

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

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

PRETRIAL STIPULATION AND ORDER

I. Nature of Action

A. Statement by Plaintiffs

ZF Meritor LLC (“ZF Meritor”) and Meritor Transmission Corporation (“Meritor,” and, with ZF Meritor, “Plaintiffs”) filed an antitrust complaint in October 2006 against defendant Eaton Corporation (“Eaton” or “Defendant”). In September 2009, the Court bifurcated the case into liability and damages phases, and the parties tried the liability phase to a jury. After a four-week trial, the jury found Eaton in violation of Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. The jury also found that, with respect to each of these violations, Eaton’s unlawful conduct caused Plaintiffs antitrust injuries. The case is now before this Court for a damages phase jury trial.

B. Statement by Defendant

On October 5, 2006, ZF Meritor LLC (“ZF Meritor”) and Meritor Transmission Corporation (“Meritor,” and, with ZF Meritor, “Plaintiffs”) filed this antitrust action against Eaton Corporation (“Eaton” or “Defendant”) for alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The Court bifurcated the case and held a trial on liability. On October 8, 2009, the jury found Eaton liable, but did not address the issue of damages. The case is now before this Court for a trial on damages.

II. Basis of Federal Jurisdiction

This Court has jurisdiction over this matter pursuant to Section 4 of the Clayton Act, 15 U.S.C. §§ 15, and 28 U.S.C. §§ 1331, 1337. 15 U.S.C. § 15 grants jurisdiction to federal district courts over private actions seeking damages predicated on violations of the antitrust laws. 28 U.S.C. §§ 1331, 1337 provide federal district courts with original jurisdiction over civil actions arising under the laws of the United States, and under “Acts of Congress ... protecting trade and

commerce against restraints and monopolies.” Plaintiffs’ complaint arises under, and the liability phase jury found, violations of three antitrust statutes, Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

III. Matters To Which The Parties Stipulated At the Liability Phase of Trial

1. Plaintiff Meritor Transmission Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Troy, Michigan.
2. Meritor Transmission Corporation, through predecessor entities, began manufacturing transmissions in the late 1980s.
3. Meritor Transmission Corporation and ZF each own 50% of ZF Meritor LLC.
4. In late 2003, ZF Meritor LLC operationally dissolved.
5. ZF is a German company which produces truck and car driveline and chassis components and systems to customers around the globe. In 2008, ZF employed 61,000 people worldwide and had sales of around \$17 billion. ZF began its automotive operations in 1915, including the design and production of transmissions.
6. Defendant Eaton Corporation is a diversified corporation which manufactures a range of electrical, hydraulic and other products, including heavy-duty and medium-duty truck transmissions.
7. Eaton began manufacturing heavy duty truck transmissions in 1958.
8. Transmissions send power generated by a vehicle’s engine to its wheels.
9. Transmissions use gear ratios or speeds to match the engine’s power with the speed of the vehicle and the rotation of the wheels.
10. There are three types of transmissions: manual, automatic, and automated manual (or automated mechanical).
11. Manual transmissions change gears manually or mechanically. They have three pedals: a gas pedal, a brake pedal, and a clutch pedal. The driver depresses a clutch pedal to engage the gears and to change gears when necessary due to changes in vehicle speed.
12. Automated manual or automated mechanical transmissions engage the gears mechanically, but through electronic controls. They can have two or three pedals, depending upon the level of automation. The greater the automation, the less interaction between the driver and the clutch pedal. A fully automated manual transmission eliminates the need for a clutch pedal or the driver to operate a clutch.
13. North American vehicles are classified by Gross Vehicle Weight Rating (“GVWR”). There are eight vehicle classes. The heaviest GVWR class (Class 8) consists of trucks

with GVWR of 33,001 pounds or more. These vehicles commonly are referred to as “heavy-duty” or “Class 8” trucks.

