No. 13-4279

IN THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SOUTHERN TRACK AND PUMP, INC.,
Plaintiff—Appellee,

v.

TERRX CORPORATION D/B/A TEREX CONSTRUCTION AMERICAS,
Defendant—Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
LEONARD P. STARK, DISTRICT JUDGE • CASE NO. 1-08-CV-00543 (LPS)

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT TEREX CORPORATION D/B/A TEREX CONSTRUCTION AMERICAS AND SUPPORTING REVERSAL

HORVITZ & LEVY LLP
DAVID M. AXELRAD
MARK A. KRESSEL
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800

LEDERER WESTON CRAIG, P.L.C.
MIKE WESTON
118 THIRD AVENUE SE, SUITE 700
CEDAR RAPIDS, IOWA 52401
(515) 224-3911

ATTORNEYS FOR AMICUS CURIAE
DRI-THE VOICE OF THE DEFENSE BAR

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae DRI – The Voice of the Defense Bar of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5) 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE DEALER STATUTE AS APPLIED CREATES AN ARBITRARY TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW. 7

A. The statute imposes a severe and oppressive penalty that is unreasonably disproportionate to the violation. 7

B. The damages award is unconstitutional because, just as with punitive damages, a statutory penalty violates due process if it lacks any proportional relationship with the nature of the defendant's conduct and the plaintiff's actual harm. 10

C. The statute creates the equivalent of a confiscatory rate. 16

II. THE DISTRICT COURT'S INTERPRETATION OF THE DEALER STATUTE CREATES AN UNCONSTITUTIONAL TAKING WITHOUT JUST COMPENSATION. 18

A. As a condition of doing business in Delaware, the district court ordered an unconstitutional exaction of the supplier's property lacking any proportionality to the dealer's loss. 18

B. The court's statutory interpretation created a *per se* taking of funds. 23

CONCLUSION 26

CERTIFICATE OF BAR MEMBERSHIP 27

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS 28

CERTIFICATE OF DIGITAL SUBMISSION 29

CERTIFICATE OF SERVICE.. 30

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 21

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 10, 11, 16

Brown v. Legal Foundation of Washington,
538 U.S. 216 (2003) 24, 25

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 8

Capitol Records, Inc. v. Thomas-Rasset,
692 F.3d 899 (8th Cir. 2012) 8, 11

CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.,
499 F.3d 184 (3d Cir. 2007) 12, 13, 14

Coffey v. County of Harlan,
204 U.S. 659 (1907) 7

Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,
532 U.S. 424 (2001) 10

D & B Enters. of Winona, Inc. v. Kawasaki Motors Corp., U.S.A.,
792 F. Supp. 653 (D. Minn. 1992) 15

Doe v. Chao,
540 U.S. 614 (2004) 5

Dolan v. City of Tigard,
512 U.S. 374 (1994) 19, 20, 21, 22

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989) 16, 17

FCC v. Fla. Power Corp.,
480 U.S. 245 (1987) 16

Frost v. R.R. Comm'n of Cal.,
271 U.S. 583 (1926) 20, 21, 22

In re J.P. Morgan Chase & Co. S'holder Litig.,
906 A.2d 766 (Del. 2006) 5

Interstate Equip. Co. v. ESCO Corp.,
Civil Action No. 5:11CV51-RLV, 2012 WL 5183605
(W.D.N.C. Oct. 18, 2012) 15

Jardel Co. v. Hughes,
523 A.2d 518 (Del. 1987) 5

Kaisershot v. Gamble-Skogmo, Inc.,
96 N.W.2d 666 (N.D. 1959) 15

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. __, 133 S. Ct. 2586 (2013) 19, 20, 21

