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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEREX CORPORATION, doing business as TEREX CONSTRUCTION AMERICAS,	:	No. 704, 2014
Defendant-Appellant,	:	Certification of Question of Law from the United States
v.	:	Court of Appeals for the Third Circuit
SOUTHERN TRACK & PUMP, INC.,	:	C.A. No. 13-4279
Plaintiff-Appellee,	:	

OPENING BRIEF OF DEFENDANT-APPELLANT TEREX CORPORATION, DOING BUSINESS AS TEREX CONSTRUCTION AMERICAS

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Dated: January 22, 2015

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NATURE OF THE PROCEEDING

This proceeding arises out of a declaratory judgment action filed in Delaware Superior Court on July 23, 2008, by Plaintiff-Appellee, Southern Track and Pump, Inc. ("Southern Track"), a Florida corporation with its principal place of business in Florida, against Defendant-Appellant, Terex Corporation, a Delaware corporation with its principal place of business in Connecticut. Southern Track sought a declaration[1] regarding the scope of the repurchase obligations found in Delaware's Equipment Dealer Contracts Statute, 6 Del. C. § 2720 *et seq*. (the "Dealer Statute"). Terex removed this action to the United States District Court for the District of Delaware.

On March 28, 2012, the district court granted partial summary judgment, in relevant part agreeing with Southern Track's argument that § 2723(a) of the Dealer Statute is unequivocal in requiring suppliers to repurchase all inventory, including used and damaged inventory, and not just new, unused, and undamaged inventory. *See S. Track & Pump, Inc. v. Terex Corp.*, 852 F. Supp. 2d 456, 466-67 (D. Del. 2012). To fill the statutory gap created by its construction, the district court added a term to the detailed repurchase-price terms of § 2723(b), requiring the parties to "negotiate" the price to be paid for used or damaged equipment. Regarding

[1] Southern Track also sought damages under the Dealer Statute and for various state tort claims, and Terex counterclaimed for damages for breach of contract and for reimbursement of $435,000 in recourse payments made by Terex under its guaranty of Southern Track's loan.

damages, the district court construed § 2727(a) of the Dealer Statute to require that Terex pay for Southern Track's entire inventory of new and used equipment at new-equipment prices, even though: (i) thirty-three pieces of equipment were used and only seven were new; (ii) Southern Track no longer owned the equipment so Terex could not receive possession or title; (iii) no consideration was given to the actual value of the equipment; and (iv) no offset was given for $2.9 million that Southern Track had already received on account of the repossession and sale of this same equipment, including the $435,000 of recourse that Terex paid in connection with Terex's guaranty of Southern Track's loan, or the $700,000 in loan forgiveness by Southern Track's lender. The court's damage award resulted in a windfall to Southern Track and a penalty to Terex of over $4 million.[2]

On October 29, 2013, Terex appealed to the United States Court of Appeals for the Third Circuit. After briefing and oral argument, the Third Circuit issued an

[2] The windfall calculation is based on the district court's construction that the supplier must repurchase used and damaged equipment at a negotiated fair value. Southern Track was credited with fair value for this equipment, when its lender gave it credit for amounts received from the sale of this equipment. Thus, the "loss" to Southern Track, if any, would be the difference between the fair value offered by Terex for the seven pieces of new equipment (for which Southern Track got credit from the lender) and the current new price of this equipment, which is more than offset by the $435,000 Southern Track received in Terex's recourse payments. Accordingly, the entire damage award of over $4 million is a windfall to Southern Track.

opinion on December 18, 2014, *sua sponte* certifying to this Court the following question of statutory interpretation:[3]

> Does a supplier's repurchase obligation under § 2723(a) of the Dealer Statute extend to used inventory or is it limited to "new, unused, undamaged, and complete inventory" under § 2723(b)?

This Court accepted certification on December 23, 2014.[4] The Third Circuit retains jurisdiction of the appeal pending resolution of this certification.

[3] The opinion of the Third Circuit Court of Appeals regarding its certified question, dated December 18, 2014, is attached as Exhibit A (hereafter,"3d Cir. Op'n"). The other issues before the Third Circuit include the award of damages under § 2727(a), the constitutionality of the district court's award, if upheld, and the district court's decision denying reimbursement for Terex's loan-guaranty payments under the theory of unjust enrichment.

[4] This Court's Order accepting certification is attached as Exhibit B.

SUMMARY OF THE ARGUMENT

1. By its terms, the Dealer Statute provides for the repurchase of only new, unused, and undamaged inventory at the termination of a dealership agreement; it does not require repurchase of used or damaged equipment. This interpretation is supported by the statutory language, the statutory preamble, and the legislative intent to provide a commercially reasonable method to wind up agreements between dealers "engaged in the business of ***retailing new construction … equipment***" and their suppliers.[5]

2. Southern Track and the district court misconstrue the phrase "all inventory … that remains unsold" in § 2723(a) to mean that the Dealer Statute requires a supplier to repurchase used and damaged equipment, despite the absence of any language imposing a duty to repurchase used or damaged equipment and the absence of any provisions governing the pricing or process for doing so. This construction improperly ignores the statutory context to construe the word "all" in isolation, violates the maxim that "the expression of the one is exclusion of the other," and needlessly creates a gap in the Dealer Statute that otherwise would not exist. To fill this gap, the district court improperly adds a "negotiated" repurchase-price term to the statute, which has no basis in the statute or its history, upsets the

[5] Del. H.B. 41 syn., 134th Gen. Assem., 66 Del. Laws ch. 173 (1987) (emphasis added). For the full text, *see infra* note 12.

legislative bargain reflected in the Dealer Statute, and creates a commercially-unworkable resolution to the winding up of a dealership, which stands out for its unworkability compared to other dealer statutes nationwide.[6]

3. The construction advocated by Southern Track leads to an absurd result because it adds to the statute a requirement for negotiation that will never work. As the Third Circuit aptly noted, this reading of the statute is unworkable because no dealer would ever agree to fair-market value for its used equipment, knowing it will receive new-equipment pricing if it runs out the ninety-day clock on negotiations or does not agree on a negotiated price. 3d Cir. Op'n (Ex. A) at 8 ("[I]t is unclear what kind of negotiation the parties can have when, if they fail to reach agreement, the supplier must pay 100% of the current net price of the inventory under § 2727(a).").

4. A proper reading of the statute limits the statutory-repurchase requirements to new, unused, and undamaged inventory. This interpretation is consistent with the statutory language and gives effect to legislative intent; it harmonizes § 2723(a) with the overall scheme of the Dealer Statute; it is consistent with dealer statutes nationwide; and it avoids serious constitutional questions.