14. Examples of heavy duty trucks include:
 - a. “18 wheelers” or “linehaul” trucks used to travel long distances on highways; and
 - b. Cement mixers, garbage trucks, and dump trucks used in on- and off-road applications.
15. There are four major heavy duty truck manufacturers or original equipment manufacturers (“OEMs”) in North America. They account for virtually all purchases of heavy-duty transmissions in North America.
16. Daimler Trucks North America LLC (“DTNA” and also called “Freightliner”) sells trucks under the Freightliner and Western Star brands, and formerly the Sterling name.
17. Paccar Inc. (“Paccar”) sells trucks under the Kenworth and Peterbilt names.
18. Navistar International Corporation sells trucks under the International Truck and Engine Corporation brand (“International”).
19. The Volvo Group sells heavy duty trucks under the Mack and Volvo names.
20. Plaintiffs Meritor Transmission Corporation and ZF Meritor LLC manufactured and sold a range of manual and automated mechanical transmissions in North America.
21. Defendant Eaton Corporation manufactures and sells a range of manual and automated mechanical transmissions.
22. Transmission Technology Corporation offers a range of manual transmissions.
23. Allison Transmission manufactures and sells automatic transmissions.
24. Truck buyers, depending on their size, purchase trucks, including the transmissions to be installed in those trucks, through negotiations with an OEM or a truck dealer.
25. In the U.S., truck buyers traditionally have selected the transmissions and other components that go into the trucks they purchase (called “spec’ing”).
26. The OEMs maintain product catalogues called “databooks” that list the various components an OEM offers in its truck models.
27. For each component, a databook lists a “standard” product and may list one or more “options.”
28. An OEM may also offer “unpublished” products, although they are not published in the databook.
29. Transmission and other component suppliers attempt to engage in both “push” and “pull” marketing. Push marketing involves selling components to OEMs and having the OEMs promote the supplier’s product.

30. “Pull” marketing involves a component supplier’s use of its sales and marketing personnel to promote dealer and end user selection or spec’ing of the supplier’s products.
31. Truck buyers include fleets, owning anywhere from a few to thousands of trucks, and owner/operators, who tend to own a small number of trucks.
32. The relevant product market in this case is “Class 8 heavy-duty transmissions.”

IV. Matters Decided By The Jury At The Liability Phase Trial

33. North America is the relevant geographic market.
34. A contract(s), combination or conspiracy existed between Eaton and others that unreasonably restrained trade.
35. The competitive harms associated with the unreasonable restraint of trade outweighed any competitive benefits proven by Eaton.
36. Eaton’s unreasonable restraint of trade caused Plaintiffs to suffer antitrust injuries to their business or property at any time since March 28, 2002.
37. Eaton possessed monopoly power in the relevant market.
38. Eaton unlawfully acquired or maintained monopoly power in the relevant market by engaging in anticompetitive conduct.
39. The competitive harms associated with Eaton’s monopoly power (as per #38) outweighed the competitive benefits proven by Eaton.
40. Eaton’s unlawful acquisition or maintenance of monopoly power caused Plaintiffs to suffer antitrust injuries to their business or property at any time since March 28, 2002.
41. Eaton entered into contracts for the sale of heavy duty transmissions that constituted de facto exclusive dealing contracts.
42. Eaton entered into a sufficient number of de facto exclusive dealing contracts such that Eaton’s conduct substantially lessened competition or tended to create a monopoly in the relevant market.
43. The competitive harms associated with the de facto exclusive dealing contracts outweighed the competitive benefits proven by Eaton.
44. Eaton’s de facto exclusive dealing contracts caused Plaintiffs to suffer antitrust injuries to their business or property at any time since March 28, 2002.

V. Issues Which Remain To Be Litigated With Respect to the Damages Phase Trial

A. Plaintiffs' Statement

1. What was the amount of damages Plaintiffs suffered by reason of Eaton's antitrust violations?

B. Defendant's Statement

1. Whether Plaintiffs can meet their burden of proof of establishing a reasonable, non-speculative evidentiary basis for the jury to determine the amount, if any, of lost net profits and/or lost enterprise value damages directly caused by Eaton's anticompetitive conduct.

VI. Issues of Law Which Remain To Be Litigated

The parties incorporate their respective Statements of Intended Proof (sections IX-X of this proposed order) herein by reference. These issues of law may change based on the Court's decision on Eaton's pending motion, the Court's resolution of any evidentiary issues, and various other subsequent rulings of the Court and/or other developments in the case.

