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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEREX CORPORATION, doing business as TEREX CONSTRUCTION AMERICAS,	:	
Defendant-Appellant	:	NO. 704, 2014
v.	:	CERTIFICATION OF QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
SOUTHERN TRACK & PUMP, INC.	:	
Plaintiff-Appellee,	:	C.A. NO. 13-4279

APPELLEE'S ANSWERING BRIEF ON CERTIFICATION

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Dated: February 23, 2015

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NATURE OF THE PROCEEDING

On July 23, 2008, Plaintiff/Appellee Southern Track & Pump, Inc. ("STP") filed a complaint in the Superior Court of Delaware against Defendant-Appellant Terex Corporation ("Terex"). Count I of the complaint sought a declaratory judgment as to the applicability of Delaware's Equipment Dealer Contracts Statute, 6 *Del. C.* §§ 2720-2727 (the "Dealer Statute"). Count II sought a declaration that Terex violated the Dealer Statute. Terex removed the case to the United States District Court for the District of Delaware (the "District Court").

Following extensive discovery in the District Court proceeding, the parties cross-moved for summary judgment on various claims and counterclaims, including Counts I and II of STP's Second Amended Complaint (seeking the same relief as in the original complaint). In the District Court, Terex argued that the Dealer Statute did not apply because the Distributorship Agreement between Terex and STP did not meet the definition of a "contract agreement" under the Dealer Statute. *See Southern Track and Pump, Inc. v. Terex Corp.*, 852 F. Supp. 2d 456, 465 (D. Del. 2012). In the summary judgment briefing below, Terex *never* disputed that it violated the Dealer Statute (assuming its applicability) with respect to equipment in STP's possession that Terex conceded was *new*. Nor did Terex dispute that if the Dealer Statute applied to used equipment, it violated the Dealer Statute with respect to used equipment in STP's possession.

On March 28, 2012, the District Court granted STP's motion for summary judgment on Counts I and II of the Second Amended Complaint and denied Terex's cross-motion on such claims. *Id.* at 466-67. Liability was therefore established under the Dealer Statute. *Id.* The District Court observed that the Dealer Statute's plain terms required a supplier to repurchase "all" remaining unsold inventory from the dealer within 90 days of termination of the Distributorship Agreement pursuant to § 2723(a), and that § 2724 *alone* supplies the exceptions to that requirement. *Id*.

Following a careful review of the Dealer Statute, the District Court held:

> Here, it is undisputed that Terex failed to repurchase all of STP's remaining inventory following termination of the Distributorship Agreement; nor did Terex contend at that time that any of the exceptions set forth in Section 2724 applied. Moreover, to the extent Terex offered to repurchase some (but not all) of STP's remaining inventory, Terex failed to comply with the mandatory pricing formula with respect to seven pieces of new equipment, as was required by Section 2723(b). (D.I. 225 at 15; D.I. 251 at 13) Based on these undisputed facts, the Court concludes that Terex violated the repurchase requirements of the Dealer Statute.

Id. at 466-67.

Based on this finding of liability, all that remained under Counts I and II of the Second Amended Complaint was a determination of STP's damages under the Dealer Statute's civil remedy provision, § 2727(a). In connection with pre-trial proceedings on the damages calculation, Terex voluntarily provided pricing

information that disposed of the need for trial, but then raised new challenges to the Dealer Statute, including its constitutionality. The District Court rejected Terex's untimely new arguments, but permitted briefing and argument on Terex's challenge to the constitutionality of the Dealer Statute. The District Court found that Terex had not waived its constitutional arguments, but ultimately rejected those arguments by Memorandum Opinion dated September 30, 2013.[1]

On October 29, 2013, Terex filed an appeal in the United States Court of Appeals for the Third Circuit. After briefing and oral argument, the Third Circuit issued an order (the "Certification Order")[2] certifying the following question of law to this Court:

> 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 the certified question by order dated December 23, 2014. In certifying this question, the Third Circuit relied upon and referenced the District Court's summary judgment ruling, and STP respectfully refers this Court to that opinion as it contains findings of fact and conclusions pertinent to the

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[1] As the District Court observed, "[f]or its part, Defendant [Terex], in the PTO, raised several new defenses to liability, including for the first time challenging the constitutionality of the application of the Dealer Statute." *Southern Track and Pump, Inc. v. Terex Corp.*, 2013 WL 5461615, at *1 (D. Del. Sept. 30, 2013).

[2] The Certification Order is attached as **Exhibit A** to Terex's Opening Brief.

certified question. As shown herein, this Court should answer the certified question by concluding, as did the District Court, that a supplier's repurchase obligation extends to all inventory that remains unsold on the date of termination of the agreement, including any used inventory.

SUMMARY OF THE ARGUMENT

1. Denied. The plain language of the Dealer Statute compels the conclusion that the repurchase obligation includes "all inventory" unless a statutorily-enumerated exception applies. In delineating the exceptions, the Dealer Statute nowhere excludes used equipment. Had the Delaware General Assembly intended to include such an exception, it could easily have done so.

