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6 Attorneys for Plaintiff
7 California Dump Truck Owners Association

8
9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11
12 CALIFORNIA DUMP TRUCK OWNERS
13 ASSOCIATION

14 Plaintiff,

15 vs.

16 MARY D. NICHOLS, Chairperson of the
California Air Resources Board; JAMES
17 GOLDSTENE, Executive Officer of the
California Air Resources Board; and DOES 1-
18 50

19 Defendants.
20
21

Case No. 2:11-CV-00384-MCE-GGH

**DECLARATION OF FRED
RECUPIDO IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

22 I, Fred ReCupido, declare as follows:

23 1. I am the owner and operator of Terra Trucking, Inc., based in Banning California.
24 Terra Trucking is a motor carrier business with both state and federal operating authority. My
25 valid California motor carrier permit is CA# 33765, USDOT# 936273 and Federal Motor Carrier
26 ID# 510728. I'm also a 34-year member of and the Transportation Affairs Advisor to the
27 California Dump Truck Owners Association ("CDTOA"), the plaintiff in the above-entitled case.
28 I have owned and operated my construction trucking business for 40 years. My business

1 involves the transportation of construction materials from material plants to construction sites
2 throughout the state of California and Arizona. I regularly quote and haul most common
3 construction materials or commodities such as asphalt, dirt, sand, rock, and gravel.

4 2. From about 1970 to 1995, I had owned and operated only one truck and
5 contracted out to other owner-operators for additional trucking capacity, as is typically done
6 within the construction trucking industry here. In 1996, I decided to expand my truck fleet due
7 to the shortage of owner-operators in the Coachella and Imperial Valleys, where I had relocated
8 my business. Over the next five years I purchased about three trucks per year, and by 2000 I had
9 expanded my truck fleet to 16 trucks and about 40 sets of double bottom dump trailers.

10 3. Over the next fifteen years (1996 – 2010), I operated my business based on this
11 model. In 2006, I decided to upgrade some of my older trucks and purchased 8 newer (2001
12 model year) used Freightliner tractors that were converted on-highway freight trucks to day cab,
13 two axle tractors. Typical of our industry, we recycled perfectly sound and clean operating
14 heavy trucks and converted them to operate in a secondary life as a lower annual mileage
15 (50,000/year) construction related commercial vehicle.

16 4. I am aware of the On-road Truck and Bus Regulation promulgated by the Air
17 Resources Board, codified at 13 CCR §2025. I attended numerous public meetings during which
18 the rule was debated, modified, and ultimately enacted. The rule requires trucks to be replaced
19 or retrofitted beginning on January 1, 2012, on a schedule based on the truck type and model
20 year of the truck engine and the size of the fleet. The rule prohibits older trucks that have not
21 been replaced or retrofitted from operating on the public roadways, and imposes steep fines and
22 penalties on anyone who operates their trucks in violation of the rule.

23 5. On or around July 31 of 2010, analyzing the costs associated with my options for
24 compliance with the CARB's final On-road Truck and Bus Regulations; I made a business
25 decision to sell all but one truck. As I ran and re-ran the options and costs of the most reasonable
26 choices: retrofitting with DPF's (Diesel Particulate Filters) or replacement (with new trucks),
27 neither were reasonable nor affordable options especially under the present business climate in
28 this state.

1 6. As part of the analysis of the feasibilities of retrofitting or new replacement, I
2 discovered many problems with each option. First, due arguably to the CARB rules, the values
3 of my trucks were artificially cut in half because they would have to be retrofitted at a unit cost
4 of about \$16,700 each sometime in the near future. Second, because the trucks were no longer
5 marketable in California, the values of the trucks had dropped by more than half of what they
6 otherwise would be, or to about \$8,000 versus a historical valuation of about \$17,000. I have
7 undoubtedly personally suffered financially from this and the entire truck value and investment
8 paradigm has changed for me. Third, I would have been forced to install an \$18,074 device on
9 an \$8,000 truck and financing such a proposition was very difficult in this lending market.
10 What makes it even worse was that by adding these DPF devices to my trucks, I discovered that
11 the value of the truck only went up by a few thousand dollars, so clearly it would have been a
12 very bad investment for both the bank and me.

