UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

ZF MERITOR LLC and ZF MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.	)	Civil Action No. 06-623-SLR **PUBLIC VERSION** **Filed June 10, 2013**

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE OPINION TESTIMONY OF DR. DAVID W. DERAMUS

OF COUNSEL:
Joseph A. Ostoyich
Erik T. Koons
William C. Lavery
Evan A. Young
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 639-7700

Theodore B. Olson
Thomas G. Hungar
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 11101
(202) 955-8500

Donald E. Reid (#1058)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 351-9219

Attorneys for Defendant Eaton Corporation

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ZFM's opposition does not dispute the basic facts and law outlined in Eaton's opening brief: that DeRamus's long drawn-out estimate of ZFM's hypothetical lost profits for years and years and years after it dissolved has been excluded by numerous courts because it "relies too heavily on speculation and conjecture;" that his estimate of ZFM's enterprise value in February 2009, *after* the market's crash, is premised on the unheard-of notion that a buyer would pay a price from the height of the market bubble several years *before* the crash; that his econometric estimate of ZFM's but-for market share contains only "macroeconomic" variables that are disconnected from real-world factors (relative price, quality, and service) that ZFM's own management and customers testified affected its share; that his unusual assumption that ZFM would have earned the exact same average profit margin on transmissions it would have sold year after year during his drawn-out damages period ignores a host of real-world factors that affect profitability and further assumes that Eaton would have stopped its history of underpricing ZFM, innovating, and lowering its costs, and instead ceded market share to ZFM; that his spectacular damages are based on the [redacted] of Eaton's conduct on an [redacted] and that he failed to disaggregate and deduct losses attributable to lawful competition, including contract terms the Third Circuit held were "not . . . unlawful," and Eaton's prices which the Court found were "never" below its costs and thus fell within the Supreme Court's "safe harbor" for above-cost pricing. *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 267, 275-77, 281 (3d Cir. 2012).

In the face of these concessions, ZFM raises several flawed procedural arguments. ZFM argues, for example, that this Court and the Third Circuit concluded that DeRamus's original methodologies were reliable. D.I. 318 at 1. But this Court reached no such conclusion and, to the contrary, broadly ruled that his original opinion "fail[ed] the reliability analysis required under Rules 104, 702, and 703," *id.*, and was riddled with flaws that the Court was unable to ad-

dress given its "limited time and resources." D.I. 309, Ex. 1 at App. 4. The failings were broad: the Court found DeRamus's damages figures "not at all connected to the real world," "upside down," "wildly inflated," and "the kind of extravagant greed that makes everything look suspect." D.I. 309, Ex. 1 at App. 5. The Court characterized the report as "the worst expert report I ever read in all my years on the bench" and, after excluding DeRamus's damages opinion, observed that "I'm not sure how we go about the damages trial…when my *Daubert* opinion has so thoroughly eviscerated the plaintiffs' damages expert." D.I. 309, Ex. 14 at App. 753.

ZFM ignores the Court's broad critique of DeRamus and argues from a stray phrase in the *Daubert* opinion that it endorsed DeRamus's methodology. D.I. 318 at 1. This Court knows better, as did the Third Circuit in holding that although "Plaintiffs assume that…the District Court necessarily concluded that Rule 702, which focuses on methodologies, was satisfied," the "District Court noted that it 'did not…have the time to parse [DeRamus's report] as carefully' as would be necessary to satisfactorily address the parties' arguments regarding damages." *ZF Meritor*, 696 F.3d at 296. The Court thus remanded to this Court to address all arguments related to DeRamus's amended opinion: "We express no opinion as to the reliability of admissibility of DeRamus's alternate damages calculations. That is a matter left to the District Court on remand." *Id*. at 300 n. 28. The Court should do so and exclude the amended opinion as unreliable.

