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 FOR JUDGMENT AS A MATTER OF LAW

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INTRODUCTION

Eaton's motion is procedurally barred, and without merit in fact or law:

1. Eaton raised its "disaggregation" argument in the Third Circuit as a ground to deny plaintiffs leave to amend their damages calculations. Response and Reply Brief of Appellant/Cross-Appellee Eaton Corporation, dated March 21, 2012, at 55-56.[1] By allowing such amendment, *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012), the Third Circuit necessarily rejected that contention, precluding Eaton from future litigation of the issue under the law of the case doctrine. *See Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008) (under law of the case, plaintiff 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, 32 (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.").

Similarly, while Eaton complains that plaintiffs did not ask for the jury verdict sheet to disaggregate Eaton's conduct on an LTA-by-LTA basis, D.I. 311 (Defendant's Memorandum of Law In Support of Its Motion For Judgment As A Matter Of Law, dated Mar. 25, 2013) ("Eaton Br.") at 2, 6, Eaton omits what actually happened -- that *Eaton* made such a request with regard to the verdict sheet, that plaintiffs opposed the request, and that this Court denied Eaton's request. D.I. 243 (Trial Tr.) at 3784; D.I. 217 (Verdict Sheet). Eaton did not contest the verdict sheet or jury instructions in its post-trial Rule 50/59 motion or on appeal,[2] leaving the Court's decision on this issue final and dispositive. *See Medcalf v.Trustees of Univ. of Pennsylvania*, 71

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[1] Attached as Exhibit 1 to the Declaration of Jennifer D. Hackett in Support of Plaintiffs' Answering Brief In Opposition to Defendant's Motion For Judgment As A Matter Of Law, dated April 22, 2013 (the "Hackett Declaration").

[2] *See* D.I. 246; Principal Brief of Appellant/Cross-Appellee Eaton Corporation, dated Dec. 14, 2011, at Issues Presented For Review (Hackett Decl. Ex. 2).

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 issue in JNOV motion).

Eaton's complaint about Dr. DeRamus's econometric model also is barred. Eaton challenged the econometric model in its original *Daubert* motion, but, as the Third Circuit noted, this Court accepted Dr. DeRamus's methodologies "as being regularly and reliably applied by economists . . . ." *ZF Meritor*, 696 F.3d at 298. And, this Court allowed Dr. DeRamus to testify about the same econometric model at trial, over Eaton's motion to strike that testimony as assertedly unreliable. D.I. 235 (Trial Tr.) at 1877. Eaton did not challenge these rulings in its Rule 50/59 motions, or raise them on its appeal. And, while (on plaintiffs' cross-appeal) Eaton did attack Dr. DeRamus's model as a reason to deny plaintiffs leave to amend their damages calculations,[3] the Third Circuit decided to the contrary, allowing Dr. DeRamus to amend his damages report and to do so specifically using "substitute data from the econometric model . . . ." *ZF Meritor*, 696 F.3d at 298, 300.

2. Eaton also ignores the applicable law on "disaggregation." A string of Third Circuit decisions has refused to allow antitrust offenders to escape damages by arguing that their conduct must be "disaggregated," i.e., considered piecemeal, rather than "taken as a whole." *See LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (where defendant's actions, taken as a whole violate antitrust laws, it is "unnecessary, if not impossible," to require disaggregation); *accord Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999); *Rossi v. Standard Roofing, Inc.*, 156 F.3d

[3] Hackett Decl. Ex. 1 at 53-55.

452 (3d Cir. 1998); *Bonjorno*, 752 F.2d at 802. Eaton does not address, much less avoid the impact of, these decisions.