[6] Indeed, the Association of Equipment Manufacturers ("AEM"), a national organization of equipment manufacturers, filed an *amicus* brief in the Third Circuit expressing concern about the draconian nature of the district court's interpretation and the problems created for equipment manufacturers by its commercially unreasonable approach to used or damaged equipment.

STATEMENT OF FACTS

I. FACTS SET FORTH IN THIRD CIRCUIT OPINION CERTIFYING QUESTION[7]

In April 2007, Southern Track, an equipment dealership that sells and leases construction equipment in Florida to contractors and construction companies, entered into a Distributorship Agreement (the "Agreement") with Terex, a construction equipment manufacturer and supplier. *See* 3d Cir. Op'n (Ex. A) at 4. Under the Agreement, which was governed by Delaware law, Southern Track purchased from Terex approximately $4 million worth of equipment (about 40 pieces in total) and $50,000 worth of parts.[8] *Id.* Southern Track financed its equipment purchase through an arrangement with GE Commercial Distribution Finance Corporation ("GE") that was secured by all Terex equipment Southern Track purchased using GE funds and partially guaranteed by Terex. *Id.*

From the outset, Southern Track had little success in marketing Terex products. *Id.* When its loan obligations became too onerous, on May 20, 2008, Southern Track terminated the Agreement. *Id.* The purported impetus behind the decision was Southern Track's assumption that it could force Terex to take back

[7] This statement of facts is drawn from the facts provided in the opinion of the Third Circuit certifying the statutory question, 3d Cir. Op'n (Ex. A) at 4-6, which are treated as undisputed for purposes of this certification. *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1021 (Del. 2001).

[8] The parts are not at issue on appeal.

all the inventory it did not want to keep under the Dealer's Statute's automatic-repurchase obligation.[9] *Id.* at 5 (citing 6 Del. C. §§ 2722 and 2723). To that end, Southern Track's termination letter and follow-up correspondence made clear that, while it wanted to keep some of the equipment, Terex had to repurchase everything else. *Id.*

Terex disagreed. *Id.* It contended that a supplier need repurchase only new and unused equipment. *Id.* And most, if not all, of the equipment it sold to Southern Track had entered the latter's rental fleet and thus was no longer new. *Id.* To clarify the extent of its repurchase obligation, Terex asked Southern Track to compile a list of the new and unused inventory in its possession. *Id.* Rather than doing that, Southern Track, in a June 2008 letter, identified seventeen pieces of equipment that it wanted Terex "to come and pick up." *Id.* Despite over one-half of those items having between 175 and 300 hours of operational use, Southern Track insisted that Terex repurchase the equipment at brand-new prices. *Id.*

Terex again pushed back, pointing to Southern Track's continued failure to identify which (if any) of its inventory was in new and unused condition.[10] *Id.*

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[9] Southern Track first asserted that a Florida statute required Terex to repurchase the equipment that Southern Track no longer wanted, and asserted Delaware law only after Terex pointed out that heavy-construction equipment was not covered by the Florida statute.

[10] Through inspection, Terex could ascertain equipment use and damage, but it could not determine through inspection which equipment had entered Southern Track's rental fleet. Although equipment with some usage might, under certain circumstances, still qualify as new, equipment that has been put into a rental fleet cannot be sold as new under any circumstances

After more back and forth, Terex offered to repurchase nine of the seventeen pieces of equipment listed in Southern Track's June 2008 letter. *Id.* As it turns out, only seven of the seventeen pieces of equipment were new, and all seven had been included in Terex's repurchase offer. *Id.* at 5-6 (citing *S. Track & Pump*, 852 F. Supp. 2d at 466–67.) Because Southern Track would not advise Terex which equipment, if any, was new, Terex offered market value, but reserved the right to take a deduction for any parts or repair services "required to return any of the repurchased equipment to good running and operating condition." *Id.* at 6.

The parties continued to negotiate, and GE indicated that it was going to exercise its right to repossess the equipment if Southern Track did not make its past-due payments. *Id.* Southern Track filed a declaratory judgment action in the Delaware Superior Court on July 23, 2008. *Id.* One day later—and one month prior to the expiration of the Dealer Statute's ninety-day repurchase period—GE took possession of all of the equipment Southern Track had purchased from Terex. *Id.* GE later sold at auction most of that equipment.[11] *Id.*

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irrespective of the condition of the equipment. Terex did not learn until litigation had begun and it engaged in discovery which of Southern Track's equipment was, in fact, new.

[11] GE credited Southern Track with the amounts it received from the sale of all of this equipment, either at auction or through private sale. Southern Track itself repurchased some of this equipment from GE before auction. GE also credited Southern Track with the $435,000 paid by Terex under its guaranty of Southern Track's loan. In total, GE credited Southern Track with approximately $2.9 million from the sale and Terex's guaranty. In addition, GE agreed to waive approximately $700,000 of Southern Track's indebtedness relating to its purchase of the equipment.

II. THE DELAWARE DEALER STATUTE

Enacted in 1987, the Dealer Statute is a comprehensive statutory scheme designed to provide a commercially reasonable method to wind up agreements between dealers "engaged in the business of ***retailing new construction*** … ***equipment***" and their suppliers.[12] The statute protects retail dealers of new construction equipment by requiring that, at termination of a dealership agreement, the supplier repurchase the dealer's remaining unsold retail inventory.

Section 2722(a) imposes the statutory-repurchase obligation: "Whenever a contract agreement between a dealer and a supplier is terminated by either party, the supplier shall repurchase the dealer's inventory ***as provided in this subchapter*** unless the dealer chooses to keep the inventory."[13] 6 Del. C. § 2722(a) (emphasis

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[12] Del. H.B. 41 syn., 134th Gen. Assem., 66 Del. Laws ch. 173 (1987) (emphasis added):

> "This is an Act relating to contract agreements between dealers engaged in the business of ***retailing new construction***, farm, industrial, and outdoor power ***equipment;*** and wholesalers, manufacturers, or distributors of their products: To require repurchase of inventory from dealers upon termination of a contract agreement: to provide procedures to establish limitations, rights, and civil liabilities relative to repurchase: To extend the right to require repurchase option to the heirs of dealers: and to provide prompt resolution of warranty claims upon termination."