Lehigh Valley R.R. Co. of N.J. v. Martin,
100 F.2d 139 (3d Cir. 1938) 17

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 19, 20, 21

Parker v. Time Warner Entertainment Co.,
331 F.3d 13 (2d Cir. 2003) 10

Perry v. Sindermann,
408 U.S. 593 (1972) 20

Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.,
391 U.S. 563 (1968) 20

S. Pac. Co. v. Denton,
146 U.S. 202 (1892) 20, 22

Sony BMG Music Entm't v. Tenenbaum,
660 F.3d 487 (1st Cir. 2011) 11

St. Louis, I. M. & S. Ry. Co. v. Williams,
251 U.S. 63 (1919).. 7, 8, 9

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003).. *passim*

Sw. Tel. & Tel. Co. v. Danaher,
238 U.S. 482 (1915).. 8, 9

Town & Country Equip., Inc. v. Massey-Ferguson, Inc.,
808 F. Supp. 779 (D. Kan. 1992).. 15

Verizon Commc'ns, Inc. v. FCC,
535 U.S. 467 (2002).. 16, 17

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980).. 23, 24, 25

West v. Chesapeake & Potomac Tel. Co. of Balt. City,
295 U.S. 662 (1935).. 17

Zomba Enters., Inc. v. Panorama Records, Inc.,
491 F.3d 574 (6th Cir. 2007).. 11

Statutes

Delaware Equipment Dealer Statute
Del. Code Ann. tit. 6, §§ 2720-27.. 2
Del. Code Ann. tit. 6, § 2727(a).. 3

Kan. Stat. Ann. § 16-1003(a)(6) 14

Md. Code Ann., Com. Law § 19-203(8).. 14

N.C. Gen. Stat. § 66-184.. 15

N.Y. Gen. Bus. Law § 696-f(4)(f) 14

Rules

Federal Rule of Appellate Procedure
Rule 29(b) 2
Rule 29 (b)(1) 2
Rule 29(c)(5) 2
Rule 32(a)(7)(C) 28

INTEREST OF AMICUS CURIAE

DRI – The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys defending businesses and individuals in civil litigation. To this end, DRI seeks to address issues important to defense attorneys, to promote the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as amicus curiae in cases raising issues of importance to its members, their clients, and the judicial system. DRI has a strong interest in supporting the argument that a state may not require a supplier, as a condition of doing business in that state, to be subject to liability for damages for failure to repurchase inventory upon termination of a distribution agreement in amounts with no relation to—and that far exceed—any actual economic loss to the dealers with whom it does business. Such a decision will be of significant importance not only to the parties in this case, but to all potential suppliers subject to the Delaware Equipment Dealer Statute, Del. Code

Ann. tit. 6, §§ 2720-27 ("Dealer Statute"), and similar statutes in other states. *See* Fed. R. App. P. 29(b)(1).

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae and its counsel contributed money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Delaware, like many states, regulates the terms by which equipment suppliers and dealers can enter into a distribution agreement that requires the dealer to order and maintain certain amounts of the supplier's inventory for sale. Delaware's Dealer Statute, Del. Code Ann. tit. 6, §§ 2720-27, provides that if either party terminates the agreement, the supplier must repurchase the dealer's inventory unless the dealer chooses to keep the inventory. Thus, the statute protects dealers from being left in the lurch with a warehouse full of expensive equipment that they are no

longer authorized to sell if a distribution agreement terminates. The statute further provides that if the supplier does not repurchase the inventory, it will be civilly liable for damages equal to the cost of the inventory. While this civil liability provision sounds simple and fair enough in the abstract, the interpretation of the formula by which a court arrives at the amount of these damages can lead to extreme results that bear no relationship to the statute's purpose.

In this case, the district court ruled the Dealer Statute requires that if a supplier fails to repurchase from the dealer within ninety days of a contract termination all enumerated types of inventory, the supplier is civilly liable for 100 percent of the "current net price" of the inventory, regardless of the actual economic loss, if any, caused to the dealer by the termination of the contract. *See* ECF No. 308 at 70-72 (pretrial order);[1] ECF No. 321 at 2-3 (court's order denying motion to preclude unconstitutional application of Dealer Statute); Del. Code Ann. tit. 6, § 2727(a). As a consequence of this ruling, the supplier was ordered to pay damages to the dealer in the full amount of the "current net price" of the

---

[1] "ECF" citations are to the Delaware District Court's ECF docket entry numbers.

