UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

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

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

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INTRODUCTION

ZFM's opposition concedes the fundamental disconnect between: (1) the generalized verdict and ZFM's generalized damages calculations[1] and (2) the Third Circuit's express finding that the provisions of each of Eaton's contracts varied, that "not every provision was unlawful," and, specifically, that the price terms of Eaton's contracts were above-cost at all times and thus fell within the Supreme Court's long-standing "safe harbor" and were "not anticompetitive." *ZF Meritor LLC v. Eaton Corp*., 696 F.3d 254, 265, 275-78 (3d Cir. 2012). That disconnect is fatal to ZFM's case because clear and long-standing antitrust authority—stretching nearly a century from the enactment of Clayton Act Section 4 to last month's Supreme Court decision in *Comcast*—mandates that an antitrust plaintiff "*must* measure *only* those damages attributable" to specific anticompetitive conduct and "cannot possibly" recover for losses attributable to defendant's lawful conduct (here, Eaton's lower prices and other competitive conduct), a plaintiff's self-inflicted wounds, or other unrelated factors. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (emphasis added). DeRamus's damages estimates are not limited to the non-price conduct at issue and, like the expert in *Comcast*, "cannot possibly" establish a valid measure of damages. *Id.*

ZFM created this problem. It sought a generalized verdict, rather than the special verdict form Eaton proposed, and proffered a damages model that failed to disaggregate losses caused by Eaton's lawful, lower prices and other competitive conduct (and ZFM's self-inflicted wounds). Instead of disputing the substance of Eaton's motion, ZFM's opposition argues only that it is "procedurally barred." D.I. 315 at 1. The bars are illusory, however; for example,

[1] The verdict is based on unidentified terms in undifferentiated "contracts" and undefined "anti-competitive conduct," D.I. 217 (questions 5, 7, and 11) and ZFM's damages are based on the "totality" of Eaton's conduct on an "aggregate basis." D.I. 311, Ex. 3 at App. 117 [redacted].

ZFM argues that Eaton raised DeRamus's failure to disaggregate in response to ZFM's appeal of this Court's order excluding DeRamus's *original* report—and that the Third Circuit somehow "rejected that contention, precluding Eaton from future litigation of the issue" with regard to his *amended* report. D.I. 315 at 1. But the Third Circuit said nothing of the sort. It simply affirmed the exclusion of the original report because it "bore insufficient indicia of reliability" and the "record amply supported the District Court's concern that . . . DeRamus lacked critical information that would be necessary for Eaton to effectively cross-examine him." *ZF Meritor*, 696 F.3d at 291. The Third Circuit did not address DeRamus's failure to disaggregate in his *original* opinion, much less preclude Eaton from raising it with regard to his *amended* opinion. Instead, it expressed "no opinion as to the reliability or admissibility of DeRamus's alternate damages calculations" and left that determination to this Court. *Id*. at 300 n. 28.

ARGUMENT

I. ZFM'S FAILURE TO DISAGGREGATE REQUIRES JUDGMENT AS A MATTER OF LAW IN EATON'S FAVOR

Just last month, the Supreme Court underscored the critical requirement that an antitrust plaintiff can only obtain damages attributable to unlawful conduct. *Comcast*, 133 S.Ct. at 1433.[2] In *Comcast*, the Court reversed a Third Circuit decision approving certification of an antitrust class action because the plaintiffs' expert failed to link his damages estimate to the unlawful conduct at issue. Plaintiffs alleged four types of anticompetitive conduct, but the district court held that only one type ("reduced overbuilder competition") was legally sufficient for class certification and rejected the other three. The *Comcast* plaintiffs' expert, however, "did not isolate damages resulting from any one theory of antitrust impact" and "expressly admitted that the model calculated damages resulting from 'the alleged anticompetitive conduct as a whole' and

[2] Eaton incorporates its Opposition to Plaintiffs' Motion Regarding Nature and Scope of Trial, D.I. 321, which addressed many of the issues herein.

did not attribute damages to any one particular theory." *Id*. at 1431, 1434. The Court rejected the expert's methodology, noting that its 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 1431. "It follows that a model purporting to serve as evidence of damages in this class action must measure ***only*** those damages attributable to that theory." *Id*. (emphasis added). The Court thus held that it is impermissible to use a "methodology that identifies damages that are not the result of the wrong[,]" and excluded the expert's model as too speculative to get to a jury because it "failed to measure damages resulting from the particular antitrust injury." Id. at 1433.

