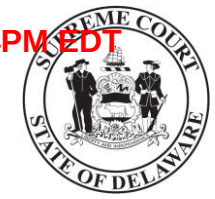

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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ARGUMENT

The Dealer Statute was enacted to provide a commercially reasonable method to wind up agreements between dealers "engaged in the business of **retailing *new* construction ... equipment**" and their suppliers.[1] Nonetheless, Southern Track & Pump ("STP") advances an unsupported and commercially unworkable construction that requires the repurchase of used, damaged, incomplete, or rental equipment, even though the statute: (1) nowhere mentions such equipment; (2) provides no price terms for such equipment, while providing detailed price terms for two different categories of new retail inventory; and (3) provides no compensatory statutory-damages formula for the failure to repurchase such equipment, while providing a compensatory statutory-damages formula for new retail inventory. Neither the plain language of the Dealer Statute nor the canons of statutory construction support STP's position. In an effort to support its untenable position, STP's Answering Brief improperly recasts the facts submitted by the United States Court of Appeal for the Third Circuit in its Certification of Question of Law,[2] advancing inaccurate facts that are outside the limited scope of review for cases certified under Supreme Court Rule 41.

I. THE PLAIN LANGUAGE OF THE DEALER STATUTE DOES NOT EXTEND TO USED, DAMAGED, INCOMPLETE, OR RENTAL EQUIPMENT.

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

[2] *See* Opening Br., Ex. A (3d Cir. Op.) at 4-6, *summarized in* Opening Br. 6-8.

In arguing that the "plain language" of the Dealer Statute supports its extension to used, damaged, incomplete, or rental equipment, STP construes the Dealer Statute to require the repurchase of all inventory, unless the General Assembly provides an express exclusion. This construction restructures the Dealer Statute, fails to consider the context in which the General Assembly used the word "all" in § 2723(a), and effectively reads § 2722 out of the statute.

A. No Repurchase is Required Absent Statutory Repurchase Terms.

Simply put, the General Assembly did not write or structure the Dealer Statute in the manner STP suggests. The requirement that a supplier repurchase inventory is set forth **not** in § 2723(a), but in § 2722, which requires that a supplier shall repurchase a dealer's inventory ***"as provided in this subchapter."*** 6 Del. C. § 2722(a) (emphasis added). Section 2723 provides the repurchase terms mandated by § 2722, and it includes no term for the repurchase of used or rental equipment. Because the plain language of § 2722 expressly requires the repurchase of inventory only **as provided** in the Dealer Statute, and the General Assembly provided no terms for the repurchase of used, damaged, incomplete, or rental equipment, the Dealer Statute simply does not require the repurchase of such equipment.

This interpretation does not "myopically" focus on only § 2723(b) as suggested by STP. Ans. Br. 17. Instead, it respects the relevant statutory language

used by the General Assembly, and properly considers the context in which the language is used. *See* discussion *infra* pp. 3-7; Opening Br. 16-17 n. 21.

Moreover, the fact that there are detailed price terms for two kinds of new retail inventory, but no price terms for used or rental equipment means that the General Assembly simply did not provide for the repurchase of such equipment and thus its repurchase is not required under the express terms of § 2722. *See, e.g., id.* 4-5, 15, 19 (discussing the maxim "the expression of the one is exclusion of the other," which this Court applies in recognition that omissions in a statute are intentional and should be respected). By suggesting that the words "all inventory" in § 2723(a) define the statutory-repurchase requirement, STP effectively reads § 2722 out of the statute, *i.e.*, the requirement of § 2722 to repurchase inventory "as provided" in the statute is duplicated, expanded, and rendered meaningless by STP's proposed construction of § 2723(a) to require the repurchase of "all" inventory regardless of whether the statute provides terms for its repurchase.

B. A Limited Interpretation Gives Effect to All Language in § 2723(a).

STP's proposed construction not only renders § 2722 mere surplusage, it also dismisses out of hand the phrase "that remains unsold" in § 2723(a), and it ignores the statutory context in which the word "all" is used in that subsection.