inventory—a paper figure comprising nothing more than the supplier's list price for new equipment less applicable discounts, totaling over $4 million. However, because some of the inventory had lost value due to use or damage, and because the dealer was able to mitigate its actual economic damages through a foreclosure and auction procedure with its financer and the supplier's payment under a recourse agreement, the dealer's alleged actual economic loss was only approximately $1 million.[2] Furthermore, the statutory "repurchase" of the inventory that the district court imposed on the supplier was largely illusory because the dealer had already disposed of the property during the ninety-day repurchase period. As a result, the supplier would not be able to regain possession of the property notwithstanding its payment of the full amount of the property's "current net price." Thus, the district court's order imposed damages

[2] The amount of the dealer's actual damages, if any, was never established because the court deprived the parties of a trial on those damages. In fact, the supplier's evidence showed that the dealer suffered at most approximately $50,000 as a result of the supplier's alleged repurchase violations, and possibly less. (J.A. 263-64, 355-56; *see* Appellant's Opening Brief 6.) To demonstrate the unconstitutionality of the district court's judgment, amicus assumes for the sake of its arguments here that the $1 million damages amount that the dealer claimed it suffered could be proven at trial on remand. Amicus notes, however, that if the damages were as low as $50,000, the ratio of statutory damages awarded here to actual damages would be well over 80-to-1.

representing approximately four times the dealer's claimed actual harm. Rather than ensure just compensation, the district court's interpretation of Delaware law offends fundamental notions of fairness and due process.

Compensatory damages "'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). There is a "fundamental principle governing entitlement to compensatory damages, which is that the damages must be logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006). Thus, "[t]he object and purpose of an award of compensatory damages in a civil case is to impose satisfaction for an injury done . . . with the size of the award directly related to the harm caused by the defendant." *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987). Because of this principle, the United States Supreme Court will endeavor to interpret a statute in a manner consistent with the "traditional understanding" that compensatory damages require "proof of some harm for which damages can reasonably be assessed." *Doe v. Chao*, 540 U.S.

614, 621 (2004) (holding that entitlement to minimum statutory award under Privacy Act of 1974 requires proof of actual damages).

The United States Constitution does not permit a state to use a statute to force a company, as a condition of doing business under that state's law, to pay damages in violation of the fundamental principle that compensatory damages must be directly related to the harm caused by the defendant. As amicus discusses below, the district court's interpretation of the Dealer Statute as applied to this case resulted in a violation of the defendant's due process rights and a taking of the defendant's property without just compensation under the Fifth and Fourteenth Amendments.

The Supreme Court has developed several doctrines that, by analogy, provide a framework to understand—and correct—the constitutional violations created by the district court's interpretation of the Dealer Statute. First, the statutory penalty in this case was so unreasonable and arbitrary that it constituted a taking of private property without due process of law. Second, as shown by examining the Supreme Court's recent punitive damages cases, the damages in this case were unconstitutional because they were in no way proportional to either the nature of the supplier's conduct or the extent of the dealer's harm. Third,

the district court's order effected a taking without just compensation by conditioning doing business under Delaware law on exposure to liability for damages that lack any proportional relationship to the amount of the dealer's actual loss. Fourth, the order here could be considered a *per se* taking of the supplier's funds for a public use without compensation. Under any or all of these theories, the district court's order should be reversed.

ARGUMENT

I. THE DEALER STATUTE AS APPLIED CREATES AN ARBITRARY TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The statute imposes a severe and oppressive penalty that is unreasonably disproportionate to the violation.

For over a century, the Supreme Court has recognized that the Due Process Clause "places a limitation upon the power of the states to prescribe penalties for violations of their laws." *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919); *see Coffey v. County of Harlan*, 204 U.S. 659, 662-63 (1907). Although courts will afford states broad latitude to set statutory penalties, statutes violate the Due Process Clause "where the penalty prescribed is so severe and oppressive as to be wholly

disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66-67; *see Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme.").

Even where a statutory provision is not unconstitutional on its face, it may be unconstitutional as applied if the award prescribed by the statute is severe and oppressive enough in a particular circumstance. *See Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909-10 (8th Cir. 2012) (holding that statutory damages under Copyright Act provisions are not unconstitutional in all cases, but acknowledging that if the damages were high enough, they might offend due process because "[t]he absolute amount of the award" is relevant to the inquiry).

