UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

ZF MERITOR LLC and MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.	**PUBLICLY FILED VERSION** Civil Action No. 06-623 (SLR)

PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE OPINION TESTIMONY OF DR. DAVID W. DERAMUS

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The Third Circuit outlined a path for Dr. DeRamus: With his methodology acknowledged as regularly and reliably applied by economists, he could replace certain data held unreliable with specified substitute data. Dr. DeRamus followed that path exactly. Eaton does not even try to challenge the reliability or implementation of his substitute data, and its efforts to attack his methodology once again are without merit procedurally and substantively. The Court should deny Eaton's *Daubert* motion.

INTRODUCTION

After affirming the jury verdict on violation and antitrust injury, the Third Circuit upheld this Court's conclusion that Dr. DeRamus's original "underlying data [from the Strategic Business Plan] was not sufficiently reliable." *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 291-93 (3d Cir. 2012). It then remanded the case to allow him to revise his damages report to eliminate use of those projections, and to "substitute data from the econometric model and actual sales data" he had included in his original report/workpapers. *Id.* at 298. The Third Circuit described in detail Dr. DeRamus's econometric model, *id.* at 295, and emphasized that this Court had "determined that . . . DeRamus used methodologies regularly employed by economists," *id.* at 291, and "recognized [his methodologies] as being regularly and reliably applied by economists . . . ." *Id.* at 298.

Dr. DeRamus has submitted a 36 page Amended Expert Damages Report ("Amended Report")[1]. His Amended Report: employs the same methodologies as before, including his econometric model; eliminates all use of Strategic Business Plan data; and applies instead the

[1] Amended Expert Damages Report, dated January 16, 2013, attached as Exhibit 1 to the Declaration of Jennifer D. Hackett in Support of Plaintiffs' Answering Brief In Opposition to Defendant's Motion To Exclude Opinion Testimony of Dr. David W. DeRamus, dated April 22, 2013 (the "Hackett Declaration").

previously identified substitute information from his original report/workpapers. Amended Report at 1-2.

Eaton does not claim that the Amended Report violates the Third Circuit's mandate in any way. Nor does it challenge the substitute data he is using. Rather, most of Eaton's motion renews methodology arguments that it made before, and lost (for good reason). And the remainder raises methodology contentions that it could have made before but did not -- and does so by misstating the law and the record, and by ignoring the Third Circuit's caution against unnecessarily frustrating the policy of protecting free competition through treble damages actions. *ZF Meritor*, 696 F.3d at 300 ("[I]f Plaintiffs are not able to pursue damages . . . the policy of deterring antitrust violations through the treble damages remedy will . . . be frustrated.").

Eaton does not mention that it already has made and (properly) lost its arguments attacking Dr. DeRamus's calculation of lost enterprise value based on three year average data (Argument I.B.), challenging his econometric model (Argument II), and complaining of his alleged failure to "disaggregate" damages (Argument III) -- including unsuccessful efforts to persuade the Third Circuit as to the last two of these contentions. D.I. 144 ("August 20, 2009 Opinion") at 6, 8; D.I. 235 (Trial Tr.) at 1877; D.I. 243 (Trial Tr.) at 3777-793; D.I. 217 (Verdict Sheet); *ZF Meritor*, 696 F.3d at 289-90, 295-300; *see, e.g.*, *Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008) (under law of case doctrine, party cannot relitigate on remand an issue that was explicitly or implicitly decided by the appellate court).

Eaton's new argument that lost enterprise value must be calculated as of 2003, when one of the plaintiffs ceased operations (Argument I.A.), also fails on many grounds. It could have been made in Eaton's original *Daubert* motion but was not; it is wrong on both the law and the

economics; and it is based on a blatant avoidance of the facts -- even Eaton ultimately acknowledges that plaintiff Meritor Transmission continued with the business, selling heavy duty transmissions into 2007 when it too was driven out by Eaton's illegal conduct. *See* Amended Report at 26; D.I. 309 (Defendant's Memorandum of Law In Support of Its Motion To Exclude Opinion Testimony of Dr. David W. DeRamus) ("Eaton Br.") at 17 n.12; *S. Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360, 1363-64 (4th Cir. 1987) ("[P]laintiff may recover his lost profits from the date he ceases doing business until a date at or near trial, and in addition his 'going concern value' as of that date as well").

Similarly, Eaton's challenge to Dr. DeRamus's use of an average but-for unit profit figure, rather than a separate figure for each but-for sale, Eaton Br. 23-25, simply confirms that Eaton has not identified any "subjective belief or unsupported speculation" prohibited by *Daubert*, *ZF Meritor*, 696 F.3d at 290, but is seeking a precision in the proof of antitrust damages long held unnecessary, and indeed counter-productive to the enforcement of the antitrust laws. *See, e.g.*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (antitrust plaintiff need only provide a "just and reasonable estimate" of its damages); *ZF Meritor*, 696 F.3d 254, 300 (3d Cir. 2012) ("[I]n the antitrust context, a damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of the public . . . .").

Unable to attack what Eaton itself calls the "single narrow issue" left open by the Third Circuit (Eaton Br. 2) -- the reliability of Dr. DeRamus's substitute data -- Eaton tries vitriol ("sheer nonsense," "junk science") (Eaton Br. 3, 4, 22), and, failing that, plays a final card -- "greed." *Id.* at 2, 4, 7, 22-23, 30. Ignoring the conclusive findings that it broke the law and injured plaintiffs, D.I. 217 (Verdict Sheet); *ZF Meritor*, 696 F.3d at 303, Eaton asks the Court to

exclude Dr. DeRamus's testimony because his damages results assertedly are high. Eaton Br. 1, 7, 16-19, 30. This argument lies outside the scope of a *Daubert* motion, which addresses method and data, not results. *Mendes-Silva v. United States*, 980 F.2d 1482, 1485 (D.C. Cir. 1993) ("[J]udicial inquiry under Rule 703 is limited to the *basis* of the expert opinion . . . the court must refrain from reviewing the *conclusions* of the expert."). [redacted]

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Eaton offers no valid basis to exclude the "critical evidence" of Dr. DeRamus's damages testimony. *ZF Meritor*, 696 F.3d at 299. The Court should deny its motion.

