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.	)	JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION REGARDING NATURE AND SCOPE OF TRIAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Rules

INTRODUCTION

Plaintiffs' motion set forth proposals for the nature and scope of the damages phase of the bifurcated trial. Plaintiffs' Motion Regarding Nature and Scope of Trial, March 25, 2013 (D.I. 307). Eaton does not respond to those proposals. It instead argues that no trial (damages phase or otherwise) can go forward now because the Court should not have bifurcated the trial in the first place. Eaton also repeats its assertion from its *Daubert* and Judgment as a Matter Of Law motions that, in calculating damages, plaintiffs purportedly have failed to disaggregate Eaton's conduct. Defendant's Opposition to Plaintiffs' Motion Regarding Nature and Scope of Trial ("Eaton Br.") (D.I. 321) at 4-5, 8-12. Eaton's arguments are procedurally barred and substantively without merit.

Eaton's opposition is precluded by the doctrines of waiver and law of the case. Having urged this Court to move forward quickly with a bifurcated trial, having asked the Court to allow appellate review of the liability verdict before addressing damages further, having failed to raise any bifurcation or verdict sheet issue in the Third Circuit, and having lost its disaggregation argument on plaintiffs' cross-appeal, Eaton cannot start from scratch now. *See infra* at 2-5. Indeed, Eaton's position no doubt would come as quite a surprise to the Third Circuit, which just allowed plaintiffs to pursue their damages claims over Eaton's disaggregation objection. *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 290-91, 298 (3d Cir. 2012).

Moreover, Eaton has no support for its effort to evade the enforcement of the antitrust laws through a damages phase trial. *See ZF Meritor*, 696 F.3d at 300 ("[I]f Plaintiffs are not able to pursue damages . . . the policy of deterring antitrust violations through the treble damages remedy will . . . be frustrated."). Eaton fails in its attempt to circumvent the Third Circuit authority on bifurcated antitrust trials, and it yet again disregards the caselaw on proof of

antitrust damages, misstates the facts of the case, and mischaracterizes Dr. DeRamus's work. *See infra* at 5-10.

Nor does Eaton benefit from the recent class action decision in *Comcast Corp. v. Behrend*, 569 U.S. ---, 133 S. Ct. 1426 (2013). While Eaton asks for disaggregation of each aspect of its challenged conduct (e.g., each LTA), *Comcast* did not involve disaggregation of defendant's various challenged "clustering" acquisitions. To the contrary, the Supreme Court treated defendant's conduct as a whole, and focused on the identification by the *Comcast* plaintiffs of four separate theories of the impact of that conduct on them, a scenario that does not apply to the unitary approach to injury of plaintiffs here.[1] Eaton cannot avoid the principle that, as a violator of the antitrust laws, it must bear any "risk of uncertainty [its] wrongdoing has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

Two days ago, the Supreme Court denied Eaton's petition for a writ of certiorari. *ZF Meritor LLC v. Eaton Corp.*, 12-1045, 569 U.S. ---, 2013 WL 673880 (Apr. 29, 2013). Plaintiffs respectfully request that the Court proceed with a damages-only phase of the trial, and do so in accordance with their proposals for the nature and scope of that trial.

I. EATON IS BARRED FROM OPPOSING A DAMAGES PHASE OF THE TRIAL BY WAIVER AND LAW OF THE CASE

A. Eaton Is Precluded From Challenging The Court's Bifurcation of The Trial

Eaton has waived any ability to contest this Court's bifurcation of the trial. In August 2009, the Court first addressed the possibility of bifurcation. At that time, plaintiffs sought to file, and subsequently filed, their Motion for Clarification, etc. regarding damages.[2] While

[1] *See* Plaintiffs' Answering Brief In Opposition to Defendant's Motion for Judgment As A Matter Of Law, dated April 22, 2013 ("JMOL Opp.") (D.I. 315) at 12.

[2] *See* Transcript of Pre-Trial Hearing, dated August 27, 2009 16 (D.I. 316, Ex. 14) at 10-16;

plaintiffs suggested that the Court defer any trial until it had decided that motion,[3] Eaton urged the Court to move forward with the liability phase of a bifurcated trial before addressing damages further. Defendant's Response To The Court's Request With Respect to Pre-Trial Conference of August 27, 2009 (August 26, 2009) (D.I. 150) at 1 (stating that Eaton was "fully prepared" to "go to trial on September 8," and asking the Court to require plaintiffs to brief their motion "during trial").