13 7. Moreover, as I ran the numbers associated with buying new, it was even worse
14 because the cost to purchase and finance such trucks could not be justified based on our current
15 work load. New trucks typically cost in excess of \$123,000, and financing charges run 15%-
16 20% depending on credit worthiness. I would be competing primarily against owner-operators
17 with older paid-for vehicles and under the regulation; they would not have to make the financial
18 investment necessary to comply with the regulation for at least two additional years. As a result,
19 I would be at a competitive disadvantage.

20 8. I built my business and made capital investments on the assumption that I would
21 be able to continue to use the trucks I purchased for at least 15 years, through 2016. Because of
22 the high initial cost of the trucks, there is little potential profit unless the trucks can be
23 depreciated out and used for many additional years.

24 9. My business model of purchasing late model used on-highway trucks is typical of
25 how the California dump truck industry has operated for at least the last 50 years. Competition
26 within the state dump truck market has become ruthless today as many companies are competing
27 for far less work than just three or four years ago. Presently, there is virtually no flexibility to
28

1 raise trucking rates to cover any additional operating costs especially with fuel prices now above
2 \$4.50/gallon and tire prices up by 30% in the last three years.

3 10. I previously owned and operated (7) 1998 Freightliner truck tractors or power
4 units with Cummins M11 (370 hp) and (8) 2001 Freightliner truck tractors with Detroit Diesel
5 Series 60 (370 hp). I had obtained an estimate of the cost to retrofit my fleet in order to comply
6 with the rule from a reputable truck dealer/DPF service provider with whom I have previously
7 purchased trucks in the past. As shown in greater detail in Exhibit A to this declaration, for these
8 trucks alone, it would have cost \$18,074/truck to retrofit in order to keep them legally operating
9 on California roadways after January 1, 2011 through 2020.

10 11. Based on my familiarity with the rule and its impending effective date, I had
11 researched the costs of bringing my trucks into compliance with the rule. Based on the size of
12 my fleet, and the model year of my truck engines, I would have had to spend approximately
13 \$18,074 per truck to purchase or install the retrofit technology (DPF's). The costs to comply with
14 CARB's regulations under the retrofit option would have been over \$90,000 per year over a three
15 year period or over \$270,000 plus debt financing.

16 12. If I were to instead replace my trucks with new trucks (which was the option I
17 initially preferred) to comply with the CARB rule, it would have cost approximately \$123,000
18 per truck. See quote from LA Freightliner Exhibit B. The three year phase in cost would have
19 been about \$615,000/year times three years or \$1,845,000, plus debt financing costs.

20 13. Whether I decided to retrofit or replace my trucks with new vehicles, I would
21 have had to make substantial capital investments in my company, on the order of hundreds of
22 thousands or millions of dollars. As part of analyzing the CARB compliance options, I have
23 determined that the only way for me to afford to make the necessary investments would have
24 been to raise the prices that I charged for my trucking services by between 8 and 25 percent,
25 depending on the compliance path. If in fact I was forced to raise my rates by any percentage, I
26 believe that I would not have been able to obtain any work at all and would likely face
27 bankruptcy. For the work I perform, the decision as to whom to award a job is almost always
28

1 based primarily on the lowest public works or agency bid. Quality of service is at best a
2 secondary consideration.

3 14. From approximately September 2010 to the present, I have frequently been in the
4 position of having too few trucks to service the needs of my customers, which negatively affect
5 the jobs I have been able to bid for, and therefore the level of service I was able to guarantee as
6 part of my previous business model.