FACTUAL BACKGROUND

As the Third Circuit recognized, plaintiff Meritor Transmission and ZF Friedrichshafen AG created plaintiff ZF Meritor in 1999 in part to bring ZF's advanced automated mechanical transmission to North America. *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 264 (3d Cir. 2012). Called the FreedomLine, this transmission was "the first two-pedal automated mechanical transmission to be sold in North America." *Id.* Eaton recognized that automated mechanical transmissions were an important growth segment, and would increase to "account for 30-50% of the market for all HD transmission sales by 2004 or 2005." *Id.* But Eaton did not have a two-pedal automated mechanical transmission, and would not fully release one until 2004. PTX 659 (Hackett Decl. Ex. 3). It thus viewed the formation of the ZF Meritor joint venture, and the introduction of the FreedomLine, as a "real threat" to its long-standing monopoly position. PTX 377 (Hackett Decl. Ex. 4).

Knowing it could not compete with plaintiffs on the merits, Eaton "hatched a plan." DX 735 (Hackett Decl. Ex. 5). As the Third Circuit held, Eaton's concerted anticompetitive conduct began with the execution of long-term de facto exclusive dealing contracts ("LTAs"), under which each of the direct purchasers in the market (the "OEMs") agreed in practical effect to buy from Eaton virtually all the heavy-duty truck transmissions it purchased for five to seven years. *ZF Meritor*, 696 F.3d at 265, 282-83. As plaintiffs competitively responded by promoting the advantages of their products and offering additional discounts and incentives to OEMs and truck buyers, D.I. 230 at 496 (Kline-ZFM); D.I. 233 at 1246-47 (Martello-ZFM); PTX 130 (Hackett Decl. Ex. 6); PTX 682 (Hackett Decl. Ex. 7), Eaton further used its monopoly power to push the OEMs into a long list of "partnership" activities to obstruct the consumer/truck buyers' access to

plaintiffs' transmissions, and artificially increase the truck buyers' cost and reduce their benefits of buying those transmissions. D.I. 241 at 3303 (Buck-Eaton); PTX 130 (Hackett Decl. Ex. 6); PTX 1307 (Hackett Decl. Ex. 8); PTX 304 (Hackett Decl. Ex. 9). As a result of Eaton's illegal conduct, plaintiffs could not compete for even 10% of the market. *ZF Meritor*, 696 F.3d at 267.

The jury held that Eaton violated three antitrust laws and caused plaintiffs antitrust injuries. D.I. 217 (Verdict Sheet). Plaintiffs consequently lost sales and profits, Amended Report at 5-6, and ultimately plaintiff ZF Meritor exited the market in 2003, followed by plaintiff Meritor Transmission in 2007, "because they could not maintain high enough market shares to remain viable." *ZF Meritor*, 696 F.3d at 267, 289.

Eaton bragged that ZF Meritor was "contained because of our actions with LTAs and aggressive field force." PTX 626 (Hackett Decl. Ex. 10). OEMs likewise identified Eaton's unlawful actions as the cause of plaintiffs' elimination from the market:

-- In 2002, a Freightliner executive wrote: "This is a dangerous situation. We have already killed Meritor's transmission business. It is just a matter of time now before they close their doors." PTX 531r (Hackett Decl. Ex. 11);

-- In 2007, a Volvo/Mack executive stated: "We just killed ArvinMeritor['s] transmission business with this contract."; "Eaton succeeded to eliminate their only and last competitor in the US. This is just an unvaluable [sic] upside for Eaton (be now in a monopolistic situation!) that they got through our last contract." PTX 272 (Hackett Decl. Ex. 12).

PROCEDURAL HISTORY

The relevant procedural history is much more extensive than Eaton suggests:

On February 17, 2009, plaintiffs submitted the original liability and damages report of Dr. DeRamus (the "Original Report"). D.I. 83. The Court set May 11, 2009 as the deadline for

Eaton to file a *Daubert* motion, if any. *See* April 14, 2009 Status Conference Transcript at 30:18-25 (Hackett Decl. Ex. 13).

Eaton filed its original *Daubert* motion by that date, D.I. 107, challenging, *inter alia*, (1) Dr. DeRamus's alleged failure to "disaggregate" Eaton's conduct in calculating damages; (2) the econometric model he used to predict plaintiffs' market shares in the but-for world; (3) his use of certain three year average data to calculate lost enterprise value; and (4) his reliance on ZF Meritor's Strategic Business Plan for certain data inputs. *Id.* at 29-41. In its reply brief, Eaton again raised the disaggregation and lost enterprise value arguments, referencing the same cases that it cites in its current Memorandum. D.I. 132 at 6-8, 16-18. In none of its original *Daubert* motion filings did Eaton contest Dr. DeRamus's calculation of lost enterprise value as of February 2009 (the time of his original report), or his use of an average but-for unit profit figure.

On August 20, 2009, the parties submitted the joint Pretrial Stipulation and Order ("Pretrial Order") D.I. 146. Although Eaton set forth in the Pretrial Order various arguments against Dr. DeRamus's damages opinions (*id.* at 38, 46), it still did not challenge his use of February 2009 to assess lost enterprise value, or his use of an average but-for unit profit number. *Id.*

The same day, this Court decided Eaton's original *Daubert* motion. As the Third Circuit noted: "The District Court determined that . . . DeRamus used methodologies regularly employed by economists," and "recognized [his methodologies] as being regularly and reliably applied by economists." *ZF Meritor*, 696 F.3d at 291, 298; *see* August 20, 2009 Opinion at 6, 8 (stating that Dr. DeRamus "applied accepted methodologies," and that "the only question before the Court is whether the expert opinion of Dr. DeRamus is based on reliable data"). However, noting that "[t]here will be times when an expert's methodology is generally reliable but some of

the underlying data is not of a type reasonably relied on by experts," August 20, 2009 Opinion at 7 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749 (3d Cir. 1994)), this Court excluded Dr. DeRamus's original damages testimony because it found Strategic Business Plan data to be unreliable. *Id.* at 8-9.

On August 27, 2009, plaintiffs sought leave to file, and subsequently filed, a follow-up motion with regard to damages issues, including a request for leave for Dr. DeRamus to amend his damages report to use substitute data. *See* Plaintiffs' Motion for Clarification, Reargument and Supplementation of the Record With Respect to the Court's August 20, 2009 Opinion and Order (Sept. 3, 2009) (D.I. 158) (the "Clarification Motion"). While plaintiffs requested the Court to decide the Clarification Motion before proceeding to trial, Plaintiffs' Response On the Court's Request With Respect to Pre-Trial Conference of August 27, 2009 (August 25, 2009) (D.I. 149), Eaton urged the Court to move forward quickly towards a potentially bifurcated trial and to decide plaintiffs' Clarification Motion later. Defendant Eaton Corporation's Reply to Plaintiffs' Response On the Court's Request With Respect to Pre-Trial Conference of August 27, 2009 (August 26, 2009) (D.I. 150) at 1. On September 10, 2009, this Court deferred resolution of plaintiffs' Clarification Motion and bifurcated the trial to address violation and antitrust injury in the first phase. The Court also affirmed that Dr. DeRamus could testify at trial as to his liability opinions. Transcript of Pre-Trial Hearing, dated September 10, 2009 at 24 (Hackett Decl. Ex. 14).