3. Eaton also misstates the Third Circuit decision in this case. Eaton repeatedly claims that the "Third Circuit Held That Eaton's Lower Prices Were Lawful," Eaton Br. 7-9, but it equally repeatedly fails to support that assertion -- because the Third Circuit held no such thing. 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 also recognized that Eaton's conduct here was not limited to pricing practices, that Eaton's claimed price reductions were fully intertwined with its exclusionary agreements with the OEMs, and that Eaton's activities must be viewed "as a whole." *E.g.*, *id.* at 277, 289, 303 & n.20 ("Therefore, because price itself was not the clearly predominant mechanism of exclusion, the price-cost test cases are inapposite . . . ."); *id.* at 320 (Greenberg, J. dissenting) ("[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct as a whole was procompetitive or anticompetitive."). These conclusions are supported by record cite after record cite showing that any alleged price reductions by Eaton to the OEMs were not independent acts, but were offered solely in exchange for the OEMs' agreements to engage in anticompetitive conduct (huge market share commitments, databook exclusions, "artificial" resale pricing "penalties," etc.). *See, e.g.*, *id.* at 265-66; PTX 115 (Hackett Decl. Ex. 3) at 3; PTX 132 (Hackett Decl. Ex. 4); PTX 247 (Hackett Decl. Ex. 5) at 1; PTX 304 (Hackett Decl. Ex. 6); PTX 599 (Hackett Decl. Ex. 7) at 7-9; PTX 651 (Hackett Decl. Ex. 8); DX 467 (Hackett Decl. Ex. 9) at 4; DX 515 (Hackett Decl. Ex. 10) at 1, 8.

Indeed, Eaton has admitted away its argument. Only twelve days ago, in its Reply brief on its Petition for Writ of Certiorari, Eaton stated on the first page that the anticompetitive provisions of its LTAs were an "integral element" of its "discounted prices." Eaton Reply Brief to Petition for a Writ of Certiorari, dated April 10, 2013 at 1 (Hackett Decl. Ex. 11).

4. Likewise, Eaton ignores the record with regard to its pricing, quality, and other causation arguments regarding Dr. DeRamus's damages methodology. As explained in detail in plaintiffs' concurrent Answering Brief in Opposition to Defendant's Motion to Exclude Opinion Testimony of Dr. David W. DeRamus ("*Daubert* Opp."), at 25-26, Eaton offers no evidence to support its conjecture that, absent its unlawful conduct, it would have substantially reduced its prices to the OEMs to meet plaintiffs' competition. To the contrary, the record is undisputed that at no time either before or during the challenged conduct did Eaton make any significant price concessions to the OEMs untethered to its anticompetitive agreements, even when Meritor's market share was tripling in the 1990s. [redacted]REDACTED[redacted] [redacted]REDACTED[redacted] And the rebates it offered the OEMs in return for their illegal agreements were, by Eaton's and its expert's own assessments, "modest" and "small." Hackett Decl. Ex. 2 at 44 n.11; D.I. 239 at 2752-53 (Murphy).

Dr. DeRamus also has explained multiple times that he considered price, quality and other potential alternate explanations for plaintiffs' lost market share, but rejected them based on his evaluation of the facts of the case and industry dynamics. *E.g.*, Deposition of Dr. David DeRamus, dated March 6, 2013 at 251, 255-59 (Hackett Decl. Ex. 13). The Third Circuit recognized this analysis, noting 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 ignores these statements too, as well as the Supreme Court's declaration that "[n]ormally, failure to include variables will affect a [regression] analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

After correcting the avoidances and misstatements in Eaton's motion, nothing remains. Eaton cannot block a damages-phase trial vindicating the private and public interests in enforcing the laws protecting competition. Nor can it re-try the liability issues it has lost through the Third Circuit. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1183 (3d Cir. 1993) ("[T]he role of the second jury [in a bifurcated case where the first jury found liability] should have been limited to determining the amount of damages [plaintiff] incurred from acts taken in furtherance of the conspiracy."); *Bonjorno*, 752 F.2d at 813 (second jury not "to evaluate or decide factual issues that were involved in the first trial").

The Court should deny Eaton's motion.

