Deere fertilizer spreader, a malfunction that threw the equipment into "limp mode" until the error codes in the software could be resolved by a Deere-authorized technician.⁴¹ Wilson was forced to haul the machine to the dealer, where it sat for 32 days. He estimated he lost \$30,000 to \$60,000

³⁷ *Deere in the Headlights*, *supra* n.24 at 5–6.

³⁸ *John Deere Turned Tractors Into Computers*, *supra* n.29.

³⁹ *Deere in the Headlights*, *supra* n.24, at 5–6.

⁴⁰ See HarvestLab Calibration File License Agreement, John Deere (Apr. 17, 2014), *available at* perma.cc/43EB-AFJY. When a Deere dealership sells a farmer a tractor, a combine, or a tractor attachment (such as a planter), the farmer completes a "Purchase Order for John Deere Equipment." The Purchase Order includes a Notice that states that the "Use of John Deere Services, if applicable, and all rights and obligations of John Deere and the Customer (as identified in the applicable agreement), are governed by the terms and conditions in the applicable Services and Software agreements available at www.JohnDeere.com/Agreements. If these terms and conditions are not agreeable, do not use the Services." At the URL provided in the Purchase Order, Deere includes links to several License Agreements for various types of software, including the License Agreement for Deere's HarvestLab Calibration File Software.

⁴¹ *Deere in the Headlights*, *supra* n.24, at 5–6.

because he was unable to use the equipment.⁴² The farmer believes that, had he been able to access the parts and diagnostic tools he needed, he could have repaired the equipment himself in a fraction of the time.⁴³

Walter Schweitzer, a hay farmer who is president of Petitioner Montana Farmers Union, had a similar experience. One summer his tractor started shutting down seemingly at random. He recently described the ordeal he went through:

“I called my dealer, because I’m forced to call my dealer,” he said. “They said they were not able to get to me until next week. I said, ‘Can I come in and borrow the diagnostic equipment?’ They said no. ‘Can I rent it?’ ‘No.’ ‘Can I buy it?’ No, they said, they’re not allowed to sell it.”⁴⁴

So he waited for a Deere-authorized technician to visit his farm. During that time, Schweitzer was forced to resort to a 40-year-old unit he keeps in reserve to continue baling hay before an anticipated rainfall that would have ruined his work. He noted, “If I had the equipment myself, I’d have the error code. Instead, I had to pay a technician to drive it around the parking lot.”⁴⁵

While Deere claims that software reprogramming “can increasingly be done remotely,”⁴⁶ that claim does not reflect farmers’ experiences. Instead, farmers can only obtain certain necessary repairs during critically important times at the whim of their local Deere dealership or repair shop.

One paradoxical result of the restrictive technological “improvements” Deere has implemented on newer machinery in recent years is that the prices of *older* tractors are skyrocketing, as farmers turn to older machinery in order to avoid Deere’s stranglehold on the parts and repairs market.⁴⁷ The obstructions Deere has put in place have made it such that many

⁴² *Id.* at 8–9.

⁴³ *Id.*

⁴⁴ David Dayen, *Rollups: The Big Tech Monopoly Down on the Farm*, The American Prospect (Feb. 7, 2022), available at perma.cc/H2V8-HD8V.

⁴⁵ *Id.*

⁴⁶ Oct. 15, 2021 SEC letter, *supra* n.19, at 6.

⁴⁷ *John Deere Turned Tractors Into Computers*, *supra* n.29.

farmers prefer to deal with decades-old equipment that they can repair as they see fit rather than adhering to Deere’s modern restrictions.⁴⁸ A recent study found that 77% of surveyed farmers purchased older-model equipment to avoid the software present in new equipment.⁴⁹ For instance, in November 2021, a Deere tractor built in 1998 sold for \$170,000—more than \$32,000 more than that model had ever been recorded selling for.⁵⁰ While some of that price increase may be due to current supply chain disruptions and Deere’s nascent labor issues, farmers have reported that one key reason for the increase in demand for older machinery is that “they’re easier to work on and repair than newer models.”⁵¹

Deere’s control over the repair market is the backbone of its financial success. Even though as discussed below Deere dominates the sales markets for new agricultural equipment and tractors, sales of its repair services are *three to six times more profitable* than its sales of equipment.⁵² And despite the COVID-19 pandemic’s effect on financial markets and supply chains, Deere is currently on pace for its best year ever: As of August 20, Deere projected its 2021 profits to be in the range of \$5.7 to \$5.9 billion, which would far exceed its previous high of \$3.5 billion in 2013.⁵³

⁴⁸ Kevin O’Reilly, *Deere in the Headlights II: How Dealership Consolidation Reduces Repair Choice for Farmers* at 9-10, U.S. PIRG Education Fund (Feb. 2022), available at <https://perma.cc/3RTP-WCDA>; see also Louise Matsakis & Olivia Solon, *Senate introduces bill to allow farmers to fix their own equipment*, NBC News (Feb. 1, 2022) (“Scott Potmesil, a fourth-generation farmer who raises cattle in Sandhills, Nebraska, recently bought a John Deere tractor that is over 25 years old. He said he purposely went looking for the older device in 2020 because he believed it would be easier to repair than newer models, which can often be fixed only by authorized dealerships.”), available at perma.cc/AFW7-RDY3.

⁴⁹ Kevin O’Reilly, *Why Farmers Need Right to Repair*, U.S. PIRG Education Fund (Feb. 1, 2022), perma.cc/3YUX-X939.

⁵⁰ Matthew Gault, *The Used Tractor Market Is Far Wilder Than the Used Car Market*, Vice (Nov. 15, 2021), available at perma.cc/LH9K-3LAW.

⁵¹ *Id.*; see also Joe Deaux, *Wilding Bidding Wars Erupt at Used Tractor Auctions Across the U.S.*, Bloomberg (Nov. 13, 2021), available at perma.cc/U7KP-8Q46; John Deere Turned Tractors Into Computers—What’s Next?, *supra* n.29 (noting that, before strike or major supply chain disruption, Deere “pre-1990 tractors are selling for double what they were a year or two ago”).

⁵² *Farmers Fight John Deere Over Who Gets to Fix an \$800,000 Tractor*, *supra* n.5.

⁵³ *News Release: Deere Reports Third Quarter Net Income of \$1.667 Billion*, Deere & Co. (Aug. 20, 2021), available at perma.cc/WGN6-ZV4T; Jonah Furman, *John Deere Workers Overwhelmingly Reject Contract, Could Strike Wednesday Night*, Labor Notes (Oct. 11, 2021), available at perma.cc/JY36-D2S8.

III. DEALERSHIP CONSOLIDATION

While this Complaint is focused primarily on how Deere’s repair restrictions affect farmers who have no choice but to accept Deere’s conditions, closely related to this issue is the enormous consolidation that has occurred in the once-competitive market for independent agricultural equipment dealerships. Deere’s repair restrictions have quickened the consolidation of dealerships across the country, which in turn has made it less feasible for farmers to use non-Deere equipment, due to the lack of competing service options.

