

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOSEPH F. APUZZO,

Defendant.

FILED

2007 DEC 27 P 3 43

U.S. DISTRICT COURT
NEW HAVEN, CT

Civil Action No.:

307CV01910CFD

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges as follows:

NATURE OF THE ACTION

1. The Commission brings this action against Joseph F. Apuzzo, former Chief Financial Officer ("CFO") of Terex Corporation ("Terex"), for aiding and abetting a fraudulent accounting scheme, involving two sale-leaseback transactions, carried out between 2000 and 2002 by United Rentals, Inc. ("URI") and its former CFO, Michael J. Nolan ("Nolan") and others. The transactions were structured to improve URI's 2000 and 2001 financial results by allowing URI to recognize revenue prematurely and to inflate the profit generated from the sales.

2. Apuzzo substantially assisted URI and Nolan in implementing the fraudulent scheme by, among other things, signing agreements with URI that he knew or was reckless in not knowing were designed to hide URI's continuing risks and financial obligations relating to the sale-leaseback transactions, directing or approving the issuance of inflated invoices that he knew or was reckless in not knowing URI, through Nolan and

fixed and determinable, and any gain from the sales must be deferred until the commitments are settled.

14. Because URI, through Nolan and others, had agreed with Apuzzo to guarantee Terex that URI would indemnify Terex for losses it would incur under its remarketing agreements with the Financing Company, URI's obligations relating to the sale-leaseback agreements were not complete in the reporting period in which the agreements were executed. As a result, GAAP prohibited URI from recording revenue from the sales in each of those reporting periods. Nolan and others were able to prevent discovery of URI's continuing obligations under the three-party agreements because they engaged in a concerted effort to hide the interlocking agreements from URI's independent auditor. In addition, Nolan and others were also able to inflate the gains that URI recorded because they were able to hide the indemnification payments URI made to Terex.

15. Apuzzo substantially assisted URI, Nolan and others in their efforts to disguise the interlocking agreements and to conceal the indemnification payments URI made to Terex. In both 2000 and 2001, Apuzzo signed agreements with URI and/or the Financing Company that disguised URI's continuing risks and financial obligations under the three-party transactions. In addition, with Apuzzo's knowledge and/or approval, Terex issued inflated invoices on URI's purchase of new equipment from Terex that concealed URI's indemnification payments to Terex and thus allowed URI to inflate its gains on the sale-leaseback transactions.

The December 2000 Sale-Leaseback Transaction ("Terex I")

16. In an attempt to meet URI's announced earnings expectations for the fourth quarter and full fiscal year-ending 2000, Nolan contacted the Financing Company and expressed interest in doing a short-term leasing that would allow URI to record an immediate gain. The Financing Company advised Nolan that to agree to do a sale-leaseback transaction with URI, it would require a third party to agree to remarket the equipment at the end of the lease period and to guarantee the Financing Company the residual value of the equipment. In addition, Nolan was advised that the Financing Company would charge URI a fee to participate in the sale-leaseback transaction.

17. Nolan and others initiated discussions with Terex, an equipment manufacturer and one of URI's vendors. Nolan explained the terms of the proposed transaction to Apuzzo, Terex's CFO, who expressed a willingness to participate as long as URI agreed to provide Terex with protection against any losses Terex might incur in providing guarantees to the Financing Company. In addition, Apuzzo insisted on URI's agreement to make additional new equipment purchases from Terex in the current fiscal year in order to boost Terex's year-end financial results.

18. On December 29, 2000, URI executed a Master Lease Agreement ("MLA") with the Financing Company pursuant to which URI sold a fleet of used equipment to the Financing Company for \$25.3 million and leased the equipment back for a period of 8 months. Simultaneously, the Financing Company and Terex entered into a Remarketing Agreement, signed by Apuzzo, pursuant to which Terex agreed to remarket the equipment at the end of the lease period and to pay the Financing Company for any shortfall between the residual value guarantee (no less than 96% of the price paid

by the Financing Company) and the proceeds that were generated by the re-sale of the equipment. Terex also agreed that, at the Financing Company's option, Terex would be required to buy, at the guaranteed residual values, any equipment that remained unsold at the end of the remarketing period. Lastly, as a result of negotiations between Apuzzo, Nolan and others, URI agreed to purchase from Terex approximately \$20 million of new equipment before the end of the 2000 calendar year, and to pay Terex approximately \$5 million immediately to cover Terex's anticipated losses from its residual value guarantee to the Financing Company. In accordance with the agreement between Apuzzo, Nolan and others, URI and Terex also executed a "backup" remarketing agreement, which Apuzzo also signed, under which URI effectively assumed Terex's remarketing obligations and guarantees to the Financing Company and agreed to cover any losses to Terex over the \$5 million advance payment through guaranteed future purchases.