This has been the well-settled rule of law for many years: to avoid a verdict based on speculation or guesswork, an antitrust plaintiff's injury and damages must reflect ***only*** the losses directly attributable to ***unlawful*** competition. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), the Supreme Court laid out the clear principle that an antitrust plaintiff must prove antitrust injury that "flows from that which makes defendants' acts *unlawful*." *Id.* Clayton Act Section 4 damages, likewise, are only available when they are caused "by reason of" conduct "forbidden in the antitrust laws." 15 U.S.C. §15(a). Accordingly, business losses caused by lawful competition, by a plaintiff's self-inflicted wounds, or any other factor unrelated to the defendant's anticompetitive conduct, are not permissible damages and must be deducted out. Otherwise, defendants might be liable for treble damages caused by entirely lawful conduct (or a plaintiff's own problems or unrelated events).

ZFM's opposition does not dispute this governing caselaw. Notably, it barely mentions *Comcast* and fails entirely to mention *Brunswick* or Clayton Act Section 4. ZFM instead argues that DeRamus's "unitary theory of impact" is somehow different from the expert's theory in

Comcast. But there is no distinction at all: both experts took the same approach and claimed that their estimated damages were caused by *all* of defendant's conduct *as a whole*. In both cases, however, the courts disagreed and, instead, concluded that some of the defendant's conduct was insufficient to be the basis for a proper antitrust claim. The similarities in the situations are striking. In *Comcast*, the Court found that the expert's analysis failed the very "first step" necessary for a valid damages study because it did not isolate and connect the "*harmful event* into an analysis of the economic impact of *that ev*ent" and, thus, "cannot possibly" establish a valid measure of damages. *Id*. at 1435 (citations omitted). The exact same flaws doom ZFM's amended damages theory (and, thus, its case) here.

DeRamus, like the *Comcast* expert, admitted that his damages were based on the [redacted], D.I. 311, Ex. 3 at App. 117, and that he did not isolate and deduct business losses caused by Eaton's lawful, lower prices or other competitive efforts (or ZFM's self-inflicted wounds and other unrelated factors). *Id*.[3] The Third Circuit here, like the court in *Comcast*, disagreed with DeRamus's holistic view. Instead, it concluded that some of Eaton's conduct was not properly the basis for liability because "not every provision [of Eaton's LTAs] was unlawful" and, in particular, the Court expressly found that Eaton's above-cost prices fell within the Supreme Court's "safe harbor" and were "not anticompetitive." *ZF Meritor*, 696 F.3d at 275-78.[4] DeRamus's "unitary theory" of damages is thus invalid as a matter of law, just

[3] [redacted] *Id.*

[4] The Supreme Court has repeatedly reaffirmed the "safe harbor" for above-cost prices and held that they "cannot give rise to antitrust injury" and damages. *See Pacific Bell Telephone Co. v. linkLine Comm'ns, Inc.*, 555 U.S. 438, 440 (U.S. 2009); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (U.S. 1993) (penalizing low, but above-cost prices

as that theory was invalid in *Comcast*.[5]

The Third Circuit has followed this long-established rule and dismissed plaintiffs who claim antitrust injury and damages attributable to lawful conduct. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975), for example, the Third Circuit overturned a jury's verdict because the "damages figures advanced by plaintiff's expert may [have been] substantially attributable to lawful competition." *Id.*[6] Every other Circuit addressing the situation has reached the same conclusion. In *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), the Seventh Circuit reversed a damages award because plaintiff's failure to disaggregate violated the "essential" rule that "damages reflect only the losses directly attributable to *unlawful* competition." *Id.* at 1161, 1164. The Ninth Circuit in *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (9th Cir. 1992), rejected a plaintiff's damages model as "seriously flawed" because it "failed to segregate the losses . . . caused by acts which were not antitrust violations from those that were." *Id.* at 1371-72; *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d

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would "chill the very conduct the antitrust laws are designed to protect"); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (U.S. 1990).