[13] The full text of § 2722 provides:

> **§ 2722. Supplier's requirement to repurchase**
> (a) Whenever a contract agreement between a dealer and a supplier is terminated by either party, the supplier shall repurchase the dealer's inventory ***as provided in this subchapter*** unless the dealer chooses to keep the inventory.
> (b) If the dealer principal who is a party to a contract agreement dies or becomes incompetent, the supplier shall, at the option of the personal representative or guardian, repurchase the inventory as if the agreement had been terminated. The personal

added). In § 2723, the General Assembly expressly provides the terms of repurchase mandated by § 2722, requiring that the supplier repurchase "all inventory previously purchased from the supplier ***that remains unsold*** at termination," and: (i) all inventory must be repurchased within 90 days of termination; (ii) the supplier must pay 100% of net cost for "all ***new, unused, undamaged and complete*** inventory except repair parts,"[14] and 85% of current net price for "***all new, unused and undamaged*** repair parts;" (iii) the dealer ***must return*** all inventory to the supplier after both parties inspect and certify the inventory as acceptable; and (iv) the supplier must pay the full statutory-repurchase price within 60 days after the supplier receives the inventory.[15] *Id*. § 2723

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representative or guardian has 1 year from the date of the death or incompetency of the dealer principal to exercise the option under this subchapter.

(c) This subchapter does not apply to a supplier that does not require the dealer to order and maintain an inventory in excess of $25,000 at current net price from the supplier.

6 Del. C. § 2722 (emphasis added).

[14] "Inventory except repair parts" is collectively referred to as "equipment."

[15] The full text of § 2723 provides:

§ 2723. Repurchase terms

(a) The supplier shall repurchase from the dealer within 90 days after termination of the contract agreement ***all inventory*** *previously purchased from the supplier* ***that remains unsold on the date of termination*** of the agreement.

(b) The supplier shall pay the dealer:

(1) One hundred percent of the net cost of ***all new, unused, undamaged and complete*** *inventory except repair parts*, less a reasonable allowance for deterioration attributable to weather conditions at the dealer's location.

(2) Eighty-five percent of the current net price of ***all new, unused and undamaged repair parts*** that are currently listed in the supplier's price book. …

(c) The inventory shall be returned FOB to the dealership. The dealer and the supplier may each furnish a representative to inspect all inventory and certify acceptability before being returned.

(emphasis added). Section 2723 is silent regarding inventory that is used or damaged.

In § 2724, the General Assembly provides exceptions to the repurchase requirements. These exceptions relieve the supplier from repurchasing certain equipment that otherwise would qualify as "new, unused, undamaged and complete," as well as certain repair parts that otherwise would qualify as "new, unused, and undamaged."[16] For example, the supplier is not required to repurchase inventory that is obsolete or dated (limited-storage life repair parts and equipment held longer than 36 months), is no longer a complete package of multiple-packaged repair parts, or is not resalable as a new repair part without repackaging or reconditioning.[17]

> (d) The supplier shall pay the full repurchase amount to the dealer not later than 60 days after receipt of the inventory.

6 Del. C. § 2723 (emphasis added).

[16] In § 2724, like § 2723(b), the General Assembly treats repair parts differently from equipment. For example, repair parts can easily become obsolete or otherwise not resalable as new much more quickly than equipment, even when parts remain on the shelf unsold and are not used in the dealer's rental fleet. Accordingly, § 2724 provides an exception for "tractors, implements, attachments or equipment" purchased more than 36 months before termination, and provides exceptions for repair parts with "a limited storage life or otherwise subject to deterioration," or which are "not resalable as a new part without repackaging or reconditioning." 6 Del. C. §§ 2724(6), 2724(1), 2724(3). Similarly, repair parts, but not other categories of inventory, can be delivered in single packages containing multiple repair parts that can be sold individually. Section 2724(2) recognizes as much, providing that, once a parts package has been opened, the supplier need not repurchase any of the parts contained therein, even though the dealer can still sell them individually as new.

[17] The full text of § 2724 provides:

> **§ 2724. Exceptions to repurchase requirements**
> This subchapter does not require repurchase from a dealer of:

In § 2727, the General Assembly provides civil remedies for the failure to repurchase. Where "a supplier fails or refuses to repurchase any inventory covered under this subchapter within the time periods established," § 2727(a) provides a compensatory formula at new-inventory prices that mirrors the repurchase terms for new inventory found in § 2723(b). *Id*. § 2727(a). Section 2727(b) further provides a civil action for injunctive relief and damages to "any person who suffers monetary loss due to a violation of this subchapter."[18] *Id.* § 2727(b). The Dealer Statute is completely silent with regard to used or damaged equipment.

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(1) A repair part with a limited storage life or otherwise subject to deterioration, such as gaskets or batteries.
(2) Multiple packaged repair parts when the package has been broken.
(3) A repair part that, because of its condition, is not resalable as a new part without repackaging or reconditioning.
(4) Any inventory that the dealer chooses to keep.
(5) Any inventory that was acquired by the dealer from a source other than the supplier.
(6) Any tractors, implements, attachments or equipment that the dealer purchased from the supplier more than 36 months before date of the notice of termination.

6 Del. C. § 2724.

[18] Section 2727 provides in relevant part:

§ 2727. Civil remedy for failure to repurchase

(a) If a supplier fails or refuses to repurchase any inventory covered under this subchapter within the time periods established, the supplier is civilly liable for 100% of the "current net price" of the inventory, plus the amount the dealer paid for freight costs from the supplier's location to the dealer's location, plus reasonable cost of assembly performed by the dealer, and plus the dealer's reasonable attorney's fees and court costs, and interest on the "current net price" of the inventory computed at the legal rate of interest, but not to exceed 18% annual percentage rate, from the ninety-first day after termination of the contract agreement.

(b) Notwithstanding any agreement to the contrary, and in addition to any other legal remedies available, any person who suffers monetary loss due to a violation of this subchapter or because of a refusal to accede to a proposal for an arrangement that, if consummated, is in violation of this subchapter may bring a civil action to enjoin further violations and to recover damages sustained together with the costs of the suit, including a reasonable attorney's fee.

ARGUMENT

I. QUESTION PRESENTED

Does a supplier's repurchase obligation under the Dealer Statute extend to used inventory or is it limited to "new, unused, undamaged, and complete" inventory? *See* 3d Cir. Op'n (Ex. A) at 9.

II. SCOPE OF REVIEW

The question presented arises as a question of law certified to this Court *sua sponte* by the Third Circuit. This Court reviews such a question of law *de novo*. *See Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 661 (Del. 2014); *Lambrecht v. O'Neal*, 3 A.3d 277, 281 (Del. 2010); *Duncan*, 775 A.2d at 1021 ("Questions certified for resolution by the Court under Supreme Court Rule 41 are determined as a matter of law on the undisputed facts submitted by the certifying court in its Certificate of Questions of Law.").