2. Denied. The District Court properly implied a price term to effect the repurchase obligation for used equipment. The commercially reasonable pricing term implied by the District Court fulfills the intent and purpose of the Dealer Statute by incorporating industry standards that would have been known and understood by the General Assembly when the Dealer Statute was enacted.

3. Denied. The Dealer Statute is both workable and commercially reasonable as drafted by the General Assembly. Contrary to Terex's characterization, the District Court's construction of the Dealer Statute does not require a supplier to pay "new" prices for used equipment; rather, a supplier is required to pay statutorily-prescribed damages for such equipment *only* if the supplier is found to have violated the statute. The District Court's interpretation as to used equipment is eminently reasonable, consistent with industry practice, and does not lead to an absurd result.

4. Denied. The District Court properly rejected Terex's request to rewrite the Dealer Statute to exempt equipment used for lease and demonstration purposes from a supplier's repurchase obligation. The District Court's construction comports with the Dealer Statute's plain language, its underlying purpose of shifting the risk of liquidating equipment from the dealer to the supplier, and analogous state dealer protection statutes that require repurchase of used and rental equipment at fair market value.

STATEMENT OF FACTS

I. Background to the Certified Question

STP was a heavy equipment dealership that sold, rented and serviced construction equipment and parts. OB at Ex. A, p. 4. Terex is a Delaware corporation and manufacturer of equipment used in construction and other infrastructure-related activities. *Id*.; http://www.terex.com/en/index.htm. In 2006, discussions ensued between STP and Terex concerning a potential business relationship through which STP would become a distributor of Terex construction equipment. *Southern Track and Pump*, 852 F. Supp. 2d at 459. Those negotiations resulted in three operative agreements, all entered into in March or April 2007: (1) a distributorship agreement between STP and Terex (the "Distributorship Agreement"), which was prepared by Terex and contains the terms and conditions governing the distributorship relationship; (2) an inventory financing agreement between STP and GE Commercial Distribution Finance Corporation ("GE"), an entity whom Terex utilized to provide financing for Terex distributors; and (3) a recourse agreement between Terex and GE, which required Terex to pay GE in the event that STP defaulted *and* GE repossessed inventory from STP. *Id*. at 459-60.

Pursuant to the Distributorship Agreement, STP purchased approximately $4 million worth of equipment, and $50,000 worth of parts. *Id*. at 460. To promote the Terex brand, and as contemplated by the Distributorship

Agreement, STP leased certain pieces of equipment and employed others in demonstrations (demos).[3] Within months of becoming a Terex distributor, STP encountered financial difficulties, including lack of sales, resulting in a deterioration of STP's business relationships with Terex and GE. *Id*.

By letter dated May 6, 2008, GE terminated the Inventory Financing Agreement due to STP's defaulting on the loan. *Id*. On May 20, 2008, STP sent a letter to Terex terminating the Distributorship Agreement, and notifying Terex of its intent to return all remaining inventory. *Id*. Terex accepted STP's termination, but denied an obligation to repurchase any inventory. *Id*.

Initially, STP made its demand for repurchase of inventory citing a Florida dealer statute. In a May 23, 2008 response, Terex denied the applicability of the Florida dealer statute, and invited STP to identify any other statutes that might require repurchase of inventory.[4] On June 2, 2008, STP did so, advising Terex of the applicability of the Dealer Statute and again demanding that Terex repurchase the inventory. STP further reminded Terex of the dire situation with GE and the impending threat of repossession of the inventory.

In July 2008, GE commenced repossession of the inventory that had been financed pursuant to the Inventory Financing Agreement. *Id*. GE then

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[3] The purchased inventory included equipment such as tractors, excavators, and backhoes.

[4] STP attempted to return parts, but Terex refused to take these back as well.

proceeded to sell the repossessed equipment to other dealers, including eight pieces of equipment to Terex, and sold the remaining equipment at auction. *Id*. GE initiated arbitration proceedings against STP and demanded a deficiency of over $1.7 million. Terex was apprised of the arbitration proceeding with GE but provided no assistance to STP. STP and GE resolved the arbitration proceeding through payment by STP of $1 million to GE. *Id*.

II. The Delaware Dealer Statute

The Dealer Statute is in the nature of a consumer protection statute and addresses the obligation of a supplier (Terex) and a dealer (STP) in the event of a contract termination by either party.[5] Specifically, it covers: notice of termination of contract agreements (6 *Del. C.* § 2721); a supplier's requirement to repurchase inventory from a dealer (*id*. § 2722); the terms for the supplier's repurchase of inventory (*id*. § 2723); the exceptions to a supplier's repurchase requirement (*id*. § 2724); the effect of the Dealer Statute on a security interest of the supplier in the inventory (*id.* § 2725); how warranty claims from a dealer following the contract termination are handled (*id.* § 2726); and the civil remedies for failure to comply with the Dealer Statute. (*id*. § 2727).

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[5] In the District Court proceedings, Terex conceded that it was a "supplier" within the meaning of the Dealer Statute and that STP was a "dealer." Terex argued, however, that the Distributorship Agreement was not a "contract agreement" under the Dealer Statute. The District Court rejected this argument. *See* 852 F. Supp. at 464-65.