7 15. While my decision ten months ago to reduce my fleet had little effect on my
8 trucking prices today, the level of services that I can guarantee has significantly declined. The
9 same is true for the entire industry; the level of service has drastically diminished as fewer
10 trucking companies can even operate profitably under today's trucking rate schemes. Had I
11 chosen to retrofit or replace my trucks early under the options CARB provided, I can honestly
12 say that I would be out of business within the first compliance year (2012). The CARB
13 regulation would have forced me to raise the prices I charge for dump truck services in order to
14 break even on my investments. I would not have been able to competitively bid for jobs against
15 smaller owner-operators who are not required to bring their trucks into compliance as quickly as
16 I would have been required to do for my fleet. Since I would inevitably have won fewer jobs, I
17 would not be able to service the debt on my trucks. The higher prices would have led to the
18 demise of my business as there is no way today to operate profitably under any additional cost
19 burdens. Due to this "catch 22" scenario, I had no choice other than to change my business
20 model.

21
22 I declare under penalty of perjury under the laws of the State of California that the foregoing is
23 true and correct and based on my personal knowledge, and if called to testify to these facts, I
24 would do so competently and truthfully.

25
26 Executed this 24 day of MAY, 2011, in Banning, California.

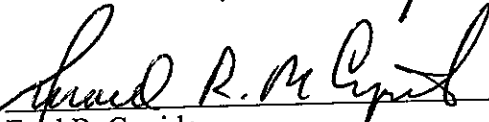
27
28 
Fred ReCupido

EXHIBIT A

Los Angeles Freightliner

A Division of Velocity Vehicle Group
 2429 S. Peck Rd. Whittier, CA 90601-1605
 (562) 447-1200 - Tel. (562) 447-1271 - Fax



Quote

Company Terra Trucking Co
 Address 1350 East Barbor Street
 City/State Banning, Ca
 Zip 92220

Date January 15, 2011
 Contact Fred Recupido
 Phone 951-849-1002
 Email _____

Line	Qty	Description	Notes	Unit Price	Parts	Shop Supplies	Labor Rate	Labor Hrs.	Extended
1	1	Cleaire Longmile- Vertical-	1DDXH12.7EGL	\$ 14,900	\$ 500.00	\$ 300.00	\$ 100.00	10	\$ 16,700.00
2		430Hp							
3									
4									
5									
6									
7									
8									
9									
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Parts Total	\$ 15,700.00
Sales Tax	\$ 1,373.75
Parts Subtotal	\$ 17,073.75
Labor Subtotal	\$ 1,000.00
GRAND TOTAL	\$ 18,073.75

All quotes for emission control devices are based upon a number of criteria including, but not limited to: engine family code, horsepower, engine condition, availability of technology and other factors. If it is determined by any party that the engine(s) or devices identified in this quotation do not meet the criteria set forth in the Executive Order for the emission control device(s), none of the devices will be installed and this quote will be considered null and void.

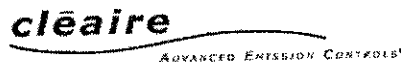


EXHIBIT B



SALES
Toll Free (800) 673-0500
Reception (909) 510-4000

PARTS (877) Parts-LA
SERVICE (866) FTL-TRKS
COLLISION CENTER (909) 510-4100

13800 Valley Blvd, Fontana CA 92335 www.LAFreightliner.com

Mark Sturdevant Ph#: 909-510-4263 Cell: 951-764-5424 Email: msturdevant@lafreightliner.com

Purchaser's Name(s) **TERRA TRUCKING** Stock # **DE-11588/2011-9683**
Address **1350 E BARBOUR ST** Date **05/16/2011**
City **BANNING** State **CA** Bus Phone **(951)849-1002**
County **San Bernardino** Zip **92220** Cell Phone
Fax Phone