Beginning on September 11, 2009, the Court presided over a four-week trial on the liability issues. Over the course of nearly two days, Dr. DeRamus testified and was extensively cross-examined about his methodologies and opinions, including his econometric model (the same model he uses for his damages analysis). D.I. 235 at 1869-77; D.I. 236 at 2107-118. Dr.

DeRamus's testimony about his econometric model included an explanation of: the variables he employed; the closeness of fit between his model's results and plaintiffs' actual pre-LTA market shares; and his use of the model to predict plaintiffs' but-for market shares, the same purpose for which he uses the model in his Amended Report. *Id.*

At the conclusion of Dr. DeRamus's direct testimony about the model (D.I. 235 at 1877), Eaton's counsel urged: "Your Honor, I object to this, and I move to strike this model. It's not an econometric model. It does not predict anything." The Court responded: "Well, that's certainly something that you can prove, but I'm not about to do it now." D.I. 235 at 1877. Eaton's counsel then extensively cross-examined Dr. DeRamus about his model, including the variables used in the model. D.I. 236 at 2111-14.

Eaton's expert economist also testified as to liability issues. Among other things, Dr. Murphy conceded that plaintiffs were an "equally efficient competitor," D.I. 239 at 2750-51 (Murphy), and that Eaton's rebates were nothing more than a "small" tool that was "not going to exclude competitors." D.I. 239 at 2752.

On October 6, 2009, after the close of evidence, Eaton filed a Rule 50(a) Motion for Judgment as a Matter of Law, arguing that plaintiffs had failed to adduce sufficient evidence of harm to competition or antitrust injury. D.I. 208. The Court denied that motion. D.I. 223.

Before the case went to the jury, Eaton again raised the issue of disaggregation of Eaton's conduct. Eaton argued for a verdict sheet that would have required the jury to determine whether Eaton harmed competition and injured plaintiffs on an LTA-by-LTA basis. D.I. 243 (Trial Tr.) at 3778-94. After hearing the parties' arguments, the Court denied Eaton's request. D.I. 217 (Verdict Sheet); D.I. 243 (Trial Tr.) at 3804.

On October 8, 2009, the jury returned a complete verdict for plaintiffs, finding that Eaton had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, and that Eaton's unlawful conduct had caused plaintiffs antitrust injuries. D.I. 217 (Verdict Sheet). On October 30, 2009, plaintiffs supplemented their Clarification Motion based on developments at trial. D.I. 227. In its response, Eaton again raised its complaints about Dr. DeRamus's econometric model and his purported failure to disaggregate damages, stating: "These issues are now ripe for the appellate court to review." D.I. 247 at 4.

Eaton subsequently filed a motion for judgment as a matter of law (JMOL) under Rule 50(b) or for a new trial under Rule 59. D.I. 245. Like Eaton's Rule 50(a) motion, this motion did not challenge the Court's denial of Eaton's motion to strike testimony about the econometric model, or the Court's decision to bifurcate the trial; nor did it contest the Court's refusal to "disaggregate" the verdict sheet as Eaton had requested. The Court denied Eaton's motion, D.I. 245; D.I. 259; D.I. 260, and subsequently denied plaintiffs' Clarification Motion and entered an order awarding plaintiffs $0 in damages. D.I. 279.

Eaton appealed the denial of its motion for JMOL, and plaintiffs cross-appealed. D.I. 284; D.I. 288. In its appeal, Eaton did not challenge:

-- The denial of Eaton's motions to preclude testimony about the econometric model;

-- the rejection of Eaton's disaggregation contentions;

-- the jury instructions or verdict sheet; or

-- the bifurcation of the trial.

In response to plaintiffs' cross-appeal, Eaton did attack Dr. DeRamus's econometric model and his alleged failure to disaggregate Eaton's conduct, raising these claimed deficiencies as additional grounds for the Third Circuit to uphold this Court's decision not to allow Dr.

DeRamus to amend his damages report. Response and Reply Brief of Appellant/Cross-Appellee Eaton Corporation, dated March 21, 2012 at 55-60 (Hackett Decl. Ex. 15).

On September 28, 2012, the Third Circuit issued its opinion, concluding that "Plaintiffs presented sufficient evidence to support the jury's finding that Easton engaged in anticompetitive conduct and that Plaintiffs suffered antitrust injury as a result." *ZF Meritor*, 696 F.3d at 303. As to Dr. DeRamus, the Third Circuit affirmed this Court's decision to admit his liability testimony, finding "no error in the District Court's acceptance of DeRamus's methodologies as reliable under Rule 702." *Id.* at 290. It also upheld this Court's exclusion of his damages testimony based on his use of projections from the Strategic Business Plan: "The District Court determined that, although DeRamus used methodologies regularly employed by economists, his opinion nevertheless failed the reliability requirements of *Daubert* and the Federal Rules of Evidence because the underlying data was not sufficiently reliable." *Id.* at 291.

The Third Circuit then authorized Dr. DeRamus to submit an amended damages report. *Id.* In granting such leave to amend, the Third Circuit necessarily rejected Eaton's arguments that leave should be denied because the alleged failure to disaggregate damages and the alleged deficiencies of Dr. DeRamus's econometric model render his testimony deficient.

Indeed, the Third Circuit upheld Dr. DeRamus's methodology generally (*ZF Meritor*, 696 F.3d at 295, 298) and his model in particular. The court specifically allowed Dr. DeRamus to amend his damages report to use "substitute data from the econometric model" (*id.* at 298), and explained the model in detail, including the variables that Eaton now attacks. *Id.* at 295 ("The econometric model did not use the SBP, but instead used economic variables, such as the number of heavy-duty trucks built and sold in the North American market, an index of consumer confidence in the United States, the average wholesale price of oil in the United States, and

interest rates. The model also considered ZF Meritor's market share from the previous month 'in order to capture market dynamics.'"). The Third Circuit added:

> DeRamus's new calculations will be based on data from the initial report, which Eaton has been aware of for nearly three years, and DeRamus will employ methodologies that the District Court has already recognized as being regularly and reliably applied by economists . . . . [I]t would be a "straightforward matter of arithmetic" to substitute data from the econometric model and actual sales data for the SBP projections.