With respect to the repurchase obligation, the Dealer Statute prescribes unequivocally what a supplier must do upon termination of a distributorship. First, in § 2722, entitled "Supplier's requirement to repurchase," the Dealer Statute provides for a repurchase obligation, "as provided in this subchapter." *Id.* § 2722(a). In particular, § 2722(a) states that:

> 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.

Id.

Next, in §§ 2723 and 2724, the Dealer Statute provides the terms of repurchase with which a supplier must comply. Section 2723(a) is entitled "Repurchase terms," and defines *what* inventory must be repurchased and *when*:

> 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.

Id. § 2723(a). Section 2723(b) provides the prices a supplier must pay to a dealer for equipment and repair parts that are, "new, unused, undamaged, and complete," *id*. § 2723(b); specifically:

> 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.

Id. § 2723(b)(1).

Section 2723(c) provides the process for the supplier and dealer to inspect equipment prior to return. *Id.* § 2723(c). The dealer is required to pay for shipping of equipment to its dealership. *Id.* The dealer and supplier are each permitted to "furnish a representative to inspect all inventory and certify acceptability before being returned." *Id*.

Section 2724 of the Dealer Statute is entitled "Exceptions to repurchase requirements." *Id.* § 2724. It establishes six specific exceptions to a supplier's requirement to repurchase inventory. *Id.* Those exceptions are as follows:

> (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.

Id. Notably, a supplier may refuse to repurchase repair parts based on their condition or "newness," *id.* § 2723(4), but the Dealer Statute provides no such

exception to a supplier's obligation to repurchase other types of used inventory, including tractors and other equipment.

In § 2727, entitled "Civil remedy for failure to repurchase," the Dealer Statute provides the consequences to a supplier's statutory violation for failing or refusing to repurchase "any" inventory. Section 2727(a) provides, as pertinent:

> 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.

Id. § 2727(a). The "current net price" is defined by the Dealer Statute as: "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). Section 2727(a) thus effectively operates as a rescission of the transaction: the supplier must return an amount approximating what the dealer paid for the equipment. (That is the result the District Court ordered here). The civil remedy provided in § 2727(a) is in addition to any other legal or equitable remedies available to a dealer aggrieved as a result of a violation of the Dealer Statute. *Id.* § 2727(e).

ARGUMENT

I. Question Presented

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

II. Scope of Review

When a question of law is certified to this Court, the normal standards of review do not apply, and the Court reviews "a certified question in the context in which it arises." *Doe v. Wilmington Housing Auth.*, 88 A.3d 654, 661 (Del. 2014); *State v. Anderson*, 697 A.2d 379, 382 (Del. 1997). The question presented is an issue of law certified to this Court by the Third Circuit Court of Appeals and is considered *de novo*. *Lincoln Nat. Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 438 (Del. 2011) (citation omitted).

III. Merits of the Argument

A court's role in interpreting a statute is to give effect to legislative intent, and, in ascertaining such intent, a court is bound to follow principles of statutory construction. *See LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (citing *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)). The plain language of a statute is the proper starting point for construing its meaning. *Fuller v. State*, 104 A.3d 817, 821 (Del. 2014). "Where a statute contains unambiguous language that clearly reflects the intent of the legislature, then the language of the

statute controls." *Zhurbin v. State*, 104 A.3d 108, 110 (Del. 2014) (internal quotation and citation omitted); *see Off. Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A.*, 103 A.3d 1010, 1014 (Del. 2014) ("'[U]nambigous statutes are not subject to judicial interpretation.'") (quoting *Leatherbury v. Greenspun, D.O.*, 939 A.2d 1284, 1288 (Del. 2007)).

Here, the Court need look no further than the plain language of the Dealer Statute to conclude that when the General Assembly said that a supplier must repurchase "all inventory," it meant just that. As explained below, such a reading fulfills the legislative purpose of shifting the re-sale obligation on the party best situated to resell the equipment: the supplier (*i.e.,* the manufacturer of the equipment).

In the event the Court deems the Dealer Statute to be ambiguous, proper statutory construction leads to the same conclusion reached by the District Court: the Dealer Statute requires the repurchase of used equipment at a negotiated price. "A statute is ambiguous if it is susceptible of two or more reasonable interpretations, or if a literal reading of the statutory language 'would lead to an unreasonable or absurd result not contemplated by the legislature.'" *Lawson v. State*, 91 A.3d 544, 549 (Del. 2014) (*quoting Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013)). In the event that

an ambiguity is found to exist, the statute should be read as a whole to produce a harmonious result. *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013).

As a preliminary matter, it is important to note that, contrary to Terex's characterization, the District Court's construction of the Dealer Statute *does not* mandate that a supplier pay "new" prices for used and damaged equipment. Rather, payment of the "current net price" (i.e., the price listed in the supplier's price list, *see* 6 *Del. C.* § 2720(3)) is imposed *only* as a measure of statutory damages *after* a judicial determination that the supplier has violated the Dealer Statute by failing or refusing to comply with its repurchase obligation. A supplier that complies with the Dealer Statute by negotiating in good faith for payment of the fair market value of any used or damaged equipment would not be subject to the statutory penalty. Any suggestion by Terex that the District Court's interpretation produces a different result mischaracterizes the ruling.

