IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ZF MERITOR LLC and MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.	C.A. No. 06-623-SLR

DEFENDANT EATON CORPORATION'S OPPOSITION TO PLAINTIFFS' OBJECTIONS REGARDING "CAUSATION AND DAMAGES" PRELIMINARY JURY INSTRUCTIONS AND MOTION FOR REARGUMENT

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INTRODUCTION

Plaintiffs filed objections to the Court's preliminary jury instructions at approximately 10:00 a.m. this morning. At approximately 2:46 p.m. today, and while Eaton was preparing its response to those objections, the Judge's case manager sent an email to the parties with revised preliminary instructions. In order to complete the record Eaton is submitting its response to plaintiffs' objections and it further hereby moves for reargument of the Court's decision to revise the preliminary jury instructions.

The instruction the Court provided to the parties is the universally accepted model instruction for use in antitrust jury trials, promulgated by the American Bar Association and applied in countless cases. The Court should overrule plaintiffs' objection and issue the instruction to the jury.

Plaintiffs raised three arguments, all false. First, they asserted that the instruction is improper because it is a collateral challenge to the first jury's determination that Eaton caused injury in fact to plaintiffs. That is easily addressed. Eaton has no intent to challenge the first jury's injury determination, and the instruction does not do so. But a simple revision of a single sentence in the instruction will eliminate any possible doubt on that subject.

Second, plaintiffs claim that the standard to which they should be held is not "reasonable certainty" but merely "a just and reasonable estimate of the damage based on relevant data." But the ABA drafted its model instruction in full light of the principle that plaintiffs espouse, that a plaintiff is entitled to latitude in proving the amount of damages once fact of injury is established; the reasonable certainty standard is fully compatible with that principle. Plaintiffs do not dispute this; their main point seems to be that two other circuits have rejected the

reasonable certainty standard. But neither the Supreme Court nor the Third Circuit has done so; reasonable certainty remains the controlling standard here. In any event, a minor edit will eliminate any dispute there, too.

Third, and most aggressively, plaintiffs asserted a novel burden-shifting argument. They propose that once fact of injury is established, the burden shifts to Eaton to prove that any portion of plaintiffs' adverse business results were the proximate result of any cause other than Eaton's adjudged unlawful conduct. Nonsense. Plaintiffs grossly misstate the law, which expressly holds the opposite: the burden remains with the plaintiffs, even after proving liability, to prove that the damages they claim result from Eaton's unlawful conduct rather than other, lawful causes. Courts have routinely reversed verdicts based on precisely the rule plaintiffs propose here.

In sum, the Court's original causation and damages instruction is appropriate, well-tested, and the Court should give it.

PLAINTIFFS' OBJECTIONS ARE INCORRECT

A. The Instruction Does Not Permit the Jury to Second Guess the Prior Verdict

As Eaton made clear at the pretrial conference on June 5, 2014, it has no intention of challenging the prior jury's determination that Eaton's contracts caused antitrust injury in fact to the plaintiffs. Plaintiffs' specter of Seventh Amendment violations is thus illusory. Any concerns plaintiffs may have, in any event, are easily addressed by simply removing a single sentence from the model instruction. Removing the words "If you find that plaintiffs' injuries were caused by factors other than defendant's unlawful conduct, then you must return a verdict for defendant" solves any arguable concerns in this regard. Eaton stipulates to this amendment, in the interests of comity, as marked in the attached Eaton's Appendix A.