1. Only New Retail Inventory "Remains Unsold"

The phrase "all inventory **that remains unsold** at termination" refers to new retail inventory that has not yet been sold at termination. This interpretation is

consistent with the statute's purpose, the other terms provided in § 2723, and the compensatory-damages formula in § 2727(a). Although it may be owned and possessed by a dealer, rental equipment is not part of that dealer's new retail inventory that remains unsold. Unlike new retail inventory, rental inventory is a separate category of equipment and is already providing income, which can continue uninterrupted after termination.[3]

STP effectively construes the phrase "remains unsold" to mean "still owned by the dealer." Ans. Br. 19. But the fact that a dealer holds title to equipment used in its rental business, and thus could decide to stop renting it out and sell it as used equipment, does not retroactively convert used rental equipment into new retail inventory that remains unsold at termination. Moreover, to have meaning within the statutory context, the phrase "remains unsold" must mean more than "still owned by the dealer," because inventory that is no longer owned by the dealer is not subject to the statute in the first place.

STP's references to various definitions in the Delaware UCC provisions are similarly misguided. The fact that the General Assembly recognizes in Article 9 that a security interest can be perfected in rental inventory, as well as in sales

[3] Here, STP had rented out 33 of the 40 pieces of equipment to third parties for use on heavy-construction projects, and STP would have continued to use this equipment in its rental business, had it been able to secure refinancing before GE repossessed the equipment.

inventory,[4] or that it enacted different UCC Articles that define leases differently from sales,[5] is not relevant to whether the General Assembly meant to require the repurchase of only new retail inventory in the Dealer Statute.

2. *A Limited Interpretation Gives Meaning to the Word "All."*

Not only does STP's proposed construction dismiss the modifying phrase "that remains unsold," it also fails to consider the statutory context in which the phrase "all inventory" is used in § 2723(a). The word "all" should not be read in isolation and given its broadest possible meaning to argue that the legislative choice of the word "all" necessarily means that the General Assembly required repurchase of all inventory that was not specifically excluded. *See, e.g.,* Opening Br. 14-15 & n. 19; *Yates v. United States*, __ U.S. __, 2015 WL 773330, at *6 (February 25, 2015) ("In law as in life ... the same words, placed in different contexts, sometimes mean different things."); *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997) (meaning of statute depends on context in which statutory language is used); *Deal v. United States*, 508 U. S. 129, 132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) ("fundamental principle of statutory construction (and, indeed,

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[4] Ans. Br. 19-20 (discussing 6 Del. C. § 9-102(a)(48) and contract provisions perfecting security interest in equipment purchased by STP whether it was held for sale or rented out).

[5] Ans. Br. 19 (discussing 6 Del. C. § 2A-103-103(1)(j)). Recognizing the fundamental differences between leases and sales, the Delaware UCC deals with them in separate Articles and nowhere indicates that products held for lease or rental are included in the same retail inventory as products held for sale. *E.g., id.* (distinguishing lease from sale); *id.* § 2-106 (definition of sale).

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").

Within the context of § 2723, the word "all" means that each term provided by § 2723(a) applies to all types of inventory covered by the statute. As discussed *supra* pp. 2-3, the phrase "all inventory" in this subsection does not create the statutory-repurchase requirement, but rather provides the repurchase terms for inventory covered by the statute. Subsection 2723(a) provides that inventory subject to repurchase (1) must have been previously purchased from the supplier, (2) must remain unsold at termination, and (3) must be repurchased within 90 days of termination. Thus, "all" such inventory, whether equipment or repair parts, must satisfy each of these statutory terms.

This interpretation is consistent with the remainder of § 2723. Subsection 2723(b) distinguishes among the different types of products included in the statutory definition of "inventory" and provides repurchase-price terms for new repair parts that are different from those provided for the other categories of new retail inventory covered by the statute.[6] Subsections 2723(c) and (d) provide terms for delivery, inspection, and payment. Significantly, the General Assembly

[6] Inventory other than repair parts must be "new, unused, undamaged and complete" and repurchased at 100% of "net cost," less a reasonable allowance for deterioration due to weather conditions, while repair parts must be "new, unused and undamaged," "currently listed in the supplier's price book" and repurchased at 85% of the "current net price." *Id.* § 2723(b)(1)&(b)(2).

interchangeably used the words "the" and "all" to set forth the inspection-and-return repurchase terms of subsection (c) and refers to "the" inventory in subsection (d). The fact that the General Assembly interchangeably used the words "all" and "the" demonstrates that the word "all" in subsection 2723(a) has no special significance and should not be given an expansive reading that ignores the limitations provided in subsections 2723(b)-(d) and § 2722.