A. The Dealer Statute Expressly Requires Repurchase of All Inventory

1. A Plain Reading of the Dealer Statute Validates The District Court's Interpretation

A plain reading of the Dealer Statute compels the conclusion that the repurchase obligation extends to "all inventory previously purchased from the supplier that remains unsold on the date termination of the agreement." *Id.* § 2723(a). Accordingly, inventory that has been leased or used to demonstrate the

equipment's capabilities ("demo") is subject to the repurchase obligation, unless a statutorily-enumerated exception applies. *See id.* § 2724. Had the Delaware General Assembly intended to exclude used inventory, it could easily have so stated. Indeed, § 2724, entitled, "Exceptions to repurchase requirements," expressly delineates the exceptions to the repurchase obligation, but nowhere excludes inventory that has been leased or used in demonstration. *See Estate of Farrell v. Gordon*, 770 A.2d 517, 522 (Del. 2001) (refusing to engraft an additional statutory exception and reasoning that the General Assembly could have easily inserted such an exclusion if it so intended).

This could not have been a mere oversight by the General Assembly. It is expected and intended that a heavy equipment dealer, like STP, would lease or demo equipment in its fleet. Like most supplier-dealer relationships, the Distributorship Agreement expressly required STP to "[a]ctively and vigorously promote the sale, lease and use of Products within the Territory and develop the market as fully as possible." (JA 266, § 3.1(a)) Under § 2724(6), the repurchase obligation extends to all inventory purchased from the supplier within the 3-year period prior to the termination. 6 *Del. C.* § 2724(6). As such, it could not have been lost on the General Assembly that dealer "inventory" would include

equipment that the dealer had placed into the field to promote the brand, but which remained unsold at the time of termination.[6]

Terex's reading of the Dealer Statute proceeds from a myopic view of just one pricing provision - § 2723(b)(1). It contends that because § 2723(b)(1) specifies the repurchase term for "all new, unused, undamaged and complete inventory," this somehow demonstrates that the General Assembly intended to exclude all inventory on hand that could not be characterized as such. This argument fails under the plain language and statutory scheme of the Dealer Statute.

First, by its plain language, the provisions of § 2723(b) speak only to the *pricing term* under which a supplier must repurchase "new, unused, undamaged and complete" inventory. *Id.* § 2723(b). The repurchase obligation itself is set forth in an altogether different section - § 2722. Section 2722(a) states that in the event of a termination of a distributor agreement, "the supplier shall repurchase the dealer's inventory as provided in this subchapter . . . ." *Id.* § 2722. "Inventory" is defined as "the tractors, implements, attachments, equipment and repair parts that the dealer purchased from the supplier." *Id.* § 2720(5). Nowhere does the Dealer Statute exclude used equipment or equipment that has entered the rental fleet. Rather, the only limitations found in the statutory language are that the inventory must (i) have been "purchased from the supplier" (*id.* § 2720(5); *see* also *id.* §

[6] This is not unlike a car dealer using vehicles for test drives or as loaners.

2724(5)), (ii) have been purchased within 36 months of notice of the termination (*id.* § 2724), and (iii) "remain unsold on the date of termination of the agreement." *Id.* § 2723(a).

Second, if the repurchase obligation included only "new, unused, undamaged and complete inventory," it would have been unnecessary to use the quoted language in § 2723(b)(1). In other words, the General Assembly could simply have defined "inventory" in § 2720(5) to include *only* new, unused, and undamaged equipment. Instead, express language was included in § 2723(b)(1) to describe inventory of a particular condition for which the supplier must pay "net cost" (as defined in § 2720(6)).

Third, Terex's reading of the Dealer Statute renders the word "all" in § 2723(a) mere surplusage. As the District Court observed, "by its plain terms, Section 2723(a) requires suppliers to repurchase 'all' remaining unsold inventory from the dealer . . . Section 2724 specifies the only exceptions to this repurchase requirement." *Southern Track and Pump*, 852 F. Supp. 2d at 466. The General Assembly's use of the word "all" and the absence of any exclusion for leased or demo inventory confirms that such inventory is covered by the repurchase obligation. *See Krafft-Murphy*, 82 A.3d at 702 (instructing courts to "ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible.").

2. Terex's Definition of "Inventory" Conflicts with the Terms of the Dealer Statute

In an argument not raised in the District Court or Third Circuit, Terex now contends that "[o]nce equipment is put into a rental fleet, it can no longer be held for sale as 'new,'" and thus no longer constitutes inventory that "remains unsold." OB at 16. As noted, however, the Dealer Statute nowhere limits the repurchase obligation to "new" equipment.

Moreover, Terex's narrow interpretation of the word "inventory" is demonstrably wrong. For one, it finds no support in the language of the Dealer Statute, which defines inventory as "the tractors, implements, attachments, equipment and repair parts that the dealer purchased from the supplier." 6 *Del. C.* § 2720(5). Further, simply because a piece of equipment is leased or used in a demo does not render it sold or no longer part of the dealer's inventory. It is blackletter law that a lessor maintains title and may sell the item after leasing it. *See, e.g.*, 6 *Del. C.* § 2A-103(1)(j) (defining "lease" as a transfer of a right to possession and use of goods for a term in return for consideration, but excluding a sale, including a sale on approval or sale on return, or retention or creation of a security interest).