Deere and its main competitors in the agricultural equipment market distribute their equipment through authorized dealers. There are approximately 1,500 dealerships across the U.S. that sell Deere equipment.⁵⁴ Twenty years ago, however, there were more than twice as many.⁵⁵ In 2002, Deere began pushing this consolidation on its dealers through its “Dealer of Tomorrow” plan, and, at the same time, began mandating that dealers who wanted to sell Deere products must sell *only* Deere products.⁵⁶ As of 2018, 83% of Deere’s dealerships were part of large dealer groups that own five or more stores, up from 74% the year before.⁵⁷ In 2011, 24 Deere dealers had ten or more farm equipment stores.⁵⁸ As of 2018, that number had risen to 61.⁵⁹ Deere dealers realize that consolidation increases market share and dealer profitability, and they also claim (without evidence) that consolidation increases customer satisfaction.⁶⁰ However, the consolidation and centralization of the dealership market have led directly to far longer average drive times and wait times for farmers who, in part due to Deere’s repair restrictions, have no

⁵⁴ Kim Schmidt, *What’s Driving Consolidation Among Farm Equipment Dealers?*, Farm Equipment (Aug. 29, 2018), available at perma.cc/6855-6UWA.

⁵⁵ *Id.*; Ilan Brat & Timothy Aepfel, *Why Deere Is Weeding Out Dealers Even as Farms Boom*, The Wall Street Journal (Aug. 14, 2007), available at perma.cc/4DA3-8K2G.

⁵⁶ *Id.*

⁵⁷ *What’s Driving Consolidation Among Farm Equipment Dealers?*, *supra* n.54.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

choice but to use their nearest Deere-authorized dealer, which may be many miles away. There is now one Deere dealership chain for every 12,018 farms and every 5.3 million acres of farmland in the United States.⁶¹ Compounding the issue, 95% of the nearly 3,000 Deere, Kubota, Case IH, and AGCO dealerships service equipment only from the manufacturer they represent.⁶²

Today, most dealers that sell Deere equipment are part of a large dealer network that sells only Deere products.⁶³ While Deere is by far the most consolidated agricultural equipment dealership,⁶⁴ Deere is not alone in this strategy: As of 2018, 53% of Case IH stores, 32% of AGCO stores, 21% of New Holland's stores, and 13% of Kubota's stores are owned by dealers who own at least five stores.⁶⁵ Moreover, Deere does not allow customers to shop around between Deere dealerships, even where that is possible; farmers have reported having to use a false name and/or address to get a quote from a Deere dealership that is not their local dealership. This prevents customers from being able to receive multiple quotes for new equipment to attempt to get the best price.

Dealer consolidation both drives and is driven by consolidation among farmers. Farms are getting larger and managing huge amounts of land, in part in order to afford the higher cost of large farm equipment and repairs. At the same time, to service these huge farms, dealers claim they have to be larger as well.⁶⁶

Across the market, consolidation of dealerships and repair operations has meant that farmers have little meaningful choice regarding where they purchase large agricultural equipment such as tractors and combines. This is not only because of Deere's dominant market share in the

⁶¹ *Deere in the Headlights II*, *supra* n.48, at 6

⁶² *Id.* at 15.

⁶³ *What's Driving Consolidation Among Farm Equipment Dealers?*, *supra* n.54.

⁶⁴ *Deere in the Headlights II*, *supra* n.48, at 16.

⁶⁵ *What's Driving Consolidation Among Farm Equipment Dealers?*, *supra* n.54.

⁶⁶ *Id.*

original equipment market, but also because of Deere's repair restrictions. Smaller farmers in particular are losing choices as consolidation continues: If the only dealership in a farmer's area sells and repairs exclusively Deere products, and all repairs must happen at Deere dealerships, a farmer has no real choice but to buy Deere equipment and accept Deere's repair restrictions.

IV. DEERE REINFORCES ITS TECHNICAL REPAIR RESTRICTIONS THROUGH RESTRICTIVE WARRANTIES

In addition to its technological restrictions and geographic dominance, Deere further solidifies its control over the repair market through restrictive warranties that purportedly govern the use of Deere's software. In Deere's view, when a farmer buys a tractor, the farmer owns the tractor but Deere owns the software necessary to run that tractor; the purchase of the tractor only gives the farmer a license to use that software.

Deere reinforces its repair restrictions through a restrictive agreement denoted an "End User License Agreement." The Agreement, which grants a farmer only limited right to use necessary software, prohibits any non-Deere-authorized repair technician from interacting with Deere software.⁶⁷ Thus, even if a farmer had the diagnostic information necessary to allow an independent repair shop to fix a tractor, it would violate the Agreement for that repair shop to deliver the payload file needed to restart the tractor.

V. JDLink LOCKS CONSUMERS IN TO DEERE PRODUCTS AND ALLOWS DEERE TO USE FARMERS' DATA FOR PROFIT

Deere has introduced JDLink and the John Deere Operations Center, automatic data collection services that collect information from every enabled piece of Deere equipment, on its new equipment. JDLink collects information about what each piece of equipment is doing on each field and provides remote connectivity for owners, with information about machine performance.

⁶⁷ A sample 2016 End User License Agreement posted on Deere's website can be found at perma.cc/46QE-FV7D.

Beginning in 2012, JDLink also allows for wireless data transfer, which automatically sends data to the John Deere Operations Center (known as MyOperations prior to 2021) when the farmer finishes a field.

A. Deere Now Offers JDLink for Free Because it Locks Consumers in to Deere Products

Initially only available via subscription, JDLink is now included for free with many large purchases.⁶⁸ Deere stopped charging for JDLink in July 2021.⁶⁹ Deere asserts that the basis for doing so was that “[p]reviously for each machine, customers had to choose the right subscription, time frame, and price. Activations took many steps and each subscription renewal had to be separately managed.”⁷⁰ Deere claims that due to “the extra steps required, some customers let their subscriptions lapse or they passed on the opportunity to connect their machines,” and “[a]s a result, these customers have been missing out on the value of Connected Support and precision agriculture.”⁷¹ Farmers who use JDLink opt in for their whole fleet, and future purchases are automatically added to their account.⁷²

Deere appears to have determined that giving customers JDLink for free would ultimately earn more money in the long run, because the JDLink ecosystem encourages farmers (1) to use all Deere equipment so everything is reported to the same place, and (2) to stay with Deere when they replace equipment so they can continue to use the platform and its historic information.

⁶⁸ Laurie Bedord, *John Deere Makes JDLink Available at No Extra Cost*, Successful Farming (July 14, 2021), available at perma.cc/RH25-FD26.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 4Rivers Equipment, *JDLink Is Now Free!* (July 20, 2021), available at perma.cc/V9MM-R5HY.

