

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELEWARE**

TL OF FLORIDA, INC.	)	
	)	CIVIL ACTION NO.
Plaintiff,	)	
	)	
v.	)	
	)	
TEREX CORPORATION, d/b/a	)	
TEREX CONSTRUCTION AMERICAS,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

COMPLAINT

Plaintiff, by its attorneys, for its Complaint against Defendants, allege as follows (on knowledge as to Plaintiff; otherwise on information and belief):

Nature of Action

1. In this action, Plaintiff, a full-service distributor of Terex heavy equipment, brings this action to recover damages for Defendant's fraudulent inducement of the Distributorship Agreement, bad faith, and violation of the Florida Deceptive and Unfair Trade Practices Act. In brief, Defendant Terex Corporation ("Terex") appointed Plaintiff TL of Florida, Inc. ("TL") as a distributor of Terex heavy equipment, such articulated dump trucks ("whole goods") and parts for such equipment, upon express and implied representations, among others, that there was a market for such heavy equipment and parts, and that Terex needed the representation of a distributor of these products, in Southern Florida. In reliance upon those representations, TL executed a Distributorship Agreement for Terex heavy equipment. However, in inducing TL to

become a Terex distributor, Terex failed to disclose to TL the material facts that the market for parts was already saturated in Southern Florida; and that there were at least six distributors in the area who sold parts only – and therefore did not have to carry the financial burden of purchasing and maintaining whole goods, and who could undercut Plaintiff on prices. Terex also failed to disclose that it was in economic straits and was signing up virtually any person who would agree to purchase whole goods as a heavy equipment distributor, regardless of the market and regardless of the qualifications of the purchaser. Based on its representations that there was a market for whole goods and parts, TL became a Terex distributor and invested substantial amounts of money in whole goods and parts, only to find that there was, in fact, very little market for whole goods, and that South Florida was flooded with authorized Terex parts distributors who carried only parts and who could undercut the prices of TL because they did not have to carry the substantial inventory of whole goods. As a result of Defendant's fraudulent omissions, bad faith performance of the Distributorship Agreement and failures to take steps to protect its distributors, Defendant is liable to Plaintiff for damages of no less than \$3 million.

Jurisdiction and Venue

2. This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1332 because the parties are of diverse citizenship and the amount in controversy exceeds \$75,000.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendant is located here and, pursuant to the Distributorship Agreement between the parties, venue is to be located here.

Parties

4. Plaintiff TL of Florida, Inc. is a Florida corporation with its principal place of business at 8489 NW 64th Street, Miami, Florida 33166.

5. Terex Corporation is a Delaware corporation having its principal place of business in South Haven, Mississippi.

Facts

6. Terex Corporation is engaged in the sale, to distributors, of heavy equipment that is used for excavation, construction, mining and other applications. This equipment is large and complex; it subjected to strenuous and extremely demanding work; as a result, heavy equipment breaks down and there is a continuing need for replacement parts.

7. The market for whole goods, such as articulated dump trucks, is highly volatile and dependent largely upon the economy. A piece of heavy equipment may cost, at wholesale, \$300,000 to \$400,000, and at retail, twice that amount. Because the work that such a piece of equipment may do, such as excavating for construction sites, is quite limited, there is not a steady demand for such equipment. Rather, demand for any particular piece of heavy equipment is sporadic and short term. Throughout the country, this demand has been met, in large part, by companies that specialize in renting heavy equipment to construction companies. By renting such equipment, construction companies can satisfy their need for whole goods without having to make the very substantial investment that they would otherwise need to make in a piece of equipment.

8. Because rental companies largely fill the need for whole goods, the market for distributors, such as TL of Florida, to sell whole goods to end users is virtually nil.

9. In or about 2008, Terex approached TL of Florida about becoming a Terex distributor. In presenting the opportunity to TL of Florida, Terex showed TL a copy of the Distributorship Agreement which contained, among others, the following provisions:

- That the Distributor would use its best efforts to develop the potential for sales, leases, rentals and use of products in the territory.
- That the Distributor would purchase at least the minimum number of units set forth in an attached Schedule A, which, in turn, provided for purchase of four “articulated dump trucks” a year in the first year and eight in the second year;
- That the Distributor would maintain an inventory of products equal to the minimum inventory listed in Schedule A, which provided for as many as 12 articulated dump trucks. The Distributorship Agreement also required the distributor to maintain an organization and facilities sufficient to support the sale of the products;
- That the Distributor would employ adequately trained personnel to service products and maintain a financial condition acceptable to Terex.

10. In reliance upon these representations, TL of Florida entered into a Distributorship Agreement with Terex dated as of May 12, 2008, as amended April 11, 2011.

11. During the course of the discussions with Terex, Terex failed to disclose to TL of Florida the following facts that would have been material to TL’s decision to enter into the Distributorship Agreement if they had been disclosed:

- That there was, in fact, no market for the number of units that the agreement otherwise required the distributor to sell and to keep an inventory.
- That the distributor was surrounded by dealers in authorized Terex parts who could sell those parts to customers without having to maintain the inventory of whole goods or infrastructure that Plaintiff was required to maintain.