For the same reasons, STP is wrong when it argues that this interpretation renders the word "all" mere surplusage. Ans. Br. 18. The word "all" in subsection 2723(a), like the interchangeable use of the words "the" and "all" in subsections (c) and (d), means that the terms provided in these subsections apply in the same fashion to all types of inventory covered by the statute, in contrast to subsection (b), which differentiates among different types of new retail inventory.

C. STP Changes the Dealer Statute from Requiring Repurchase "As Provided" to Requiring Repurchase "Unless Excluded."

STP argues that all equipment, regardless of whether it is rental, used, damaged or incomplete, must be repurchased unless the General Assembly expressly excludes such equipment in § 2724. Ans. Br. 16-17. This argument improperly rewrites § 2722 from requiring repurchase "as provided" in the statute to requiring repurchase "unless excluded" from the statute. This argument is premised on the false presumption that the statute requires the repurchase of used

rental equipment. However, no exclusion is necessary for equipment or other inventory that was never included in the statute in the first place.

Moreover, STP assumes that the exceptions in § 2724 represent examples of used inventory that would be subject to repurchase absent such exception. *Id.* at 11-12. Based on this assumption, STP reasons that, because there is no express exclusion for used or rental equipment, such equipment must be repurchased. This assumption is simply not true. The exceptions in § 2724 do not describe used inventory, but rather relieve a supplier from repurchasing equipment and repair parts that otherwise qualify as "new, unused, and undamaged." For example, the exceptions relieve the supplier from repurchasing new, unused and undamaged inventory that has remained in the dealer's new retail inventory: (1) if such inventory has become obsolete or dated while sitting on the dealer's shelf; or (2) if a new repair part cannot be readily sold as new by the supplier after repurchase, because it is no longer part of an unopened package of multiple-packaged repair parts or because it needs repackaging or reconditioning after sitting on the dealer's shelf. 6 Del. C. § 2724. The absence of an exception for used rental equipment does not reflect an intent to require the repurchase of such equipment. There is no exemption for used rental equipment because the repurchase obligation simply does not extend to such equipment.

II. CANONS OF STATUTORY CONSTRUCTION DO NOT REQUIRE REPURCHASE OF USED, DAMAGED, INCOMPLETE, OR RENTAL EQUIPMENT.

STP's argument that the canons of statutory construction support extending the ambiguous language to require the repurchase of used rental equipment does not withstand analysis. Ans. Br. 14-15.

A. Legislative Intent Does Not Support STP's Proposed Construction.

STP can point to no expression of legislative intent that the General Assembly meant to extend the repurchase requirements to used, damaged, incomplete, or rental equipment. Instead, STP argues that the expression of 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[7] does not necessarily exclude STP's alternative purpose regarding the repurchase of construction equipment used in a dealer's rental business. Ans. Br. 22-23. However, the failure of a legislative body to exclude an intention is too slim a reed from which to divine legislative purpose. The General Assembly's expressions of intent in the preamble and statutory definitions are limited to the business of retailing new construction equipment, and support limiting the statutory-repurchase provisions to new retail equipment. *See* Opening Br. 20-22. They simply do not evidence any legislative intent to subject other businesses of a dealer to the statute's provisions.

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

Nor does STP's description of the dealer statute as a "consumer protection" statute fare any better. Dealers, such as STP, are engaged in the business of retailing new construction equipment to the heavy-construction industry. The dealers, and the suppliers from which they purchase new construction equipment, are not consumers but are sophisticated commercial businesses occupying different places on the distribution chain of such equipment to this industry. Accordingly, the Dealer Statute, like similar statutes around the country, was not intended to and does not provide consumer protection.[8] Instead, these statutes afford a commercially reasonable method to wind up a business agreement between commercial parties who have different commercial interests covered by the legislation. *Id.* at 21-22, 30-32.

Finally, STP's argument that the General Assembly is presumed to know the industry simply does not support its proposed construction because STP inaccurately describes the industry by: (1) conflating rental equipment with demonstration ("demo") equipment to imply that industry practice is to rent out equipment to market its sale as new retail equipment; and (2) asserting that the supplier is in the best position to efficiently use or dispose of used rental equipment after a dealership terminates.

[8] Reinforcing this point is the fact that there is a separate subchapter, 6 Del. C. § 2732, *et seq.*, labeled "Consumer Contracts" intended to provide consumer protection.

