UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

ZF MERITOR LLC and MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.	)	Civil Action No. 06-623 (SLR) Jury Trial Demanded

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR CERTIFICATION OF ORDERS FOR IMMEDIATE INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

INTRODUCTION

Since the denial of its motion for judgment as a matter of law, Eaton has tried time and again to stop this case from proceeding in this Court. Eaton's current attempt comes in the form of a request for certification for interlocutory appeal of the Court's Orders of March 10, 2011 and October 9, 2009, and for a stay of the case in this Court until the appellate process is over. So determined is Eaton to try to avoid the next steps in this Court that it now asks the Court for a procedure that it told the Court would be inappropriate only four months ago.

In its March 14, 2011 motion for the Court to issue a judgment with no relief, Eaton urged that a § 1292(b) interlocutory appeal likely is not available, and that "an interlocutory appeal at this point would not necessarily 'materially advance' the end of the litigation, but instead may lead to 'protracted and expensive' litigation and piecemeal appeals."[1] Now Eaton contends exactly the opposite.

[1] *See* Mem. in Support of Motion to Amend the Court's March 10, 2011 Order and Entry of Final Judgment ("Motion to Amend Order"), filed March 14, 2011 (D.I. 263), at 10; *accord* Eaton's Reply Mem. in Support of Motion to Amend Order, filed April 11, 2011 (D.I. 267), at 1.

Eaton was right on this issue the first time. Not only does it fail to identify any controlling question of law, much less one as to which there are substantial grounds for a difference of opinion, but its request for interlocutory appeal is far too late, and is designed only to delay, not advance, the termination of this litigation. Even if the Third Circuit were to accept the appeal, by the time it did so and the appeal were briefed, argued and decided (not to mention additional delay raised by any subsequent request for Supreme Court review), the remedies phases in this Court could long be over, leaving no need for "piecemeal appeals." The Court should deny Eaton's motion.

PROCEDURAL BACKGROUND

Eaton argues, for at least the fourth time, that Plaintiffs' Section 2 claims fail to pass muster under an asserted "price-cost test." Eaton first made this argument in its motion to dismiss in November 2006. *See* D.I. 8 at 12-13.[2] The Court denied that motion in its June 13, 2007 Order (D.I. 17). Eaton did not move for an interlocutory appeal of that Order.

Eaton then made its "price/cost" argument in its motion for summary judgment in 2009, citing the same Supreme Court cases that it now asserts are "recent authority." *See* D.I. 107 at 26-29.[3] The Court denied that motion as well, but again Eaton did not move for an interlocutory appeal. *See* May 14, 2009 Order (D.I. 108).

In October 2009, after a 17-day trial on the liability issues, the jury returned a verdict for Plaintiffs on all counts. Eaton moved for judgment as a matter of law, making the same "price-

[2] Mem. in Support of Eaton Corporation's Motion to Dismiss Plaintiffs' Complaint, filed November 22, 2006

[3] Defendant Eaton Corporation's Memorandum in Support of its Motion for Summary Judgment, filed May 11, 2009

cost test" argument that it had made in its previous motions. *See* D.I. 246 at 26-27.[4] On March 10, 2011, the Court denied that motion. *See* March 10, 2011 Order (D.I. 260).

Eaton did not move under § 1292(b) then either. Instead, on March 14 Eaton filed a motion asking the Court to issue a final judgment of zero damages and no injunctive relief. Eaton argued that the Court should do so to expedite appellate review of the liability verdict because the case likely could not otherwise reach the Third Circuit at this time, either as a final or an interlocutory appeal. S*ee* Motion to Amend Order at 1, 9-10 (D.I. 263) ("Thus, outside of the limited context of patent cases, appellate courts have not generally accepted interlocutory review of liability decisions alone."). The Court denied that motion on June 9, 2011. (D.I. 268).

On July 1, 2011, the Court set a status conference for July 25, 2011. A week later, Eaton completely reversed course, and filed its § 1292(b) motion, asking for the same interlocutory certification it had just derided, as well as a stay of the litigation in this Court, and once again arguing the same "price-cost test" and citing the same cases as before.

28 U.S.C. § 1292(b) REQUIREMENTS

A district court may certify an order for immediate appeal only if (1) the order involves a controlling question of law; (2) there are substantial grounds for difference of opinion with regard to that controlling question of law; and (3) an immediate appeal from the order may materially advance the termination of the litigation. 28 U.S.C. § 1292(b). In addition, courts focus on whether the party seeking the interlocutory appeal did so in a timely manner. *See, e.g.*, *Shulick v. Credit Bureau Collection Servs.*, 2003 U.S. Dist. LEXIS 15545, at *3 (E.D. Pa. July 28, 2003) (two months too long to wait to seek certification); *see also Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (same).