[5] ZFM attempts to distinguish *Comcast* as involving the rejection of a "unitary theory of impact," which they claim is different than Eaton's challenge to DeRamus based (in ZFM's characterization) on his unitary theory of Eaton's conduct. D.I. 315 at 12. First, that was not Eaton's argument. Its opening brief clearly criticized DeRamus for failing to link his generalized damages to the non-price conduct identified by the Third Circuit, and the generalized verdict itself for failing to identify what Eaton conduct caused ZFM's antitrust injury and when. D.I. 311 at 18-20. Second, that appears to be a distinction without a difference: ZFM cites no caselaw finding any such distinction legally significant.

[6] ZFM's attempt to distinguish *Coleman* misses the point. ZFM does not dispute the precedential legal principle laid out in *Coleman*, but claims that *Coleman* does "not support" Eaton's position because although *Coleman* ruled damages models insufficient where (as here) plaintiffs "did not account for any lawful competition," unlike the expert in *Coleman*, DeRamus "took into account competitive activity." D.I. 315 at 13. [redacted] D.I. 311, Ex. 14 at App. 524. Thus, *Coleman* directly supports Eaton's argument.

802, 806 (9th Cir. 1988) (rejecting damages model that "did not relate the loss to specific [unlawful] acts" by the defendant).[7]

ZFM raises two arguments in response. The first is a straw man: ZFM cites a number of cases holding that an antitrust plaintiff does not need to disaggregate damages caused by each of the defendant's anticompetitive acts. D.I. 315 at 11-12. But that is not the issue for purposes of this motion. Eaton's motion is not based on DeRamus's failure to separate out damages caused by each of the non-price types of conduct identified by the Third Circuit. Rather, judgment as a matter of law is compelled by DeRamus's failure to separate out losses caused by Eaton's *lawful* above-cost prices and other competitive conduct (for example, Eaton's rebate incentives to fleets, broader transmission product offerings, and larger service organization), ZFM's self-inflicted wounds (its "significant" defect and warranty problems, according to DeRamus), and unrelated market factors (the sharp decline in truck builds and raw materials cost increases) from damages attributable to the non-price conduct identified by the Third Circuit. Even ZFM's cases require disaggregation of losses caused by lawful and unlawful conduct. The *LePage's* court, for example, held that plaintiff was only entitled to damages from "the unlawful activity [that] caused the antitrust injury." *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003). The *Bonjorno* court, likewise, followed the Supreme Court's rule and Clayton Act Section 4 and held that plaintiff could obtain damages "from only those acts" that were unlawful. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 813 (3d Cir. 1984). In both cases, unlike here, the Court found

[7] ZFM's attempts to distinguish *MCI*, *City of Vernon* and *McGlinchy* are misplaced. ZFM argues that *MCI* and *City of Vernon* are distinguishable because they involved separate antitrust claims, and *McGlinchy* is distinguishable because in that case the expert "could not recall a single act taken by the defendant." D.I. 315 at 14. But ZFM's "distinctions" are completely irrelevant. ZFM does not dispute that in *MCI*, *City of Vernon* and *McGlinchy*, the Courts expressly required that an expert's damages model relate the loss ***only*** to the specific ***unlawful*** conduct. *MCI*, 708 F.2d at 1164; *City of Vernon*, 955 F.2d at 1371; *McGlinchy*, 845 F.2d at 806.

all of the defendant's conduct unlawful and that plaintiff's damages flowed from that unlawful activity. *LePage's*, 324 F.3d at 166; *Bonjorno*, 752 F.2d at 813.[8]