B. JDLink and John Deere Operations Center Harvest Farmers' Data for Deere's Benefit

The information generated by farmers while performing their own work is collected by JDLink and freely accessible to Deere, for Deere to use for nearly any reason it likes. The contract that purchasers must sign to use the mobile network notes that the purchaser agrees “that John Deere may use any information that is generated by or collected as part of your use of the Network under this Agreement (‘Your Information’) as provided below and in our Privacy and Data Statements published at www.johndeere.com/privacy.”⁷³ The contract gives broad usage access to Deere:

Your Information may include user information, IP addresses, names, physical addresses, contact information, location history, and usage logs. You grant John Deere, its affiliates, and its third-party suppliers the right to use Your Information as described in this Agreement and as needed to provide all services and functionalities provided under this Agreement, including providing access to the Network. This permission extends to third parties engaged by John Deere in connection with providing the Network and associated services. John Deere may disclose Your Information to outside parties when it has a good faith belief that disclosure is reasonably necessary to (a) comply with any applicable law, regulation or compulsory legal request; (b) protect the safety of any person from death or serious bodily injury; (c) prevent fraud or abuse against John Deere or its affiliates or third-party suppliers; (d) to protect John Deere’s property rights; or (e) defend John Deere and its affiliates, suppliers, or personnel from any legal proceedings arising out of Your use of the Network.⁷⁴

The agreement notes that “accessing or using the network signifies your acceptance of and agreement to these terms and conditions.”⁷⁵ Under this agreement, by turning the key on their equipment, farmers agree that Deere can collect and use their data.

⁷³ John Deere, *John Deere Mobile RTK Signal Network Subscription Agreement* (August 15, 2016), available at perma.cc/E2A7-MN8Q.

⁷⁴ *Id.*

⁷⁵ *Id.*

Deere’s privacy policy in the European Union makes clear that the data is stored on Deere’s servers and Deere has the right to store the data indefinitely.⁷⁶ Additionally, Deere “is entitled to access the non-anonymised customer data set to provide the contractually defined service (e.g. but not exclusively: JDLink, Operation Center information, Field analyser).”⁷⁷ Deere notes that Deere dealers can access machine data and that Deere, the parent company, and affiliates can do the same “as necessary to provide you with the Site services and to enable your use of the Site features and for the other purposes described in this notice. Information is shared to provide joint content and services (e.g., registration, transactions); improve products and services; to detect, investigate and prevent improper or unauthorized activities; identify, protect, detect, respond and recover from security events and incidents; to comply with laws and regulations (e.g., laws and regulations of countries where Affiliates of John Deere operate); and establish, exercise, and defend legal rights.”⁷⁸

By using Deere equipment, farmers are, generally without realizing what Deere is doing, sharing their methods and techniques with Deere, who can then use that information for its own benefit. John Deere Operations Center offers a service called “Field Analyzer,” which is designed to provide insight on how farming techniques are affecting yield.⁷⁹ Deere appears to be using the data it collects from JDLink on all its machines to suggest optimized techniques for *other* farmers, not just for the farmer generating that data. These are techniques farmers have developed and keep secret for a competitive advantage over their rivals. But if they use a Deere machine with JDLink, farmers are revealing those techniques for Deere to profit off of.

⁷⁶ *MyJohnDeere Data Privacy*, perma.cc/8NPV-FZU7 (last visited Mar. 2, 2022).

⁷⁷ *Id.*

⁷⁸ John Deere, *JDLink Privacy Notice* (May 25, 2018), available at perma.cc/TL3U-J42Z.

⁷⁹ John Deere, *Field Analyzer* (last visited January 11, 2022), perma.cc/JK6N-UDRR.

JDLINK and John Deere Operations Center also effectively lock in consumers to using exclusively Deere equipment. JDLINK is available only for Deere equipment, creating an incentive for farmers to use only Deere equipment. If a farmer is using a non-Deere piece of equipment alongside Deere equipment, JDLINK will provide only a partial picture of his operations. The farmer would need multiple applications to achieve the same result as if all his equipment were from Deere. Most importantly, a farmer has an incentive to continue using Deere equipment so he does not lose access to the data he has previously generated on his land. Field Analyzer, for instance, allows a farmer to compare performance over its documented history. Those insights are dependent on the farmer using Deere equipment every year.⁸⁰

These data issues merely compound the already high switching costs for farmers. Large agricultural equipment is one of the largest capital costs for farmers and is an investment meant to last for years. Replacing Deere equipment with equipment from another company is expensive. If the farmer also loses access to data and data tools from past years, the cost of using a different company is even higher. Additionally, these data tools push farmers to use only Deere equipment, meaning that switching to another company would involve switching all of their equipment to have access to the same information on one platform.

Deere's data gathering also may explain why, in the face of a growing recognition that repair restrictions are anticompetitive, it has refused to permit farmers to conduct their own repairs while other equipment manufacturers, such as Apple and Microsoft, have relaxed their repair restrictions. A recent article noted that "Deere doesn't want to give customers access to the software needed to repair equipment because it weakens their argument that customers shouldn't

⁸⁰ *Id.*

have access to their own data.”⁸¹ And as Joe Maxwell, president of Petitioner Farm Action, noted, “That data can be used against that farmer.”⁸²

VI. DEERE’S FALSE PROMISES: THE 2018 STATEMENT OF PRINCIPLES

In September 2018, a trade group representing Deere and a number of other agricultural equipment manufacturers agreed that, beginning January 1, 2021, the manufacturers would make maintenance, diagnostic, and repair information available to end users “at fair and reasonable terms.”⁸³ The agreement has so far been successful at staving off broad right to repair legislation that states had been considering at the time.⁸⁴ Also, it is likely that many farmers frustrated by Deere’s repair restrictions bought new Deere equipment in reliance on the company’s suggestion that it would allow access to the codes necessary to self-repair or use an independent repair shop.

Unfortunately for farmers, Deere has not lived up to this commitment, but instead has turned the promised repair information into its own, new profit center. Beginning in 2021, Deere began *selling* a product called Customer Service ADVISOR that provides at least some relevant diagnostic information to farmers. To use Customer Service ADVISOR, a farmer must pay (1) a one-time fee of up to \$5,000 to buy a “dongle”—essentially a laptop plus a unique connector—that will plug into Deere equipment, and (2) an annual subscription fee of more than \$2,500 to maintain access to the needed diagnostic information.

Even for those who pay its high price tag, Customer Service ADVISOR is of limited utility. According to some farmers, the dongle breaks often and itself requires service; this poor functionality caused one farmer to cancel his subscription after only a few months. But more

⁸¹ *Rollups*, *supra* n.44.

⁸² *Id.*

⁸³ Right to Repair Statement of Principles, *available at* perma.cc/MR6U-ESTM.