Concealing URI's Risks and Continuing Obligations

19. Apuzzo knew or was reckless in not knowing that disclosure of URI's commitment under the backup remarketing agreement to assume Terex's risks and obligations to the Financing Company would jeopardize URI's accounting for the transactions. Apuzzo substantially assisted Nolan and others' efforts to conceal URI's assumption of those risks and obligations from URI's auditor.

20. Apuzzo sent to Nolan an initial draft of the proposed backup agreement, explicitly describing Terex's residual value guarantee to the Financing Company on the fleet of equipment being leased by URI. The draft laid out URI's agreement to remarket that fleet of equipment and to indemnify Terex for any shortfalls (i.e. the difference

between the resale price and the residual value guarantee) incurred in reselling the equipment.

21. However, in response to Apuzzo's initial draft, Nolan and others provided to Apuzzo a draft agreement that deleted all explicit references to the Financing Company and URI's agreement to remarket the fleet. In their place, the new draft referred to URI's obligation to remarket a fleet of equipment "which is typically in United Rentals rental fleet and is then owned by a leasing company which is not less than investment grade, and is required to be remarketed by Terex from such leasing company for a period commencing in August, 2001." Nowhere in the URI draft was any language identifying the name of the leasing company or the fact the fleet to be remarketed was the same fleet URI had sold to the Financing Company. In place of the residual value that Terex had agreed to pay the Financing Company, URI's revised draft referred to URI's guarantee to pay Terex "the total cost incurred or that would be incurred by Terex to purchase such equipment...."

22. Apuzzo signed the revised backup remarketing agreement knowing, or with reckless disregard for the truth, that Nolan and others were attempting to hide URI's risks and obligations under the three-party transaction.

Concealing the Inflated Valuations

23. Apuzzo knew or was reckless in not knowing that the prices at which URI had sold the used equipment to the Financing Company were inflated above fair market values. Apuzzo assisted URI in concealing the inflated valuations.

24. Before committing Terex to the residual value guarantees that the Financing Company required, Apuzzo sought an internal appraisal of the equipment URI

was selling to the Financing Company. Based on that appraisal, Apuzzo knew that Terex's agreement to guarantee the Financing Company at least 96% of the valuations URI had placed on the equipment would likely cause Terex to incur substantial losses when the equipment was resold. As a result, Apuzzo insisted that URI agree to indemnify Terex against any such loss.

25. Apuzzo signed the Remarketing Agreement that guaranteed the Financing Company residual values that both he and URI understood would likely result in millions of dollars in losses to Terex. He did so, however, knowing that URI's commitment to indemnify Terex for such losses was confirmed in a separate document.

26. Apuzzo was later asked to provide a valuation letter to URI's auditor representing that URI had assigned fair market valuations to the equipment sold to the Financing Company. Instead, Apuzzo offered to provide an appraisal letter that not only failed to disclose the appraisal values that Terex had determined, but affirmatively and misleadingly asserted that "nothing has come to [his] attention" to cause Apuzzo to believe that the overall equipment valuations regarding the equipment "could not be achieved in a transaction between a willing buyer and willing seller."

Concealing URI's Indemnification Payments to Terex

27. URI made two lump-sum indemnification payments to Terex in connection with the three-party transaction. The initial payment, for \$5 million, was made simultaneously with the execution of the transaction documents. The second payment was made on January 2, 2003, pursuant to a final reconciliation among the Financing Company, Terex and URI.

approximately \$8.7 million. URI improperly recorded the \$8.7 million as expenses unrelated to the sale-leaseback transaction.