I. DERAMUS'S OPINION IS UNRELIABLE BECAUSE IT FAILS TO EMPLOY VALID TIMEFRAMES TO MEASURE DAMAGES

A. DeRamus Improperly Projects Years Of Lost Profits After ZFM's Dissolution (And Then Adds Enterprise Value)

The majority of courts - - including the First, Second, Fifth, and Eighth Circuits and the only district court from this Circuit to have addressed the issue - - squarely hold that lost profits are only available up to the date plaintiff exits the market and going concern value should be determined "as of the date the plaintiff's business was terminated or sold as a result of the illegal

[antitrust] conduct." *Bonjorno v. Kaiser Aluminum & Chem. Co.*, 559 F. Supp. 922, 936-37 (E.D. Pa. 1983), *rev'd in part on other grounds*, 752 F.2d 802 (3d Cir. 1984); *see also* D.I. 309 at 16-17; *Coastal Fuels of Puerto Rico v. Caribbean Petroleum*, 175 F.3d 18, 27-28 (1st Cir. 1999). Indeed, the leading ABA-published treatise endorses the principle that lost profits are properly measured only up to plaintiff's exit and going concern value should then be calculated "on the date the plaintiff goes out of business." Antitrust Law Developments (7th ed. 2012) at 785.[1]

ZFM raises two points. First, it cites a single decision from the Fourth Circuit, *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, for the proposition that going concern value can, in certain circumstances, be calculated for a short period after exit. 826 F.2d 1360, 1363-64 (4th Cir. 1987). But *Southern Pines* is an outlier and ZFM cites no case extending it to an anti-trust plaintiff in any Circuit. It is also factually distinguishable. Unlike here, plaintiff proffered a fairly short period of lost profits after exit (roughly 18 months after its 1983 exit). *Id* at 1362. In contrast, DeRamus draws out his lost profits until February 2009 - - more than five years after ZFM's dissolution at the end of 2003. Second, ZFM argues that December 2003 is not the right date for determining the end of ZFM's lost profits and its enterprise value because *Meritor* (not ZFM) continued selling transmissions after ZFM dissolved and up through 2006. ZFM cites no support for its argument and it does not help ZFM for two reasons. First, even if that date were correct, DeRamus's amended report does not include any scenario calculating lost profits up to the end of 2006 and then enterprise value on that date. Instead, his amended calculations were

[1] ZFM fails to distinguish the cases Eaton cites. ZFM argues that *Bonjorno* is distinguishable "because the plaintiff's business did not actually terminate." D.I. 318 at 20-21. But the *Bonjorno* plaintiff alleged that it was forced to sell rather than terminate its business. Either way, Bonjorno reaffirms the rule that exit (or sale) is the proper date for determining lost profits and going concern value - - not a hypothetical date years and years after the exit (or sale). ZFM concedes that *Eiberg* also followed the same rule: "the 'going concern' value was calculated as of the point the business ceased operations." *Id.* (emphasis added).

based on one, extended time frame: lost profits up through February 2009 and then enterprise value as of February 2009. Second, the 2006 date fails because DeRamus acknowledges that his enterprise value is [redacted] if it had survived and earned profits he hypothesizes in his but-for world, D.I. 309, Ex. 5 at App. 237, and not the value of Meritor's separate sales after ZFM's dissolution. DeRamus's report contains no analysis demonstrating that Meritor's much-broader business had a similar cost and profit structure to ZFM.

"The burden is on the plaintiff to show circumstances which warrant choice of some date other than the date the company went out of business *and* that the evidence proffered is not speculative." *Coastal Fuels*, 175 F.3d at 27-28 (emphasis added). But ZFM offers nothing. Instead, DeRamus acknowledges that he has "not written a peer-reviewed academic article of lost profits" and that he cannot identify any academic study endorsing his long, drawn-out lost profits period. D.I. 309, Ex. 3 at App. at 63. He also acknowledges that ZFM never performed long-term earnings projections because it did not consider them to be reliable. *Id*. at 117; D.I. 309, Ex. 4 at App. 170-71. Despite his client's reluctance to rely on such data, DeRamus wants this Court to allow him to base his opinion of ZFM's potential earnings upon long-range projections. In support, DeRamus contends that he did so only because he [redacted] without testing it, that it was reliable. D.I. 309, Ex. 3 at App. 60. His mere say-so fails as a matter of law. And by his own admission, the data he used to estimate ZFM's but-for share (and, hence, supposed lost profits) is disconnected from the record and is un reliable. *See infra* Section II. The Court should thus reject his time frames for hypothesizing ZFM's supposed lost profits as contrary to law and disconnected from the evidence. His drawn-out hypothetical damages are particularly speculative here because they are being applied to "a brand new line of transmissions that had never been sold in the North American market." *ZF Meritor*, 696 F.3d 293, n.24.