⁸⁴ Jason Koebler & Matthew Gault, *John Deere Promised it Would Make Tractors Easy to Repair. It Lied.*, *Vice* (Feb. 18, 2021), *available at* perma.cc/U6ZW-XVZN.

importantly, Customer Service ADVISOR does *not* make available to farmers all of the code information they need to conduct their own repairs—as Deere admits.⁸⁵ Specifically, Customer Service ADVISOR does not include any coding necessary to make repairs to features of the equipment related to environmental controls, which encompass many of the systems that most often need repairs. Moreover, Customer Service ADVISOR does not include the codes necessary to “pair” many important replacement parts with an existing machine, meaning that replacing a part still requires a Deere-authorized technician.

Perhaps because of its limited utility, many Deere dealerships do not even offer Customer Service ADVISOR. One right to repair advocate posed as a customer and called twelve Deere dealerships in six states. Eleven dealerships said they did not sell the diagnostic software and the last gave him an email address to contact, which did not respond.⁸⁶ Simply put, Customer Service ADVISOR is not an adequate substitute for what farmers who buy Deere equipment deserve: free, comprehensive access to the tools and information necessary to self-repair or to obtain independent repair services.

LEGAL CLAIMS

I. LEGAL STANDARDS

A. Unfair Methods of Competition

Section 5 of the FTC Act prohibits unfair methods of competition, including agreements in restraint of trade prohibited by Section 1 of the Sherman Act and monopolization prohibited by Section 2 of the Sherman Act.⁸⁷ A Section 1 violation requires proof of (1) a contract, combination,

⁸⁵ *John Deere Turned Tractors Into Computers*, *supra* n.29 (noting there are some repairs, particularly related to environmental systems, that cannot be made with Customer Service ADVISOR).

⁸⁶ *John Deere Promised it Would Make Tractors Easy to Repair. It Lied.*, *supra* n.84.

⁸⁷ 15 U.S.C. § 45(a); *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948).

or conspiracy that (2) unreasonably restrains competition.⁸⁸ A Section 2 monopolization violation requires proof of (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power.⁸⁹

Tying occurs when a seller forces a buyer to pay for a secondary good or service in conjunction with their initial purchase, effectively tying the purchases together.⁹⁰ Tying can violate both Section 1 and Section 2 of the Sherman Act.⁹¹ It is a *per se* violation of Section 1, and thus, the FTC Act, where: (1) separate markets exist for the tying and tied products or services; (2) the seller has market power in the tying market; (3) the seller ties the tying product or service to the tied product or service; and (4) the tie forecloses a substantial volume of interstate commerce in the market for the tied product.⁹² If a tying arrangement does not fit the criteria for *per se* illegality, it may nonetheless be deemed unlawful under the Rule of Reason, if the tie's procompetitive benefits do not outweigh its anticompetitive effects.⁹³

“[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”⁹⁴ Such coercion can be found in an explicit contractual provision, but it need not be.⁹⁵ A tie may also exist where the seller offers the tying product or service on such terms that, under the circumstances, accepting the additional tied product or service is the only viable

⁸⁸ 15 U.S.C. § 1.

⁸⁹ 15 U.S.C. § 2; *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

⁹⁰ *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 461–62 (1992).

⁹¹ *See id.* at 462, 482–83.

⁹² *Id.* at 461–62.

⁹³ *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984).

⁹⁴ *Id.* at 12.

⁹⁵ *See Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 272 (6th Cir. 2015); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 n.3 (3d Cir. 1978).

economic option for the buyer.⁹⁶ The Commission has written that “harm is particularly likely when the tied markets are concentrated and the tie results in substantial foreclosure in these markets.”⁹⁷

Tying also violates Section 2 of the Sherman Act and Section 5 of the FTC Act where it is the mechanism through which a firm maintains its monopoly or attempts to extend its monopoly in the tying product to a new monopoly in the tied product.⁹⁸

B. Unfair or Deceptive Trade Practices

Section 5 of the FTC Act also prohibits unfair or deceptive trade practices.⁹⁹ Under Section 5 of the FTC Act, unlawful deception will be found “if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹⁰⁰ A representation is thus unlawfully deceptive if it is (1) material to a consumer’s decision-making; and (2) likely to mislead the consumer.¹⁰¹

Materiality is established when the representation at issue “is likely to affect the consumer’s conduct or decision with regard to a product or service.”¹⁰² An advertisement is likely to mislead reasonable consumers regardless of whether it conveys different messaging to different consumers, because a company is responsible for *all* reasonable interpretations of its advertisements.¹⁰³ Furthermore, if a particular consumer group is targeted or likely to be affected

⁹⁶ *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1500 (8th Cir. 1992).

⁹⁷ *Broadcom Incorporated*, No. 181-0205 (FTC June 30, 2021), 2021 WL 2852037, at *5; *see also* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 414 (2009).

⁹⁸ *See Eastman Kodak Co.*, 504 U.S. at 482–83.

⁹⁹ 15 U.S.C. § 45(a).

¹⁰⁰ F.T.C., Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), *available at* perma.cc/7EY4-UTME (hereinafter “FTC, Policy Statement on Deception”).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.* at 2–3.

by the advertisement—as is the case here with farmers—the advertisement should be examined from the perspective of a reasonable member of that group.¹⁰⁴

II. ANALYSIS UNDER THE FEDERAL TRADE COMMISSION ACT

A. Unfair Methods of Competition

1. Sherman Act Section 1

As stated above, tying is a *per se* violation of Section 1 of the Sherman Act, and thus, the FTC Act, where: (1) separate markets exist for the tying and tied products or services; (2) the seller has market power in the tying market; (3) the seller ties the tying product or service to the tied product or service; and (4) the tie forecloses a substantial volume of interstate commerce in the market for the tied product.¹⁰⁵

a. Relevant Market Definitions

In a tying case, there are two relevant markets: the tying market and the tied market. Here, the tying market is the U.S. market for large agricultural equipment, in which Deere has a market share of over 50%, significantly higher than courts require in the tying market to consider tying unlawful. The tied market is the U.S. market for repairs of large agricultural equipment. These markets are separate markets because they are not interchangeable and can be sold separately. Indeed, before Deere imposed the repair restrictions at issue in this Complaint, there existed a robust market for third-party repair providers, and farmers also performed many repairs on large agricultural equipment, including Deere equipment, themselves.

¹⁰⁴ F.T.C., Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (Nov. 23, 1984), *available at* perma.cc/JWB4-BDSC.

¹⁰⁵ *See, e.g., Broadcom*, 2021 WL 2852037, at *7 & n.14; *see also Eastman Kodak*, 504 U.S. at 461-62; *United States v. Microsoft*, 253 F.3d 34, 85, 87 (D.C. Cir. 2001) (“The core concern is that tying prevents goods from competing directly for consumer choice on their merits.”); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir. 2020); *In re Sandoz Pharms. Corp.*, 115 F.T.C. 625, 629–30 (1992).