Without support, STP asserts that it rented out equipment to third parties in order to "promote" the Terex brand.[9] Ans. Br. 7-8, 21. However, STP conflates rental equipment with demo equipment. *Id.* at 19-21. Equipment rental is a business used to generate rental income, separate and apart from the retail sale of new equipment. Equipment that is rented out to third parties cannot be sold as "new," even if it is rented out only for a few hours. Accordingly, a dealer retailing new equipment does not rent out heavy-construction equipment to then sell such equipment as new. Unlike rental equipment, demo equipment is used to promote or market new retail equipment and can be sold as new, as long as it does not have so many hours of demo use that it must be treated as "used." This distinction between rental equipment and demo equipment is accepted throughout the industry and is reflected in most, if not all, dealer statutes,[10] with some statutes expressly specifying the number of hours that can be put on demo equipment and still be considered "unused." Opening Br. 28-31 & nn. 35-37 (citing dealer statutes).[11]

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[9] In reality, STP had little success retailing Terex products from the outset, Opening Br., Ex. A (3rd Cir. Op.) at 4, so it rented the equipment out to third parties to generate income.

[10] This distinction gives meaning to both of the terms "new" and "unused" in the dealer statutes. Equipment with only a few hours of use is considered new and unused if those hours come from using the equipment only in demonstrations, but it would not be "new" if the same number of hours come from use by a third party under a rental contract.

[11] Indeed, STP's auto-dealership analogy demonstrates the fallacy of equating rental equipment with demo equipment. Ans. Br. 17 n.6. Cars used only as demo vehicles for test drives by potential customers are sold as new unless they accumulate too many miles, but cars that are rented or used in a dealer's rental fleet cannot be sold as new, even if they have very few miles on them. *Cf.* 21 Del. C. § 2124 (allowing prospective purchasers, but not lessees, to test drive

Contrary to STP's suggestion, Terex never refused to repurchase equipment from STP on the grounds that it had been used for demo purpose.[12]

Similarly, STP is simply wrong when it argues that the supplier is in the best position to most efficiently use or dispose of used rental equipment after termination. Ans. Br. 14, 22. A dealer operating a rental business can continue to do so without interruption when the dealership terminates. Indeed, this is precisely what STP hoped to do here if it had been able to refinance the equipment before GE exercised its right to repossession. *Cf.* Opening Br., Ex. A (3rd Cir. Op.) at 4-5 (STP wanted to keep 23 pieces of equipment, all of which had been rented out). Not only is the dealer in a better position to generate value from rental income after termination, it also is in at least as good a position to sell rental equipment, perhaps to its local market of rental customers.[13] Neither the continued rental nor the sale of used equipment is affected by a dealership termination.

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new cars that are owned by a retail dealer and have not been registered, as long as they display special plates, issued to retail automobile dealers based on annual sales).

[12]To the contrary, Terex repeatedly asked STP to identify which equipment had been used as rental, as opposed to demo, equipment, but STP never responded. Opening Br., Ex. A (3rd Cir. Op.) at 4-5. Indeed, STP concedes Terex's willingness to repurchase demo equipment when it cites Terex's expert testimony that equipment with less than 100 hours of use is considered "new and unused," as long as those hours came from demo use, the equipment's condition did not reflect prior use inconsistent with a demo, and the equipment had not been rented for revenue. Ans. Br. 27.

[13] In support of its position, STP makes the inaccurate claim (one not raised in the District Court or Third Circuit) that Terex has a "used equipment" division, which better enables Terex to sell used equipment. Terex has no "used equipment" division, and the website cited by STP, Ans. Br. 22 & n.10 (citing www.terexused.com), is a portal hosted by Terex to provide **dealers** with

B. Requiring Repurchase of Used Rental Equipment is Inconsistent with Policy Underlying Similar Dealer Statutes.

STP's argument that its construction is supported by the policy animating similar dealer statutes suffers from the same fatal flaws – it is premised on distorted depictions of industry practices regarding demo and rental equipment, as well as the sale or rental of used equipment. In addition, STP incorrectly describes dealer statutes as having only the protection of the dealer in mind. To the contrary, these statutes reflect a balance between the interests of dealers and those of manufacturers and suppliers. *See* Opening Br. 21-22, 25; discussion *supra* p. 10 Other courts have recognized as much, and have construed these statutes strictly against the dealer, refusing dealers' requests to expand statutory obligations beyond the terms provided in the statute. *See, e.g., Town & Country Equip., Inc. v. Massey-Ferguson, Inc.*, 808 F. Supp. 779, 781 (D. Kan. 1992) (sale of parts or equipment after termination, even if in "mitigation," is election to keep, negating supplier's obligation to repurchase); *Kaisershot v. Gamble-Skogmo, Inc.*, 96 N.W.2d 666 (N.D. 1959) (same regarding dealer who sells inventory after supplier allegedly refused return); Opening Br. 31-32.