III. MERITS OF THE ARGUMENT

A. The Dealer Statute Does Not Require Repurchase of Used or Damaged Inventory.

The principles of statutory interpretation under Delaware law are straightforward. First and foremost, when interpreting a statute, the Court's goal is to "'determine and give effect to legislative intent.'" *Delaware Bd. of Nursing v.*

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6 Del. C. § 2727.

Gillespie, 41 A.3d 423, 427 (Del. 2012) (citations omitted). The "starting point in statutory interpretation is the language of the statute itself." *Fuller v. State*, 2014 WL 5463324, at *4 (Del. Oct. 21, 2014) (citing *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.")).

In examining the language of a statute, the meaning of words should be ascertained in the context of the statute under consideration.[19] *Id.* (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ("Words, like syllables, acquire meaning not in isolation but within their context.")); *Nationwide Ins. Co. v. Graham*, 451 A.2d 832, 834 (Del. 1982) (Any interpretation of the statute must give "full effect to all of the pertinent statutory language and produce the most consistent and harmonious result under the wording of the section."). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the

[19] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108 & n.419 (2001) (modern textualists, such as Judge Easterbrook and Justice Scalia, acknowledge that language has meaning only in context) (citing *Deal v. U.S.*, 508 U.S. 129, 132 (1993) (Scalia, J.) (invoking the "fundamental principle of statutory construction (and, indeed of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used") and Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994) ("Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.")).

statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988), *quoted in Fuller*, 2014 WL 5463324, at *4 n.31.

1. The Language of the Dealer Statute Supports This Interpretation

The Dealer Statute, in plain language, requires that a supplier "repurchase *inventory as provided in this subchapter*," 6 Del. C. § 2722(a) (emphasis added). The statute then provides for the repurchase of only new, unused, and undamaged inventory at the termination of a dealership; it does not address, much less require, repurchase of used or damaged equipment. Thus, the inclusion of repurchase terms and a compensatory remedy formula for only new, unused, and undamaged equipment and the absence of *any* provision for (or even reference to) the repurchase of used or damaged equipment in the Dealer Statute, mean that the statute simply does not require the repurchase of used or damaged equipment. This interpretation is supported by "the maxim of statutory interpretation 'expression of the one is exclusion of the other' (in Latin, *expressio unius est exclusio alterius*)," which honors the legislature's decision to omit a term from a comprehensive list. *Fuller*, 2014 WL 5463324, at *5 (citations omitted).

Moreover, the language of § 2723(a) itself excludes equipment that has been put into a dealer's rental fleet and thus is no longer new, by providing that "all inventory previously purchased from the supplier **that remains unsold** on the date of termination" should be purchased within ninety days after termination. *Id*. § 2723(a) (emphasis added). The words "all inventory" in this subsection are modified by the phrase "that remains unsold." Once equipment is put into a rental fleet, it can no longer be held for sale as "new."[20] Thus, inventory leased out to third parties is moved from retail inventory to the rental fleet, and as such, it does not "remain unsold" at termination.

The word "all" in § 2723(a) should not be read in isolation to require the repurchase of used or damaged equipment, where the General Assembly has provided no terms for the repurchase of such equipment.[21] Instead, within the

[20] For tax or accounting purposes, rental-fleet equipment is treated as an asset, and it is not treated as unsold inventory. *See, e.g.*, 26 U.S.C.A. §§ 167(c)(2) (calculation for depreciation deductions of leased property), 1221 (defining capital assets and excluding depreciable property and inventory), 1231 (concerning depreciable property used in trade or business, excluding from capital-gains treatment, inventory and property held primarily for sale to customers); *Andrew Crispo Gallery, Inc. v. C.I.R.*, 16 F.3d 1336, 1345 (2d Cir. 1994) ("Property is inventory if it is 'held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.'") (citations omitted); *Grant Oil Tool Co. v. United States*, 381 F.2d 389, 397 (Ct. Cl. 1967) ("'inventory' … must be that from which the taxpayer gets his normal sales profits."); FASB ASC 840-20-35-3 ("property subject to an operating lease shall be depreciated"), Master Glossary ("Inventory") (excluding "long-term assets subject to depreciation accounting"), https://asc.fasb.org/home.

[21] Under the statutory scheme, the obligation to repurchase inventory is set forth not in § 2723(a) with the phrase "all inventory," but in § 2722, which requires suppliers to "repurchase the dealer's inventory *as provided in this subchapter* unless the dealer chooses to keep the inventory." 6 Del. C. § 2722 (emphasis added). Section 2723 then sets forth the statutory

context of § 2723, the word "all" means that each term provided by § 2723(a) applies to all inventory that remains unsold at termination.[22] Thus, all such inventory, whether equipment or repair parts: (i) is subject to the ninety-day repurchase period; (ii) must have been previously purchased from supplier; and (iii) must remain unsold.

This interpretation is consistent with § 2723 in its entirety. Section 2723(b) distinguishes among the different types of products included in the statutory definition of "inventory" and provides different repurchase-price terms for new repair parts than it does for the other categories of inventory covered by the statute. For example, equipment must be "new, unused, undamaged and complete" and must be repurchased at one-hundred percent of its "net cost,"[23] less a reasonable allowance for deterioration due to weather conditions. *Id.* § 2723(b)(1). In

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repurchase terms, which together provide the scope of the repurchase obligation of § 2722. This understanding is confirmed by the titles or headings used by the General Assembly for each section. *Compare id.* § 2722 (titled "Supplier's requirement to repurchase") *with* § 2723 ("Repurchase terms"). *See* 2A N. Singer & S. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47:3 (7th ed. 2014) (title or heading can illuminate statutory meaning); *cf. In re Mary R. Latimer Trust*, 78 A.3d 875, 881 (Del. Ch. 2013) (considering title of subchapter to characterize cemetery trust as noncharitable).

[22] The word "inventory" is defined in the statute to include several types of products: "tractors, implements, attachments, equipment and repair parts that the dealer purchased from the supplier." 6 Del. C. § 2720(5).

[23] "Net cost" is defined in the statute to mean "the price the dealer paid the supplier for the inventory, less all applicable discounts allowed, plus the amount the dealer paid for freight costs from the supplier's location to the dealer's location, plus reasonable cost of assembly performed by the dealer." *Id.* § 2720(6).

contrast, repair parts must not only be "new, unused and undamaged," they must also be "currently listed in the supplier's price book" and repurchased at eighty-five percent of the "current net price."[24] *Id*. § 2723(b)(2).