Similarly, for purposes of Article 9 of the UCC, inventory includes leased equipment. 6 *Del. C.* § 9-102(a)(48) (defining "inventory" to include goods "held by a person for sale or lease"). Indeed, the Distributorship Agreement itself

purports to grant Terex a security interest in unsold inventory, wherever located and whether held for sale, lease or demonstration; it makes no distinction between inventory that is leased or demoed versus supposedly "new" inventory. (JA 268, §4.5) Accordingly, all pertinent definitions of inventory, including most importantly the Dealer Statute itself, supports an interpretation that includes leased or demo inventory.[7]

3. The Legislature is Presumed to Have Understood the Industry and Intended What It Drafted

In enacting the Dealer Statute, the General Assembly is presumed to have debated, considered and resolved the competing constituent interests through the legislative process. *See generally Shea v. Matassa*, 918 A.2d 1090, 1092 (Del. 2007) (deferring to the General Assembly's role in fashioning resolutions to policy questions). Based on this policy-making role, the General Assembly similarly can be presumed to have understood the heavy construction equipment industry, including the relationship between suppliers and dealers covered by the Dealer Statute. *See Chicago, M. & St. P. Ry. v. Tompkins*, 176 U. S. 167, 173 (1900) (recognizing that the "legislature is presumed to act with full knowledge of the

[7] Terex's citations to certain authorities relating to potential tax and accounting implications of assets held for rental use do not support the legal proposition that leasing equipment precludes it from being considered "inventory" held for sale. These citations simply are not relevant to the interpretation of the Dealer Statute, particularly given that both the Dealer Statute itself and the UCC contradict Terex's proffer of these authorities.

facts upon which its legislation is based."); *Delaware Valley Field Servs. v. Ramirez*, 105 A.3d 396, 410 (Del. Super. 2012) (interpreting statute involving immigration status and concluding that the "Court must and can reasonably assume the General Assembly is aware of the myriad issues swirling around illegal immigrants"); *Sierra Club v. Tidewater Envt'l Serv., Inc.*, 2011 WL 5822636, at *14 (Del. Super. Oct. 27, 2011) (observing that the General Assembly was presumed to have knowledge of operation of wastewater treatment plans when passing an environmental statute); *see also In re Cont'l Airlines, Inc.*, 125 B.R. 399, 411 n.12 (D. Del. 1991) (observing that legislature was presumed to have knowledge of the commercial conditions involving sale-leaseback transactions existing when statute was enacted).

As such, the General Assembly would have understood that in a typical termination situation, a dealer would have on hand certain equipment that could not be considered "new" and "unused," but rather had logged hours as a result of lease or demo use. This is particularly true since, as noted, suppliers encourage, if not require (as here), their dealers to put equipment to use in the field to promote the brand. Given this circumstance, it would contravene the purpose and intent of the Dealer Statute to conclude that used inventory is excluded from the repurchase requirement. Rather, including such equipment in the repurchase obligation fulfills the plain language (i.e., requiring repurchase of "all inventory").

Terex concedes that one purpose of the Dealer Statute is to cause the inventory to be placed with the party best positioned to resell it upon termination of a distributorship.[8] Terex posits, however, that the dealer is in a better position to redistribute used equipment. This is not correct. When a distributorship agreement is terminated (by a dealer's choice or not), a dealer is prohibited from holding itself out as a distributor of the supplier's equipment. It no longer has access to sales incentive programs and support from the supplier to compete with other dealers, and it no longer has the ability to offer warranty protection to buyers of the equipment. On the other hand, suppliers typically have vast distribution networks to resell their own brand of equipment.[9] Terex itself has a used equipment division.[10]

4. Application of The Plain Meaning Rule is Consistent with the Preamble to the Dealer Statute

In the Certification Order, the Third Circuit questioned whether the District Court's interpretation of the repurchase provisions was consistent with the preamble to the Dealer Statute, which states:

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8 Suppliers such as Terex have additional motivation to repurchase inventory. For example, Terex might not want a repossession and auction to occur because the value of its equipment in a certain market might be depressed due to the liquidation prices paid for its equipment at auction, or the effect this might have on its other dealers' sales.

9 *See e.g.*, http://www.volvoce.com/constructionequipment/na/en-us/usedequipment (Volvo Construction Equipment North America).

10 http://www.terexused.com (Terex used equipment sales).

> This is an Act relating to contract agreements between dealers engaged in the business of retailing new farm, industrial, and outdoor power equipment; and wholesalers, manufacturers, or distributors of their products: 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.

Del. H.B. 41 syn., 134th Gen. Assem., 66 Del. Laws ch. 173 (1987). The use of the word "new" in this context describes the types of businesses to which the Dealer Statute applies; not what equipment must be repurchased. It was undisputed in the District Court proceeding that STP purchased and retailed for sale new equipment acquired from Terex. As such, there is no question that the Dealer Statute applies to this situation. Moreover, nothing in the preamble speaks to the treatment of equipment purchased as new but which has been used and remains on hand.