A. Issues of Law/Evidence That Remain to be Litigated

Plaintiffs' List

1. Whether Eaton can make any argument, or offer or otherwise use (e.g. through cross-examination or reliance by Eaton's expert) any evidence, that explicitly or implicitly contradicts or disregards the liability jury's findings (e.g., monopoly power, antitrust violations, antitrust injuries)?
2. Whether Eaton can offer testimony that Plaintiffs suffered \$0 in damages because Plaintiffs assertedly would not have earned a profit in the but-for world?
3. Whether Eaton can make any argument, or offer or otherwise use any evidence (including calling John Coll of Eaton as a witness, who was not disclosed during the fact discovery period in this case), regarding post-2009 developments in or characteristics of the heavy duty transmissions market?

Defendant's List

1. Whether, as set forth in Eaton's pending motion for partial summary judgment, Plaintiffs are precluded as a matter of law from seeking duplicative damages for both lost profit damages following the dissolution of their joint venture in 2003 and compensation for the "going concern" value of their business in 2009.

2. Whether the “contribution margin” calculation of “lost profits” offered by Plaintiffs’ expert unlawfully fails to account for any fixed or operating costs Plaintiffs would have incurred had they sold an additional 298,000 transmissions in the “but for” world and must be precluded by Third Circuit and other precedent that limits Plaintiffs’ damages claim to lost net profits.
3. Whether Plaintiffs’ expert’s damages model unlawfully assumes that ZFM would have made sales of FreedomLine transmissions during a period of time when the U.S. International Trade Commission issued an order preventing ZF Meritor from importing the FreedomLine in the United States and ZF Meritor was thus precluded from selling the FreedomLine.
4. Whether certain evidence admitted during the liability trial is unduly prejudicial for the purposes of determining damages and should be excluded.

VII. Exhibits And Objections

A. Plaintiffs’ Exhibits (accompanied by Defendant’s objections)

Attached hereto as Exhibit 1 is Plaintiffs’ list of trial exhibits and Defendant’s objections thereto. This list does not include Plaintiffs’ demonstrative exhibits or exhibits to be used for rebuttal, if any.

B. Defendant’s Exhibits (accompanied by Plaintiffs’ objections)

Attached hereto as Exhibit 2 is Defendant’s list of trial exhibits and Plaintiffs’ objections thereto. This list does not include Defendant’s demonstrative exhibits, if any.

VIII. Witnesses

A. Plaintiffs’ Witnesses

Attached hereto as Exhibit 3 is Plaintiffs’ list of potential trial witnesses (excepting rebuttal witnesses).

B. Plaintiffs’ Trial and Deposition Designations

Attached hereto as Exhibit 4 are Plaintiffs’ lists of designations from the transcripts of the liability phase trial and deposition designations (including counter-designations).

If there are any additional depositions, Plaintiffs reserve the right to designate testimony from such depositions and to amend Plaintiffs’ exhibit list to include documents used in those depositions.

C. Defendant's Witnesses

As addressed in Eaton's submission to the Court to be argued on June 2, 2014, Eaton believes that Plaintiffs' witness and exhibit designations are overbroad and improperly would expand the scope of trial beyond that contemplated by the limited nature of the remaining damages issue. Nonetheless, in an effort to respond to what Plaintiffs have proffered, attached hereto as Exhibit 5 is Defendant's list of potential trial witnesses.

If there are any additional depositions, Defendant reserves the right to designate testimony from such depositions and to amend Defendant's exhibit list to include documents used in those depositions.

D. Defendant's Deposition Designations

Attached hereto as Exhibit 6 are Defendant's lists of designations from transcripts of the liability phase trial and deposition designations (including counter-designations).

IX. Brief Statement Of What Plaintiffs Intend To Prove In Support Of Their Claims

In the following summary, Plaintiffs set forth the main matters they intend to prove at the damages phase of the trial. The summary is not exhaustive and Plaintiffs reserve the right to prove any additional facts necessary to establish their claims and rebut Defendant's defenses.

In general, Plaintiffs intend to prove the amount of damages Plaintiffs suffered by reason of Eaton's antitrust violations.