Significantly, STP has identified no other statute that has adopted its proposed construction to require repurchase of all equipment, whether used,

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an additional resource for selling the dealers' used equipment, not all of which has been purchased from Terex.

damaged, incomplete or rental equipment, for a "negotiated price." Although STP identifies three statutes that allegedly support its position, those statutes do not extend repurchase requirements to all rental equipment or to equipment that is otherwise damaged or incomplete. For example, the Ohio statute applies only when the supplier terminates a dealership, and it requires repurchase only if inventory is in "new, unused, undamaged, complete and saleable condition." Oh. St. § 1353.02 (B)&(D)(6). The Kentucky statute extends its repurchase requirements only to "inventory used in demonstrations" and only if "equipment is in like-new condition." Ky. Rev. St. § 365.810(1)(b). And the Oregon statute applies only to equipment "that is in new condition." Or. Rev. St. § 646A.304(1)(b). Moreover, none of these statutes provides a vague repurchase price term like "negotiated price." Instead, they reference industry guides or depreciated value, for which there are tables and established depreciation guidelines.[14] In sum, these three statutes do not establish that the general policy animating similar dealer statutes nationwide supports STP's proposed construction, particularly in light of the fact that the overwhelming majority of dealer statutes limit repurchase to new, unused, undamaged, and complete equipment, with very few, more limited extensions. *See* Opening Br. 28-31 & nn. 35-37.

[14] Oh. St. § 1353.02 (B) ("average 'as-is' value shown in industry guides"); Ky. Rev. St. § 365.810(1)(b) (depreciated value); Or. Rev. St. § 646A.304(1)(b) (same).

C. Requiring Repurchase of Used Rental Equipment Works a Disharmony in the Statute and Raises Constitutional Concerns.

The net-price damages formula of § 2727(a) parallels the net-cost repurchase price of § 2723(b) for new equipment, providing a compensatory remedy for the failure to repurchase new equipment by giving 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 equipment's purchase and termination. *Compare* 6 Del. C. § 2727(a) *with id.* § 2723(b). STP's proposed 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). As the Third Circuit observed, this disharmony renders unworkable the District Court's judicially engrafted term of "a negotiated price" for used or damaged equipment, since a dealer's reward for failed negotiations is that the supplier is forced to pay new-equipment prices for used or damaged equipment, resulting in a windfall to the dealer.[15] This windfall also implicates constitutional concerns because, by requiring the forced repurchase of used, damaged, and incomplete rental equipment at new-inventory prices, the statute imposes a penalty on the supplier and grants the dealer a windfall. *See* Opening Br. 32-34.

[15] STP's unsupported speculation about supplier and dealer motivations does not adequately address the concern raised by the Third Circuit that having a "negotiated" price term seems unworkable, where the reward for the failure of negotiation is for one party to receive a windfall. Ans. Br. 30-31.

In response, STP argues that these concerns are not a problem for its proposed construction because no violation can be found if the supplier has negotiated in good faith or if the dealer has not. Ans. Br. 31. This argument adds a good-faith term that was not applied by the District Court. Moreover, it also fails to recognize: (1) the inherently punitive nature of a statutory-damages formula that forces repurchase of used, damaged, incomplete or rental equipment at new-inventory prices, regardless of its value or whether, as in this case, title and possession cannot be passed to the supplier; and (2) the lack of notice that the statute retroactively applies to such equipment. Moreover, contrary to STP's position in the federal-court litigation, its argument here requires that § 2727(a) be construed to ensure that damages for the failure to repurchase used equipment both (1) take into account the dealer's actual loss, and (2) be imposed only after a finding that the supplier's failure to repurchase involved sufficiently culpable conduct to warrant imposing a penalty on the supplier and granting a windfall to the dealer. Such a requirement finds no support in the Dealer Statute, the Constitution or industry custom.