B. The Dealer Statute Is Workable And Commercially Reasonable As Written

1. The District Court Properly Implied A Price Term

Terex argues that by interpreting the Dealer Statute to require the repurchase of used equipment, the District Court improperly created an "unworkable and commercially unreasonable" statutory scheme. This argument is profoundly mistaken, both because it misconstrues the District Court's ruling and because negotiating a price for repurchase of used equipment makes complete sense and is

the industry norm. Indeed, in the District Court, Terex agreed that the statute contemplated a negotiation for used equipment.[11]

It is first important to understand the District Court's summary judgment ruling. Apart from the repurchase mandate specified in § 2722(a) and repurchase "terms" in § 2723, the Dealer Statute contains a civil remedies provision for failure to repurchase "any" inventory. 6 *Del. C.* § 2727(a). By its plain terms, the civil remedy provision comes into play "if a supplier *fails* or *refuses* to repurchase any inventory covered under this subchapter . . . ." *Id.* (emphasis added). As the District Court held based on undisputed facts, Terex was subject to § 2727(a), because it admittedly "failed to repurchase all of STP's remaining inventory following termination of the Distributorship Agreement . . . ." *Southern Track and Pump*, 852 F. Supp. 2d at 466.

Significantly, as Terex still refuses to candidly acknowledge, it is undisputed (as the District Court found) that Terex failed to comply with § 2723(b)(1)'s mandatory pricing formula *even as to what it conceded was "new, unused,*

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[11] In the District Court, Terex argued that § 2723 authorizes a supplier and dealer to inspect inventory to determine "if it was acceptable as used, in which case the parties would negotiate the repurchase price . . . ." (D.I. 225 at 28); *see also Southern Track and Pump*, 852 F. Supp. 2d at 466 ("As Terex itself notes, Section 2723(b) provides a mandatory pricing formula for new, unused, and undamaged equipment; inventory that is not new, unused, or undamaged remains subject to the repurchase requirement, but at a price subject to negotiation by the parties instead of the prices set forth by statute.").

undamaged and complete" inventory. *See id.* ("[T]o the extent Terex offered to repurchase some (but not all) of STP's remaining inventory, Terex failed to comply with the mandatory pricing formula with respect to seven pieces of new equipment, as was required by Section 2723(b)"). Throughout the District Court proceeding, Terex insisted the Dealer Statute simply did not apply (on grounds no longer asserted on appeal) and denied an obligation to repurchase *any* inventory (new or used). *Id.* at 463-65. As such, the District Court applied the Dealer Statute precisely as written, since there was an indisputable failure to repurchase certain inventory, notwithstanding Terex's current position on used inventory. *Id.* at 466; *see also* 6 *Del. C.* § 2727(a).[12]

Terex now quibbles, however, with the District Court's reading of § 2723(b)'s repurchase terms. As the District Court's ruling suggests, Terex could have complied with the Dealer Statute by paying "net cost" for the new and unused inventory (which it failed to do), and by negotiating a price for used or damaged equipment. According to Terex, the District Court's reasoning as to used equipment amounts to a judicially improper gap-filler and would be commercially unreasonable in practice. Terex is wrong on both counts.

First, it is not improper for a court to imply a price term where to do so would otherwise fulfill the intent and purpose of the statute. *See, e.g.*, *Hillman v.*

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[12] In the District Court proceeding, Terex contended that only seven pieces of equipment were new; STP asserted that at least nine pieces were new.

Hillman, 910 A.2d 262, 276-78 (Del. Ch. 2006) (addressing statutory gap in partnership statute and concluding that disassociated partner's interest would be reimbursed at "fair value" under the statute); *The 99-year Lease Tenants of Lynn Lee Village v. Key Box 5 Operatives, Inc.*, 2003 WL 22332173, at *3 (Del. Ch. Oct. 10, 2003); *see generally Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013) (recognizing that courts are empowered to construct statutory gap fillers where necessary to effect public policy considerations). In the *99-year Lease* case, for example, the Court of Chancery was faced with the question whether 25 *Del. C.* § 7010 of the Mobile Home Lots and Leases Act applied to the 99-year leases at issue in that case. The court observed that, if applicable, the statute failed to address how tenants would be compensated if their prepaid long-term leases were terminated. *Id.* at *3. As opposed to finding that the statute simply did not apply, the court held it could fashion a pricing mechanism "to fill the gap" so as to fulfill the intent of the General Assembly to include such leases within the statute. *Id.* Significantly, the Court observed that this approach was consistent with the "common law of landlord tenant relations in the case of tenancies prematurely terminated for other reasons." *Id.* (citations omitted).