ZFM's alternative argument is that DeRamus "considered . . . but rejected" the need to disaggregate ZFM's damages. D.I. 315 at 15. But that is nothing more than a concession that DeRamus failed to disaggregate and deduct business losses caused by Eaton's lawful conduct (or ZFM's self-inflicted wounds) coupled with a lawyer argument that an expert does not have to follow the law if—in his personal view—he "considered" disaggregating the effects of lawful and unlawful conduct, but decided not to, and instead estimated damages attributable to the defendant's conduct "as a whole." *Id.* at 13, 15. *Comcast* rejected a damages "as a whole" opinion as "obvious[ly] and exceptional[ly] erroneous." 133 S.Ct. at 1431, 1434 n. 5. Indeed, courts routinely exclude experts who disregard the law in favor of their personal views. *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1322-23 (11th Cir. 2003) (affirming exclusion of expert where "he did not differentiate between legal and illegal pricing behavior, and instead simply grouped both of these phenomena under [one] umbrella.").

ZFM cites no case permitting an expert to "consider"—but refuse to apply—a method required by law. Such an approach would make it easy to do an end run around the legal requirements, obviously. An expert's job is not to simply review the record and subjectively decide (according to his own *ipse dixit*) that certain facts are irrelevant to his damages estimate. Instead,

[8] ZFM's remaining cases are inapplicable because they did not address the reliability of an expert's opinion at all, let alone dispense with the requirements of disaggregating losses attributable to lawful (and unrelated) conduct from and damages resulting from unlawful conduct. Instead, *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 258 (3d Cir. 1999), and *Rossi v. Standard Roofing, Inc.* 156 F.3d 452 (3d Cir. 1998), simply held that there was sufficient evidence on liability to withstand summary judgment. Neither case reached damages. *Callahan*, specifically held, for example, that it did not address whether the "plaintiff has brought forth sufficient evidence to justify the actual damages awarded" and, instead, decided to "leave it to the District Court to consider" it on remand. *Id*. at 258 n.13.

an expert must follow the law and employ a peer-reviewed, testable method "based on the methods and procedures of science rather than on subjective belief." *Calhoun v. Yamaha Motor Corp., U.S.A* ., 350 F.3d 316, 321 (3d Cir. 2003). In this case, and every antitrust case, that includes employing a test and developing a damages estimate that separates out business losses caused by lawful conduct (Eaton's lower prices and other competitive efforts), by ZFM's own self-inflicted wounds (for example, its [redacted] warranty problems that lasted for several years, according to DeRamus), and unrelated market factors, from damages caused by purportedly unlawful conduct (the non-price conduct identified by the Third Circuit).

Substantial record evidence demonstrated that Eaton's lawful lower prices, its innovation of new transmissions, its efforts to lower manufacturing and supply chain costs, and its field service support led truck buyers to specify its transmissions, *see* D.I. 238 at 2529; D.I. 242 at 3596, and that ZFM also lost sales because of its [redacted] transmission defects. D.I. 311, Ex. 3 at App. 64. But DeRamus did not disaggregate those losses, as he admits. Instead of proffering a reliable peer-reviewed method quantifying those losses, he proffered his own *ipse dixit* that he simply did not consider those factors important. This is insufficient. An expert is required to use reliable methods to demonstrate that certain factors are not important, not simply to assume that conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (economist's analysis was flawed where he "ignored inconvenient evidence").

DeRamus's failure to disaggregate losses caused by Eaton's lawful lower prices is particularly egregious here because it is flatly inconsistent with his liability testimony (and, more broadly, ZFM's argument to the jury) that "Eaton's pricing behavior" was "anticompetitive" and

"exclusionary" conduct that injured ZFM. See D.I. 311, Ex. 4 at App. 175, 180, 226; D.I. 236 at 1893:16-25 (DeRamus).

