

## PRELIMINARY LIST OF QUESTIONS

1. Do either *Fontana Aviation* or *Name Brand Prescription Drugs* decisions control as the Seventh Circuit never explicitly addressed the issue of whether co-conspirators need to be named and joined as defendants?
2. Are the parties aware of any case law applying the conspiracy exception to an alleged hub-and-spoke conspiracy?
3. If the Court were to determine that alleged co-conspirators must be named and joined, shouldn't Plaintiffs be given the opportunity to do that under *Girl Scouts*?
4. What are the parties' views on whether to certify the following question—or something like it—under 28 U.S.C. Section 1292(b): Is a plaintiff required to name and join as defendants alleged co-conspirators to avoid the direct purchaser requirement of *Illinois Brick*?
5. If the parties believe that a question should be certified to the Seventh Circuit, should the case be stayed until the Seventh Circuit either declines the appeal or answers the question?
6. Does Deere contend that Plaintiffs have added (a) facts/allegations and (b) claims in response to the motion for judgment on the pleadings, and if so, what if anything should be the consequence of that under less than clear Seventh Circuit precedent?
7. What, if anything, is Deere “passing on”?
8. Are Plaintiffs' claims based on a vertical conspiracy or hub-and-spoke conspiracy or both (setting aside that in a hub-and-spoke conspiracy there is by its very nature a vertical conspiracy)?
9. *Illinois Brick* applies only to damage claims. Plaintiffs seem to also be seeking injunctive relief. So, even if Deere prevails on the issue of naming and joining co-conspirators, judgement could not be entered in favor of Deere, assuming the Court rejects Deere's other arguments, correct?
10. Deere contends that that the Complaint alleges that Deere has agreed to provide Repair Tools to only certain dealerships. See page 8. Is this Plaintiffs' allegation?
11. Are Plaintiffs' alleging an agreement between the Dealerships? If so, where is that allegation in the Complaint? On page 11 of the memorandum in opposition, Plaintiffs state, “Plaintiffs allege that they and all class members purchased Repair Services from Deere's authorized Dealers who are alleged co-conspirators both with Deere *and with each other*.” (Emphasis added.) Where in the Complaint is the allegation that the Dealers are conspirators with each other?
12. Are *all* Dealerships allegedly part of the conspiracy or just the Big Dealers?
13. Why would Deere engage in this type of alleged anti-competitive behavior? What is the economic rationale for it?
14. Is an antitrust complaint required to explain why a monopolist engages in the alleged actions?

15. On page 4 of the reply brief, Deere hints that at least some of the Dealerships—the Court assumes not the Big Dealers but does not know if that assumption is correct—are supportive of this litigation. Why would they be and why does that matter at this stage of the litigation and would it matter if the litigation were to proceed?
16. Do Plaintiffs need to plead a hub-and-spoke conspiracy? If so, do they? If they do, how and where are those allegations in the Complaint?
17. What, if any, weight should the Court give to the Department of Justice’s statement of interest, particularly given that it appears the Department of Justice has flipped on this position repeatedly? Don’t believe me? Take a look at footnote 16 in *Eastman Kodak* and see the position referenced in Deere’s response to the Department of Justice’s filing. The Court understands that elections have consequences (or as they say in Cook County, a new broom sweeps clean) so why should the United States’ *current* position hold any particular weight?
18. The Complaint alleges that Deere is essentially forcing a consolidation of Dealerships, resulting in Big Dealers. But the Complaint does not provide a clear motive why Deere would engage in that activity or how it supports the claims. Please explain.
19. The Complaint alleges that the consolidation is of only already authorized Deere Dealerships, not that Deere is somehow obtaining control of local independent mechanics and then “converting” them into Dealerships. Is this a fair reading of the Complaint?

**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF NextGen 1.7.1.1  
Western Division**

Deere & Company Repair Services Antitrust  
Litigation, et al.

Plaintiff,

v.

Case No.:  
3:22-cv-50188  
Honorable Iain D.  
Johnston

Deere & Company

Defendant.

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**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Wednesday, July 19, 2023:

MINUTE entry before the Honorable Iain D. Johnston: In preparation of the hearing on August 7, 2023, the Court has attached to this entry a list of preliminary questions for counsel to chew on. The Court anticipates at least one more set of questions being provided before the hearing. As the Court stated previously, it will be glad to hear any arguments counsel have. But counsel should be aware that the Court has read the filings and the cases cited more than once. Nevertheless, counsel can focus or highlight any issues and arguments they think is necessary to properly represent their clients. But, at some point during the hearing, the Court would like to address the attached questions as the Court is interested in counsel's views. Counsel is cautioned not to read too much into these questions. The Court is going to the hearing with an open mind on these issues; that's why it's asking the questions. To be sure, the Court has reached conclusions on other issues but not these ones. Additionally, the Court is aware that there is a move afoot to encourage arguments from more junior attorneys. The Court understands and respects why its colleagues do this. Indeed, some of the undersigned's best friends have written their master's thesis on this topic and have standing orders on the topic. But the Court doesn't have a standing order on this, and, in fact, questions whether judges should be interfering with the attorney-client relationship. The Court's goal is to reach the right answer. Whichever counsel for the parties furthers that process (regardless of their place in the legal food chain or any other characteristic) is who the Court would like to hear from. If more than one counsel per side is needed, that's fine. The Court leaves this decision to the judgment of counsel and their clients. (yxp, )

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