Similarly, the Due Process Clause prohibits a state from applying a statute that appears reasonable on its face if the state applies the statute in a *manner* that is "plainly arbitrary and oppressive." *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) (where state law authorized penalty of $100 per day for telephone companies that discriminate in supplying service, state court violated due process by applying law to

impose fines on company for unreasonable service conduct that did not discriminate).

Here, the district court's interpretation of the Dealer Statute required the supplier to pay what amounts to a statutory penalty directly to the dealer as "damages" for the termination of the distribution agreement without any regard for the amount of the dealer's actual economic loss, if any. The result is the imposition of a disproportionate and obviously unreasonable penalty of over $4 million despite that the dealer claimed it suffered only $1 million in damages.

As applied by the district court, the statute is also arbitrary and oppressive because it purports to impose damages approximating a payment to "repurchase" the dealer's inventory, even though in this case the dealer is unable to return the inventory to the supplier. In short, the Dealer Statute as interpreted and applied is unconstitutional because it "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law." *Sw. Tel. & Tel. Co.*, 238 U.S. at 490; *see Williams*, 251 U.S. at 66.

B. The damages award is unconstitutional because, just as with punitive damages, a statutory penalty violates due process if it lacks any proportional relationship with the nature of the defendant's conduct and the plaintiff's actual harm.

In *Campbell*, the Supreme Court explained in the context of punitive damages awards that the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments. 538 U.S. at 416 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001)). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417. Moreover, in the context of punitive damages, the Due Process Clause requires that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* at 425; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

Several circuits generally acknowledge that although the Supreme Court has yet to formally apply the *Gore/Campbell* punitive damages analysis to statutory damages, that analysis appears instructive in evaluating statutory damage awards. As the Second Circuit cautioned in *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003), where statutory damages are "so far beyond the actual damages suffered

that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award," *Gore/Campbell* suggests a due process violation. *See also Capitol Records*, 692 F.3d at 907-08 (considering but declining to apply *Gore/Campbell* to Copyright Act statutory damages); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 512-13 (1st Cir. 2011) (discussing the "many questions" about applying *Gore/Campbell* to Copyright Act damages); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586-88 (6th Cir. 2007) (considering whether to apply *Gore/Campbell* to Copyright Act damages). The *Gore/Campbell* analysis intuitively provides a useful framework to ensure the constitutional guarantee that a statutory damages award is proportional to "the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425.

Here, the district court's interpretation of the Dealer Statute disregards outright the *Gore/Campbell* basic proportionality requirement because it does not even *require* the plaintiff to prove any economic loss to recover. Rather, the district court found that the Dealer Statute automatically imposes damages in the amount of 100 percent of the

"current net value" of all equipment, without regard to whether the plaintiff suffered any harm at all.

The district court's interpretation of the Dealer Statute also results in unconstitutionally excessive damages by analogy to the *Gore/Campbell* "guideposts" for assessing a punitive damages award. "In determining whether a punitive damages award comports with due process, courts must 'consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.'" *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 188-89 (3d Cir. 2007) (quoting *Campbell*, 538 U.S. at 418).

The degree of reprehensibility is the most important factor to consider. *Id.* at 190. To evaluate reprehensibility, the court "must consider whether: '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an

isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" *Id.* (quoting *Campbell*, 538 U.S. at 419). In this case, four of the five factors indisputably show the supplier acted with no reprehensibility: the harm caused was solely economic, there was no indifference to health or safety, the conduct was an isolated incident arising from a single contract termination, and there was no evidence that the supplier acted with malice. The dealer has argued that it was in a position of financial vulnerability—a questionable premise given that the dealer was a company involved in an arms-length business transaction—but even taking the dealer at its word, this means only one out of five factors arguably indicate any reprehensibility in the defendant's conduct.