Id. at 298.

After remand, this Court denied Eaton's motion to stay the case pending Supreme Court consideration of its petition for writ of certiorari, and subsequently entered a scheduling order. Transcript of Status Conference, dated November 28, 2012 at 5, 8-9 (Hackett Decl. Ex. 16); D.I. 304 (Scheduling Order).

On January 16, 2013, Dr. DeRamus served his Amended Report, which does exactly what the Third Circuit directed him to do. Employing the same methodology as before, he eliminated all use of the Strategic Business Plan, and instead now uses substitute data from his original report/workpapers: (a) market share forecasts from the same econometric model he used before; and (b) profit margin/operating expense data from ZFM's actual (not forecast) financial results and from Eaton's actual financial results. Amended Report at 2. With this substitute data, he calculates plaintiffs' damages, as before, in two parts: (1) lost profits from March 28, 2002 through February 2009; and (2) lost enterprise value as of February 2009. *Id.* at 5.[2]

[2] Dr. DeRamus now calculates lost profits from March 28, 2002, rather than from July 2000 (the effective date of the International and PACCAR LTAs) as in his Original Report, given that the jury found injuries from that later date. D.I. 217 (Jury Verdict Sheet); *see* D.I. 240 (Trial Tr.) at 2960-61 (stipulation that the beginning date for determining damages for statutes of limitations purposes was March 28, 2002).

Eaton took Dr. DeRamus's deposition on March 6, 2013, focusing almost exclusively on issues it had addressed previously, such as the econometric model, lost enterprise value and disaggregation. *Compare* March 13, 2009 Deposition (Hackett Decl. Ex. 17) at 305-328 *with* March 6, 2013 Deposition (Hackett Decl. Ex. 18) at 244-60 (econometric model); D.I. 107 (May 11, 2009 *Daubert* motion) at 24-26, 39-40 *with* Hackett Decl. Ex. 18 at 82-97 (lost enterprise value); D.I. 107 at 32-35 *with* Hackett Decl. Ex. 18 at 383-401 (disaggregation). Eaton did not ask questions about the substitute data that Dr. DeRamus used or the way he used that data.

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On March 25, 2013, Eaton filed this *Daubert* motion, along with a motion for judgment as a matter of law that addresses the same disaggregation issues as Eaton raises in this motion. *Compare* D.I. 311 (Defendant's Memorandum of Law In Support of Its Motion For Judgment As A Matter Of Law) at 9-17 *with* Eaton Br. 19-21, 27-30.

ARGUMENT

Eaton does not claim that Dr. DeRamus exceeded the Third Circuit's mandate in any way. Nor does it challenge the reliability of his substitute data or the way in which he used the substitute data. Rather, it yet again launches meritless attacks on his methodologies.

I. EATON'S ARGUMENTS ARE PROCEDURALLY BARRED

As a threshold matter, Eaton's arguments are all barred by the doctrines of law of the case and/or waiver. Law of the case precludes each of Eaton's arguments that was made and rejected (explicitly or implicitly) by the Third Circuit. *See Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008) (party cannot relitigate on remand an issue that was explicitly or implicitly decided by the appellate court); *Bolden v. Se. Penn. Transp. Auth.*, 21 F.3d 29, 23 (3d Cir. 1994) ("The law of the case doctrine applies both to issues expressly decided by a court in prior rulings and to issues decided by necessary implication.")

As the Third Circuit emphasized in *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949-50 (3d Cir. 1985): "It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal . . . . A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *See also United States v. Kennedy*, 682 F.3d 244, 253 (3d Cir. 2012) (mandate rule "promotes predictability and finality by notifying parties of the matters that remain open on remand and committing the rest to final resolution").

The doctrine of waiver prohibits Eaton from now pursuing arguments that it:

(1) Did not assert in its Rule 50/59 motions and on appeal, *see Medcalf v.Trustees of Univ. of Pennsylvania*, 71 Fed. App'x 924, 933 (3d. Cir. 2003) (defendant waived argument by failing to appeal jury instruction); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814 (3d Cir. 1984) (defendant waived argument as to admissibility of expert testimony by failing to raise it in JNOV motion); *McNaboe v. NVF Co.*, CIV.A. 97-558-SLR, 2002 WL 31444484 (D. Del. Oct. 31, 2002) (Robinson, J.) (issue not raised on appeal waived on remand); or

(2) did not raise by the May 15, 2009 *Daubert* motion deadline and/or the August 20, 2009 Pretrial Order date and could have done so. *See, e.g., Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir.1987) ("[t]he finality of the pretrial order contributes substantially to the orderly and efficient trial of a case"); *Babby v. City of Wilmington Dep't of Police*, 614 F. Supp. 2d 508, 510-11 (D. Del. 2009) ("Legal theories and issues not raised in the pretrial order are considered waived.").

These doctrines preclude all of Eaton's arguments in this motion:

1. Each of Eaton's arguments about Dr. DeRamus's lost enterprise value methodology is barred. Eaton did not previously argue that Dr. DeRamus should have calculated lost enterprise value as of 2003 (its Argument I.A.), and it has no excuse for its failure to do so by the May 15, 2009 *Daubert* deadline or the time of the pre-trial Order. Dr. DeRamus's original Report (submitted February 17, 2009) and his Amended Report are unchanged in this regard; they both calculate lost enterprise value as of February 2009, not 2003. *See* Hackett Decl. Ex. 19 ("Original Report") at 7; Amended Report at 5. Eaton cannot start from scratch now.

Eaton's original *Daubert* motion did make its Argument I.B., regarding Dr. DeRamus's use of certain three year average data in calculating lost enterprise value. *See* D.I. 107 at 40. But the Court rejected that argument when it stated that his methodologies were reliable and that "the only question" was the reliability of the Strategic Business Plan data. August 20, 2009 Opinion at 8. And Eaton waived any further right to assert this issue when it failed to raise it in the Third Circuit, either on its appeal or on plaintiffs' cross appeal. *See, e.g., Medcalf*, 71 Fed. App'x at 933 (defendant waived argument by failing to appeal jury instruction). In any event, the Third Circuit indicated its understanding that Dr. DeRamus's lost enterprise value methodology could

go forward when it noted this Court's approval of his methodology generally, *ZF Meritor*, 696 F.3d at 291, 293, and stated particularly that "Plaintiffs indicated in their motion for clarification that DeRamus could make similar [approved substitute data] revisions to [its lost enterprise value] calculations." *ZF Meritor*, 696 F.3d 254 n.26.