[4] Defendant Eaton Corporation's Brief in Support of its Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial, filed November 3, 2009.

Finally, even if the statutory requirements are met, that is not enough, as § 1292(b) certification is reserved for "exceptional circumstances." *See In re Chocolate Confectionary Antitrust Litig.*, 607 F. Supp. 2d 701 (M.D. Pa. 2009) ("The certification decision rests with the discretion of the district court, and the court may decline to certify an order even if the parties have satisfied all elements enumerated in the statute . . . A district court should exercise this discretion and certify issues for interlocutory appeal only sparingly and in exceptional circumstances.").

ARGUMENT

This Court should deny Eaton's § 1292(b) motion for each of the following reasons: (1) the motion is inexcusably untimely; (2) the requested certification would delay, not materially advance, the ultimate termination of the litigation; and (3) it raises no question of law that is either controlling or subject to substantial grounds for difference of opinion with the Court's Orders.

I. EATON'S MOTION IS FIVE YEARS TOO LATE

If Eaton thought its "price/cost test" issue appropriate for interlocutory appeal, it could have sought permission to take an interlocutory appeal in 2006, after this Court denied Eaton's motion to dismiss the complaint. Or Eaton could have tried to do so two years ago, after the denial of its motion for summary judgment. Eaton did neither. Instead, it sat on its hands; again failed to move under § 1292(b) promptly after the Court denied its motion for judgment as a matter of law. Not only that, but Eaton argued just the opposite -- that an interlocutory appeal likely is not available at this time.

Eaton's repeated failures over the last five years to seek such relief in a timely way precludes its request for § 1292(b) certification now. *See, e.g.*, *Weir*, 915 F.2d at 286; *Shulick*, 2003 U.S. Dist. LEXIS 15545, at *3.

II. AS EATON HAS CONCEDED, AN INTERLOCUTORY APPEAL AT THIS STAGE WOULD NOT "MATERIALLY ADVANCE" THE CONCLUSION OF THIS CASE

Courts have held that the most important of the three elements of the § 1292(b) test is the requirement that the interlocutory appeal "materially advance the outcome of the litigation." *See, e.g.*, *Nesbiet v. General Electric Co.*, No. 04 Civ. 9321, 2005 WL 729670, at *3 (S.D.N.Y. Mar. 31, 2005); *Lerner v. Millenco*, *L. P.*, 23 F. Supp. 2d 345, 347 (S.D.N.Y. 1998). Eaton's cursory discussion of this topic provides no clear road map as to how its requested appeal could possibly achieve that result at this point in the litigation. *See* D.I. 270 at 16-17.[5] Indeed, Eaton does not cite a single decision supporting its request for an interlocutory appeal at this advanced, post-trial stage. *Id.*

Nor does Eaton even mention, much less try to explain away, its recent assertions that:

> An interlocutory appeal at this point would not necessarily 'materially advance' the end of litigation, but instead may lead to 'protracted and expensive' litigation. . . . . Because only orders certified by the Court would be reviewed by the Third Circuit, if an interlocutory appeal were to be taken now before final judgment is entered, the parties could be back before the Third Circuit for a second time, after remand and final judgment, to address all other appellate issues not subsumed within the order certified.

Motion to Amend Order at 10 (D.I. 263) (citations omitted).

The median time between notice of appeal and decision in the Third Circuit is almost a year, without even adding the additional time required for § 1292(b) certification proceedings in the Third Circuit or any request for subsequent Supreme Court review. *See* United States Courts Management Statistics, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2010Dec.pl

[5] Defendant Eaton Corporation's Memorandum of Law in Support of its Motion for Certification of Orders for Immediate Interlocutory Appeal Under 28 U.S.C. § 1292(b) ("§ 1292(b) Motion"), filed July 8, 2011.

(average of 11.7 months from filing appeal to disposition). Thus, even if the Third Circuit agreed to hear Eaton's interlocutory appeal, by the time that process had run its course, the damages and injunctive relief proceedings in this Court could long be over, and the entire case could be on the Third Circuit's docket for plenary review. Eaton's request for § 1292(b) certification and a stay of the rest of the case thus is designed to delay the ultimate resolution of this case, not advance it.