B. DeRamus's Rigged Lost-Enterprise Value

ZFM does not dispute DeRamus's concession that he can cite no peer-accepted authority - - and no buyer in the history of American commerce - - endorsing his method of estimating ZFM's market value [redacted] *after* the market's crash, by using data from several years *before* the crash. ZFM's only argument is that the Court should overlook the lack of peer acceptance and real world support because DeRamus said he [redacted] and simply thought his valuation method was reasonable.[2] D.I. 309, Ex. 3 at App. 239-40. But the Supreme Court has been clear that an expert's mere say-so that his assumptions were reasonable creates "too great an analytical gap" and is insufficient as a matter of law. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("nothing...requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

II. DERAMUS'S BUT-FOR SHARE ESTIMATE IS UNRELIABLE

A. DeRamus's "Macro" Variables Have Nothing To Do With Truck Buyers' Selection Between Eaton and ZFM Transmissions

Expert testimony is useful only "as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). District courts "must" exclude unreliable testimony "that is connected to existing data only by the *ipse dixit* of the expert" or that has "too great an analytical gap" to the real world to be reliable. *Joiner*, 522 U.S. at 146; *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579, 589 (1993). These principles require exclusion of DeRamus's econometric estimate of ZFM's but-for share

[2] ZFM's argument that Eaton "waived" a challenge to DeRamus's profit estimates and enterprise value in his *amended* report because it (supposedly) did not raise the critique in connection with his *original* report is simply wrong. First, Eaton raised these arguments in its challenge to DeRamus's original report. D.I. 123 at 16 ("The appropriate measure of damages . . . is (1) lost profits up to the time of exit; and (2) going concern value as of the business at exit" and "ZF Meritor can obtain damages only for the value of its business ***at the time of exit***") (citing *Farmington*, *Coastal Fuels*, *Bonjorno*, and *Eiberg*.) Second, the Third Circuit remand order does not limit the arguments available to challenge DeRamus's *amended* opinion.

because DeRamus concedes that the only variables in his model are [redacted] variables that are entirely disconnected from - - *i.e.*, they do not [redacted] - - the record here. D.I. 309, Ex. 3 at App. 95-97; Ex. 5 at App. 244. DeRamus concedes, for example, that there is no evidence that any purchaser ever specified an Eaton versus a ZFM transmission because of West Texas Intermediate crude oil prices, the U.S. Treasury's constant maturity index, or any of his other variables, and ZFM's opposition points to no such evidence. Instead, OEM testimony established the common sense notion that they chose transmissions based on the relative price, quality, and service between the two suppliers - - and, indeed, ZFM's own management reported that those were the factors that affected its share of overall transmissions sold. D.I. 309, Ex. 3 at App. 66; Ex. 14 at App. 524; *see also* Ex. 15 at App. 540, 572-74.

The Third Circuit has held that experts cannot substitute their own assumptions for real-world facts. *E.g.*, *In re TMI Litig.*, 193 F.3d 613, 683 (3d Cir. 1999); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (expert excluded for failure to "incorporate all aspects of the economic reality."). ZFM does not explain why the Court should disregard real-world evidence in favor of macroecomic variables divorced from the record. Accordingly, the Court must exclude DeRamus's opinion under *Daubert*, 509 U.S. at 589, particularly since he cannot explain the extraordinary reversal of fortune and growth his disconnected variables immediately produce in June 2000 following its substantial decline in market share before any of the contracts at issue. D.I. 309 at 15. DeRamus acknowledges his hypothetical increase is inexplicable; it does not result from the FreedomLine (it was not commercially available until the following Spring) nor from ZFM's manual transmissions (which were riddled with

[redacted] defects in 2000 and for years afterward). D.I. 309, Ex. 3 at App. 41, 64, 66-67, 76-77; Ex. 7 at App. 382, 431. His choice of disconnected variables fails *Joiner*.[3]

B. DeRamus Ignores Eaton's Lawful, Lower Prices, As Well As ZFM's Self-Inflicted Wounds And Bad Luck

ZFM does not dispute DeRamus's concession that his opinions are predicated on profit margin assumptions unheard of in the history of American commerce: that the average profit margin ZFM would have earned, but for Eaton's conduct, would be $1,019 per unit from March 2002 all the way up to February 2009. D.I. 309, Ex. 3 at App. 58. That assumption is, again, disconnected from the evidence in this case, which demonstrated that ZFM's FreedomLine and manual transmissions had very different prices (roughly $7,000 versus roughly $3,100 according to DeRamus), very different costs of production (roughly $5,000 versus roughly $2,400, respectively), D.I. 309, Ex. 7 at App. 405, 446, and were subject to very different customer demand (manuals are still the vast majority of all transmissions today, for example). It is also disconnected from evidence of a significant decline in demand for trucks (and, thus, transmissions) in the early years of DeRamus's damages calculations and from evidence that each OEM purchased transmissions under very different terms.