New/Used	Make	Model	Year	Color	To Be Delivered On Or About				
New	FREIGHTLINER	CASCADIA 113DC	2012	White	1/25/2012				
Type of Vehicle	Serial Number	Mileage			Price Per Unit	Quantity			
Tractor						10			
Cash Price Of Base Vehicle					\$99,668.00	\$996,680.00			
<i>Additional Options:</i>									
Extended Towing Warranty					\$0.00	\$0.00			
2 axle tractor spec for double bottom dump asphalt application					Doc Fee / Prep Fee	\$55.00	\$550.00		
					Total	\$99,723.00	\$997,230.00		
					California Tire Recycle Fee	\$10.50	\$105.00		
FET Tire Credit \$151.80					FET	\$11,808.36	\$118,083.60		
County San Bernardino					Sales Tax 8.750000	\$8,725.76	\$87,257.60		
GVWR/GCWR 80000					License/Registration Fee	\$2,884.00	\$28,840.00		
					O/S Delivery Fee				
					Total Cash Delivered Price	\$123,151.62	\$1,231,516.20		
CASH					Cash down	Check/PO#	Deposit on Order		
					payment		Deposit Each	\$0.00	\$0.00
							Cash on Delivery Each	\$0.00	\$0.00
<i>Description Of Trade-In</i>					<i>Appraisal Allow. For Used Vehicle Trade</i>				
Make	Model	Type	Year	Quantity	Less Balance Owning to				
Eng. No.	VIN No.		License No	Trade in Allowance					
					Amount Due Upon Delivery		\$1,231,516.20		

ONLY THOSE ITEMS AND SERVICES SPECIFICALLY WRITTEN ON THIS ORDER ARE INCLUDED IN THE STATED PRICE. ANY OTHER AGREEMENTS, UNLESS IN WRITING, ARE NOT BINDING ON SELLER.

The first and second pages of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning this purchase has been made or entered into, or will be recognized. I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of this agreement.

I have read and understand the second page of this agreement and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am of legal age, or older, that I have legal capacity and authority to execute this agreement on behalf of my company, and hereby acknowledge receipt of a copy of this order.

TERRA TRUCKING

Purchaser's Name

Mark Sturdevant

Sales Person

Purchaser's Signature

Approved By:

This order is not valid unless signed and accepted by dealer

1. **TRADE-IN(S).** Purchaser shall deliver trade-in(s) in the same condition as at time of inspection and appraisal by Seller reasonable wear and tear excepted, except as disclosed in the Agreement. Purchaser represents that each truck shall be free and clear of all liens and encumbrances and warrants that the trade-in(s) are that type and condition described in this Agreement, including any attachments hereto.
2. **TERMS OF PAYMENT.** Unless otherwise agreed, net payment shall be due on delivery. Late payments shall bear interest at the rate of 18% per annum, or the maximum permitted under law, whichever is less. If acceptance of delivery is delayed by Purchaser, payment shall become due on the date when Seller is prepared to deliver. If the financial condition of Purchaser at any time does not, in the judgment of Seller, justify continuance of the work to be performed by Seller hereunder on the terms of payment as agreed upon, Seller may suspend such work, or postpone delivery, and require such assurances of Purchaser's performance as Seller deems adequate, including payment in advance, or Seller may cancel this order and shall receive reimbursement for its reasonable and proper cancellation charges. In the event of bankruptcy or insolvency of Purchaser, voluntary or involuntary, Seller shall be entitled to cancel any order then outstanding at any time and seek reimbursement for its reasonable and proper cancellation charges.
3. **CANCELLATION.** Purchaser may cancel this order only if Seller is able to cancel said order with the manufacturer, and only upon written notice. Upon any cancellation or failure to accept delivery, Purchaser shall pay Seller reasonable cancellation charges and expenses, not to be less than Seller's out-of-pocket expenses including carrying costs.