The Court ultimately conducted a four-week jury trial on liability. Transcript of Pre-Trial Hearing, dated September 10, 2009 (D.I. 316, Ex. 15) at 24-25. At and after the trial, Eaton filed motions under Rules 50(a) and 50(b)/59. D.I. 208; D.I. 245. In neither of those motions did Eaton challenge the bifurcation of the trial. D.I. 208; D.I. 245. To the contrary, on numerous occasions Eaton again supported the bifurcation, asserting that the Court had tried liability first in order to get "some finality" to the case, and requesting the Court to defer any further decision on damages until the Third Circuit had resolved any liability issues.[4] When this case reached the Third Circuit, Eaton still did not contest the bifurcation of the trial. *See, e.g.*, Principal Brief of Appellant/Cross-Appellee Eaton Corporation, dated Dec. 14, 2011 (D.I. 316, Ex. 2) at Issues Presented For Review.[5]

Plaintiffs' Motion for Clarification, Reargument and Supplementation of the Record With Respect to the Court's August 20, 2009 Opinion and Order (Sept. 3, 2009) (D.I. 158).

[3] Plaintiffs' Response To The Court's Request With Respect to Pre-Trial Conference of August 27, 2009 (August 25, 2009) (D.I. 149).

[4] *See* Response to Email Request for Relief, Oct. 19, 2009 (D.I. 225) ("The judgment on the verdict is a final, appealable decision . . . 'generally the parties resolve [damages] after the appellate court has its final say'"); Motion for Interlocutory Appeal dated July 8, 2011 (D.I. 269); Defendant Eaton Corporation's Response to Plaintiffs' Statement in Preparation for the July 25, 2011 Status Conference (D.I. 273).

[5] 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. 13; D.I 316, Ex. 1 at 12 n.2. A reference in a footnote, especially one in a response/reply brief, does not raise an issue on appeal.

As a result, Eaton cannot complain about bifurcation now. *See Medcalf v. Trustees of Univ. of Pennsylvania*, 71 Fed. App'x 924, 933 (3d Cir. 2003) (defendant waived argument by failing to appeal jury instruction); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814 (3d Cir. 1984) (defendant waived admissibility argument by failing 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.) (issue not raised on appeal waived on remand).

B. Eaton Is Precluded From Raising Its Disaggregation Arguments

Eaton's disaggregation argument likewise is barred. Eaton complains that Dr. DeRamus "attributes his damages to 'the totality' of Eaton's conduct on an 'aggregate basis.'" Eaton Br. 4. Eaton raised this contention (D.I. 107), and lost it, at the original *Daubert* stage. August 20, 2009 Memorandum Opinion (D.I. 144) at 6, 8 (stating that Dr. DeRamus "applied accepted methodologies," and "the only question before the Court is whether the expert opinion of Dr. DeRamus is based on reliable data."). Eaton also raised and lost the disaggregation issue at trial, where it unsuccessfully sought a verdict sheet that would have required the jury to determine harm to competition and antitrust injury on an LTA-by-LTA basis. D.I. 243 (Trial Tr.) at 3778-94, 3804; D.I. 217 (Verdict Sheet).

The parties subsequently appealed to the Third Circuit. Eaton did not raise the bifurcation issue, or any disaggregation issue, on its appeal. *See, e.g.*, Principal Brief of Appellant/Cross-Appellee Eaton Corporation, dated Dec. 14, 2011 (D.I. 316, Ex. 2) at Issues Presented For Review. It did raise its disaggregation contention on plaintiffs' cross-appeal, as a ground for the Third Circuit to deny plaintiffs leave to amend their damages calculations. Response and Reply Brief of Appellant/Cross-Appellee Eaton Corporation, dated March 21,

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John Wyeth & Brother Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (contentions that are raised only in footnotes or in passing, but not squarely argued, are waived).

2012 (D.I. 316, Ex. 1) at 55-56. The Third Circuit necessarily rejected that argument when it granted such leave over Eaton's objection. *ZF Meritor*, 696 F.3d at 298, 300; D.I. 316, Ex. 1 at 55-59; *see* JMOL Opp. (D.I. 315) at 8; *Daubert* Opp. (D.I. 316) at 11.