BACKGROUND

On May 11, 2009, Eaton filed its original *Daubert* motion, which made the same "disaggregation" arguments it raises in this Motion. D.I. 107 at 1, 3, 32-34. In response, as the Third Circuit noted, this Court found Dr. DeRamus's methodologies to be "being regularly and reliably applied by economists," *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 298 (3d Cir. 2012), and granted Eaton's motion solely because it found projections in the ZF Meritor Strategic Business Plan to be unreliable data. *Id.* at 290-91; D.I. 144 ("August 20, 2009 Opinion") at 8.

After this Court issued that decision, plaintiffs sought leave to file, and subsequently filed, a motion to clarify, reconsider, etc., including a request for leave to amend Dr. DeRamus's

calculations (the "Clarification Motion"). D.I. 158. At a conference, the Court discussed the possibility of bifurcating the trial. Transcript of Pre-Trial Hearing, dated August 27, 2009 at 10-16 (Hackett Decl. Ex. 14). Plaintiffs requested the Court to rule on their Clarification Motion before holding a trial. D.I. 149 at 1. Eaton, in contrast, pushed for an immediate and potentially bifurcated trial, stating that it was "fully prepared" to "go to trial on September 8," and urging the Court to require plaintiffs to brief their motion "during trial." D.I. 150 at 1. *See also* Hackett Decl. Ex. 14 at 26-29. The Court bifurcated the damages issue, and proceeded to trial on violation and antitrust injury, allowing Dr. DeRamus to testify as to those issues. Transcript of Pre-Trial Hearing, dated September 10, 2009 at 24-25 (Hackett Decl. Ex. 15).

During the trial, Dr. DeRamus testified on direct and cross-examination about his econometric model, the same model he uses for substitute data in his amended damages calculations. D.I. 235 at 1869-77; D.I. 236 at 2107-18. His testimony included explanation of the variables he included, the reasons he chose July 2000 as the beginning of the anticompetitive conduct period for the model, and his use of the model to predict plaintiffs' but-for market shares (the same purpose for which he uses the model now). D.I. 235 at 1869-71; D.I. 236 at 2111-14.

At the end of his direct testimony about the model, Eaton's counsel moved to strike that testimony. D.I. 235 (Trial Tr.) at 1877. The Court denied that motion. *Id.*

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.

The Court then heard argument on the proposed jury instructions and verdict sheet. Eaton sought a verdict sheet that would have required the jury to determine whether Eaton's conduct harmed competition and injured plaintiffs on an LTA-by-LTA basis. D.I. 243 (Trial Tr.)

at 3778-94. Plaintiffs opposed that request. *Id.* at 3779. During the argument, the Court said to Eaton's counsel: "[I]f you've got case law, a verdict sheet that is like this that has passed muster in front of anybody, I'm happy to look at it. But if, in fact, this creates error instead of makes it clear, then, once again, I don't want to try this again." *Id.* at 3784. The Court subsequently denied Eaton's request. *See* D.I. 217 (Verdict Sheet). *See* cases cited *infra* at 10-12.

On October 8, 2009, the jury returned its verdict, and the Court entered judgment in favor of plaintiffs on October 14, 2009. D.I. 217 (Verdict Sheet); D.I. 222 (Judgment). *See also* D.I. 226 (Amended Judgment). On November 3, 2009, Eaton filed a motion for judgment as a matter of law or a new trial under Rules 50(b) and 59. D.I. 245. Eaton's principal argument was that plaintiffs failed to establish that Eaton engaged in anticompetitive conduct because they assertedly did not show that Eaton priced its transmissions below cost. As in its Rule 50(a) motion, Eaton did not there contest the Court's denial of its motion to strike Dr. DeRamus's testimony about his econometric model, or the Court's decision to bifurcate the trial; nor did it challenge the verdict sheet or jury instructions. The Court denied Eaton's motion. D.I. 260.