2. Eaton's arguments regarding Dr. DeRamus's econometric model also are prohibited. Eaton raised its complaints about the econometric model in its original *Daubert* motion, but the Court found no problem with Dr. DeRamus's methodology. *See supra* at 7-8. Eaton again challenged the model at the liability phase of the trial, moving to strike Dr. DeRamus's testimony about it, D.I. 235 (Trial Tr.) at 1877, but the Court denied that objection too. *Id.* Eaton did not raise these issues on its appeal, but it did challenge the model on plaintiffs' cross-appeal as a reason to deny plaintiffs leave to amend Dr. DeRamus's damages calculations. *See* Hackett Decl. Ex. 15 at 57-58. The Third Circuit rejected Eaton's argument, granting plaintiffs leave to amend and specifically allowing Dr. DeRamus to "provide substitute data from the econometric model . . . ." *ZF Meritor*, 696 F.3d at 295.

3. Eaton's challenge to Dr. DeRamus's use of an average figure for but-for unit profit margin also is barred. Like his Amended Report, Dr. DeRamus's Original Report used an average but-for profit margin figure (Original Report p. 126 and Tables 7 to 11), not a separate number for each but-for transaction, as Eaton now says is required. *See* Eaton Br. 23-24. Though the source of profit data is different, Eaton could have attacked Dr. DeRamus's use of an average figure by the time of the *Daubert* deadline/Pretrial Order. It did not, precluding its assertion now. *See Petree*, 831 F.2d at 1194; *Babby*, 614 F. Supp. 2d at 510-11.

4. Eaton also is unable to raise its disaggregation argument. Eaton contends that Dr. DeRamus cannot testify as to his damages opinions because he assertedly fails to disaggregate

Eaton's conduct, but "simply attributes all damages to the undefined 'totality' of Eaton's 'aggregate' conduct." Eaton Br. 28. However, Eaton raised this argument, and lost it, in this Court at both the *Daubert* and verdict sheet stages. D.I. 107 at 32-25; D.I. 243 (Trial Tr.) at 3784; D.I. 217 (Verdict Sheet). Eaton failed to raise the issue in its Third Circuit appeal (*see supra* at 10), and raised and lost it on plaintiffs' cross-appeal when the Third Circuit allowed plaintiffs to amend their damages calculations over Eaton's disaggregation contention. *See supra* at 10-12.

Eaton can obtain no exception from these doctrines by reference to a footnote in the Third Circuit opinion, *ZF Meritor*, 696 F.3d at n.28, for the claimed proposition that the Third Circuit contemplated the prospect of a second, plenary *Daubert* motion on any and all issues. Eaton Br. 2, 15. When that sentence is read in context with the entire footnote and the text above it, the Third Circuit was not broadly opening the door to relitigation of issues that were, or could have been, addressed before; it was noting that, in granting leave to substitute certain data, it was expressing no opinion as to the reliability or admissibility of that data. This straight-forward understanding is consistent with: the Third Circuit's recognition that this Court had approved Dr. DeRamus's methodologies; its explanation that it was only disturbing this Court's ruling to allow Dr. DeRamus to use substitute data; and its emphasis on orderly case management. *ZF Meritor*, 696 F.3d at 291, 297-98, 299 ("allowing DeRamus to submit additional damages calculations will not disrupt the orderly and efficient flow of the case"). Eaton agrees elsewhere, stating that the Third Circuit remanded the case on a "single, narrow issue." Eaton Br. 2.

II. EATON'S ARGUMENTS FAIL FACTUALLY AND LEGALLY

As the Third Circuit explained, this Court's "gatekeeping" role under *Daubert* and its progeny is to "ensure that 'the expert's opinion [is] based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" *ZF Meritor*, 696. F.3d at

290 (quoting *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003)). In an antitrust case, "subjective belief or unsupported speculation" cannot include standard processes of creating a "but-for" world, which an antitrust plaintiff's damages expert typically must do. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 485-86 (3d Cir. 1998) (rejecting argument that "but for" models should be precluded as too speculative to serve as a basis for antitrust causation and damage calculation); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 812 (3d Cir.1984) ("In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative.").

Indeed, it long has been established that, once an antitrust plaintiffs has established liability (as plaintiffs have done here), "plaintiff's proof of damages will be evaluated under a more lenient standard." *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 212 (3d Cir. 1983); *accord Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (plaintiff need only present a "just and reasonable estimate of the damage based on relevant data").[3] As an antitrust offender, Eaton is ill-placed to demand calculation of damages with precision. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The wrongdoer shall bear the risk of uncertainty that his wrongdoing has created."); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible"). These standards are based, in part, on the recognition that an

[3] *See also* June 29, 2009 Transcript of *Daubert* hearing at 17 ("[T]he amount of damages is something that a jury should decide so long as the fundamental assumptions that there has been injury have been established.") (Hackett Decl. Ex. 20).

antitrust "damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of the public . . . ." *ZF Meritor*, 696 F.3d at 299.

Dr. DeRamus's amended damages calculations are based not on "subjective belief or unsupported speculation," but on already-accepted methodologies and now-unchallenged data.

A. Lost Enterprise Value

As before, Dr. DeRamus calculates plaintiffs' damages in two parts: lost profits from 2002-2009, and lost enterprise value as of February 2009, the time of his original report. Amended Report at 5. Eaton's first argument attacks only his lost enterprise value calculation. Although Dr. DeRamus's lost enterprise value methodology is regularly used in valuing companies for a range of purposes, including stock market valuation of public companies, mergers and acquisitions, the formation of joint ventures, and general business management,[4] Eaton complains (1) that it calculates lost enterprise value as of February 2009, not 2003, and (2) (quite inconsistently) that it uses 2006-2008 and 2005-2007 average data for his calculations, rather than data from February 2009 only. These arguments are not only barred (*see supra* at 14-16), but are wrong factually, legally, and economically.

1. The Facts

Eaton misstates the facts. Eaton complains that Dr. DeRamus measured lost enterprise value as of February 2009 for an enterprise that assertedly terminated in December 2003. Eaton Br. 18. However, while the ZF Meritor joint venture operationally dissolved at the end of 2003, plaintiff Meritor Transmission continued with the business and sold heavy-duty transmissions into 2007. Amended Report at 10. *See* Eaton Br. 17 n.12. Thus, Dr. DeRamus had available from plaintiffs actual financial data into 2007, Amended Report at 26, and testified in his

[4] Amended Report at 24-25 (citing T. Copeland, T. Koller, and J. Murrin, *Valuation: Measuring and Managing the Value of* Companies, 2d ed. (New York: John Wiley, 1995)).

deposition that it would not have been as appropriate to calculate lost enterprise value (rather than lost profits) for the years when Meritor remained in the market. Hackett Decl. Ex. 18 at 103:18-104:4.