Eaton's disaggregation position consequently is barred by the law of the case doctrine. *Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008) (party cannot relitigate on remand issue that was explicitly or implicitly decided by appellate court); *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 . . . the 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.").

II. EATON HAS NO BASIS TO OPPOSE A DAMAGES PHASE OF THE TRIAL

A. Eaton Cannot Avoid The Third Circuit Authority On Bifurcated Antitrust Trials

Plaintiffs' moving papers showed that, under the Seventh Amendment and the law of the case doctrine, Eaton could not properly seek a re-trial of any liability issues, as it had requested in its Statement For The November 28, 2012 Status Conference. D.I. 300 at 3; *see* D.I. 307 at 3-4 (citing *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993) and *Bonjorno*, 752 F.2d 802). Eaton does not now ask for such a re-trial; it opposes any further trial at all. Eaton Br. 11-14.

Eaton tries to support this position by arguing that, in *Lower Lake Erie* and *Bonjorno*, both antitrust cases, "the plaintiffs properly limited their claimed damages to defendant's precise *anticompetitive* conduct." Eaton Br. 13. But that is what plaintiffs are doing here, where Eaton's

conduct has been found unlawful as a whole. *ZF Meritor*, 696 F.3d at 289 n.20, 303; *id.* at 320 (Greenberg, J. dissenting); *see also infra* at 8; JMOL Opp. at 8, 14-15; *Daubert* Opp. at 27-28.

Eaton cannot avoid this conclusion by misstating those opinions. In *Lower Lake Erie*, the second jury was "limited to determining the amount of damages [plaintiff] incurred by acts taken in furtherance of the conspiracy" -- not because of any question of disaggregation, as Eaton suggests without support (Eaton Br. 13), but because the second jury could not properly decide anything but the amount of damages. *Lower Lake Erie*, 998 F.2d at 1183. Eaton's effort to distort that decision makes no sense, given the Third Circuit's extensive discussion and decision of the issue of re-trying liability (causal injury) issues (*id.* at 1181-85),[6] contrasted with its complete lack of any mention (much less analysis) of any disaggregation question.

The passage from *Bonjorno* that Eaton references, when read in its entirety, directly supports plaintiffs' position. The Third Circuit first rejected the disaggregation argument Eaton makes here:

> Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separated from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. The liability jury properly found causation from only those acts which could evince the defendants' willful acquisition or maintenance of a monopoly. In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what act caused which injury as long as the damages are not based upon speculation or guesswork.

[6] *See Lower Lake Erie*, 998 F.2d at 1184 ("The instructions given concerning the function of the jury at this juncture were confusing. Taken as a whole, and in combination with the court's opening statement and the liability-type evidence which was introduced during the damage phase, the jury could have easily understood that they were to consider causation.").

752 F.2d at 812-13. The court immediately followed with an explanation of why a damages-only trial was appropriate, again rejecting Eaton's position:

> Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business . . . . When the antitrust injury is of an indivisible nature, and the jury properly found that that injury was caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

Id. at 813 (internal citations omitted).[7]

B. Eaton Is Factually and Legally Wrong With Respect to Disaggregation

Eaton tries once more to make calculation of damages effectively impossible here, by seeking a ruling requiring disaggregation of every aspect of its conduct even though that conduct has been held unlawful as a whole.[8] Eaton Br. 4. This effort again fails.

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[7] Eaton also cites *Harden v. Allstate Ins. Co.*, No. 93-513, 1996 WL 190013 (D. Del. Apr. 16, 1996). Eaton Br. 11. In *Harden*, a personal injury case, the original trial was not bifurcated but covered both liability and damages. The jury awarded damages to one of the plaintiffs, but not to the estates of the other three. Both the plaintiff and defendants moved for a new trial under Rule 59. The Court denied the defendant's motion. It granted the *plaintiffs'* motion based on inadequacy of the verdict in light of the almost undisputed evidence of causation and damages suffered by the three plaintiff estates. In those circumstances (very unlike the situation here), the Court held that a retrial of the damages issues alone was not the correct course, and ordered a full new trial -- not, as Eaton requests, no trial at all.