"'The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.'" *Id.* at 192. The Supreme Court has been reluctant to set a concrete limit on the constitutional ratio. *Id.* "It has cautioned, however, that 'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'" *Id.* (quoting *Campbell*, 538 U.S. at 425). In fact,

"[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. Here, the court entered a judgment against the supplier in excess of $4 million, while the dealer has admitted it suffered at most approximately only $1 million in actual economic loss (the amount it paid to settle its debts with the equipment financer). This 4-to-1 ratio of statutory damages to actual damages—imposed as a matter of strict liability regardless of the nature of the defendant's conduct—falls outside any reasonable measure of constitutional proportionality. *See CGB Occupational Therapy,* 499 F.3d at 193.

The third *Gore/Campbell* guidepost considers the difference between the damages awarded in this case and "'civil penalties authorized or imposed in comparable cases.'" *Id.* at 189. Tellingly, like Delaware's statute, other states' versions of the Dealer Statute do *not* require the repurchase of used, damaged, or incomplete equipment, and generally require the dealer to *return the equipment* as a precondition to the supplier's obligation to repurchase. *See, e.g.*, Kan. Stat. Ann. § 16-1003(a)(6); Md. Code Ann., Com. Law § 19-203(8); N.Y. Gen. Bus. Law

§ 696-f(4)(f); N.C. Gen. Stat. § 66-184; *Kaisershot v. Gamble-Skogmo, Inc.*, 96 N.W.2d 666, 670-71 (N.D. 1959) (interpreting North Dakota dealer statute, holding that supplier was not required to pay statutory price to repurchase inventory after dealer sold off inventory at reduced price to mitigate its potential loss); *D & B Enters. of Winona, Inc. v. Kawasaki Motors Corp., U.S.A.*, 792 F. Supp. 653, 654-55 (D. Minn. 1992) (holding that Minnesota dealer statute repurchasing provisions must be interpreted so as to compensate dealer only for actual lost economic investment and not to ensure a dealer windfall); *Town & Country Equip., Inc. v. Massey-Ferguson, Inc.*, 808 F. Supp. 779, 781 (D. Kan. 1992) (holding that Kansas dealer statute does not require supplier to repurchase inventory if the dealer already sold off the inventory at a reduced price to mitigate damages, because otherwise "wholesalers would be subject to the obligation of the repurchase statute without assurance of receiving the corresponding benefit"); *Interstate Equip. Co. v. ESCO Corp.*, Civil Action No. 5:11CV51-RLV, 2012 WL 5183605, at *5-7 (W.D.N.C. Oct. 18, 2012) (interpreting North Carolina statute). Thus, the award here differs significantly from comparable awards under similar statutes in other states. The district court's order requires the supplier to pay for the

repurchase of all equipment, regardless of condition or prior use by the dealer, at the current net price, and requires this "repurchase" even though the dealer will not return the equipment to the supplier.

In sum, the *Gore/Campbell* framework shows that the district court's interpretation of the Dealer Statute has resulted here in an unconstitutionally excessive award that bears no relation to either the defendant's conduct *or* the plaintiff's actual economic loss.

C. The statute creates the equivalent of a confiscatory rate.

Another relevant framework for assessing the troubling constitutional implications of the district court's order is the Supreme Court case law holding states may not impose confiscatory rates on utilities and other public companies. "The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). The Court has been consistent for over one hundred years that a "confiscatory" rate is unconstitutional. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987); *see, e.g.*, *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 479-89 (2002) (discussing history); *Duquesne Light Co.*, 488 U.S. at 307 ("confiscatory");

West v. Chesapeake & Potomac Tel. Co. of Balt. City, 295 U.S. 662, 675 (1935) ("confiscation"); *see also Lehigh Valley R.R. Co. of N.J. v. Martin*, 100 F.2d 139, 144 (3d Cir. 1938) ("confiscation").

Although the supplier here is not a public utility, the principles underlying the Court's confiscatory rate-setting cases still apply: the Constitution puts limits on the way the state may regulate businesses so as to balance the public's need, on the one hand, for salutary access to goods and services, and a business's need, on the other hand, to earn a return on investment. *See Verizon*, 535 U.S. at 481.