2. The Law

Dr. DeRamus's calculation of lost enterprise value is in keeping with the law. As explained in *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360, 1363-64 (4th Cir. 1987), "plaintiff may recover his lost profits from the date he ceases doing business until a date at or near trial, and in addition his 'going concern value' as of that date as well." *See Magnus Petroleum Co. v. Skelly Oil Co.*, 446 F. Supp. 874 (E.D. Wis. 1978), *rev'd on other grounds*, 599 F.2d 196 (7th Cir. 1978) (plaintiff that was prevented from acquiring a business because of defendant's antitrust violation permitted to recover lost profits until the time of trial and going concern value as of the time of trial).

Eaton's citations do not hold otherwise. In *Farmington Dowel Prod. v. Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1970), the plaintiff went out of business in 1958 but the trial did not begin until 1968, 10 years later. The plaintiff's expert calculated lost profits from 1956 through 1968 and then valued the business as of 1968. The court was troubled by the ten year gap between the time the plaintiff went out of business and the date as of which its expert calculated lost enterprise value. 421 F.2d at 81-82. It thus held, in very limited fashion, that "the method urged by Farmington, at least as applied to this case, relies too heavily on speculation and conjecture, particularly concerning the determination of 'going concern' value so long after the company ceased to be a going concern." *Id.* at 81. That is not the case here, where plaintiff Meritor Transmission continued in the market into 2007, close to the February 2009 date Dr. DeRamus used (to coincide with the time of his original report).

Eaton's other cites are equally inapposite. In *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983), the plaintiff's business did not actually terminate, but continued as a going concern after the date as of which the plaintiff calculated going concern value. And, in *Eiberg v. Sony Corp.*, 622 F.2d 1068 (2d Cir. 1980), the "going concern" value was calculated as of the point the business ceased operations, but the court nowhere stated that it must be calculated as of that time.

3. The Economics

a. Eaton also has no economic basis to contest Dr. DeRamus's calculation of lost enterprise value because he did not do it as of 2003. As Dr. DeRamus explained in his Amended Report and deposition, "lost profit damages" relating to a time after a company has been driven out of business can be computed either by continuing to calculate explicit lost profits into the future, or by stopping the explicit lost profits calculation at some point and then calculating lost enterprise value (which effectively places a capital value on the anticipated future stream of lost profits). Amended Report at 21 ("ZFM's damages after February 2009 can be computed either as the discounted present value of ZFM's expected future lost profits after February 2009; or, equivalently, as the lost enterprise value of ZFM caused by Eaton's anticompetitive conduct measured as of February 2009."); Hackett Decl. Ex. 18 at 93-95. Dr. DeRamus further explained that he calculated lost enterprise value as of February 2009 (the date of his original report) because he had sufficient data to do a lost profits analysis up through that time. *See* Amended Report at 26; Hackett Decl. Ex. 18 at 101:17-102:10. This methodology is far from "subjective belief or unsupported speculation."

b. While claiming that Dr. DeRamus should have calculated lost enterprise value as of 2003, not February 2009, Eaton inconsistently argues (as it did in its original *Daubert*

motion (p. 40)) that he should have used only data from February 2009. Eaton's effort to obtain a windfall because of the economic downturn at that time also fails economically.

As Dr. DeRamus explains in his Amended Report (pp. 26-27) (and his Original Report, (pp. 137-38)), he used an average of three years data for lost enterprise value inputs (2006-2008 for his projected lost profits and 2005-2007 for the multiplier valuations). These periods represented the most recent years for which Dr. DeRamus had complete data when he prepared his Original Report, and he concluded that employing an average over a range of years minimized the possibility that "annual fluctuations in earnings" would improperly distort his valuation. Amended Report at 26. Dr. DeRamus also performed a number of sensitivity analyses, which confirmed the reliability of his results. Amended Report at 27-28.

Eaton's analogy to selling a house at the bottom of the market using comparables from the height of the market (which analogy Eaton also used in its original *Daubert* motion) simply confirms its misunderstanding of Dr. DeRamus's methodology. As he explained, the goal is not to find an actual sales price on a specific date for a company that no longer existed in 2009, but to place a reasonable valuation on the company using historical data and projecting that data (including market swings up and down) into the future. Hackett Decl. Ex. 18 at 83. "The 'fair market value' [of an enterprise] principle is based on 'the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts.'" Original Report at 137 (quoting American Society of Appraisers, Business Valuation Standards – Definitions). Eaton's scenario, in contrast, contemplates a "fire sale" at the bottom of the market, an approach

that does not reflect the proper methodology, rational behavior by a seller not acting under compulsion, or real world transactions.[5]

B. Econometric Model

Eaton yet again challenges Dr. DeRamus's econometric model, complaining that it includes variables that "are not tethered to the record" and does not include other variables such as price and quality. Eaton Br. 19-27. Eaton still provides no basis for this argument.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), a case involving an effort to exclude a multiple regression analysis because of a claimed failure to include certain variables, the Supreme Court stated that: "Normally, failure to include variables will affect a [regression] analysis' probativeness, not its admissibility." *Id.* at 400. Similarly, in *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1177 (3d Cir. 1993), the Third Circuit upheld the district court's refusal to grant an antitrust defendant a new trial, stating: "[Defendant] next points to the models designed by the plaintiffs to assess damages and characterizes them as over speculative and in conflict with the economic realities of the time. As with its sufficiency of evidence causation claim, [defendant] was given the opportunity to confront the plaintiff's evidence, aggressively seized upon the opportunity to do so and presented its own version of the extent of damages to the jury." *See In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 6675117, at *8 (E.D.N.Y. Dec. 21, 2012) (plaintiff's *Daubert* motion "asks the Court to take sides in a dispute between experts about the intricacies of econometric modeling. That is not the

[5] *See* Original Report at 137. Compare with Eaton's view the recent US Airways/American Airlines merger, which valued American at almost $8 billion even though it had losses of $1.9 billion in 2012. *See, e.g.*, *AMR Corporation Form 10-K*, dated Feb. 20, 2013 at 18, available at http://phx.corporate-ir.net/phoenix.zhtml?c=117098&p=irol-sec&control_selectgroup=Annual%20Filings; *US Air, AMR near $11 billion merger, deal seen within week*, February 10, 2013, available at http://www.reuters.com/article/2013/02/10/us-amr-usairways-merger-idUSBRE91900K20130210.

proper function of a *Daubert* motion . . . . It is for the jury to determine whether the methodological decisions that [defendant's expert] made render his analysis either more or less persuasive than [plaintiff's expert's] model.").