Unsurprisingly, in the heavy equipment industry, negotiations over the pricing of used equipment occur routinely, and there is a vibrant market for used

heavy equipment. *See generally* https://www.rbauction.com/aboutus (Ritchie Bros. Auctioneers); http://www.terexused.com (Terex used equipment sales). Equipment such as tractors or backhoes with hours of operation ranging from 50 to 300 may still be considered new by industry standard. *See e.g.* La. Rev. Stat. Ann. § 51-484 (demo equipment used for less than 300 hours deemed new inventory); Nev. Rev. Stat. Ann. § 597.11539(1)(e) (demo equipment with 50 hours of use is deemed new inventory); Wyo. Stat. Ann. § 40-20-120 (same); Tex. Bus. & Com. Code Ann. § 57.353 (same).[13] In fact, Terex and STP each retained experts in the heavy equipment industry to address pricing issues based primarily on hours of operation, and Terex's expert opined that 100 hours is a standard accepted meter threshold for new equipment. In construing the Dealer Statute to require a negotiation for inventory deemed no longer new or unused, the District Court implied a sensible mechanism to arrive at a price where the alternative would have been to renounce (erroneously) the plain language of the Dealer Statute.

Indeed, Terex's argument that the District Court's application of a common sense price term for used equipment equates to a "judicially created statute" is belied by the fact that the Dealer Statute itself necessarily requires the parties to determine whether equipment qualifies as "new, unused, undamaged, and complete." That is accomplished by inspection of the equipment (*see* 6 *Del. C.* §

[13] Terex itself concedes, as it must, that "equipment with some usage might, under certain circumstances, still qualify as new." OB at 7, n.10.

2723(c)), and not by a statutorily-imposed standard. *See generally James River Companies, LLC v. BB Buggies, Inc.*, 2013 WL 4779015, at *6 (W.D. Va. Sept. 6, 2013) (denying summary judgment under Virginia Equipment Dealers Protection Act because dispute over whether the damages to a particular piece of equipment was sufficient to establish it was not in "new, unused and undamaged" condition was a factual issue to be resolved at trial); *Interstate Equip. Co. v. ESCO Corp.*, 2014 WL 3547348, at *14 (W.D.N.C. July 17, 2014) (applying North Carolina dealer protection statute and finding that "new, unused and undamaged" repair parts that qualified for repurchase included parts that had "never been used and [had] only superficial discoloration, paint chipping, and the like").

The task of having the parties (or a court) determine whether equipment qualifies as "new" using industry norms is no different than applying a commercially reasonable pricing formula to a supplier's obligation to repurchase used equipment through a negotiation. Consistent with the District Court's interpretation, the Dealer Statute functions as a statutory overlay to allow courts to provide backstop protections for dealers in a common sense fashion based on existing commercial practices. This is an eminently reasonable approach consistent with the legislative intent.

2. The Statute Encourages A Fair And Reasonable Resolution

Terex insists that requiring a supplier and dealer to negotiate prices for used equipment is commercially unreasonable. Borrowing from the Third Circuit's reference to the application of § 2727(a) (OB at Ex. A, p. 8), Terex contends that such a negotiation is doomed to fail if the dealer can simply insist on new inventory prices. In so arguing, Terex ignores the reality of the supplier-dealer relationship. Dealer statutes exist primarily because suppliers typically have far superior bargaining strength, and, as in this case, have financial and marketing capacities that dwarf the dealer. *See generally FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, 557 F.3d 758 (7th Cir. 2009) ("[T]he purpose of state franchise and dealership laws 'is to protect franchisees who have unequal bargaining power once they have made a firm-specific investment in the franchisor.'") (quoting *Wright–Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 135 (7th Cir. 1990)); *Midwest Great Dane Trailers, Inc. v. Great Dane Ltd. P'ship*, 977 F. Supp. 1386, 1392 (D. Minn. 1997) ("There is little doubt, if any, that the [Minnesota dealer] statute was passed to protect dealers from the excesses of manufacturers possessing superior bargaining power.").

It is irrational to think that a dealer forced to terminate a distributorship contract would be in any position to demand new prices for used equipment.[14] That is because such a dealer is usually struggling, insolvent and/or on the verge of bankruptcy, and may (as was the case here) be threatened with repossession of the equipment by its lender. A cash-poor dealer is not going to play "hard ball" in negotiations or credibly threaten expensive and protracted litigation in an effort to extract an unfair price. For if such a gambit fails, the dealer receives nothing for the equipment and has only the prospect of litigation against a deep-pocketed supplier. To be sure, in this case, STP *never* insisted upon Terex paying "net cost" for used inventory when attempting to negotiate a resolution.

Even assuming *arguendo* that a dealer attempts to take a hard line position and demand "net cost" prices for all inventory, the Dealer Statute specifies, consistent with the District Court's interpretation, that "net cost" applies only to "new, unused, undamaged and complete" equipment. It strains credulity to think that a dealer would pursue a claim to recover "net cost" for all equipment under § 2727 in that circumstance.