ZFM disputes none of this, arguing only that the law does not require experts to calculate damages with "absolute precision" and that an expert can use "averages." D.I. 318. That may be true in a broad sense, but it does not mean an expert may offer pure speculation divorced from

[3] ZFM argues that *Bazemore v. Friday*, 478 U.S. 385 (1986), held that any econometric model, no matter how divorced from reality, creates a fact question. D.I. 318 at 23. But *Comcast* rejected that argument in holding plaintiffs' econometric model unreliable because it did not estimate damages "attributable to overbuilding alone" and was thus 'obvious[ly] and exceptional[ly]' erroneous." 133 S. Ct. at 1434 n. 5. Moreover, *Bazemore* itself recognized that "there may, of course, be some regressions so incomplete as to be inadmissible as irrelevant," but found that the model there "account[ed] for the major factors" impacting the determination of whether racism was at work. *Bazemore*, 478 U.S. at 400 and n. 10. In contrast, DeRamus's econometric estimate contains ***none of the real-world factors*** affecting ZFM's share (price, quality, service).

reality and the record. *Daubert*, 509 U.S. at 590 (expert testimony "demands a grounding in the methods and procedures of science, rather than subjective belief or unsupported speculation"); *Weisgran v. Manley Co.*, 528 U.S. 440, 453 (2000) (conclusory or speculative expert testimony contributes "nothing to a 'legally sufficient evidentiary basis'"); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003) ("expert's opinion 'must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation'").

The speculative nature of DeRamus's year-after-year $1,019 profit margin assumption is underscored by his further assumption that Eaton would stop all competitive efforts in response to the massive growth in ZFM's share that DeRamus hypothesizes. *See, e.g.*, D.I. 309, Ex. 3 at App. 113. That is, he assumes that Eaton would stop pricing below ZFM, would stop making new and innovative transmissions, would stop all of its initiatives to lower its costs, and would simply cede massive market share to ZFM - - even though Eaton had a history of engaging in exactly that type of competitive conduct. *E.g.*, *ZF Meritor*, 696 F.3d at 266-67 ("At all times relevant to this case, Eaton's average prices were lower than Meritor's average prices"). The assumption that Eaton would not compete is perverse and would make truck buyers worse off in DeRamus's but-for world. It is also counter to the caselaw set out in Eaton's opening brief, which ZFM's opposition ignores; "A reasonable jury could not…indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits." *Murphy Tugboat Co. v. Crowey*, 658 F.2d 1256, 1262-63 (9th Cir. 1981).[4] Finally,

[4] ZFM argues that the Court cannot judge the reliability of DeRamus's econometric model because it admitted it at trial (albeit, for the different purpose of shedding light on antitrust injury). But that argument fails for the familiar reason that admissibility does not equal reliability under the Federal Rules of Evidence 702 and 703. After all, the Third Circuit affirmed this Court's exclusion of DeRamus's original opinion despite the SBP's admission at trial. ZF Meritor, 696 F.3d at 294 n.25 ("After all, a piece of evidence may be relevant for one purpose, and thus ad-

to the extent ZFM argues that the Court's admission of DeRamus's econometric projections during the liability trial somehow make it reliable for damages, it is also wrong. *Comcast* also rejected the same argument and expressly found the expert's methodology invalid despite its admissibility. *Comcast*, 133 S. Ct. at 1433 n.8.