Eaton filed its appeal on December 14, 2011. *See* Hackett Decl. Ex. 2. Eaton did not appeal any disaggregation, econometric model or bifurcation issues.[4] Eaton did, however, raise both its disaggregation and econometric model arguments as grounds for opposing plaintiffs' cross-appeal, contending that the Third Circuit should not grant leave for Dr. DeRamus to

[4] Eaton is wrong in claiming that it appealed the bifurcation issue through a footnote in its Response and Reply Brief in the Third Circuit. Eaton Br. at 4 n.5; Hackett Decl. Ex. 1 at 12 n.2. Such a passing reference in a footnote, especially one in a response/reply brief, does not raise an issue on appeal. *John Wyeth & Brother Ltd. v. Cigna Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (arguments that are raised only in footnotes or in passing, but not squarely argued, are waived). *See also* Hackett Decl. Ex. 2 at Issues Presented For Review (not raising bifurcation as an Issue Presented for Review).

substitute data to amend his damages calculations because his testimony would be defective for those reasons anyway. Hackett Decl. Ex. 1 at 55-59.

On September 28, 2012, the Third Circuit upheld the jury verdict. Contrary to Eaton's assertion that the Third Circuit found Eaton's prices to be "lawful," both the majority and the dissent recognized that Eaton's conduct was not limited to pricing practices, that Eaton's claimed price reductions were fully intertwined with its exclusionary agreements with the OEMs, and that Eaton's activities must be viewed "as a whole." *Id.* at 289 n.20; *id.* at 320 (Greenberg, J. dissenting). The majority found the totality of Eaton's conduct to be unlawful. *Id.* at 289, 303.

The Third Circuit also granted leave for Dr. DeRamus to amend his damages calculations, including by use of "substitute data from the econometric model . . . ." *Id.* at 291, 295, 298. In so holding, it necessarily rejected Eaton's opposition to such leave based on its disaggregation and econometric model arguments. *See* Hackett Decl. Ex. 1 at 55-59.

On March 25, 2013, Eaton filed a *Daubert* motion to exclude Dr. DeRamus's damages opinions and this motion for judgment as a matter of law ("JMOL motion"), which make virtually identical disaggregation arguments. *Compare* D.I. 309 ("Eaton *Daubert* Br.") *with* D.I. 311 (Eaton JMOL Br.). The Court should deny this JMOL motion, as well as Eaton's new *Daubert* motion.

ARGUMENT

Eaton contends that plaintiffs cannot proceed to trial on damages because Dr. DeRamus assertedly failed to disaggregate Eaton's pricing and other conduct. Eaton Br. 7-17. The Court should reject Eaton's position.

I. EATON'S MOTION IS PROCEDURALLY BARRED

Eaton's motion is precluded. While Eaton does not say whether it purports to bring this JMOL motion under Rule 50(a) or Rule 50(b), neither is available to it.[5] Eaton brought a Rule 50(a) motion on October 6, 2009, and a Rule 50(b)/59 motion on November 3, 2009. D.I. 208; 245. In neither of those motions did Eaton raise any of the arguments it makes here. *See supra* at 6-7; *see* D.I. 208, 245. And the appellate process in the Third Circuit has now run its course -- with Eaton failing to raise any disaggregation, econometric model or bifurcation argument on its appeal, and with the Third Circuit rejecting the disaggregation and econometric model arguments Eaton made on plaintiffs' cross-appeal. *See supra* at 8.

Under the doctrine of law of the case, Eaton cannot now relitigate any issue that was explicitly or implicitly decided by the Third Circuit. *Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008); *accord Bolden v. Se. Penn. Transp. Auth.*, 21 F.3d 29, 31 (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."); *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

[5] A Rule 50(a) motion may be brought after "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a). Rule 50(b) permits a party that did not prevail on a Rule 50(a) motion to renew its motion if it loses at trial. A Rule 50(b) motion may only address issues raised in the Rule 50(a) motion; all other issues are waived. *See, e.g.*, *Hayer v. Univ. of Med. & Dentistry of N.J.*, 490 Fed. App'x 436 (3d Cir. 2012) ("The rule that a post-trial Rule 50 motion can only be made on grounds specifically advanced in a motion for a directed verdict at the end of plaintiff's case is the settled law of this circuit.") (internal quotes omitted); *Taylor v. USF – Red Star Express, Inc*., CIV.A.03-2216, 2005 WL 555372, at *2 (E.D. Pa. Mar. 8, 2005) ("Defendant failed to seek Rule 50 relief at trial for its business necessity defense, and therefore waived its ability to renew its motion for this defense.").