Subsections 2723(c) and (d) then revert to the pattern of subsection 2723(a), providing the same repurchase terms for all types of inventory, whether equipment or repair parts. For example, all such inventory: (i) is subject to the right of both the dealer and supplier to inspect and certify as acceptable before return to the supplier, FOB to the dealership; and (ii) must be paid for in full within sixty days of its receipt by the supplier. The fact that the General Assembly interchangeably used the words "all" and "the" to indicate that it was not differentiating among types of inventory when imposing some statutory repurchase terms means that the word "all" should **not** be given an isolated and expansive reading that ignores the limitations found in the other statutory-repurchase terms of § 2723.[25]

[24] "Current net price" is defined in the statute to mean "the price listed in the supplier's price list in effect at the time the contract agreement is terminated, less any applicable discount allowed." *Id*. § 2720(3).

[25] Indeed, within § 2723(c), the General Assembly interchangeably used the words "the" and "all" to set forth the inspection-and-return repurchase terms of that subsection. Moreover, construing the phrase "all inventory … that remains unsold" to mean all types of inventory expressly covered by the statute is the only meaning that makes sense in light of the supplier's right under subsection 2723(c) to inspect inventory and certify it as "acceptable" before its return. Certification as "acceptable" under the statute makes sense only if the statutory-repurchase obligation is limited to the terms provided in § 2723(a) & (b), where only unsold, unused, and undamaged inventory must be repurchased. There is simply no "unacceptable" inventory under the broader construction of "all inventory" advocated by Southern Track.

The absence of any repurchase terms in § 2723 for used or damaged equipment also shows that the General Assembly did not mean for the word "all" in subsection (a) to extend statutory coverage to such equipment. This Court recognizes that omissions in a statute are intentional and should be respected. *See e.g.*, *Fuller*, 2014 WL 5463324, at *5; *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007). Recently in *Fuller*, the Court applied the maxim "expression of the one is exclusion of the other" to "honor the express legislative decision to omit specific crimes from a comprehensive list." *Fuller*, 2014 WL 5463324, at *5. Under this maxim, the Court should respect the express legislative decision to omit used, damaged, and incomplete equipment from the repurchase terms of § 2723.[26] The specific inclusion of terms relating to both equipment and repair parts that are new, unused, and undamaged, and the complete omission of any similar terms for used or damaged equipment, means the Dealer Statute was never meant to apply to used or damaged equipment.

The contrary construction advocated by Southern Track unreasonably assumes that the General Assembly carefully crafted detailed and different repurchase-price terms for two types of new, unused, and undamaged inventory, yet simply forgot to mention or provide any term to cover used or damaged

[26] *See also* 3 N. Singer & S. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 57:10 (7th ed. 2014).

inventory, which could, as here, encompass much more inventory. Moreover, to give the phrase "all inventory" the expansive meaning argued by Southern Track requires the Court to impermissibly amend the Dealer Statute to add repurchase-price terms for used or damaged equipment. The district court did so by adding the requirement that the supplier and dealer "negotiate" the price to be paid for used or damaged equipment – and providing the dealer an incentive to not reach an agreement during the ninety-day repurchase period as 100% of the current net value is the award when no agreement is reached. As discussed *infra* pp. 23-25, this judicially created gap-filler has no basis in the statute or its history, upsets the legislative bargain reflected in the Dealer Statute, and creates a commercially-unworkable resolution to the winding up of a dealership.

2. This Interpretation is Consistent with Legislative Intent.

Interpreting the Dealer Statute to require the repurchase of only new, unused and undamaged equipment gives effect to the General Assembly's intent. The purpose of the statute is to provide a commercially reasonable method to wind up agreements between dealers "engaged in the business of **retailing *new* construction … equipment**" and their suppliers.[27] This intention is repeated in the official synopsis of the initial bill, and in each succeeding substitute bill leading

[27] Del. H.B. 41 syn., 134th Gen. Assem., 66 Del. Laws ch. 173 (1987) (emphasis added).

up to the statute's passage in 1987. Limiting the repurchase requirements to new, unused, and undamaged inventory that a retail dealer has not yet sold or used in its rental business serves precisely this legislative intent. *See State v. Lillard*, 531 A.2d 613, 617 (Del. 1987) ("Legislative history and preliminary statements, such as the preamble, can often aid in statutory construction.") (citing 2A N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.04 (4th ed. 1984)).[28]

The definition of "Dealer" in § 2720(4) further establishes that the Dealer Statute is meant to apply only to retail sellers of new, unused and undamaged equipment and parts. Under § 2720(4), "Dealer" means "a person, firm or corporation engaged in the business of **selling, at retail**, construction … equipment and who maintains . . . [an] inventory of **new** equipment and repair parts …." (emphasis added). Thus, it is the retail sale and maintenance of new equipment and parts in inventory that qualifies a business as a "Dealer" under the statute.

By requiring the repurchase of only new, unused, undamaged, and complete equipment, the Dealer Statute addresses the termination of a dealership agreement in a commercially reasonable and balanced way, taking into account the interests of suppliers as well as dealers. It leaves inventory in the hands of the party in the better position to efficiently use or dispose of it after a dealership agreement ends.

[28] *See also* 1A N. Singer & S. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 20:3 (7th ed. 2014) (preamble or purpose clause should be considered in determining meaning of statute, as long as it supports meaning that dispositive statutory text can bear).

The manufacturer or supplier is generally in a better position to resell new, unused, undamaged, and complete equipment through its distribution channels. In contrast, heavy-construction equipment that has been used, including equipment used in a dealer's rental fleet, cannot be resold as new through the supplier's distribution channels, and is best left with the dealer, who is better suited to obtain value from that equipment by continuing to use it in its rental fleet or by selling it used, perhaps to some of its rental customers.[29]

This interpretation also ensures that the statutory scheme is compensatory, keeping the statutory-damages formula provided in § 2727(a) parallel to the repurchase-price terms of § 2723(b), and avoiding the penalty to the supplier and windfall to the dealer resulting from the construction advocated by Southern Track. This is especially important because the Dealer Statute is not predicated on any concept of fault by the supplier, and it imposes repurchase obligations on the supplier when the dealership is terminated for any reason, even by the dealer, as was the case here.