Eaton does not discuss, much less overcome, these principles. In contrast, Dr. DeRamus specifically addressed and rejected Eaton's assumptions:

> I analyzed the potential impact on ZFM's market shares of certain factors, such as macroeconomic fluctuations; potential quality issues associated with certain ZFM manual (G-series) transmissions; and ZFM's and Eaton's relative prices. Based on my analysis, I either incorporated such factors into my analysis (as with the macroeconomic fluctuations); concluded that such factors did not have a significant impact on my calculation of ZFM's but for market shares (as with the potential quality issues); or concluded that it would be inappropriate to include econometric model variables that were significantly affected by Eaton's anticompetitive conduct (as with Eaton's prices).

Amended Report at 13-14. In its opinion, the Third Circuit detailed the variables Dr. DeRamus used, and recognized that he "considered whether foreclosure of the market could be attributed to factors other than the LTAs, such as market conditions or quality issues with Plaintiffs' products." *ZF Meritor*, 696 F.3d at 290, 295; *see In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 678-79 (E.D. Pa. 2007) (allowing use of an econometric model notwithstanding similar complaints by the defendant about the expert's choice of variables).

Eaton also gets no mileage out of its misleading claim of an alleged "leap" in the model's but-for market share projections. Eaton Br. 12-13. Eaton asserts that Dr. DeRamus's model shows that plaintiffs' but-for share in June 2000 was 12%, leapt to 16% "the very next day," and jumped again to 19% three months later. *Id.* However, Eaton's numbers are wrong; the correct figures are 13%, 15% and 17%, respectively (*see* Figs. 17 and 35 of Original Report and accompanying workpapers). *See also* Amended Report at 11-12. Eaton's assertion regarding "the very next day" also is wrong; the data are stated in monthly, not daily, format. *Id.* And, as

the history of Meritor's actual pre-LTA market shares shows, projection of such a limited change is not at all "subjective belief or unsupported speculation." *Id*. In any event, as described *supra* at 19, an antitrust violator like Eaton is in no position to demand precision.

C. Profit Margin

Eaton does not challenge the reliability of the substitute profit margin data Dr. DeRamus now uses, taken from actual financial data of plaintiffs and Eaton. Amended Report at 8-9; 16-24. It instead complains that Dr. DeRamus is using the same average profit margin figure for "*every single transmission"* in the but-for world. Eaton Br. 23. This argument fails too.

Eaton's insistence on atomistic proof of but-for profit margins would create an unprecedented logistical nightmare -- subjecting the parties and the Court to endless fights over the correct profit margin for every but-for transmission sold to every but-for customer on every but-for date -- and, as a result, is contrary to law. *See Comcast v. Behrend*, No. 11-864, 2013 WL 1222646 (March 27, 2013) ("Calculations need not be exact.") (citing *Story Parchment*, 282 U.S. at 563 (antitrust damages calculation may be a "just and reasonable estimate")); *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (the disaggregation defendant requested would be "unnecessary, if not impossible"); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. 1981) ("Each sale and the amount of loss on the transaction need not be shown; averages may be used to show that the plaintiff generally lost money over a period of time.") *See also* cases cited *supra* at 19 (antitrust violator cannot demand specificity in the calculation of damages).

Eaton also argues that the lost profit margin should be lower because, absent its anticompetitive conduct, Eaton assertedly would have engaged in a "price response" to the OEMs because of plaintiffs' competition. Eaton provides no record cite for this argument, nor could it, since its assertion is directly contrary to the facts over two decades.

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[redacted]

And, during the period of the challenged conduct, Eaton did not offer any claimed price reduction to the OEMs other than as an integral part of its anticompetitive agreements with them, as demonstrated by an array of evidence showing that any alleged price reductions were not independent acts but were offered solely in exchange for agreements to engage in exclusionary conduct. *See, e.g.*, *ZF Meritor*, 696 F.3d at 265-66; PTX 115 (Hackett Decl. Ex. 21) at 3; PTX 132 (Hackett Decl. Ex. 22); PTX 247 (Hackett Decl. Ex. 23) at 1; Hackett Decl. Ex. 9; PTX 599 (Hackett Decl. Ex. 24) at 7-9; PTX 651 (Hackett Decl. Ex. 25); DX 467 (Hackett Decl. Ex. 26) at 4; DX 515 (Hackett Decl. Ex. 27) at 1, 8.[6]

Eaton admits this point elsewhere. Less than two weeks ago, it told the Supreme Court that any discounted prices it offered were "an integral element" of the anticompetitive provisions of its LTAs. Eaton Reply Brief to Petition for a Writ of Certiorari at 1 (Hackett Decl. Ex. 29). Eaton's "price response" argument is purely imaginary.[7]

[6] Even then, Eaton's rebates were, in its word and that of its expert, only "modest" or "small," not enough to exclude a competitor. Principal Brief of Appellant/Cross-Appellee Eaton Corporation, dated December 14, 2011 (Hackett Decl. Ex. 28) at 44 n.11; D.I. 239 at 2752-53 (Murphy).

[7] Eaton's other argument, that Dr. DeRamus "assumes away quality, performance and warranty problems," and therefore "buyers' perceptions" would be different in the but-for world (Eaton

D. Disaggregation

As it does in its concurrent motion for judgment as a matter of law, Eaton attempts to separate pricing conduct from other conduct in order to claim that Dr. DeRamus did not properly disaggregate Eaton's conduct in calculating damages. *See* D.I. 311 at 27-30 (focusing on price disaggregation); *id*. at 28 (claiming that Dr. DeRamus "simply attributes all damages to the undefined 'totality' of Eaton's 'aggregate' conduct.") Not only is Eaton's argument procedurally barred, *see supra* at 14-15, 17, but it fails as a matter of fact and law.