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.").

Under the doctrine of waiver, Eaton cannot now pursue any argument that it failed to raise in its Rule 50/59 motions and the Third Circuit. *Medcalf v. Trustees of Univ. of Pennsylvania*, 71 Fed. App'x 924, 933 (3d Cir. 2003) (defendant waived argument by failing to appeal jury instructions); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814 (3d Cir. 1984) (defendant waived argument as to admissibility of expert testimony when it failed to raise issue in JNOV motion); *McNaboe v. NVF Co.*, CIV.A. 97-558-SLR, 2002 WL 31444484 (D. Del. Oct. 31, 2002) (Robinson, J.) (issues not raised on appeal waived on remand).

These doctrines bar Eaton's Motion.

II. EATON'S MOTION FAILS AS A MATTER OF LAW AND FACT

A. Eaton's Disaggregation Argument Is Contrary To Law

As the Supreme Court stated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), "[t]he character and effect of [an antitrust] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." The dissenting judge in the Third Circuit in this case agreed, stating: "[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct as a whole was procompetitive or anticompetitive." *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 320 (3d Cir. 2012) (Greenberg, J. dissenting).

In particular, in exclusive dealing cases, the Supreme Court has focused on the cumulative practical effect of the challenged conduct. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-26 (1961) (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949)) (requirement contracts as a whole violated antitrust law because their cumulative, practical effect was to foreclose competition); *United Shoe Mach. Corp. v. United States*, 258

U.S. 451, 457 (1922) (practical effect of restricted use clauses in defendants' many leases with shoe manufacturers violated antitrust law); *accord United States v. Dentsply Intern., Inc.*, 399 F.3d 181, 196 (3d Cir. 2005) (holding defendant's conduct unlawful under the Sherman Act where the cumulative effect of more than twenty exclusionary dealer contracts "effectively choked off the market"); *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (defendant's exclusionary agreements with multiple suppliers, "taken as a whole," violated the Sherman Act).

As the Third Circuit has recognized, this approach applies to the calculation of damages, especially when those damages reflect defendant's anticompetitive conduct "taken as a whole." This result not only makes practical sense, but is necessary to prevent wrongdoers from avoiding the consequences of their violations, and thereby supports the enforcement of the antitrust laws and their policies promoting competition. *See, e.g.*, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) ("The wrongdoer shall bear the risk of uncertainty that his wrongdoing has created."); *ZF Meritor*, 696 F.3d at 300 ("in the antitrust context, a damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of the public . . . .").

In *LePage's*, 324 F.3d at 165-66, the Third Circuit upheld an expert's calculation of damages on an aggregate basis in a case involving multiple exclusive dealing arrangements, declaring that disaggregating the causes of plaintiffs' injury for damages purposes was "unnecessary, if not impossible" where defendant's actions, taken as a whole, violated the antitrust laws. Similarly, in *Bonjorno*, the Third Circuit held that, where the plaintiff had proven that defendant had engaged in multiple activities that collectively violated Section 2 of the Sherman Act, ultimately causing the plaintiff to go out of business, plaintiff was not required to disaggregate its damages. 752 F.2d at 813*; accord Callahan v. A.E.V., Inc.*, 182 F.3d 237, 258 (3d Cir. 1999) (rejecting defendant's contention that expert opinion must be excluded for failure

to disaggregate causes of plaintiff's injury); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 485-86 (3d Cir. 1998) (expert report created genuine issue for trial despite failure to measure particularized effects of various alleged illegal practices).[6]

The Supreme Court's recent decision in *Comcast Corp. v. Behrend*, No. 11-864, 2013 WL 1222646 (March 27, 2013), is consistent with these principles. Citing *Story Parchment v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), the Court recognized that antitrust damages "[c]alculations need not be exact," *Comcast*, 2013 WL 1222646 at *5, and based its decision on the "unremarkable premise" that, where plaintiff customers had asserted four different theories of impact in a class action but only one theory survived class certification, the class' expert was required to limit his damages calculations to just the one remaining theory of impact, which he did not do. *Id*.