III. THERE IS NO SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

Eaton also has offered no basis to conclude that there is a substantial ground for difference of opinion with the Court's Orders with respect to the asserted "price/cost test." This Court has three times refused to accept Eaton's "price/cost" argument. *See* June 13, 2007 Order; May 14, 2009 Order; March 10, 2011 Order ("Defendant essentially argues that, so long as its prices were above its costs, it is insulated from antitrust review. However, this is not the law. Exclusion of competition is sufficient injury to give rise to liability. *LePage's*, 324 F.3d at 159.").

As Eaton recognizes, *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), is the law in the Third Circuit. § 1292(b) Motion at 8. *See also U.S. v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005). Eaton's notion that maybe some day the Third Circuit might revisit *LePage's* and perhaps alter its holding is rank speculation. § 1292(b) Motion at 8. So too is Eaton's suggestion that, at some point in the future, there may be a conflict among the circuits implicating *LePage's*, and the Supreme Court might then grant certiorari in some unidentified case and might then modify *LePage's.* § 1292(b) Motion at 14-15. And, even more speculative is the implicit notion that any such future, hypothetical revision of *LePage's* would lead to a result in this case in Eaton's favor. *See also infra* 7-8.

Such wild guesses do not even come close to showing that there is such a "substantial" ground for a difference of opinion that overrides Congress' goal "to reserve [§ 1292(b)] interlocutory review for 'exceptional' cases." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74. *See*, *e.g.*, *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996) ("Mere disagreement, even if vehement, with a court's ruling . . . does not establish a substantial ground for difference of opinion."); *Smith v. Honeywell Int'l, Inc.*, 2011 U.S. Dist. LEXIS 51854 (D.N.J. May 13, 2011) ("Not all differences of opinion justify an interlocutory appeal, rather the second Section 1292(b) factor must arise out of genuine doubt as to the correct legal standard.").

IV. EATON RAISES NO CONTROLLING QUESTION OF LAW

Finally, Eaton's § 1292(b) motion does not implicate any "controlling question of law." Even if this Court granted the § 1292(b) motion, and the Third Circuit decided to take the appeal, the judgment against Eaton would still stand.

The jury found that Eaton violated Section 1 of the Sherman Act, Section 2 of the Sherman Act and Section 3 of the Clayton Act. *See* Jury Verdict Form, October 8, 2009 (D.I. 216). *Brooke Group* and the other cases Eaton cites in support of its asserted "price/cost test" have nothing to do with concerted action or exclusive dealing claims under Sherman Act Section 1 or Clayton Act Section 3 like those found in this case. *See* § 1292(b) Motion at 8-10.

Nor is Eaton's asserted "price/cost test" in any way controlling even with respect to Plaintiffs' Section 2 claims. As this Court has recognized, the anti-competitive conduct by Eaton here is far more extensive than that of the defendant in *LePage's*. *See, e.g.*, March 10, 2011 Order at 1-3, 10-11, 20-21. For example, the trial record includes compelling evidence of:

- Eaton's consistent monopoly power over the course of decades;
- Eaton's inability to compete on the merits with Plaintiffs' technologically-advanced FreedomLine transmission;

- Eaton's exclusive dealing agreements for long terms and with every OEM in the market;
- The enormous market share requirements of those agreements, which left no room for any competitor;
- The agreements' failure to mandate that the OEMs pass through any alleged discount to the truck buyers;
- Eaton's "partnership" with the OEMs to deny truck buyers their historical choice of transmissions;
- Eaton's threats and agreements designed to hide Plaintiffs' transmissions from truck buyers who might want to buy them, and artificially penalize truckers who did buy them; and
- Eaton's use of its power to terminate its supply obligations if an OEM failed to purchase the requisite, overwhelming share of transmissions from Eaton. *See, e.g.*, March 10, 2011 Order at 1-3, 10-11, 20-21.

Eaton's alleged "price/cost" issue thus does not control any of Plaintiffs' claims, much less all of them. *See JamSports & Entm't, LLC v. Paradama Prods.*, 2004 U.S. Dist. LEXIS 25601, at *3 (N.D. Ill. Dec. 20, 2004) ("[C]ertification should be granted only if there is a contestable and controlling question of law, the resolution of which will hasten the end of the litigation.") (citing *Ahrenholz v. Board of Trustees of Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000)).

CONCLUSION

The Court should deny Eaton's § 1292(b) motion.

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Respectfully submitted,

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