A. Plaintiffs currently intend to prove the following respecting their claim for damages:

1. Eaton's violations of the antitrust laws caused damages to the business or property of Plaintiffs since March 28, 2002 in an amount to be proven at the damages phase of trial, which amount must be trebled under the antitrust laws. 15 U.S.C. § 15. *See, e.g.*, Dr. DeRamus's January 18, 2013 Amended Report, his deposition on March 3, 2013, his trial testimony in the liability trial, his 2009 Report, the work papers associated with both reports, his deposition on March 13, 2009, and the declarations Dr. DeRamus submitted in connection with the *Daubert* briefing September 3, 2009 and June 11, 2009.
2. Plaintiffs also request the cost of suit, including reasonable attorney fees, expenses and disbursements, as provided for by 15 U.S.C. § 15.

X. Brief Statement Of What Defendant Intends To Prove In Support Of Its Defenses

A. Defendant intends to prove the following with respect to Plaintiffs' claim for damages:

1. Plaintiffs have not provided a reasonable or non-speculative evidentiary basis upon which a jury could determine the amount of Plaintiffs' claimed lost net profits and lost enterprise value damages.
2. Plaintiffs have not provided a reasonable or non-speculative evidentiary basis upon which a jury could determine the amount of Plaintiffs' lost sales and lost net profits caused by Eaton's unlawful conduct separate from unrelated market factors or actions taken by Plaintiffs which adversely affected their sales of products and profitability.
3. Plaintiffs' alleged damages are unsupported by and inconsistent with the facts. Any damages Plaintiffs actually incurred as a direct result of anticompetitive conduct and antitrust injury were substantially less and significantly different than the damages claimed by Plaintiffs.
4. Plaintiffs failed to take appropriate steps to mitigate any net lost profits or lost enterprise value damages that may have occurred as a result of Eaton's anticompetitive conduct.

XI. Amendments To The Pleadings

A. Plaintiffs' Amendments

1. Plaintiffs do not have amendments to the pleadings at this time.

B. Defendant's Amendments

1. Defendant does not have amendments to the pleadings at this time.

XII. Certification Of Good Faith Efforts To Explore Resolution Of Controversy By Settlement

Prior to the filing of this lawsuit, Plaintiffs and Defendant met in the Spring and Summer of 2006 to discuss Plaintiffs' claims. In the early Fall of 2006, the parties mediated the dispute with Professor Thomas Kauper of the University of Michigan Law School. The parties' good faith efforts did not result in settlement and this action commenced. At various times in 2008 and 2009, the parties, individually and collectively, participated in teleconferences with Magistrate Judge Stark, acting as mediator. On May 1, 2009, Judge Stark conducted an in-person mediation with the parties. The mediation did not result in settlement.

On March 2, 2014, Plaintiffs and Defendant again mediated the dispute, this time with an in-person mediation with Eric Green, an accomplished private mediator who has settled a

number of complex civil disputes. The mediation has not resulted in settlement. The parties remain in contact with Eric Green.

XIII. Other Matters

A. Conduct of Damages Phase Trial

1. The parties request that the Court order that the liability phase jury verdict is final and conclusive in all respects and governs the damages phase trial.
2. The parties request that the Court order that the completed jury verdict sheet and the preliminary and final jury instructions from the liability phase trial be part of the damages phase trial record, and are available for use during the damages phase trial and by the damages phase jury during deliberations.
3. Plaintiffs request that the Court order that the documents, testimony, and other evidence admitted at the liability phase trial are in evidence in the damages phase trial (subject to any good faith relevancy objection to a specific item of evidence), and that they be available for use during opening statements and thereafter.
4. Plaintiffs request that the Court order that there be no reference in the presence of the jury to the trebling of damages or the award of attorneys' fees and expenses under the antitrust laws.
5. Plaintiffs request that the Court prohibit Defendant and its witnesses from making any argument or other reference to any alleged failure to disaggregate Plaintiffs' damages.
6. Defendant requests that it be allowed to file motions in limine addressing the legal issues referenced by Defendant above in Section VI.A.