Terex further asserts that under the District Court's construction dealers will have no incentive to negotiate for fair prices based on the aspiration to ultimately

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[14] In this case, STP attempted to negotiate prices for certain used equipment, but those negotiations failed when Terex refused to take action before the equipment was repossessed by GE.

recover "net cost" for all equipment. Terex fails to acknowledge, however, that from the supplier's perspective, but for the risk of the imposition of the civil remedies provision (6 *Del. C.* § 2727(a)), it would have little incentive to negotiate fairly, if at all, with a dealer. Rather, a supplier could take advantage of the dealer's desperate situation by insisting upon inadequate prices. Indeed, a supplier's negotiation position is bolstered by the likelihood of being able to recover the subject equipment at "fire sale" auction prices coupled with the imbalance of legal resources that would discourage a dealer from pursuing litigation for the civil remedies under §2727. As noted, a supplier that has negotiated in good faith will not have "failed" or "refused" to repurchase inventory. *Id.* § 2727(a).[15] Rather, the court would find that the supplier met its repurchase obligation and was not subject to the civil remedies provision.

Further, as opposed to attempting to specify a price term in a vacuum and without reference to a particular piece of equipment, imposing a negotiation price term for used equipment makes business sense, and, again, comports with the plain

[15] Section 2727(a) states that for any inventory the supplier "fails" or "refuses" to repurchase, it must pay statutory damages. In this case, the District Court found that Terex *refused* to repurchase any inventory covered by the Dealer Statute, which was the case. Terex has not directly challenged this finding. The District Court was not making a decision with regard to what constitutes a "failure" to repurchase under the Dealer Statute. If a supplier can show that it offered a commercially reasonable price for used equipment and a dealer simply does not accept such an offer, a court likely would not interpret the supplier's conduct as a failure to repurchase pursuant to the Dealer Statute.

language. Indeed, it would be difficult in advance to specify a price term for used equipment without reference to the condition of a particular piece of equipment. That is perhaps why the General Assembly elected not to specify a price term for used inventory.

Nor can Terex claim unfairness or surprise from the District Court's reading. Terex elected to apply Delaware law to the Distributorship Agreement, and thus knew or should have known of its repurchase obligation. Any doubt it may have harbored concerning the applicability of the Dealer Statute to used equipment could have been resolved by seeking declaratory relief. Instead, it steadfastly refused to acknowledge the applicability of the Dealer Statute (before and during the District Court litigation) and sought recourse in the Distributorship Agreement, which disclaims any liability in connection with a termination. (JA 273, §10.7) For over six years now, Terex has successfully evaded satisfying its repurchase obligation, thus denuding the very purpose of the Dealer Statute.

Moreover, Terex's suggestion that the District Court's interpretation of the Dealer Statute "stands alone as an outlier, inconsistent with the general policy underlying [dealer] statutes" (OB at 29) cannot be squared with the fact that numerous dealer protection statutes expressly require the repurchase of used equipment, including equipment used in a rental fleet. Recognizing the need to protect dealers, and in accordance with industry practice, these sister state statutes

simply codify the common sense approach of the District Court in requiring that used equipment be repurchased at fair market value using industry guides. *See, e.g.*, Ky. Rev. Stat. Ann. §810(1)(b) (repurchase of inventory used for lease or demo at "its agreed depreciated value"); Ohio Rev. Code. Ann. § 1353.02 ("supplier shall pay the average 'as-is' value shown in current industry guides for each component of a rental fleet of farm machinery or construction equipment"); Or. Rev. Stat. Ann. § 646A.304(1)(b) (repurchase price "shall equal the depreciated value of the equipment to which the supplier and retailer have agreed.").

C. Imposing A New and Unused Exception Would Constitute An Impermissible Rewriting of the Statute

In its attempt to have this Court rewrite the Dealer Statute to exempt used equipment from the repurchase obligation, Terex invokes the scenario that a supplier who does not comply with its statutory obligations may be forced to pay "new" prices for used equipment.[16] Terex's construction of the Dealer Statute produces a far more unpalatable result if, for example, a supplier could renounce its repurchase obligation simply because a piece of equipment has run for a few

[16] As it argued to the District Court, Terex posits that upholding the District Court's interpretation "implicates serious constitutional concerns" in allowing STP to recoup a punitive recovery. The District Court dispensed with all constitutional-related arguments in its September 30, 2013 opinion and such issues are not before this Court on certification. *See Southern Track and Pump, Inc. v. Terex Corp.*, 2013 WL 5461615, at *2-4 (D. Del. Sept. 30, 2013).

"hours" and therefore (in the supplier's view) is no longer "new, unused, undamaged or complete." Faced with competing interpretations that may lead to austere consequences, it is appropriate to construe the Dealer Statute in the manner most aligned with its underlying purpose – shifting the burden of liquidating equipment from the dealer to the supplier.

Finally, to the extent that the language used by the General Assembly may be ambiguous, imperfect or lead to a potentially harsh result, the remedy for such inartful drafting lies with the General Assembly. *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 542 (Del. 2011); *see also Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) ("[The Court] do[es] not sit as an überlegislature to eviscerate proper legislative enactments . . . . [r]ather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.") (citation omitted). Accordingly, the Court should not rewrite the Dealer Statute, as Terex suggests, but rather should apply its plain terms (as did the District Court) and allow any affected constituents to lobby for future revisions.

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 includes equipment that is used and remains unsold.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015, a copy of the foregoing document was served electronically via *LexisNexis File & ServeXpress* on the following counsel of record at the address indicated:

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