To determine whether a rate is confiscatory, the court must consider the actual rate imposed in a given case, not the methodology prescribed by the statute that resulted in the rate—thus, a rate may be unconstitutionally confiscatory as applied even if the statutory rate-setting methodology is not on its face unreasonable. *See id.* at 524 ("[T]his Court has never considered a taking challenge on a ratesetting methodology without being presented with specific rate orders alleged to be confiscatory."); *Duquesne Light Co.*, 488 U.S. at 314 ("'It is not theory, but the impact of the rate order which counts.'").

Here, the court's interpretation of the Dealer Statute effectively resulted in a confiscatory rate imposed on the supplier as a condition of doing business under Delaware law. Although the Dealer Statute presumably endeavors to protect dealers from certain risks of financial exposure in the event they terminate a contract with a supplier, and thereby improve market conditions for dealers in the state, in this case the statute simply confiscated a significant amount of the supplier's property and gave it to the dealer. The supplier was ordered to pay a penalty in the amount of over $4 million to "repurchase" inventory that the dealer can no longer return, regardless of the dealer's actual economic loss. The Constitution prohibits this confiscation of a supplier's return on investment.

II. THE DISTRICT COURT'S INTERPRETATION OF THE DEALER STATUTE CREATES AN UNCONSTITUTIONAL TAKING WITHOUT JUST COMPENSATION.

A. As a condition of doing business in Delaware, the district court ordered an unconstitutional exaction of the supplier's property lacking any proportionality to the dealer's loss.

"The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides: '[N]or shall private property be taken for public

use, without just compensation.'" *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994). Here, the Delaware statute as construed by the district court violates the Fifth Amendment's Takings Clause by requiring that as a condition of doing business under Delaware law, a supplier must agree to be liable for statutory "repurchases" of equipment in amounts that bear absolutely no relation to—and far exceed—any actual economic loss to the dealer.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan*, the Supreme Court analyzed whether an exaction that the state demands as a condition for receiving a land use permit violates the Takings Clause, and in doing so applied the doctrine of unconstitutional conditions. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—[including] the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385; *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. __, 133 S. Ct. 2586, 2594 (2013) (describing "'special application'" of unconstitutional conditions doctrine).

Significantly, an exaction of *money*—as opposed to real or personal property—is also subject to the Takings Clause under the same analysis. *Koontz*, 133 S. Ct. at 2599; *see id.* at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

The principles underlying the *Nollan/Dolan* analysis may be applied beyond the confines of land use permitting. Indeed, the land use cases applying the unconstitutional conditions doctrine draw upon cases from many other contexts. *See, e.g.*, *id.* at 2596 (citing *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592-93 (1926) (state may not condition grant of business permit on promise to devote business assets to public use) and *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892) (state may not condition grant of business permit on waiver of right to remove state court lawsuits to federal court)); *Dolan*, 512 U.S. at 385 (citing *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (state university may not deny professor contract renewal as punishment for exercising First Amendment rights) and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*,

391 U.S. 563, 568 (1968) (public school may not fire teacher for exercising First Amendment rights)).

Nollan and *Dolan* and the line of "unconstitutional conditions" cases on which they rely stand for the general proposition that while the state may regulate the use of property, the state may not require a property owner to give up its constitutional rights as a condition of receiving the benefits and privileges of the state. The Takings Clause requires that there be a balance between the state's power to regulate for the public good and the burdens such regulations may place on individuals or companies seeking to make beneficial use of their property. *See Koontz*, 133 S. Ct. at 2594-95; *Dolan*, 512 U.S. at 383-85; *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

Applied in this context, these cases show that Delaware may not require that as a condition of doing business under its law, a supplier must agree to be liable for statutory "repurchases" of equipment in amounts that bear absolutely no relation to—and far exceed—any actual economic loss to the dealer. *See Frost*, 271 U.S. at 597 (although "'a state may prescribe

conditions upon which a foreign corporation may do business within its borders,'" it may not "'exclude or expel such corporations because they insist upon the exercise of a right created by the federal Constitution'"); *Denton*, 146 U.S. at 207 (same). Under the district court's application of the Delaware Dealer Statute, "[t]he [supplier] is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Frost*, 271 U.S. at 593.