B. Plaintiffs Must Prove Damages With Reasonable Certainty

It is understandable, given the shoddy nature of their expert's work, that plaintiffs have concerns about being held to any standard of certainty at all in their damages case. But they cannot escape their burden of proving the amount of their damages with reasonable certainty. The notion that this standard "contravenes" a long line of Supreme Court and Third Circuit precedent is unfounded. "Reasonable certainty" is, to the contrary, the recognized standard for proving causation of antitrust damages which is precisely the question here, where plaintiffs are asserting that all their business losses were the result of Eaton's unlawful conduct, to the exclusion of other, lawful marketplace forces that unquestionably also caused business losses. Nonetheless, again in the interest of resolving this dispute, Eaton will stipulate to the substitution of plaintiffs' preferred "just and reasonable basis" language, as marked in Eaton's Appendix A

C. Plaintiffs Bear the Burden of Proving Their Damages

That leaves plaintiffs' attempt to shift the burden of proof. ZFM and Meritor are not the first plaintiffs to attempt the argument that the burden shifts to the defense to prove that business losses were caused by lawful, rather than unlawful, forces. Prior decisions have rejected just such gambits, which is why plaintiffs cannot cite to a single case actually holding that such a burden-shift takes place upon finding of injury in fact. Countless cases hold the opposite: where multiple potential causes of losses exist, it remains the plaintiffs' burden throughout to prove that the damages it is claiming are the result of the unlawful conduct they have proven, rather than the result of other, lawful causes. *See, e.g., U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1377-78 (2d Cir. 1988) ("*USFL*") (rejecting plaintiff's claim that "the [defendant] should have borne the burden of separating out the amount of [plaintiff's] losses caused by the [defendant's] wrongful acts from the amount caused by other factors") (collecting cases).

As the Second Circuit explained in *USFL*:

> Whatever latitude is afforded antitrust plaintiffs as to proof of damages, however, is limited by the requirement that *the damages awarded must be traced to some degree to unlawful acts*. That latitude is thus circumscribed by the need for proof of causation . . . . A plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to *estimate the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors*.

Id. at 1378-79 (emphasis added); *see also MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1982) ("The courts have always distinguished between proof of *causation* of damages and proof of the *amount of damages*. Thus courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the *illegal* practices of the defendant.") (emphasis in original).

The Third Circuit, in fact, has held exactly the opposite of what plaintiffs suggest. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975), the court rejected a jury award where it noted that the "plaintiff's projections fail to account for significant factors bearing upon its diminished market share." As a result, because the "damage figures advanced by the plaintiff's experts may be substantially attributable to lawful competition" the court held that it "cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition." *Id.*

The Supreme Court cases cited by plaintiffs do not hold otherwise. As the Second Circuit summed it up in *USFL*:

> The Supreme Court's decisions in *Bigelow* and *Story Parchment* . . . *do not shift the burden of proving the cause of damages from the plaintiff to the defendant*. They simply restate the established principle that where damages have been shown to be attributable to the defendant's wrongful conduct, but are uncertain in amount, the defendant bears the risk of those uncertainties.

842 F.2d at 1379 (emphasis added). The Second Circuit noted the precise "not shown to be attributable to other causes" language on which plaintiffs rely, yet unambiguously held that the burden did not shift. *Id.*

This case is thus on all fours with *Coleman, MCI Communications,* and *USFL.*[1] The plaintiffs' damage estimate assumes that *all* of their business losses were the result of Eaton's unlawful conduct. But that is very much in dispute, and substantial evidence at trial will indicate that other, lawful causes (including plaintiffs' mismanagement, product quality problems and delays, two recessions, and lawful competition) contributed to those losses. Under those circumstances, plaintiffs bear the burden of proving how much of their claimed losses are attributable to Eaton's conduct, rather than those other factors. Their failure to do so leaves the jury to speculate. The jury needs to be instructed as to how the law says they should assess the damage analysis that the plaintiffs have chosen to proffer.

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[1] Plaintiffs try to confuse the issue, and cite to cases, such as *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984), holding that where plaintiffs have proven distinct claims of unlawful conduct, their damages estimate need not apportion the damages caused by each category of unlawful conduct. Plfs.' Obj. at 5-6. But Eaton does not seek, and the instruction does not suggest, apportionment of damages among different strains of unlawful conduct.

CONCLUSION

For the foregoing reasons, Eaton respectfully requests that the Court overrule plaintiffs' objections and give its original preliminary jury instruction, as amended in the attached Appendix A.

June 20, 2014

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