B. Special Voir Dire Questions

The parties' agreed-upon proposed questions

1. You have been given a list of companies and organizations
 - a. Have you, a family member or close friend, ever worked for any of these companies or organizations?
 - b. Do you or any member of your household now own, or have you or any such member ever owned, any stocks or bonds in any of those companies or organizations?

- c. Have you, any family member, or anyone close to you had any dealings with, or relied financially in any way on, any of the companies or organizations?
 - d. Have you, any family member, or anyone close to you had any experience with the products of any of those companies or otherwise have any strong feelings, positive or negative, toward any of these companies or organizations?
2. You have been given a list of additional parties to this litigation. Have you, any family member, or anyone close to you had any dealings with any of the individuals?
 3. You have been given a list of attorneys and law firms involved in this litigation. Are you related to, or personally acquainted with, any of those attorneys, or have you ever been represented by any of those attorneys or other associates or members of the listed law firms?
 4. You have been given a list of the individuals who might appear as witnesses in this case. Are you related to, or personally acquainted with, any of those individuals?
 5. Do you have any personal knowledge of this case, or have you read or heard it discussed, or have an opinion regarding it?
 6. Have you ever been a plaintiff, a defendant, or a witness in a civil lawsuit?
 7. Have you ever served as a juror in a civil lawsuit?
 8. You have been given a list of subject areas. Have you ever been educated, employed, trained, or had any experience in any of the following limited areas?
 9. Have you ever worked for a company that has been alleged to have engaged in, or has alleged that another company has engaged in, an unlawful monopoly or restraint of trade?
 10. Do you work for a company that buys or leases large trucks?
 11. Do you work for a company that maintains or performs maintenance on large trucks?
 12. Do you work for a company that sells parts to truck manufacturers or truck suppliers?
 13. Do you have any special disability or problem that would make it difficult or impossible for you to serve as a member of the jury in this case?

14. Do you know of any other matter which you believe should be called to the court's attention as having some bearing upon your qualifications or ability to sit as a juror, or which you think may prevent you from rendering a fair and impartial verdict based solely upon the evidence and my instructions as to the law?

LIST OF PARTIES

- A. Meritor Transmission Corporation
- B. Meritor, Inc.
- C. ZF Meritor LLC
- D. Eaton Corporation

ADDITIONAL COMPANIES (to be filled in before trial)

ATTORNEYS (to be filled in before trial)

WITNESSES (to be filled in before trial)

SUBJECT AREAS

- A. Trucking Industry
- B. Antitrust law
- C. Purchasing trucks
- D. Maintenance of trucks
- E. Maintenance of transmissions

C. Verdict Form

The parties stipulate to deferral of submission of the proposed verdict forms until June 16, 2014.

D. Jury Instructions

The parties stipulate to deferral of submission of the proposed final jury instructions until June 16, 2014.

Defendant intends to file proposed preliminary jury instructions not later than June 16, 2014. Plaintiffs filed their proposed preliminary jury instructions on May 14, 2014. [D.I. 365]

E. Requested Number of Hours

1. Plaintiffs request that the Court assign to Plaintiffs half of the time allotted by the Court for trial. Plaintiffs reserve the right to address the topic further in light of the Court's decisions on evidentiary issues listed above.
2. Defendant requests half the time allotted by the Court for trial.

F. Number of Jurors

The parties request that eight jurors be seated.

G. Miscellaneous

1. Joint Requests
 - a. Confidentiality of Trial Proceedings

The parties agree that the damages phase of the trial should, as was the liability phase of the trial, be open to the public and not sealed except as allowed by law.

This Order shall control the subsequent course of the action, unless modified by the Court to prevent manifest injustice.

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Dated: May 29, 2014

SO ORDERED, this ____ day of June, 2014.

Sue L. Robinson
United States District Judge

PARTIES

Meritor Transmission Corp.

Meritor, Inc.

ZF Meritor LLC

Eaton Corporation

ADDITIONAL COMPANIES [to be filled in before trial]

ATTORNEYS [to be filled in before trial]

WITNESSES [to be filled in before trial]

SUBJECT AREAS

Trucking Industry

Antitrust law

Purchasing trucks

Maintenance of trucks

Maintenance of transmissions