To determine whether a condition or exaction violates the Takings Clause, the court determines whether there is an "essential nexus" between the state's regulatory goal and the exaction. *Dolan*, 512 U.S. at 386. The Dealer Statute arguably satisfies the "essential nexus" test because, on its face, the statute requires suppliers as a condition of doing business under Delaware law to provide some protection from risk of loss to dealers who must maintain a supply of inventory in order to sell the supplier's products.

Even if an essential nexus exists, however, the exaction is still unconstitutional unless it bears a "rough proportionality" between the exaction and the state's interest. *Dolan*, 512 U.S. at 391. Here, the Dealer

Statute as applied lacks a "rough proportionality" between the exaction and the state's interest. In fact, it lacks any proportionality at all. The supplier was required to pay damages in the form of a "repurchase" price for inventory without regard to whether the dealer suffered any loss of its investment in that inventory—and in fact the damages award was *four times* the amount of any actual loss claimed by the dealer, and many times more than any loss for which the dealer was not fully compensated. Furthermore, the supplier was required to pay these damages even though it cannot recover the inventory. Thus, the damages award represents a classic "unconstitutional conditions" taking whereby the supplier was required to pay an exorbitant amount of money to another private company—without receiving anything in exchange—as a condition of doing business under Delaware law.

B. The court's statutory interpretation created a *per se* taking of funds.

The Supreme Court has also found a violation of the Takings Clause where the state takes ownership of a business's funds for public purposes.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 156-57 (1980), a Florida statute required litigants seeking to discharge

corporate debts prior to a corporate acquisition to deposit the corporation's purchase price with the court and directed the clerk to deposit those funds in an interest-bearing account. The state high court held that the interest earned in that account could be appropriated as "public money" for use by the county. *Id.* at 158-59.

The U.S. Supreme Court held that Florida's construction of the statute was an improper taking of private property without just compensation. *Id.* at 164-65. Among other justifications, the Court explained that the state could not *require* litigants seeking to avail themselves of the state's interpleader procedure to deposit funds in the court's registry and then simply *appropriate* the funds, even for purposes that would benefit the county. *Id.*

Later, relying on *Webb's Fabulous Pharmacies*, the Court in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 240-41 (2003), *assumed* that a law that appropriates interest generated on funds deposited in an IOLTA account to fund charitable legal services would also constitute a *per se* taking requiring payment of just compensation to the client who paid the funds into the account.

Webb's Fabulous Pharmacies and *Brown* are instructive. In those cases, statutes required companies and firms as a condition of doing business under state law to submit to government appropriation of their business funds for public purposes. In both cases, the Court found that a statute that requires a business to submit to such requirements creates a *per se* taking requiring just compensation.

Here, the district court's application of the Dealer Statute requires the supplier to pay a damages award that bears no relationship to the dealer's economic loss. The state apparently requires suppliers to agree to these conditions, not because of damage suffered by any individual dealer, but to vindicate a public interest in protecting dealers generally from the risks associated with entering distributor agreements that require them to maintain a stock of inventory. This type of burden, imposed by the district court's statutory interpretation on equipment suppliers in order to benefit the public interest, is the quintessential taking that the Constitution prohibits.

CONCLUSION

For the above reasons, this Court should reverse the district court's order.

April 10, 2014

HORVITZ & LEVY LLP
DAVID M. AXELRAD
MARK A. KRESSEL
LEDERER WESTON CRAIG, P.L.C.
MIKE WESTON

By: /s/ Mark A. Kressel
Mark A. Kressel

Attorneys for Amicus Curie
DRI-THE VOICE OF THE DEFENSE BAR

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the United States Court of Appeals for the Third Circuit.

/s/ Mark A. Kressel_____
Mark A. Kressel

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

☒ this brief contains 5,111 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

☒ 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or

☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

April 10, 2014
Date

/s/ Mark A. Kressel
ATTORNEY NAME

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing amicus curiae brief was submitted in digital format, is an exact copy of the written document filed with the Clerk, and has been scanned for viruses with the Symantec Endpoint Protection, Small Business Edition, Version 12.1.2100.2093, and according to the program, is free of viruses.

/s/ Mark A. Kressel_____
Mark A. Kressel

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: /s/ Mark A. Kressel