(Purchaser's Initials)

4. **SALES AND OTHER TAXES.** Unless otherwise specified herein, Seller's price does not include federal excise, sales, use, or other taxes. Consequently, in addition to the price specified herein, the amount of any other excise, sales, use, or other tax applicable to the sale or use of the truck purchased hereunder shall be paid by Purchaser, or in lieu thereof Purchaser shall provide Seller with a tax exemption certificate acceptable to the taxing authorities. Purchaser agrees that all taxes related to this transaction, whether arising at the time of the transaction or in the future, are Purchaser's responsibility and further agrees to promptly pay any such taxes.
5. **DELIVERY.** All trucks furnished hereunder shall be delivered to Purchaser at the Seller's dealership location or other location as designated in this Agreement. Unless otherwise provided, delivery will be made via carriers and routes designated by manufacturer with freight charges to be included in the purchase price. Delivery dates are approximate and are based upon receipt of all necessary information from Purchaser. Seller shall not be liable for delays in delivery or manufacturing, or other causes beyond Seller's control.
6. **TECHNICAL CHANGES.** Purchaser acknowledges that the manufacturer and Seller reserve the right to change the specifications of the truck(s) at any time without obligation to make such changes in other trucks previously delivered to Purchaser. In addition, manufacturer and Seller reserve the right to make design changes and substitution of materials subsequent to the receipt of the order which, in manufacturer's or Seller's opinion are necessary to improve the truck. Purchaser agrees to accept any such changes as fulfillment of Seller's obligations under this order.
7. **REQUIRED EQUIPMENT.** This order shall be deemed to include, whether or not specified herein, all equipment or accessories required by the National Highway Traffic Safety Act or other regulations in effect at the time of order receipt. It is agreed that any additional or different equipment not specified which is required at the time of delivery to meet the foregoing Act or other regulations will be added and the costs shall be paid by Purchaser.
8. **TITLE AND REMEDIES.** Until full payment by Purchaser of all amounts due hereunder, Seller reserves the title to all equipment furnished hereunder. If Purchaser defaults in payment or performance hereunder or becomes subject to insolvency, receivership, or bankruptcy proceedings, or makes an assignment for the benefit of creditors, or without the consent of Seller voluntarily or involuntarily sells, transfers, leases, or permits any lien or attachment on the equipment delivered hereunder, Seller may treat all amounts then or thereafter owing hereunder by Purchaser as immediately due and payable (subject only to credits required by law) and Seller may repossess said equipment by any means available by law and shall enjoy any and all other remedies of a secured creditor under the Uniform Commercial Code. Purchaser shall execute and deliver to Seller such financing statements and other documents, as Seller may deem appropriate to evidence, perfect, and protect the priority of its security interest in the truck(s) subject to this order.
9. **GENERAL.** Any assignment by Purchaser of this order or any rights hereunder, without written consent of Seller, shall be void. Clerical errors in this order may be automatically corrected by giving written notice thereof to Purchaser by a duly authorized representative of Seller. No waiver, alteration, or modification of any of the provisions hereof shall be binding unless and until in writing and signed by a duly authorized representative of Seller. To the extent not covered by other terms herein, including terms of warranty and limitation of liability, etc., the provisions of the Uniform Commercial Code shall govern this sale.

This Agreement (including by reference the provisions set out in manufacturer's standard warranty or warranties) shall constitute the entire agreement between Purchaser and Seller, and no understandings or obligations not expressly set forth herein or in manufacturer's standard warranty or warranties are binding upon Purchaser or Seller.

ALL WARRANTIES, IF ANY, BY A MANUFACTURER OR SUPPLIER OTHER THAN SELLER ARE THEIRS, NOT SELLER'S, AND ONLY SUCH MANUFACTURER OR OTHER SUPPLIER SHALL BE LIABLE FOR PERFORMANCE UNDER SUCH WARRANTIES. SELLER HEREBY DISCLAIMS ALL WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Accepted and Agreed by: _____
(Company Name) (Date)

Signor's Name and Title: _____
(Please Print Name and Title. Must be an officer (Signature)
of the company authorized to approve capital purchases.)