Alternatively, under the “derivative aftermarket” theory applied by the Supreme Court in *Eastman Kodak*,¹⁰⁶ the tying market can be defined as the parts and diagnostic error codes necessary to repair large Deere equipment, and the tied market as the market for repairs to large Deere equipment. In *Eastman Kodak*, the alleged tie was not between the original equipment (industrial-sized photocopiers) and service, but rather between the parts needed to repair Kodak equipment and the service needed to repair Kodak equipment. Thus, like in *Eastman Kodak*, here, the tied market could also be defined as the market for repair services for Deere tractors and combines.

Deere’s tying scheme is especially harmful because of the significant switching costs farmers would have to incur to switch to a different product. As noted above, each piece of large agricultural equipment that a farmer purchases is expensive, with some larger pieces costing hundreds of thousands of dollars. Moreover, Deere uses auxiliary programs like JDLink to make it even costlier for a farmer who would like to switch to another brand to do so; if a farmer has used Deere machinery for years, switching would cause the loss of all data generated through JDLink.

Deere has also made it difficult, if not impossible, for farmers to assess the “lifecycle price” of a piece of equipment—that is, the upfront purchase cost plus the costs of obtaining necessary repairs for that equipment. As noted above, in 2018 Deere announced a “principle” that by 2021 it would make freely available to farmers the information needed to self-repair or to obtain repair from an independent repair shop, either of which would be significantly less expensive than obtaining repairs from a Deere-authorized technician. But Deere has failed to live up to that representation, instead charging extra fees for Customer Service ADVISOR and refusing to make

¹⁰⁶ See *Eastman Kodak Co.*, 504 U.S. at 454.

other information required for repairs available to farmers. Thus, farmers who purchased machines after these representations were made were unable to make informed decisions about the lifecycle price for pieces of machinery. And even if a farmer understood that he would have to rely on Deere for all future repairs, the total control over pricing that this regime gives to Deere leaves the farmer unable to estimate what the market price for repairs would be—there simply is no “market” for repairs; Deere is essentially free to charge whatever it likes for repairs. Thus, these realities worsen the effects of Deere’s repair restrictions, because farmers are completely unable to determine *ex ante* what the lifecycle price of a given piece of machinery is.

These factors—high switching costs and a farmer’s inability to compare lifecycle prices of equipment across brands—exacerbate Deere’s power over the market for repairs. Before a farmer purchases Deere equipment, he is unable to determine whether that equipment’s lifecycle price is cheaper than the lifecycle price of comparable equipment sold by a competitor. And after a farmer purchases Deere equipment, he is essentially locked in to using that equipment regardless of what Deere charges for its repairs. Through its tying scheme and refusal to provide farmers consistent and accurate information, Deere has made the demand for Deere-authorized repairs far more inelastic than it would be absent Deere’s anticompetitive conduct.

b. Per Se Analysis

Deere has committed a *per se* violation of Section 1 by unlawfully tying repair services to the sale of its tractors and combines.

Under the *per se* analysis’s first factor, products (such as large agricultural equipment) and services (such as repairs of such equipment) are distinct, and thus may be subject to a tying inquiry, if there is consumer demand such that it would be efficient for a seller to sell the two items

separately.¹⁰⁷ In fact, even where products are “functionally linked”—i.e., where one is useless without the other—they may have separate markets: Courts have found cameras and film, computers and software, and cars and tires all to be separate products that can be subject to a tying analysis.¹⁰⁸ Under this standard, separate markets exist between *sales* of large agricultural equipment and *repairs* of such equipment. These markets have been distinct since the advent of these machines.¹⁰⁹ Further, before Deere’s dealer consolidation and its implementation of the repair restrictions, there was a robust independent market for repair services for these machines,¹¹⁰ and farmers could always choose to repair their equipment themselves.¹¹¹

Second, Deere has market power in the tying market—the U.S. market for large agricultural equipment. Courts have generally found this element to be satisfied where a defendant possesses more than 30 percent market share in the tying market.¹¹² Deere easily meets this requirement, with a market share of well more than 50 percent of the U.S. aggregate market for large agricultural equipment, and well more than 50 percent for many specific pieces of machinery, such as large tractors or large combines.¹¹³

Third, Deere has tied the sale of its repair services to the sale of its large agricultural equipment. Courts have recognized that a tie exists where “the defendant’s policy makes the purchasing of the tying and tied products together the only viable economic option.”¹¹⁴ Deere does

¹⁰⁷ *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 21–22.

¹⁰⁸ *Eastman Kodak Co.*, 504 U.S. at 463.

¹⁰⁹ *See id.* at 462–63 (holding that markets for parts and service were distinct because “service and parts ha[d] been sold separately in the past” and “some consumers, those who self-service for example, would purchase parts without service”).

¹¹⁰ *See Farmers Will Soon Have the Right to Repair their Tractors*, *supra* n.33; *FIGHT TO REPAIR*, *supra* n.33.

¹¹¹ *See John Deere Just Swindled Farmers out of Their Right to Repair*, *supra* n.32.

¹¹² *See, e.g., Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 7; *Digital Equip. Corp. v. Uniq Digital Tech.*, 73 F.3d 756, 761 (7th Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1993).

¹¹³ *See Farmers Fight John Deere Over Who Gets to Fix an \$800,000 Tractor*, *supra* n.5 (Deere “account[s] for more than half of all farm machinery sales in the U.S.”); *Manufacturer Consolidation Reshaping the Farm Equipment Marketplace*, *supra* n.5 (stating that Deere controls 53 percent of the North American market for large tractors and 63 percent of the North American market for combines).

¹¹⁴ *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1500 (8th Cir. 1992) (cleaned up).

exactly this by designing its vehicles such that software tools are needed to diagnose and complete repairs and then making those software tools available only to Deere-authorized repair technicians. There simply is no economically viable repair alternative for a Deere purchaser, if the only meaningful recourse other than using Deere repair services is to buy a new piece of equipment (or to pay an expensive up-front and subscription fee for Customer Service ADVISOR¹¹⁵). Antitrust scholarship confirms that such ties remain anticompetitive where the tied product is used in varying amounts with the tying product.¹¹⁶ That condition is present here: Farmers vary in the amount of repair services they will require after having purchased a Deere tractor. Moreover, the Commission has noted that “the use of embedded software that forces consumers to have the maintenance and repair of their products performed by the manufacturers’ authorized service networks may also raise competition issues.”¹¹⁷ Simply put, farmers have no choice but to purchase repair services from Deere when their Deere tractor breaks down.¹¹⁸

Fourth, Deere has foreclosed a substantial volume of interstate commerce in the market for repair services. This element is satisfied if the impact on the tied market is more than “de minimis.”¹¹⁹ Here, the market for repair services has been impacted greatly. Farmers can no longer repair their own Deere equipment, and the market for repair services that used to include thousands of independent repair shops has essentially disappeared.¹²⁰ Some farmers—lacking

¹¹⁵ As described above, while Deere does now sell its Service ADVISOR, which allows farmers to diagnose certain issues, it is prohibitively expensive for farmers, costing thousands of dollars, and does not even help a farmer complete the repairs that require software updates. See *John Deere Turned Tractors Into Computers*, *supra* n.29.