Unlike the situation in *Comcast*, Eaton does not ask for separation of multiple theories of *plaintiff impact*, but (as in the cases discussed above) for disaggregation of *defendant conduct*, asserting that Dr. DeRamus "simply attributes all damages to the undefined 'totality' of Eaton's 'aggregate' conduct." Eaton *Daubert* Br. at 28; Eaton Br. at 16 n.9. Indeed, Eaton could not make a *Comcast*-like argument here, since plaintiffs (former competitors, not customers) have a unitary theory of impact -- that Eaton's unlawful conduct caused them to lose profits and ultimately forced them out of the market -- and Dr. DeRamus's damages calculations go directly to that theory of impact. [redacted]REDACTED[redacted] [redacted]REDACTED [redacted].

[6] *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 expert's testimony should be excluded for failure to separate losses from unlawful conduct from losses that may be result of lawful conduct).

In contrast, the cases on which Eaton relies do not support its position. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975), the only Third Circuit case Eaton cites on this point, involved an expert who relied on business projections taken from a previous time, when the dealer had faced no intrabrand competition from "factory"-owned dealers. Because the expert assumed no such competition going forward even though such competition had in fact arisen, the Third Circuit excluded the expert's opinion. In this case, Dr. DeRamus explicitly took into account continued competitive activity (concluding that Eaton would have remained by far the largest seller in the but-for world). Amended Report at 12.

Like *Coleman, R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa. 1981), preceded *LePage's*, *Callahan*, *Rossi*, and *Bonjorno*, cited *supra* at 2, 11-12. Moreover, the court in *R.S.E.* found insufficient evidence of causal injury to the plaintiff there based on a fact-specific inquiry, including that the plaintiff had cherry-picked its benchmark periods and did not account for any lawful competition. *Id.* at 966. Here, by contrast, the Third Circuit confirmed the jury's finding that Eaton's anticompetitive conduct caused plaintiffs to suffer antitrust injuries; and Dr. DeRamus's methodology was well-formulated and tested and accounts for lawful competition, such that the Third Circuit expressly authorized him to amend his damages calculations by use of "substitute data from the econometric model . . . ." *ZF Meritor*, 696 F.3d at 291, 298.

Eaton's citations from other courts fare it no better. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983), supports plaintiffs' position, recognizing 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."

In *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (9th Cir. 1992), the court quoted this language from *MCI* at 1371 (quoting *MCI*, 708 F.2d at 1161), but found the situation before it distinguishable. Plaintiffs there had brought three separate antitrust claims (a group boycott claim, a rate discrimination claim and a refusal to deal claim), but plaintiff's expert had failed to separate them for damages purposes. Given that the Court of Appeals allowed only one of the claims to proceed on the merits, it held the expert's collective damages opinion to be too speculative. *Id.* at 1372.

The decision in *U.S. Football League v. NFL*, 842 F.2d 1335, 1378-79 (2d Cir. 1988), also does not help Eaton, stating 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 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1988), the court excluded an expert's testimony because he could not recall a single act taken by the defendant, and did not know which of the plaintiff's product lines had declined or in which geographic areas it had been harmed. That is not the situation here.

B. **Eaton's Disaggregation Argument Is Contrary To The Facts**

Eaton's disaggregation argument also fails on the facts. Eaton contends that Dr. DeRamus should be barred from testifying because of his alleged "failure" to disaggregate "business losses attributable to Eaton's lawful, lower prices . . . from damages caused by Eaton's non-price conduct." Eaton Br. 1. This assertion is directly contrary to Eaton's recent argument to the Supreme Court that the anticompetitive provisions of its LTAs were an "integral element" of its "discounted prices." Hackett Decl. Ex. 11 at 1. In any event, Eaton misstates the Third Circuit opinion and the facts of the case.