- Terex did not select distributors on the basis of demand in the marketplace or quality of the distributor. Instead, it would give a distributorship agreement to any person who asked for it and had the financial ability to purchase whole goods.
- Terex was in financial distress and had embarked upon a practice of signing up distributors and obligating them to purchase whole goods without regard to the demand in marketplace or the ability of the distributor to market the products.

12. If TL of Florida had known the foregoing facts, it would not have entered into the Distributorship Agreement.

13. In addition, in performing the Distributorship Agreement, Terex has breached the implied covenant of good faith and fair dealing by insisting that Plaintiff purchase whole goods in excess of the number demanded by the marketplace, which has burdened Plaintiff with excessive costs for inventory, personnel and parts that it should not have had to purchase.

14. As a result of Defendant's conduct, Plaintiff has been injured in an amount to be determined at trial.

COUNT ONE
(Fraudulent Non-Disclosure)

15. Plaintiff repeats and realleges each and every allegation set forth above as though set forth herein full.

16. In inducing TL of Florida to enter into the Distributorship Agreement, Terex represented that there was a market for Terex whole goods, that that market was sufficient to support the required purchases and inventory that were contained in the agreement and that Plaintiff would be able to market the products at that level.

17. In undertaking to make these representations to TL of Florida, Terex undertook to speak the whole truth, and not simply half truths, to Plaintiff. Terex failed to tell the whole truth, and falsely and wrongfully withheld the information described above from TL of Florida as well as the following:

- Terex knew, and had internally discussed, that there was no market for whole goods that nearly approached the number of purchases required in the Distributorship Agreement; that Terex had longstanding financial problems because the market for whole goods in the United States was suffering; that Terex had embarked upon a program of indiscriminately signing up distributors in order to require them to purchase whole goods in order to support its market; and Terex would require Plaintiff to purchase whole goods notwithstanding the fact that there was no market for them and that Plaintiff could not resell them.
- There was a substantial number of parts sellers in the market that could sell parts to end users at prices substantially lower than TL can sell them for.

18. As a result of Terex's fraudulent failure to disclose all of the facts, TL of Florida entered into an agreement with Terex for the distribution of wholegoods and parts that it would not have entered into if it had known all of the facts.

19. As a result of Defendant's fraudulent non-disclosure, Plaintiff has sustained damages in an amount to be determined at trial but in no event less than \$75,000.

COUNT TWO
(Negligent Misrepresentation)

20. Plaintiff repeats and realleges each and every allegation set forth above as though set forth here in full.

21. Plaintiff and Defendant entered into a business relationship in which Defendant knew that Plaintiff was relying upon it for accurate and reliable information concerning the nature of a Terex Distributorship, and Plaintiff had a pecuniary interest in such information.

22. Defendant made the misleading statements and omissions set forth above, and did so negligently, without using reasonable care to ensure that the information provided to Plaintiff was accurate and complete.

23. As a result of Defendant's negligence in providing misleading information and making misleading omissions to Plaintiff, Plaintiff relied upon Defendant's statements and omissions to its detriment and sustained pecuniary loss.

24. Plaintiff has been injured as a result of Defendant's negligence in an amount to be determined at trial, but in no event less than \$75,000.

COUNT THREE
(Violation of Florida Deceptive and Unfair Trade Practices Act)

25. Plaintiff repeats and realleges each and every allegation set forth above as though set forth herein full.

26. Terex has committed a violation of the Florida Deceptive and Unfair Trade Practices Act by misrepresenting to Plaintiffs that there was a market for products when in fact there was not and by making other misrepresentations as set forth above.

27. As a result of Defendant's misrepresentations, Plaintiff has been injured in an amount to be determined at trial but in no event less than \$75,000.

COUNT FOUR
(Violation of Good Faith and Fair Dealing)

28. Plaintiff repeats and realleges each and every allegation set forth above as though set forth herein full.

29. In every contract there is implied an obligation of good faith and fair dealing, pursuant to which neither party shall deprive the other of the fruits of the contract.

30. The agreement between Terex and TL of Florida provided that TL of Florida would purchase whole goods in a number determined in the discretion of Terex. Terex exercised its discretion in bad faith in determining the number of units of whole goods that TL of Florida was required to purchase.

31. As a result of Terex's breach of the implied covenant of good faith and fair dealing, TL of Florida has been injured in an amount to be determined at trial, but in no even less than \$75,000.

WHEREFORE, Plaintiff seeks judgment as follows:

- A. An award of actual damages in an amount to be determined at trial, but in no event less than \$75,000;
- B. An award of attorneys' fees as to the extent permitted by law;
- C. An award of costs and disbursements; and
- D. Such other and further relief as the Court deems just and proper.

Dated: December 9, 2013

Respectfully submitted,

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