¹¹⁶ See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 404, 447 (Dec. 2009); Einer Elhauge & Barry J. Nalebuff, *The Welfare Effects of Metering Ties*, Harvard John M. Olin Discussion Paper Series Paper No. 822 (Apr. 2015).

¹¹⁷ *Nixing the Fix*, *supra* n.3, at 10.

¹¹⁸ See *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062 n.3 (3d Cir. 1978) (noting that “a formal agreement is not necessary” to find tying where there is coercion).

¹¹⁹ See *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969) (substantial effect on commerce cannot be simply de minimis); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008) (tie must impact “a not insubstantial volume of commerce”).

¹²⁰ See *Farmers Will Soon Have the Right to Repair their Tractors*, *supra* n.33.

legitimate options—have had to resort to black market solutions to attempt to work around Deere’s restrictions, all of which expose them to serious legal and performance risks.¹²¹ Given the substantial impact that Deere’s restrictions have had on the market for repair services, this element is satisfied.

c. Rule of Reason Analysis

If Deere’s practices are analyzed under the Rule of Reason instead of the *per se* approach,¹²² they still are clearly unlawful under Section 1. To determine whether a restraint violates the Rule of Reason, courts apply a three-step, burden-shifting framework: (1) The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market; (2) if the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint; (3) the burden then shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.¹²³

As discussed above, Deere’s tying has had a substantial anticompetitive effect in the U.S. market for repairs of tractors and combines that has harmed farmers. Independent repair shops that would have competed with Deere, and therefore helped keep prices reasonable, have either exited the repair market or at least been substantially foreclosed from competing with Deere.¹²⁴ And because farmers can no longer fix their own equipment or have independent mechanics do the work, prices and wait-times for repairs have skyrocketed.¹²⁵ In addition, the structures of the

¹²¹ Jason Koebler, *Why American Farmers Are Hacking Their Tractors With Ukrainian Firmware*, Vice (Mar. 2017) available at perma.cc/6SNP-PXH8.

¹²² See, e.g., *Jefferson Parish Hosp. Dist. No.*, 466 U.S. at 29 (analyzing challenged restraint under rule of reason after finding it not to be *per se* unlawful).

¹²³ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

¹²⁴ *FIGHT TO REPAIR*, *supra* n.33.

¹²⁵ See *Standoff Between Farmers And Tractor Makers Intensifies Over Repair Issues*, NPR (May 26, 2021), available at perma.cc/JVG9-J263.

agricultural equipment and repair markets in the U.S. increase the damage associated with Deere’s behavior. The Commission has recognized that anticompetitive effects are “particularly likely when the tied markets are concentrated and the tie results in substantial foreclosure in these markets.”¹²⁶ This echoes language from the U.S. Supreme Court, which has stated that vertical restraints “should be subject to more careful scrutiny . . . if many compet[it]ors adopt the practice.”¹²⁷ The market for large agricultural equipment is extremely consolidated, and the other major manufacturers—Case, Kubota, AGCO, and Mahindra—implement the same types of technological restrictions on their own equipment as Deere does on Deere equipment.¹²⁸

Finally, Deere’s justifications for its restrictions are unconvincing and could be achieved by other, less restrictive means. First, Deere argues that it must restrict who has access to its software in order to protect its intellectual property.¹²⁹ As detailed above, such a concern is a red herring.¹³⁰ Deere cites the potential for rivals to steal and then modify the source code in its software, essentially enabling competitors to put Deere-created software in their own machines. Source code consists of instructions written in a software code that a person could read, modify, and use in competing equipment. Before the source code is turned into the software that consumers use, however, it is compiled into embedded code, 1’s and 0’s that a computer can read. It is virtually impossible for embedded, computer-legible code to be translated back into source, human-legible code.¹³¹ For this reason, large tech companies like Apple and HP make embedded

¹²⁶ *In the Matter of Broadcom Incorporated*, F.T.C., 2021 WL 2852037, at *5.

¹²⁷ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007); see also *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1203 (9th Cir. 2012) (“We cannot rule out the possibility that competition could be injured or reduced due to a widely applied practice that harms consumers.”).

¹²⁸ See *Farmers Will Soon Have the Right to Repair their Tractors*, *supra* n.33.

¹²⁹ See, e.g., *Comment of John Deere, Kansas HB 2122: Digital Electronic Repair Requirements* (Jan. 31, 2017), available at <https://www.repair.org/s/Deere-Position-Paper-1-31-17-Analysis-2-7-17.doc>.

¹³⁰ See *Report Highlights Equipment Manufacturers’ Support for Right to Repair*, Association of Equipment Manufacturers (June 15, 2020), available at perma.cc/NE7B-ZLK2.

¹³¹ *John Deere Turned Tractors Into Computers*, *supra* n.29.

code freely available for their products without any concern that the embedded code could be translated into source code.¹³² In order for farmers to be able to obtain independent repairs or to repair large agricultural equipment themselves, Deere would only need to provide farmers with the *embedded software* required for diagnosis and completion of a repair.¹³³ Thus, Deere’s putative concern for intellectual property rights is unfounded and cannot justify the onerous restrictions it has imposed.

Second, Deere argues that various environmental regulations make its technological restrictions necessary.¹³⁴ However, contrary to Deere’s claims, making available to farmers the diagnostic software necessary to obtain independent repairs would not allow farmers to freely subvert environmental controls, which is illegal tampering.¹³⁵ Model right to repair legislation requires manufacturers to make available “any special documentation, tools, and parts needed to reset [an electronic security] lock or function when disabled in the course of diagnosis, maintenance, or repair of the equipment.”¹³⁶ Thus, a farmer would be able to diagnose a problem, fix it, and then turn off the diagnostic error code that indicated the issue. To override environmental controls, though, a farmer would have to do more than simply clear a diagnostic error code: He or she would have to actually erase the operating system present on the machine, and then upload new, modified software that either does not have environmental controls or allows the farmer to ignore them.¹³⁷ But such conduct is plainly illegal under Environmental Protection Agency (“EPA”) regulations, which prohibit “remov[ing] or render[ing] inoperative any device or

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Dennis Slater, *Equipment Manufacturers Support Farmers’ Right to Repair*, PennLive (Mar. 1, 2020), available at perma.cc/HD7D-Z9AP.

¹³⁵ *Deere in the Headlights*, *supra* n.24, at 5–6.

¹³⁶ *Model State Right-to-Repair Law*, Repair.org (Dec. 2, 2020), available at perma.cc/RBJ6-KAE2.

¹³⁷ See *Deere in the Headlights*, *supra* n.24, at 5–6.

element of design installed on or in engines/equipment in compliance with [EPA] regulations.”¹³⁸ Thus, farmers could be given the tools necessary to diagnose and complete repairs without any danger that environmental regulations would become obsolete or that Deere would be held liable for farmers’ violation of such laws.