[29] The same commercially reasonable approach underlies the exemptions of § 2724. The supplier is in no better position than the dealer to market unsold equipment or repair parts that have been held in inventory too long to be resalable as new. The General Assembly did not want to unfairly burden the supplier with the repurchase of such equipment or with the obligation to repurchase if it had to undergo the expense of repackaging or reconditioning new parts before it could resell them as new.

B. Judicially Extending the Dealer Statute to Used and Damaged Equipment is Unworkable and Commercially Unreasonable.

By interpreting the Dealer Statute to require the repurchase of used or damaged equipment, Southern Track and the district court not only misconstrue the language of the statute and the General Assembly's intent, they also improperly add terms to the statute, thereby creating an unworkable and commercially unreasonable statutory scheme.[30] Finding no mention of used or damaged equipment in the Dealer Statute, and no price terms for its repurchase, the district court created the requirement that a supplier repurchase such equipment "at a price subject to negotiation by the parties instead of the prices set forth by statute." *S. Track & Pump*, 852 F. Supp. 2d at 466. Adding this new repurchase term to the Dealer Statute violates accepted methods of statutory interpretation and constitutes judicial legislation.[31] There is no textual support for adding any repurchase-price

[30] To support this interpretation, Southern Track points to the lack of a specific exception in § 2724 for used or damaged equipment. This analysis reflects a fundamental misunderstanding of the exceptions provided in § 2724. As noted *supra* p. 11, these exceptions describe inventory that otherwise would be subject to repurchase as unsold, new, unused, undamaged and complete. As such, the absence of a specific exception for used or damaged equipment does not reflect an intention to include such equipment in the repurchase obligations. Instead, it supports Terex's contention that the entire statutory scheme provides for the repurchase of only unsold equipment that is new, unused, and undamaged: No exemption discusses used or damaged equipment because the repurchase obligation simply does not extend to such equipment in the first place.

[31] Neither the textualist approach to statutory interpretation, nor the approach favored by intentionalists or purposivists, supports the construction advocated by Southern Track, which lacks support in the language or context of the statute, impermissibly adds price terms where the General Assembly was silent, and creates a commercially unreasonable scheme that lacks support in the purpose or intention of the statute. *See, e.g.*, Manning, *supra*; Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467 (2014).

term for used or damaged equipment, much less for including the amorphous and unworkable "negotiated price" term to the statute. Section 2723(b) sets forth detailed repurchase-price terms for equipment and repair parts that are new, unused, and undamaged. These price terms are formulaic and easy to apply once the inventory is certified as acceptable and returned to the supplier, and the formulas parallel the statutory-damages formula of § 2727(a). In contrast, the proposed "negotiated price" term is neither. Nor can support for adding this term be found in the history or purpose of the statute, the overall statutory scheme, or similar statutes around the country.

In essence, Southern Track advocates for a judicially created statute that requires suppliers to repurchase all equipment that remains on hand when a dealership agreement terminates, regardless of its prior use, condition, or value. It then imposes a statutory negotiation that is a negotiation in name only and is commercially unreasonable – why would a dealer agree to a fair value for used and damaged equipment when the statute automatically awards new-inventory prices if the ninety-day clock runs out or negotiations fail? The Third Circuit recognized the absurdity of this "negotiated-price" repurchase term, where one side in the negotiation not only has no incentive to reach agreement, but benefits by not doing so. 3d Cir. Op'n (Ex. A) at 8 ("it is unclear what kind of negotiation the parties can have when, if they fail to reach agreement, the supplier must pay 100% of the

current net price of the inventory under § 2727(a)"). Almost every state has a dealer statute intended to protect dealers holding retail inventory when a dealership terminates, but none has adopted a course even close to the unworkable solution created by the district court. *See* discussion *infra* pp. 28-32.

This proposal upsets the legislative bargain that was struck when the Dealer Statute was passed. Both suppliers and dealers have legitimate interests at stake in dealer statutes, and the repurchase terms in the Dealer Statute reflect the General Assembly's balance of these interests. There is no mention of used or damaged equipment, and the General Assembly has provided no repurchase-price term for such equipment. Southern Track's strained construction of the phrase "all inventory … that remains unsold" creates a statutory gap that does not exist in the Dealer Statute, and the Court should not invent terms to fill it.[32]

C. Canons of Statutory Construction Support Limiting Repurchase Obligations to New, Unused, and Undamaged Equipment.

The meaning of "all inventory … that remains unsold" advocated by Southern Track is unsupported by statutory language, judicially creates an entirely new repurchase obligation, and does so in a manner that is commercially unreasonable, if not outright absurd. Delaware courts look to the canons of

[32] For a thorough discussion of why judges should not fill a perceived statutory gap with what they believe desirable, see A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 8 (2012) (discussing the "omitted-case" canon).

statutory construction to resolve any uncertainty about the correct interpretation of statutory language.[33] Here, the only interpretation that comports with these canons of statutory construction limits the statutory-repurchase requirements to new, unused, and undamaged inventory. This interpretation harmonizes § 2723(a) with the overall scheme of the Dealer Statute, is consistent with dealer statutes nationwide, and avoids serious questions about the statute's constitutionality.

1. *Requiring Repurchase of Only New, Unused, and Undamaged Equipment Harmonizes the Statutory Scheme.*

Construing the Dealer Statute to require the repurchase of only new, unused, undamaged, and complete equipment is consistent with the canon of statutory construction that admonishes courts to "read each section [of the statute] in light of all the others to produce a harmonious whole." *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 496 (Del. 2012) (quoting *ML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)). This limited interpretation gives meaning to § 2722, which imposes the statutory obligation to repurchase inventory "as provided in this subchapter," as well as to all of § 2723, which provides the statutory-repurchase terms, limitations,

[33] A statute is ambiguous where the statutory language "is reasonably susceptible to different conclusions or interpretations" or "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." *Delaware Bd. of Nursing*, 41 A.3d 423 at 427 (internal quotation omitted). Where statutory language is reasonably susceptible of more than one interpretation, it should be construed in accordance with the canons of statutory construction, and "interpreted 'in a way that will promote its apparent purpose and harmonize it' with the statutory scheme." *Id.* (citation omitted).

and requirements. *See supra* pp. 15-20. The contrary construction advocated by Southern Track renders § 2722 mere surplusage, *i.e.*, the obligation imposed by § 2722 on suppliers to repurchase inventory "as provided in this subchapter" is duplicated and expanded by the obligation Southern Track improperly ascribes to the word "all" in subsection 2723(a) to repurchase equipment for which the General Assembly provided no repurchase-price terms. *See supra* note 21.