As described *supra* at 3, 8, the Third Circuit never separated Eaton's pricing from other conduct and held the former lawful. Both the majority and the dissent recognized (as Eaton now

admits) that Eaton's claimed price reductions were inseparable from its anticompetitive agreements with the OEMs and must be viewed "as a whole" -- conclusions supported by a plethora of evidence showing that any alleged price reductions were not independent acts but were offered solely in return for agreements to engage in anticompetitive restraints. *See supra* at 3. The Third Circuit majority found Eaton's conduct as a whole to be unlawful. *ZF Meritor*, 696 F.3d at 289 n.20, 303.

Likewise, by arguing that plaintiffs "chose to proffer a damages opinion" "without disaggregating losses attributable to Eaton's lawful competitive conduct, such as its lower, above-cost prices, or to Plaintiffs' own self-inflicted quality and other problems," Eaton Br. 2, Eaton once again ignores large swaths of the record. As described *supra* at 4 and in Plaintiffs' *Daubert* Opposition at 25, Eaton's "price response" contention is purely fanciful; two decades of history provides no evidence that Eaton ever responded to increased competition by simply and unilaterally reducing its prices to the OEMs. And, as also discussed in Plaintiffs' *Daubert* Opposition (at 28), Eaton's claim that Dr. DeRamus did not consider plaintiffs' supposed product defects, lack of cost competitiveness, relative pricing and other assertedly causal factors is equally untrue. Dr. DeRamus has explained that he considered all of those issues but rejected them based on his analysis of the facts and industry dynamics. [redacted]REDACTED[redacted]. The Third Circuit recognized that he did just that, *ZF Meritor*, 696 F.3d at 295, and concluded that "Eaton's argument on this point really amounts to nothing more than a complaint that DeRamus did not adopt Eaton's view of the case." *ZF Meritor*, 626 F.3d at 290.

III. EATON CANNOT VITIATE THE LIABILITY PHASE OF THE TRIAL

Eaton says in its memorandum that it does not seek a new trial on both liability and damages, but appears to change its mind in the docket entry titled "Motion for Judgment as a Matter of Law or In The Alternative, a New Trial Encompassing Liability and Damages,"

accompanying the redacted version of its memorandum. D.I. 313. To the extent Eaton does seek a plenary new trial, the Court should deny its request. Eaton's disaggregation argument fails for all the reasons discussed above, and a re-trial of liability issues is precluded by both the Third Circuit opinion and judgment, and by Eaton's failure to challenge the bifurcation of the trial in its Rule 50/59 motions or on appeal, waiving that issue. *See, e.g.*, *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1183 (3d Cir. 1993) ("the role of the second jury [in a bifurcated case where the first jury found liability] should have been limited to determining the amount of damages [plaintiff] incurred from acts taken in furtherance of the conspiracy."); *Bonjorno*, 752 F.2d at 813 (second jury not "to evaluate or decide factual issues that were involved in the first trial."); waiver cases cited *supra* at 10; s*ee generally* D.I. 307 (Plaintiffs' Motion Regarding Nature and Scope of Trial, March 25, 2013).[7]

CONCLUSION

The Court should deny Eaton's motion.

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[7] The cases Eaton cites in favor of a "theoretical" new trial on both liability and damages do not support its argument. Those cases dealt with fact situations that are inapplicable here, such as a jury compromise on the liability issues that the court felt might taint the damages award (*Harden v. Allstate Ins. Co.*, No. 93-513, 1996 WL 190013 (D. Del. Apr. 16, 1996), and *Vizzini v. Ford Motor Co.*, 569 F.2d 754 (3d Cir. 1977)), or the presence of multiple parties some of which were found liable and some of which were not, making it impossible to tell which party caused the damages (*Pryer v. C.O. 3 Slavic*, 251 F.3d 448 (3d Cir. 2001)).

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