Deere’s practices thus violate Section 1 of the Sherman Act and Section 5 of the FTC Act under either a *per se* analysis or the Rule of Reason.

2. Sherman Act Section 2

Deere’s unlawful tying scheme violates Section 2 of the Sherman Act, which is also a violation of Section 5 of the FTC Act. Deere has either actually monopolized or attempted to monopolize the market for repair services for Deere equipment. Attempted monopolization occurs when a defendant (1) has engaged in anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.¹³⁹ Monopolization occurs when a defendant has (1) monopoly power in the relevant market and (2) willfully acquired or maintained that power.¹⁴⁰ Furthermore, the Commission has noted that “a manufacturer with market power that has refused to provide consumer or aftermarket service providers with key inputs (such as parts, manuals, or diagnostic software and tools) may be subject to antitrust liability for maintaining its monopoly, if the effect of such conduct is to harm competition.”¹⁴¹

Depending on how the relevant market is defined, Deere has either unlawfully attempted to monopolize or monopolized in violation of Section 2 of the Sherman Act.

¹³⁸ 40 C.F.R. § 1068.101.

¹³⁹ See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

¹⁴⁰ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

¹⁴¹ *Nixing the Fix*, *supra* n.3, at 9 (citing *Eastman Kodak*, 504 U.S. 451).

a. Attempted Monopolization

Deere has attempted to monopolize the market for repair services for large agricultural equipment because Deere has (1) has engaged in anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.¹⁴²

By tying repair services to sales of its large agricultural equipment, Deere has both engaged in anticompetitive conduct and demonstrated the necessary intent to monopolize.¹⁴³ Deere also has a dangerous probability of achieving monopoly power in the U.S. market for repairs of large agricultural equipment. Through its technological restrictions, Deere has effectively eliminated all competition for repairs to its large agricultural equipment. The anticompetitive effect of Deere's repair restrictions is evident based on (1) market share data regarding the growth of Deere's market share in the market for repairs, and (2) Deere's ability to charge supracompetitive prices for repairs on equipment for which it has implemented the repair restrictions.¹⁴⁴ Moreover, where "entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing," as is the case here with respect to independent repair shops, Deere's market share and supracompetitive pricing for repairs is more than sufficient to demonstrate that, unless Deere is prohibited from continuing its present course of conduct, there is a dangerous probability Deere will obtain a monopoly in the repairs market.¹⁴⁵

¹⁴² See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

¹⁴³ See *California Computer Prod., Inc. v. Int'l Bus. Machines Corp.*, 613 F.2d 727, 736 (9th Cir. 1979) ("[W]hen the attempt claim is founded upon a [Section 1 violation] the requisite specific intent may be inferred.") (internal quotation marks omitted); *Heattransfer Corp. v. Volkswagenwerk, A. G.*, 553 F.2d 964, 981 (5th Cir. 1977).

¹⁴⁴ See, e.g., *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 226 (3d Cir. 2008) ("[P]roof of anti-competitive effects 'can be achieved by demonstrating that the restraint is facially anticompetitive or that its enforcement reduced output, raised prices or reduced quality.'" (emphasis added, citation omitted)).

¹⁴⁵ See *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (citing cases); see also *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997) ("[E]ven if the ISOs only succeeded in proving a share near 50%, this would suffice to support a jury finding of market power for the purposes of the ISOs' attempted monopolization claim.").

b. Monopolization

Alternatively, if the “derivative aftermarkets” approach of *Eastman Kodak* were followed and the relevant markets are defined as the U.S. market for parts necessary to repair Deere large agricultural equipment (tying market) and the U.S. market for repairs to Deere large agricultural equipment (tied market), Deere already has *successfully* monopolized the tied market in violation of Section 2 of the Sherman Act. Deere (1) has monopoly power in the U.S. market for repairs to Deere tractors and combines; and (2) willfully acquired or maintained that power.¹⁴⁶

In *Eastman Kodak*, the alleged tie was not between the original equipment (industrial-sized photocopiers) and service, but rather between the parts needed to repair Kodak equipment and the service needed to repair Kodak equipment. Thus, like in *Eastman Kodak*, here, the tied market could also be defined as the market for repair services for Deere equipment. Using this definition for the tied market, the case against Deere is even stronger, because tying is especially pernicious where the defendant has power in the tied market, as Deere indisputably would under this market definition given the technological restrictions it imposes on its equipment.¹⁴⁷

Deere has market power over the U.S. market for repairs to Deere tractors and combines. As described above, Deere’s tying practices ensure that only Deere-authorized technicians—as opposed to independent mechanics or farmers themselves—are able to repairs these machines when they break down. A farmer who purchases Deere equipment is effectively stuck with Deere equipment and repair services. The cost of purchasing another brand of tractor or combine is high, running well into six figures. Additionally, the data services Deere pushes onto its customers

¹⁴⁶ See *Grinnell Corp.*, 384 U.S. at 570–71.

¹⁴⁷ See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 404, 413 (Dec. 2009); Einer Elhauge & Barry J. Nalebuff, *The Welfare Effects of Metering Ties*, Harvard John M. Olin Discussion Paper Series Paper No. 822 (Apr. 2015).

encourage farmers to use only Deere equipment, locking farmers into Deere equipment in the future.

Because of Deere's technological and contractual restrictions, when Deere equipment fails, farmers are forced to purchase repair services from Deere. The repairs farmers previously were able to do themselves or obtain from a local, independent repair shop are no longer an option.

Additionally, similar to the analysis of intent in attempted monopolization, where a defendant has engaged in conduct unlawful under Section 1, its acquisition or maintenance of monopoly power is willful.¹⁴⁸ Thus, by unlawfully tying the sale of repairs of its tractors and combines to original sales of its tractors and combines, Deere has willfully acquired monopoly power in violation of Section 2.

B. Unfair and Deceptive Trade Practices

In connection with its practice of tying its repair services to sales of large agricultural equipment, Deere has made statements that violate the FTC Act's prohibition on deceptive trade practices. Such statements are unlawful if they are both "material" and "deceptive" to the consumer¹⁴⁹ such that the representations are "likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."¹⁵⁰

1. Deere Misleadingly Advertises its Commitment to Farmers' Right to Repair

At the same time as Deere has imposed the serious and economically harmful restrictions on repairs described above, the company has told another story to consumers, promising them easy access to the information needed to maintain Deere equipment. These statements, which on information and belief Deere has made both to induce farmers to purchase Deere equipment and

¹⁴⁸ See, e.g., *Eastman Kodak Co.*, 504 U.S. at 483; *Viamedia, Inc.*, 951 F.3d at 467.

¹⁴⁹ FTC, Policy Statement on Deception, *supra* n.99.

¹⁵⁰ *Id.*

to stave off state and federal legislation that would curtail Deere’s unlawful tying, have substantially harmed farmers.