II. THE POSSIBILITY OF A NEW LIABILITY AND DAMAGES TRIAL IS NOW MOOT

The disconnect between (1) the generalized verdict and DeRamus's "totality" damages and (2) the Third Circuit's opinion that "not every provision [of the LTAs] was unlawful" and that Eaton's above cost prices fell within the Supreme Court's "safe harbor," *ZF Meritor*, 696 F.3d at 277-78, is a problem of ZFM's own creation. This result was entirely avoidable, but ZFM chose not to avoid it. During trial, Eaton submitted a detailed special verdict form separating out each LTA and the various terms, and argued that a general verdict form was not sufficient. D.I. 217. ZFM argued against it, and this Court repeatedly warned ZFM about its concerns with its proposed verdict sheet. D.I. 243, Tr. 3780 ("THE COURT: My concern with whether the contract should be specifically identified, at least in those claims where it really does focus on contracts, was in terms of what we do with damages later . . . I just don't want to have to retry anything that this jury is in a position to decide."). ZFM disregarded that risk and, instead, argued for a generalized verdict sheet, claiming that "I don't think that risk is present here because . . . it's the conduct as a whole would cause the injury." *Id.* The Court eventually granted ZFM's verdict form, but only after warning ZFM a second time that it would have to live with consequences that might include an inability to get a damages trial. *Id.* at Tr. 3784 ("THE COURT: Well, as I've said . . . if, in fact, this creates error instead of makes it clear, then, once again, I don't want to try this again."). Thus, ZFM received the verdict form it wanted (over Eaton's objection)—and what it wanted was a verdict form that does not answer the questions necessary for a new damages-only jury to enter a valid damages verdict (in particular, what conduct caused ZFM's antitrust injury and when after March 28, 2002).

ZFM tries to turn this around and argue that Eaton somehow waived this argument because it did not appeal the general verdict form. D.I. 315 at 1. But Eaton expressly preserved its objections to the general verdict form at trial, *see* D.I. 243 at 3800, 3804 ("Everybody's objections are preserved"), and its appeal (which challenged the propriety of the Court's Rule 50 decision) expressly preserved its right to contest the scope of any re-trial. Ex. 21 at App. 811-12, 828, 840, Eaton's Principal Br. at 35-36 & n.7, 52, 64; *see* Ex. 22 at App. 867, 899, Eaton's Reply Br. at 12 n.2, 44 n.14. The Third Circuit did not reach that alternative argument and its ruling, thus, does not bar Eaton from raising the issue here.[9] ZFM cites nothing to support the novel proposition that Eaton was required to appeal a verdict form entered over its objection in order to preserve its objections to any potential damages trial that might only arise if ZFM prevailed on its appeal of this Court's exclusion of DeRamus's original or amended damages opinion.

Under *Comcast*, *Pueblo Bowl-O-Mat*, *Coleman*, and Clayton Act Section 4, a valid damages study would have to be linked to the precise non-price conduct identified by the Third Circuit as anticompetitive and it would have to disaggregate and deduct business losses attributable to Eaton's lawful, lower prices and other competitive conduct (and to ZFM's self-inflicted wounds). But here, the verdict itself and DeRamus's "totality' damages are only generalized and would, thus, penalize Eaton for lawful conduct—a result *Comcast* and a host of other cases makes clear is invalid as a matter of law.

[9] Courts in the Third Circuit routinely order a new trial on both liability and damages where, as here, "the issues of liability and damages [are] so intertwined as to make a fair trial on damages alone impossible." *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 455 (3d Cir. 2001). That theoretical solution is now moot, however, because DeRamus's failure to disaggregate losses due to Eaton's lawful lower prices and other conduct means that his "totality" damages would still be disconnected from any re-trial verdict limited to the non-price conduct identified by the Third Circuit.

CONCLUSION

For the reasons stated herein, judgment as a matter of law should be granted.

Dated: June 10, 2013

Respectfully submitted,

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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 For Judgment As A Matter Of Law was served by electronic filing on the following counsel of record:

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