The limited interpretation also harmonizes the repurchase terms required by § 2723 with the statutory remedy provided by § 2727. Section 2727(a) provides a formula for statutory damages based on new-inventory prices. When the Dealer Statute is construed to require the repurchase of only new, unused, and undamaged equipment, the statutory remedy is compensatory, approximating what the dealer would have received had the supplier purchased the new inventory under § 2723(b) during the ninety-day statutory period. In other words, the net-price damages formula of § 2727(a) parallels the net-cost obligation of § 2723(b) for new equipment, providing the dealer precisely what the supplier should have paid for new equipment, adjusted to prevent either a windfall or penalty based on equipment price changes between the dealer's purchase and termination.[34] In

[34] The definitions for the terms "net cost" and "current net price" are parallel. Each term nets out applicable dealer discounts, and both the definition of net cost used in § 2723(b)(1), and that of current net price used in the formula of § 2727(a), credit the dealer with the amounts paid for freight costs and reasonable costs of assembly. 6 Del. C. §§ 2720(3), 2720(6), 2727(a). The only difference between the net-cost formula of § 2723(b)(1) and the net-price formula of § 2727(a) is that the former uses the price of covered equipment at the time of purchase and the

contrast, the district court's broader construction works a disharmony by adding to § 2723(b) repurchase terms for used or damaged equipment for which there is no parallel compensatory formula in § 2727(a). This disharmony also renders unworkable the judicially engrafted term of "a negotiated price" for used or damaged equipment, since a dealer's reward for failed negotiations is a windfall to the dealer.

2. *Requiring Repurchase of Only New, Unused, and Undamaged Equipment is Consistent with the Policy Underlying Dealer Statutes Nationwide.*

Restricting the repurchase obligations to new, unused, and undamaged equipment is consistent with the general policy and purpose "animating other similar statutes from other states." *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1182 (Del. Ch.) *aff'd*, 889 A.2d 283 (Del. 2005); *see also Hudson Farms, Inc. v. McGrellis*, 620 A.2d 215, 221 (Del. 1993) (construing ambiguous state statute based on legislative intent discerned, in part, by reference to interpretation of similar statutes in other jurisdictions and recognition of the purposes underlying the adoption of such statutes); *Dooley v. Rhodes*, 135 A.2d 114, 116 (Del. 1957) ("[A statute] must be read in the light of its legislative history and of the legislative policy evidenced by other related statutes."). Almost every state has a dealer

latter uses the price of the same equipment at the time of termination. Thus, the repurchase price under each provision will be the same unless the supplier has changed prices on the same make/model of equipment between the time of purchase and termination.

statute that requires a supplier to repurchase certain categories of new equipment when a dealership agreement is terminated.[35] The district court's construction of the Delaware statute to require the repurchase of used and damaged equipment stands alone as an outlier, inconsistent with the general policy underlying these statutes.

Like the Dealer Statute, most other state statutes impose repurchase-price terms for different categories of new, unused, and undamaged inventory, such as equipment and repair parts, but they generally require that all inventory subject to repurchase be new, unused, and undamaged. *See supra* note 35. Several statutes have language and structure that parallel the Dealer Statute, first requiring a supplier to repurchase inventory "as provided" in the statute, and then requiring the supplier, within ninety days, to repurchase or pay for all inventory "previously

[35] Terex has identified the following statutes that require the repurchase of at least some kinds of equipment when a dealership contract terminates, regardless of the reason for termination. *See* Ala. Code § 8-21A-6; Alaska Stat. Ann. § 45.45.710; Ariz. Rev. Stat. Ann. § 44-6705; Cal. Bus. & Prof. Code § 22905; Colo. Rev. Stat. Ann. § 35-38-106; Conn. Gen. Stat. Ann. § 42-347; 6 Del. C. § 2722; Fla. Stat. Ann. § 686.606; Ga. Code Ann. § 13-8-22; Idaho Code Ann. § 28-23-101; 815 ILCS 715/3; Ind. Code Ann. § 15-12-3-10; Iowa Code Ann. § 322F.3; Kan. Stat. Ann. § 16-1002; Ky. Rev. Stat. Ann. § 365.805; La. Rev. Stat. Ann. § 51:484; Me. Rev. Stat. tit. 10, § 1288; Md. Code Ann., Com. Law § 19-201; Mass. Gen. Laws Ann. ch. 93G, § 3; Mich. Comp. Laws Ann. § 445.1453; Minn. Stat. Ann. § 325E.0681; Miss. Code. Ann. § 75-77-3; Mo. Ann. Stat. § 407.855; Mont. Code Ann. § 30-11-702; Neb. Rev. Stat. § 87-707; Nev. Rev. Stat. Ann. § 597.1153; N.Y. Gen. Bus. Law § 696-f (McKinney); N.C. Gen. Stat. Ann. § 66-183; N.D. Cent. Code Ann. § 51-07-01; Ohio Rev. Code Ann. § 1353.02; Okla. Stat. Ann. tit. 15, § 246; 73 Pa. Stat. Ann. § 205-3; R.I. Gen. Laws Ann. § 6-46-4; S.C. Code Ann. § 39-59-20; Tenn. Code Ann. § 47-25-1305; Tex. Bus. & Com. Code Ann. § 57.353; Utah Code Ann. § 13-14a-2; Vt. Stat. Ann. tit. 9, § 4073; Va. Code Ann. § 59.1-352.4; Wash. Rev. Code Ann. § 19.98.010; W. Va. Code Ann. § 47-11F-4; Wyo. Stat. Ann. § 40-20-120.

purchased from the supplier," followed by payment terms for different categories of new, unused, and undamaged inventory.[36] Other statutes effectuate the same result by first imposing the repurchase-price terms or by expressly exempting inventory that is not new from the repurchase obligations.

Despite minor differences in statutory language, dealer statutes across the country reflect a common purpose and policy. They address the termination of a dealership agreement in a commercially reasonable and balanced way, taking into account the interests of suppliers as well as dealers, by leaving inventory in the hands of the party in the better position to efficiently use or dispose of it after the dealership agreement ends. *See supra* pp. 21-22. For these reasons, state dealer statutes do not generally extend repurchase obligations beyond new, unused, undamaged, and complete equipment.[37] If they do extend beyond new, unused,

[36] *See, e.g.*, Conn. Gen. Stat. Ann. § 42-347; Ky. Rev. Stat. Ann. § 365.805; Me. Rev. Stat. tit. 10, § 1288; Mass. Gen. Laws Ann. ch. 93G, § 3; R.I. Gen. Laws Ann. § 6-46-4; Vt. Stat. Ann. tit. 9, § 4073; W. Va. Code Ann. § 47-11F-4. The Third Circuit recognized that West Virginia uses the same language as Delaware. 3d Cir. Op'n (Ex. A) at 7. The Connecticut, Maine, Massachusetts, and Rhode Island statutes provide the same framework, but omit the requirement that inventory "remain unsold" and include a price term requiring the repurchase of supplier-financed rental-fleet inventory at the "average 'as is' value shown in current industry guides."