In its online advertising and public statements, Deere has portrayed itself as “lead[ing] the industry” in “repairability” and “committed to enabling customers to repair the products that they buy.” For example, on the “Repair” section of its website, Deere explicitly represents that it is committed to, and actively helping, its consumers repair their equipment: “From Do-It-Yourself tractor repairs to connected support, we’re committed to keeping your machines up and running when you need them most. *We also know you want to repair your own equipment in your own shop, and on your own time. That’s why repairability is designed into every tractor we build.*”¹⁵¹ In an interview with The Verge, Deere’s Chief Technology Officer Jahmy Hindman echoed this commitment, stating “we have and remain committed to enabling customers to repair the products that they buy. The reality is that 98 percent of the repairs that customers want to do on John Deere products today, they can do.”¹⁵² In a response to public criticisms regarding its lack of repairability, Deere issued a statement claiming that it “lead[s] [the] industry in providing repair tools, spare parts, information guides, training videos and manuals needed to work on our machines, including remote access for technicians to provide long-distance help.”¹⁵³

Deere has also promised, in the face of mounting pressure from state legislatures, that it would take meaningful measures to provide farmers with more access to self-repair technologies and capabilities. For example, as discussed above, in 2018, via one of its representative bodies, the Equipment Dealers Association, Deere issued a “Statement of Principles,” that promised to “make available through authorized dealers [tools] to empower farmers and ranchers to perform

¹⁵¹ *Repair: Self-Repair Made Easy*, John Deere, perma.cc/ZAGF-ZD4K (last visited Feb. 23, 2022) (emphasis added).

¹⁵² *John Deere Turned Tractors Into Computers*, *supra* n.29.

¹⁵³ Tyne Morgan, *AEM, John Deere Respond to Biden’s Planned Executive Order Over Right to Repair Equipment*, AG Web (July 7, 2021), *available at* perma.cc/S2FX-L8HE.

basic service, maintenance and repairs on their equipment.”¹⁵⁴ The Statement of Principles vowed to make good on this promise starting January 1, 2021.¹⁵⁵

Despite these representations, Deere has utterly failed to deliver upon these “principles” and, as demonstrated above, has left its customers without any meaningful ability to repair their own equipment. Reasonable consumers of Deere’s products—particularly farmers and ranchers—care about being able to carry out their own repairs in order to autonomously and efficiently pursue their work, and Deere’s advertisements regarding these issues are material to them. Therefore, Deere’s false, misleading, and deceptive representations and omissions about its commitment to “enabling customers to repair the products that they buy” are unlawfully deceptive under Section 5 of the FTC Act.

2. Deere Misrepresents its Obligations Under Federal Statutes and Regulations

In addition to these general misrepresentations, Deere has made more specific statements seeking to explain its problematic tying scheme by claiming federal legislation and regulations require its dominance of the repair market.

For example, in opposing right to repair legislation at the state level, Deere submitted comments claiming that its “embedded software code is copyright-protected, and access is governed by U.S. copyright law.”¹⁵⁶ While this statement is technically true, “it is well established that advertising need not be literally false in order to fall within the proscription of the [FTC Act].”¹⁵⁷ Read in its context, Deere’s statement strongly suggests that U.S. copyright law would

¹⁵⁴ *AEM, EDA Announce Statement of Principles on ‘Right to Repair,’* Ass’n of Equipment Manufacturers & Equipment Dealers Ass’n (Feb. 1, 2018), available at perma.cc/8XBD-4ZHR.

¹⁵⁵ *John Deere Promised it Would Make Tractors Easy to Repair. It Lied.*, *supra* n.84.

¹⁵⁶ *See, e.g., Comment of John Deere, Kansas HB 2122: Digital Electronic Repair Requirements* (Jan. 31, 2017), available at <https://www.repair.org/s/Deere-Position-Paper-1-31-17-Analysis-2-7-17.doc>.

¹⁵⁷ *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963).

prohibit a farmer from accessing embedded software for the sole purpose of repairing a tractor or combine. This is false.

A farmer is expressly allowed under copyright law to do exactly that. Section 1201 of the Digital Millennium Copyright Act (“DMCA”) makes it unlawful to “circumvent” digital security measures.¹⁵⁸ There is, however, currently an exemption to Section 1201 for “motorized land vehicle[s],” including “mechanized agricultural vehicle[s].”¹⁵⁹ Thus, a farmer may in fact access embedded software to repair his or her tractor without violating copyright law. Deere’s statements regarding copyright law are designed to mislead farmers into purchasing repair services from Deere as opposed to seeking to repair their tractors and combines themselves.

Also, in its opposition to the right to repair movement, Deere has made numerous statements regarding the necessity of its restrictions due to environmental regulations. For example, on its website, Deere states that ensuring software “operat[es] the way it was designed helps protect the environment and ensure your farming operations meet critical and required environmental standards.”¹⁶⁰ Luke Gakstatter, Deere’s Senior Vice President for aftermarket and customer support, stated that Deere opposes making software information necessary for repairs widely available “due to emissions regulations.”¹⁶¹ And Deere’s Chief Technology Officer, Jahmy Hindman, has stated that “we have a responsibility to produce a product that meets the requirements that the regulatory environment requires.”¹⁶² Through these statements, Deere suggests that the technological restrictions that it imposes on its tractors and combines are necessary *because of* environmental regulations. However, as discussed above, Deere could still

¹⁵⁸ 17 U.S.C. § 1201.

¹⁵⁹ 7 C.F.R. § 201.40.

¹⁶⁰ *Repair: Self-Repair Made Easy*, John Deere, perma.cc/Z4GF-ZD4K (last visited Feb. 23, 2022).

¹⁶¹ Spencer Chase, *A ‘Right-to-Repair’ Conversation with a John Deere Exec*, AgriPulse (Mar. 31, 2020), available at perma.cc/YE8R-CYGL.

¹⁶² *John Deere Turned Tractors Into Computers*, *supra* n.29.

design tractors and combines with environmental controls that comply with EPA regulations, while, at the same time, providing farmers the diagnostic tools to repair their own vehicles.

Deere's attempts to excuse its restraints on customer and independent repair via these misleading representations are intended to drive its consumers to accept its restrictions as opposed to advocating for their right to repair and for competition in the market for repair of Deere's large tractors and combines. These representations therefore further deceive reasonable consumers in violation of Section 5 of the FTC Act.

RELIEF REQUESTED

Deere's actions described above constitute unfair methods of competition and unfair and deceptive practices under the FTC Act. Accordingly, Petitioner and the undersigned respectfully request that the Commission:

- (1) investigate Deere's use of anticompetitive exclusive dealing, tying, attempted monopolization, and monopolization;
- (2) take appropriate action to enjoin Deere from withholding information in its possession that is necessary for the repair and maintenance of Deere equipment; and
- (3) impose all other penalties and take other appropriate actions as are just and proper.

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Washington, D.C.

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