III. DERAMUS'S FAILURE TO DISAGGREGATE DAMAGES RENDERS HIS MODEL SPECULATIVE AND UNRELIABLE

The Supreme Court in *Comcast* reaffirmed a plaintiff's burden to link its claimed damages to the alleged anticompetitive conduct and its antitrust injury. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). There, as here, the plaintiffs' expert "did not isolate damages resulting from any one theory of antitrust impact" and, instead, "expressly admitted that the model calculated damages resulting from 'the alleged anticompetitive conduct as a whole' and did not attribute damages to any one particular theory of anticompetitive impact." *Id*. at 1431, 1434. The Court reversed class certification because the expert's holistic approach was invalid as a matter of law. "There is no question his model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Id*. 1434. The Court's conclusion stemmed from the "unremarkable premise" that at trial plaintiffs "would be entitled only to damages resulting from reduced overbuilder competition since that [was] the only theory of antitrust impact accepted" by the district court. *Id*. at 1433-34.

The Third Circuit, as in *Comcast*, rejected ZFM's argument that all of Eaton's conduct was unlawful. It held that only some of Eaton's non-price conduct was unlawful (and did not hold a host of other pro-competitive conduct by Eaton to be unlawful, like engineering support, commitments to innovate, and warranty coverage offered to OEMs). *ZF Meritor LLC*, 696 F.3d at 278. Like the expert in *Comcast*, DeRamus acknowledges he did not disaggregate damages

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missible at trial, but not be the type of information that can form the basis of a reliable expert opinion.").

caused by non-price conduct from losses caused by Eaton's lawful prices or other competitive conduct. D.I. 311, Ex. 3 at App. 28, 117. The Third Circuit has barred damages as a result of this failure because it "cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975); *see also* D.I. 311 at 12-14 (citing authority).[5]

ZFM's cases hold only that disaggregation is unnecessary if *all* of a defendant's conduct is unlawful. *Le Pages, Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2002) (disaggregation unnecessary if defendant's acts "as a whole" violated the antitrust laws); *see also MCI Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("Not requiring strict disaggregation of damages…makes sense when damages arise from a series of unlawful acts intertwined with one another."). But here, that is not the case: the Third Circuit expressly found that "not all of the provisions of [Eaton's LTAs] were unlawful" and specifically concluded that Eaton's prices were "never" below cost and thus fell within the Supreme Court's "safe harbor" for above-cost pricing. *ZF Meritor*, 696 F.3d at 266-67, 275-77, 282, 289 n. 20.[6]

CONCLUSION

DeRamus's amended damages opinions suffer from the same flaws as his original opinions, which the Court excluded as "not at all connected to the real world," "upside down," and as estimating damages that demonstrate "the kind of extravagant greed that makes everything look suspect." His amended opinions should likewise be excluded as unreliable and inadmissible.

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[5] ZFM's attempt to distinguish *Coleman* because it "preceded" *LePages* and involved "different" facts is unavailing. D.I. 218 at 29. *Coleman* is not inconsistent with *LePage's*, remains controlling precedent in this Circuit, and unequivocally places the burden to distinguish between losses attributable to lawful versus unlawful conduct on the antitrust plaintiff's expert.

[6] ZFM's procedural argument regarding DeRamus's failure to disaggregate damages misunderstand that this Court excluded ***all*** of DeRamus's damages opinions. It would have been absurd for Eaton to challenge the damages exclusion order in a Rule 50 / 59 motion, or to appeal a damages issue that Eaton won *in toto*. It is, therefore, implausible to argue that Eaton raised or failed to raise an argument regarding the Court's *Daubert* opinion and lost or waived such arguments.

Dated: June 10, 2013

Respectfully submitted,

/s/ Donald E. Reid

Donald E. Reid (# 1058)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DC 19899-1347
(302) 351-9219
dreid@mnat.com
Attorneys for Defendant Eaton Corporation

Joseph A. Ostoyich
Erik T. Koons
William C. Lavery
Evan A. Young
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
(202) 639-7905

CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 10th day of June, 2013, a copy of the foregoing REDACTED Defendant's Reply Brief In Support Of Its Motion To Exclude Opinion Testimony of Dr. David W. Deramus was served by electronic filing upon the following counsel of record:

Joseph C. Schoell, Esquire
Drinker Biddle & Reath LLP
1100 North Market Street
Suite 1000
Wilmington, DE 19801

Christopher H. Wood, Esquire
Attorney at Law
1489 Steele Street
Denver, CO 80206
Chris.hepp.wood@gmail.com

Peter J. Kadzik, Esquire
Dickstein Shapiro LLP
1633 Broadway
New York, NY 10019

/s/ Donald E. Reid
Donald E. Reid (#1058)