[8] While Eaton complains that Dr. DeRamus's Amended Report did not change his methodology to disaggregate plaintiffs' damages (Eaton Br. 1, 5, 12), Eaton previously asserted to the Court that Dr. DeRamus would not be allowed to make such changes in his amended report. *See* Defendant Eaton Corporation's Response to Statement of Plaintiffs ZF Meritor and Meritor Transmission Corporation For The November 28, 2012 Status Conference (D.I. 300) at 2 ("The Third Circuit remanded only for the narrow purpose of allowing Plaintiffs to tender Dr.

Eaton gains nothing on this point from the Third Circuit opinion. Eaton Br. 3-9. As evidenced by Eaton's continued inability to provide any supporting citation, the Third Circuit never separated Eaton's pricing conduct from the rest of its behavior and held it lawful. 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 both also recognized -- consistent with the evidence[9] -- that Eaton's conduct was not limited to pricing practices, *ZF Meritor*, 696 F.3d at 277-78; *id.* at 318 (Greenberg, J. dissenting), that Eaton's pricing was intertwined with its exclusionary agreements with the OEMs, *ZF Meritor*, 696 F.3d at 281; *id.* at 320 (Greenberg, J. dissenting), and that Eaton's activities must be viewed "as a whole." *ZF Meritor*, 696 F.3d at 287-89 & n.20; *id.* at 320 (Greenberg, J. dissenting).

Eaton also claims that Dr. DeRamus "ignores" Eaton's purportedly "procompetitive conduct," and other asserted causal factors (Eaton Br. 5, 7). However, Dr. DeRamus evaluated the factors Eaton raises, and rejected them based on his analysis of the facts and industry dynamics. Amended Report at 13-14; Deposition of Dr. David DeRamus, dated March 6, 2013 (D.I. 316, Ex. 13) at 251, 255-58. The Third Circuit recognized Dr. DeRamus's assessment of such factors, stating 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.

Nor can Eaton escape the controlling law. Not only is plaintiff's burden to prove damages lessened once injury has been shown, *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d

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DeRamus's alternate damages calculations that were 'based on data already in the expert report.'").

[9] *See, e.g.*, *id.* at 265-66; PTX 115 (D.I. 316, Ex. 3) at 3; PTX 132 (D.I. 316, Ex. 4); PTX 247 (D.I. 316, Ex. 5) at 1; PTX 304 (D.I. 316, Ex. 6); PTX 599 (D.I. 316, Ex. 7) at 7-9; PTX 651 (D.I. 316, Ex. 8); DX 467 (D.I. 316, Ex. 9) at 4; DX 515 (D.I. 316, Ex. 10) at 1, 8.

206, 212 (3d Cir. 1983), but the Third Circuit has held that, in an antitrust case where defendant's conduct is unlawful "taken as a whole," disaggregation of damages is "unnecessary, if not impossible." *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003); *accord Callahan v. A.E.V., Inc.*, 182 F.3d 237, 260 (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 not measuring particularized effects of various challenged practices); *Bonjorno*, 752 F.2d at 813 (where all the defendant's acts taken together show an antitrust violation, "it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act," and it is unnecessary to do so).

These decisions conform to extensive Supreme Court precedent. As 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." *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-26 (1961) (multiple requirement contracts as a whole violated antitrust law because of their cumulative effect (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949))); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457 (1922) (restrictive clauses in defendants' many leases as a whole violated antitrust law).

The recent opinion in *Comcast* is consistent with these decisions and with plaintiffs' position here. Citing *Story Parchment v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), the Supreme Court affirmed that antitrust damages "[c]alculations need not be exact," *Comcast*, 133 S. Ct. at 1433, and held that, where plaintiff customers had asserted four different theories of impact in a class action but only one theory survived class certification, plaintiffs' expert was

required to limit his damages calculations to just the one remaining theory of impact. *Id.* at 1434-35. While Eaton seeks disaggregation of each aspect of its challenged conduct, the Court in *Comcast* did not even consider requiring any disaggregation of defendant's various challenged "clustering" acquisitions. *See id.* To the contrary, it treated defendant's challenged conduct as a whole, and based its decision on plaintiffs' separate theories of how the totality of defendant's conduct had impacted plaintiffs. Here, in contrast, plaintiffs have a unitary approach to 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 approach. Amended Report at 12-14; Original Report at 2; *see* cases cited *supra* at 8-9.

CONCLUSION

Plaintiffs respectfully submit that their motion be granted in its entirety.

May 1, 2013

Respectfully submitted,

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