Concealment of Terex's Inducements to URI

35. Apuzzo knew or was reckless in not knowing that certain terms of his agreement with URI, if fully disclosed to Terex's auditor, would prevent Terex from recording immediately the revenue generated from URI's purchase of new equipment.

36. URI agreed to purchase \$20 million of new equipment from Terex and to pay Terex before year-end 2000 if the equipment could be delivered in 2001 rather than immediately. Apuzzo agreed to this and, in addition, provided assurances to Nolan and others that URI could substitute different equipment if needed, or otherwise return equipment for full credit if URI subsequently determined that it did not need the equipment.

37. Under GAAP, since Terex was unable to deliver the new equipment to URI before December 31, 2000, Terex could immediately recognize the revenue from the sale to URI if the transaction complied with "bill and hold" accounting guidance. Among other things, Apuzzo's agreement to allow URI to substitute or return equipment to Terex did not comply with those "bill and hold" requirements.

38. Apuzzo was able to avoid disclosing fully the terms of his agreement with Nolan and others. No purchase agreement was prepared between Terex and URI and URI did not issue any purchase orders. In addition, while Nolan and others reduced to writing URI's "right of return" on the new equipment it was purchasing, and sent it to Apuzzo along with the backup remarketing agreement, the document was described as a

and provide residual value guarantees to the Financing Company as well as URI's agreement both to indemnify Terex and to purchase new equipment from Terex..

42. Just as with Terex I, in which the transaction documents were edited to remove references to the interlocking agreements, Apuzzo signed the Terex II Remarketing Agreement knowing that it contained no disclosures regarding URI's commitment to reimburse or indemnify Terex. Moreover, Apuzzo understood that URI continued to want the agreements to be kept separate. On December 19, 2001, Apuzzo received an email from the Terex sales manager engaged in the negotiations with URI, specifically noting that the URI sales manager wanted the transactions "on two separate documents." Consistent with this goal, URI's commitment to indemnify Terex was not disclosed in the "bill and hold" letter, dated December 21, 2001, URI sent in connection with its agreement to purchase new equipment from Terex.

43. Apuzzo also knew or was reckless in not knowing that the Remarketing Agreement between Terex and the Financing Company, dated December 28, 2001, which he signed on behalf of Terex contained valuations attached to the used equipment that were likely to result in millions of dollars in losses for Terex, and consequently for URI, once the equipment was resold. Prior to entering into the three-party transaction, Terex had determined that the valuations of the equipment being sold to the Financing Company by URI were above fair market values and would likely cause Terex losses in excess of \$4 million as a result of Terex's promise to pay the Financing Company at least 96% of the price the Financing Company was paying to URI. Before agreeing to provide the Financing Company with the guarantee, Terex insisted that URI agree to indemnify Terex for this anticipated loss. Apuzzo received internal email communications

disclosing the materially lower appraisals of the used equipment and the imposition of a \$4 million "premium" on the sale of \$24 million of new equipment to URI (covering the corresponding shortfall expected from Terex providing the Financing Company with the residual value guarantee).

44. Further, on December 27, 2001, the day before the sale-leaseback and remarketing agreements were executed, Apuzzo received an email from a Terex employee notifying the Financing Company and others that the equipment list submitted by URI to the Financing Company, for which Terex was providing the residual value guarantee, contained "correct values." Notwithstanding this communication to the Financing Company, Apuzzo signed the Remarketing Agreement between Terex and the Financing Company knowing that it did not disclose the materially lower appraisals that Terex had obtained, the likelihood of substantial losses being generated and URI's commitment to indemnify Terex for those losses.

45. Moreover, Apuzzo knew or was reckless in not knowing that the three-party transaction was designed to inflate the gain that URI would recognize from the sale-leaseback transaction by disguising the indemnification payment to Terex as an undisclosed "premium" on the purchase of new equipment. Apuzzo received internal Terex communications discussing the payment of a \$4 million "premium" on the purchase of \$24 million in new equipment. As in the Terex I transaction, Terex issued inflated invoices showing the aggregate purchase price of the new equipment to be \$28 million, without disclosure of the purported "premium" being charged. As before, the disguising of the indemnification payment was done with Apuzzo knowledge.