Contrary to Eaton's oft-repeated refrain (D.I. 311 at 4, 7-10), the Third Circuit never separated Eaton's pricing conduct from the rest of its behavior and held it lawful. While the majority and dissent both concluded that unilateral above cost pricing alone is not unlawfully exclusionary, *ZF Meritor*, 696 F.3d at 273-74; *id.* at 319 (Greenberg, J. dissenting), they both also recognized that Eaton's conduct was not limited to pricing practices, *ZF Meritor*, 696 F.3d at 277-78; *id.* at 318 (Greenberg, J. dissenting), that Eaton's pricing was intertwined with its exclusionary agreements with the OEMs, *ZF Meritor*, 696 F.3d at 281; *id.* at 320 (Greenberg, J. dissenting), and that Eaton's activities must be viewed "as a whole." *ZF Meritor*, 696 F.3d at 287-89 & n.20; *id.* at 320 (Greenberg, J. dissenting).

These conclusions are not surprising, since Eaton's alleged "modest" or "small" price reductions to the OEMs were not independent acts, but were only offered in return for the OEMs' agreements to engage in anticompetitive conduct (huge market share commitments, databook exclusions, "artificial" resale pricing "penalties," etc.). Hackett Decl. Ex. 28 at 44 n.11; D.I. 239 at 2752-53 (Murphy); Hackett Decl. Ex. 21 at 3; Hackett Decl. Ex. 22; Hackett Decl. Ex. 23 at 1; Hackett Decl. Ex. 9; Hackett Decl. Ex. 24 at 7-9; Hackett Decl. Ex. 25;

Br. 26), fails as well. As described in detail *supra* at 24, far from "ignoring" plaintiffs' purported issues, Dr. DeRamus took all of those factors into account in developing his damages analysis.

Hackett Decl. Ex. 26 at 4; Hackett Decl. Ex. 27 at 1, 8. Eaton itself acknowledged this point, when it recently told the Supreme Court that the anticompetitive provisions of its LTAs were an "integral element of, and motivated by, [Eaton's] discounted prices. . . ." Eaton Reply Brief to Petition for a Writ of Certiorari, dated April 10, 2013 at 1 (Hackett Decl. Ex. 29).[8]

Likewise, Eaton cannot properly claim that Dr. DeRamus did not consider factors besides Eaton's misconduct that allegedly harmed plaintiffs, such as plaintiffs' supposed product defects and asserted lack of cost competitiveness. Eaton Br. 27-28, 30. Dr. DeRamus has explained that he considered all the factors Eaton raises, but rejected them based on his analysis of the facts and industry dynamics. Hackett Decl. Ex. 18 at 251, 255-58. The Third Circuit recognized Dr. DeRamus's assessment of such factors, stating that he "considered whether foreclosure of the market could be attributed to factors other than the LTAs, such as market conditions or quality issues with Plaintiffs' products." *ZF Meritor*, 696 F.3d at 290.

Eaton's position also is contrary to established caselaw. Not only is a plaintiff's burden to prove damages lessened once, as here, injury has been shown, but the Third Circuit has held that, in an antitrust case in which the defendant's conduct is unlawful "taken as a whole," disaggregation of damages is "unnecessary, if not impossible." *LePage's*, 324 F.3d at 166; *accord Callahan v. A.E.V., Inc.*, 182 F.3d 237, 260 (3d Cir. 1999) (rejecting defendant's contention that expert opinion must be excluded for failure to disaggregate causes of plaintiff's injury); *Rossi*, 156 F.3d at 485-86 (expert report created genuine issue for trial despite failure to measure particularized effects of various alleged illegal practices); *Bonjorno*, 752 F.2d at 813

[8] Eaton also claims that its prices were always lower than plaintiffs', Eaton Br. 3, 22. However, it fails to show that its assertion includes incentives to truck buyers, addresses product mix, or recognizes that Eaton's conduct so harmed the competitive process that it prevented plaintiffs from selling more transmissions by offering lower prices. *See supra* 5-6; D.I. 230 at 495-96 (Kline-ZFM).

("When the antitrust injury is of an indivisible nature . . . then it is unnecessary to segregate the damages according to the specific causes").

As the Third Circuit stated in *LePage's*:

> in constructing a hypothetical world free of the defendant's exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. Once a jury has found that the unlawful activity caused the antitrust injury, the damages may be determined without strict proof of what act caused the injury, as long as the damages are not based on speculation or guesswork.

Id. at 324 F.3d at 166 (quoting *Bonjorno*, 752 F.2d at 812). [9]

Eaton does not mention any of these holdings. And its cases do not contradict them; indeed, *MCI Communications Corp. v. AT&T Co.*, 708 F.3d 1081 (7th Cir. 1983), supports plaintiffs' position. The court there recognized that: "Not requiring strict disaggregation of damages among the various unlawful acts of the defendant serves to prevent a defendant from profiting from his own wrongdoing and makes sense when damages arise from a series of unlawful acts intertwined with one another." 708 F.3d at 1161.

Eaton's only Third Circuit citation on this point, *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975), preceded *LePage's*, *Callahan*, *Rossi* and *Bonjorno*, and is very different on the facts. It involved an expert who relied on business projections based on a prior time, when the dealer had faced no intrabrand competition (from factory-owned

[9] *See also Univac Dental Co. v. Dentsply Int'l, Inc.*, CIV.A. 1:07-CV-493, 2010 WL 844507 (M.D. Pa. Jan. 20, 2010), report and recommendation adopted, 2010 WL 1816745 (M.D. Pa. Apr. 27, 2010) (relying upon *LePage's* and rejecting defendant's argument that plaintiff's expert testimony should be excluded for failing to segregate losses from unlawful conduct from losses that may be result of lawful conduct); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368(CLB), 2006 WL 931692 (S.D.N.Y. Apr. 7, 2006) (denying a motion to exclude an expert for failure to disaggregate factors underlying his damages opinion or potential lawful behavior of the defendants, and holding that "these issues concern the weight that the jury must choose to give [the expert's] testimony. At most the failure to disaggregate goes to the weight of the testimony.").

dealerships). The Third Circuit excluded the expert's opinion because he assumed no such competition going forward even though such competition had in fact arisen. Here, Dr. DeRamus explicitly took into account Eaton's continued involvement in the market (acknowledging that Eaton would have remained by far the largest seller in the but-for world). Amended Report at 12.

Eaton's other cases equally fail to help it. The decision in *U.S. Football League v. NFL*, 842 F.2d 1335, 1378-79 (2d Cir. 1988), states that a plaintiff does not have to disprove every possible other cause of injury, and need only trace its damages "to some degree to unlawful acts." And, in *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985), the damages expert (in stark contrast to Dr. DeRamus) had not even considered the possibility of other causes of the plaintiff's damages. Eaton's disaggregation arguments should be denied.

CONCLUSION

The Court should deny Eaton's motion.

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