UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

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

PLAINTIFFS' STATEMENT ACCOMPANYING THEIR REVISED PROPOSED PRELIMINARY JURY INSTRUCTIONS FOR THE DAMAGES PHASE TRIAL

Pursuant to the Court's statements at the final pretrial conference (Trans. at 33:21-24), Plaintiffs ZF Meritor LLC and Meritor Transmission Corporation (together, "Plaintiffs") herewith submit their revised proposed preliminary jury instructions. These proposed instructions replace the proposed instructions Plaintiffs submitted to the Court on May 14, 2014 (D.I. 365). Although Plaintiffs' current proposal remains largely the same as their May 14, 2014 proposal, Plaintiffs have made revisions in light, *inter alia*, of pretrial rulings and Eaton's revised proposed preliminary jury instructions. The remaining principal differences in the parties' proposals are discussed below.[1]

Plaintiffs' proposal is derived principally from (1) the Pretrial Stipulation and Order for this damages phase trial (D.I. 367); (2) the preliminary jury instructions the Court used in the liability phase trial (D.I. 229 at 13-22); and (3) the completed liability phase jury verdict sheet

[1] Plaintiffs attempted to meet and confer with Eaton before submitting these proposed instructions, but Eaton never responded to Plaintiffs' counsel's email of June 9th. Plaintiffs therefore compare their current proposed instructions with the proposed instructions Eaton submitted to the Court on June 4, 2014.

and final instructions the Court gave with regard to that sheet (D.I. 216, 214). Plaintiffs' proposal is attached as Exhibit A. A comparison of Plaintiffs' current proposal and Eaton's current proposal is attached as Exhibit B.

I. PRINCIPAL REMAINING DIFFERENCES BETWEEN THE PARTIES' PROPOSALS

A. Description of the Parties and Third Parties

Plaintiffs' proposed preliminary instructions include a very brief description of the parties and third parties in this case. Given that the parties have once again agreed with respect to the stipulated facts that were read to the liability phase jury (*see* Pretrial Stipulation and Order, D.I. 376, at Section III), Plaintiffs propose that those facts be read to the damages phase jury, in lieu of the lengthy and tilted description in Eaton's proposed preliminary jury instructions.

B. Description of the Liability Phase Jury's Findings

Plaintiffs have amended their proposed preliminary jury instructions on pages 3-4 to follow closely the parties' stipulation in Section IV of the Pretrial Stipulation and Order. While Eaton suggests that Plaintiffs purposely manipulated the language in the liability phase jury verdict form (D.I. 372 at 7) regarding (1) the finding that Eaton willfully acquired or maintained monopoly power and (2) the timing of Plaintiffs' injuries, that is not the case, as demonstrated by the agreed-upon language in Section IV of the Pretrial Stipulation and Order. Plaintiffs request that the Court adopt the stipulated language in Section IV with respect to the findings of the liability phase jury.

II. EATON'S PROPOSED "BURDEN OF PROOF" AND "CALCULATION OF LOST PROFITS" INSTRUCTIONS SHOULD NOT BE INCLUDED IN THE PRELIMINARY JURY INSTRUCTIONS

A. Eaton's Proposed "Burden of Proof" Instruction

Plaintiffs do not dispute that the Court should instruct the jury with respect to burden of proof at the appropriate time. However, given the caselaw on antitrust damages burden of proof, discussed below, a burden of proof instruction would need to be extensive and could create confusion for the damages-phase jury if given in the preliminary instructions, before the full presentation of evidence. Moreover, Eaton's proposed burden of proof instruction is legally erroneous, as also explained below. Should the Court conclude that the jury should hear some preliminary instruction regarding burden of proof, Plaintiffs submit that the Court should read Plaintiffs' proposed burden of proof instructions set forth in Exhibit A at 10-12.

Eaton erroneously states the burden of proof in this damages phase trial, including mistakenly suggesting that Plaintiffs bear the burden of proving that their damages did not result from any factor other than Eaton's illegal conduct. D.I. 372, Exhibit A at 7. The Supreme Court has established that the jury may calculate Plaintiffs' damages as a matter of just and reasonable inference from Eaton's wrongful actions and their injury to Plaintiffs, which already have been established, and from evidence of the decline in Plaintiffs' profits and/or values compared to what they would have been had Eaton's antitrust violations not occurred. *E.g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *accord W. Geophysical Co. of Am., Inc. v. Bolt Assocs., Inc.*, 584 F.2d 1164, 1174 (2d Cir. 1978). It is then Eaton's burden to prove that some or all of Plaintiffs' damages are "attributable to other causes," and that damages therefore should be less and by how much. As the Supreme Court has stated:

> In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123–124, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969), for example, the Court discussed at some length the fixing of damages

> in a case involving market exclusion. We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation: '[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-66 (1981) (citations omitted);[2] *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 573 n. 31 (1990); *Zenith Radio v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25 (1969); *Bigelow*, 327 U.S. at 264-65. Eaton's proposed instructions fail to recognize this principle, and that the burden of proof shifts to Eaton to prove that some or all of Plaintiffs' damages were "attributable to other causes . . . ." *Accord* Dec. 20, 2013 Mem. and Order at 3 and 5 (Plaintiffs need not disaggregate damages).

B. Eaton's Proposed "Calculation of Lost Profits" Instruction

Eaton's proposed preliminary jury instructions also include a "Calculation of Lost Profits" instruction. D.I. 372, Exhibit A at 7. Plaintiffs submit that such instructions are more properly suited for the final jury instructions, after full presentation of the evidence, rather than for preliminary jury instructions. D.I. 229 (Tr. Transcript at 160:1-169:18); D.I. 214.

[2] The Court added: "In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946), relied on in *Zenith*, . . . [t]he lower court thought the evidence too imprecise to support the award, but we reversed because the evidence was sufficient to support a 'just and reasonable inference' of damage. We explained: 'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.'" *J. Truett Payne*, 451 U.S. at 566 (citations omitted).

Further, Eaton's proposed instruction fails properly to describe the burden of proof (discussed above), and it remakes arguments this Court and the Third Circuit already have rejected, including Eaton's effort to require Plaintiffs to disaggregate damages. D.I. 372, Ex. A at 8. As this Court held in denying Eaton's 2013 *Daubert* motion (D.I. 337): "I reject defendant's argument that the DeRamus opinion is fatally flawed because it fails to 'disaggregate the losses attributable to Eaton's non-price conduct.'" Dec. 20, 2013 Mem. and Order (D.I. 337) at 4; *id.* at 5 ("Consistent with the facts of record and the rule of reason analysis applied to those facts by the Third Circuit, I likewise find disaggregation unnecessary, if not impossible.") *Accord LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (in an antitrust case in which the defendant's conduct is unlawful "taken as a whole," disaggregation of damages is "unnecessary, if not impossible"); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 813 (3d Cir. 1985). Eaton's attempt to require disaggregation of damages should be rejected once again.

III. Conclusion

Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed preliminary jury instructions.

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June 13, 2014

CERTIFICATE OF SERVICE

I, Joseph C. Schoell, hereby certify that, on this 13th day of June, 2014, a copy of the foregoing document was served on the following counsel of record in the manner indicated below:

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