III. STP'S STATEMENT OF FACTS EXCEEDS THE SCOPE OF REVIEW.

STP presents to this Court disputed facts not included in the statement of facts submitted by the Third Circuit, thus exceeding the limited scope of review for questions certified for resolution by the Court under Supreme Court Rule 41. *See, e.g., Duncan v. Theratx, Inc.,* 775 A.2d 1019, 1021 (Del. 2001) ("Questions

certified ... 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."). The Statement of Facts in STP's brief attempts to create the false impression that Terex did not fully and fairly engage in good-faith negotiations with STP before GE repossessed STP's equipment or that Terex conceded key issues on appeal. These disputed assertions lack any support, are a distraction from the question certified by the Third Circuit, and should not be considered by this Court.

STP incorrectly suggests that Terex acted in bad faith by refusing to repurchase any inventory and failing to offer new-inventory prices for the seven pieces of new equipment. Ans. Br. 8, 24-25, 31-32. But STP's efforts to discount Terex's good-faith belief that the Dealer Statute applies only to new retail inventory are undermined by the fact that the Third Circuit certified that very question to this Court.

Moreover, the facts certified by the Third Circuit establish that Terex did not refuse to repurchase any inventory or fail to offer new-inventory prices for new equipment because STP refused to advise Terex which pieces of equipment were new. When STP terminated the Dealership Agreement with Terex, STP demanded that Terex repurchase seventeen of the approximately forty pieces of Terex equipment then owned by STP, and indicated that it wanted to keep the remaining

twenty-three pieces presumably to continue its rental business.[16] Terex responded that the Dealer Statute required repurchase of only new equipment, and, in order to ascertain which of this equipment was new, Terex asked STP to identify which of the seventeen pieces had not been rented out.[17] STP persistently either ignored or refused to respond to this request. As a result, Terex did not know which of STP's equipment was new and therefore offered to repurchase at fair-market value nine of the seventeen pieces that STP asked to be picked up, based on Terex's inspection of the equipment.[18] Terex did not learn until discovery which pieces of equipment had been used for demonstration purposes only and had not been rented out, and based on this late-discovered information, agreed that seven of the pieces of equipment were new. All seven of those pieces of equipment had been included in Terex's offer to repurchase.[19]

In addition, STP does not accurately portray the record when it refers to alleged positions that Terex allegedly conceded below. For example, STP argues that Terex conceded that it violated the Dealer Statute with regard to used equipment. Ans. Br. 1, 24-25, 31-32. However, the Third Circuit recognized this as nothing more than STP's argument, based on Terex's good-faith assertion that

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[16] Opening Br., Ex. A (3d Cir. Op.) at 4-5.

[17] *Id.* at 5-6.

[18] *Id.*

[19] *Id.*

the Dealer Statute requires repurchase of only new, unused, undamaged, and complete equipment. Opening Br., Ex. A at 7 (referring to STP's argument that, "because Terex offered to repurchase only new and unused inventory, it fell afoul of the statute"). Similarly, STP makes the puzzling claim that Terex first raises here that the plain statutory language limits the repurchase obligation to new retail equipment. Ans. Br. 19. Terex has argued from the outset that the Dealer Statute requires repurchase of only new, unused, undamaged and complete equipment, pointing to, *inter alia*, the statutory phrase "remains unsold" to support this interpretation. *E.g.*, Terex 3rd Cir. Opening Br. (Doc. 3111578504), at 23, 26, 29-30; Terex 3rd Cir. Reply Br. (Doc. 3111618978), at 11-12; 3rd Cir. Oral Arg. Tr. (Doc. 3111766718), at 50-51 (attached as Exhibits A, B and C, respectively).

Despite these misstatements by STP, it is clear from the facts certified by the Third Circuit and the Third Circuit briefing that Terex: acted in good faith in its dealings with STP; made a reasonable offer to STP based on Terex's limited knowledge (which STP refused to augment); and amended its position once it learned through the discovery process that seven pieces of equipment were new. Thus, Terex has consistently, properly maintained that the Dealer Statute requires repurchase of only new, unused, undamaged, and complete equipment.

CONCLUSION

For the foregoing reasons and the reasons set forth in its Opening Brief, Terex respectfully requests that this Court 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 was rental equipment or equipment that is used, damaged or incomplete.

Respectfully submitted,

Dated: March 10, 2015

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