[37] Approximately one-third of dealer statutes extend repurchase obligations to demo equipment, but they do so in a limited and fairly detailed manner, consistent with the general purpose animating the dealer statutes. *See, e.g.*, Iowa Code Ann. § 322F.3(1)(f); Ky. Rev. Stat. Ann. § 365.810(1)(b); La. Rev. Stat. Ann. § 51:484; Md. Code Ann., Com. Law § 19-202; Mich. Comp. Laws Ann. § 445.1453; Miss. Code. Ann. § 75-77-5; N.C. Gen. Stat. Ann. § 66-183; Okla. Stat. Ann. tit. 15, § 246; Tenn. Code Ann. § 47-25-1305; Tex. Bus. & Com. Code Ann. § 57.353; Va. Code Ann. § 59.1-352.4; Nev. Rev. Stat. Ann. § 597.1153; Wyo. Stat. Ann. § 40-20-120. These statutes generally require that the demo equipment be new, in new condition, undamaged, or otherwise fit for resale to another dealer after repurchase. For example, a few statutes require

undamaged, and complete equipment, the statutes do so expressly in a limited manner, generally requiring that the equipment be in new, resalable condition, such as demo equipment. *See supra* notes 36 & 37.

This legislative bargain has led other courts to construe the statutory-repurchase requirements strictly against the dealer:

> Expanding the remedies available to the retailer upon the wholesaler's breach of its statutory obligation would upset that balance. The clear purpose of the repurchase statute is to facilitate the liquidation of farm equipment and repair parts upon termination of a franchise. Because the wholesaler has required the retailer to maintain a stock of its inventory, it is fair to require the wholesaler to repurchase its merchandise upon termination of the franchise. This disadvantage to the wholesaler is offset by the wholesaler's regaining title to the merchandise upon payment. If retailers were allowed to "mitigate damages" in the manner that plaintiff proposes, then wholesalers would be subject to the obligation of the repurchase statute without assurance of receiving the corresponding benefit.

Town & Country Equip., Inc. v. Massey-Ferguson, Inc., 808 F. Supp. 779, 781 (D. Kan. 1992). Of course, the parties are always free to negotiate a different arrangement at termination, which is what Southern Track asked from Terex

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that demos with less than fifty hours be deemed "new," while undamaged demos with more than fifty hours may be covered at their depreciated value, as long as the demos are in new and resalable condition. *E.g.*, Nev. Rev. Stat. Ann. § 597.1153; Wyo. Stat. Ann. § 40-20-120. Other statutes may treat demos with more hours as new, as long as they have been used as a selling method, are undamaged and complete, and include an allowance for usage as a demo, for refurbishing, and/or for the price another dealer would pay. *E.g.*, La. Rev. Stat. Ann. § 51:484; Mich. Comp. Laws Ann. § 445.1453; Okla. Stat. Ann. tit. 15, § 246; Tex. Bus. & Com. Code Ann. § 57.353. However, none of these statutes extends statutory-repurchase obligations to used or damaged equipment in the manner advocated by Southern Track and adopted by the district court.

before GE repossessed its equipment. However, once a dealer elects to seek a different solution, courts have strictly construed the statutory-repurchase requirements against the dealer. *See, e.g.*, *id*. (sale of parts or equipment after termination, even if in "mitigation," negates supplier's obligation to repurchase); *Kaisershot v. Gamble-Skogmo, Inc*., 96 N.W.2d 666 (N.D. 1959) (dealer who sells inventory after supplier allegedly refused return has elected to keep/sell and cannot recover the difference between sales price and statutory price for return).

In sum, the overwhelming approach to dealer statutes around the country is to effectuate a commercially reasonable scheme for winding up a dealership agreement. No state has adopted legislation imposing the draconian and unworkable requirements that Southern Track's expansive approach entails.

3. *Requiring Repurchase of Only New, Unused, and Undamaged Equipment Avoids Constitutional Concerns.*

Requiring the repurchase of only new, unused, and undamaged equipment also avoids serious constitutional concerns implicated if the Dealer Statute is expanded to require repurchase of used and damaged equipment. Used or damaged equipment is not even mentioned in the statute, and the implied repurchase-price term of "a negotiated price" has no precedent and lacks any parallel compensatory statutory remedy. The statutory construction advocated by Southern Track requires that Terex purchase Southern Track's entire inventory at new-inventory prices, even though: thirty-three pieces of equipment were used and

only seven pieces of equipment were new; Southern Track no longer owned the equipment so Terex could not receive possession or title; no consideration was given to the actual value of the property; and no offset was given for $2.9 million that Southern Track had already received on account of the repossession and sale of this same equipment, including the $435,000 of recourse that Terex paid in connection with Terex's guaranty of Southern Track's loan, or the $700,000 in loan forgiveness by Southern Track's lender. The court damages award resulted in a windfall to Southern Track and a penalty to Terex of over $4 million.

This construction implicates serious constitutional concerns with the takings and notice protections of due process under both the Delaware and federal constitutions. *See, e.g.*, *Globe Liquor Co. v. Four Roses Distillers Company*, 281 A.2d 19, 24 (Del.) (statutory damages imposed without the proof of actual loss are punitive, and as such, constitute the "taking of private property without compensation and without due process of law"), *cert. denied*, 404 U.S. 873 (1971); *Crissman v. Del. Harness Racing Comm'n*, 791 A.2d 745, 747 (Del. 2002); *United States v. Lanier*, 520 U.S. 259, 264-67 (1997); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915). At a minimum, this construction should be given a prospective-only application. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (judicial civil decision not applied retroactively where, *inter alia*, it

establishes “an issue of first impression whose resolution was not clearly foreshadowed”).

CONCLUSION

For the foregoing reasons, this Court should answer the certified question as follows: A supplier's obligation to repurchase inventory under the Dealer Statute is limited to "new, unused, undamaged, and complete inventory other than repair parts" and to "new, unused, and undamaged repair parts" covered by the Dealer Statute, and it does not extend to inventory that is used, damaged or incomplete.

Respectfully submitted,

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