UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In its Motion for Permission to file this motion, Eaton provocatively promised that elimination of plaintiffs' alleged "sleight-of-hand" would reduce their damages figure from "hundreds of millions of dollars" to "tens of millions of dollars." D.I. 355 (Mot. For Permission) at 2. Eaton's current motion does not even suggest such an unattainable result. D.I. 358 (Eaton Partial Summ. J. Br.) at 4 (acknowledging lost profits claim alone exceeds $300 million).

Nor does this motion raise anything new from a legal perspective. It simply re-states Eaton's "2003 valuation date" argument from its last *Daubert* motion. *Compare* D.I. 358 (Eaton Partial Summ. J. Br.) at 2-3, with D.I. 308 (Eaton Mar. 25, 2013 Daubert Br.) at 16-17 and D.I. 332 (Eaton May 1, 2013 Daubert Reply Br.) at 2-4. Eaton cites the same legal authority it referenced in its *Daubert* motion (*id.*), and does not challenge, or indeed mention, the Court's analysis rejecting this argument several months ago. D.I. 337 (Dec. 20, 2013 Mem. and Order).

Eaton cannot support any different conclusion because it cannot avoid the consistent precedent, including in its own citations, holding that a plaintiff may obtain damages for both lost profits and subsequent lost enterprise value. *See, e.g.*, *Heatransfer Corp. v. Volkswagenwerk*

A.G., 553 F.2d 964, 987 n.20 (5th Cir. 1977); *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1970); D.I. 337 (Dec. 20, 2013 Mem. and Order) at 8 ("There can be no dispute that a plaintiff injured by anticompetitive practices may recover lost profits while in business, and 'going concern' value as of the date the business terminated . . . .").

Likewise, Eaton cannot reduce the duration of the plaintiffs' business in this case by trying to diminish the role of plaintiff Meritor Transmission. Eaton repeatedly pretends that Meritor Transmission continued post-2003 only as a "reseller" of FreedomLine transmissions. D.I. 358 at 3, 9, 10. However, based on the undisputed evidence, this Court explained to the liability phase jury, without objection from Eaton, that after 2003 Meritor Transmission continued not only to sell FreedomLines, but also to make and sell manual transmissions (as it had done for a decade prior to the creation of the joint venture). *See* D.I. 243 (Final Jury Inst.) at 3933:15-3934:16. Indeed, in mischaracterizing Meritor Transmission as a "reseller," Eaton ignores the extensive on-going manufacturing, assembly and service activity by Meritor Transmission of both FreedomLine and manual transmissions after 2003. *See* D.I. 230 (Tr. Trans. - Kline) at 444:21-445:4; 520:15-521:19; D.I. 240 (Tr. Trans. - Gosnell) 3029:17-3030:7. And, while Eaton claims that Meritor Transmission was not part of Dr. DeRamus's damages calculations (D.I. 358 at 9-10), his damages work extensively included both Meritor Transmission and its data, including sales data through 2007. *See, e.g.*, DeRamus Amended Report, attached as Exhibit B to D.I. 359 (Eaton's Appendix) at APP_0199 n.6, 202, 204; Exhibit A (May 2, 2014 Declaration of Jennifer Hackett ("Hackett Decl.")), at Exhibit 1 (demonstrative created from Meritor sales data (ZFMFD0001-ZFMFD00024) produced in fact discovery and with Dr. DeRamus's workpapers, showing last transmission sold in September 2007).

There thus is no genuine issue that plaintiffs' heavy duty transmissions business continued into 2007. As this Court specifically held on the *Daubert* motion, the law allows Dr. DeRamus to continue his lost profits calculation for the short period between 2007 and the time of his original report in February 2009, up to which point he had actual data to use, thereby preventing any claim of speculation. D.I. 337 (Dec. 20, 2013 Mem. and Order) at 8-9. Indeed, Eaton has doubly contradicted itself by objecting to this use by Dr. DeRamus of pre-February 2009 data while (1) arguing that Dr. DeRamus must use lost enterprise value multiples drawn from 2009, D.I. 308 (Eaton Mar. 25, 2013 Daubert Br.) at 18-19 and D.I. 332 (Eaton May 1, 2013 Daubert Reply Br.) at 4- 5, and (2) seeking to use *post*-2009 data to address damages issues. D.I. 350 (Eaton Mar. 4, 2014 Letter) at 1.

Eaton has offered nothing to change the Court's *Daubert* decision and avoid prompt and proper enforcement of Eaton's antitrust violations. Dr. DeRamus's damages testimony is consistent with law. All that remains is cross-examination. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012) ("if Plaintiffs are not able to pursue damages . . . the policy of deterring antitrust violations through the treble damages remedy will also be frustrated.").

BACKGROUND

While Eaton now tries to downplay the role of Plaintiff Meritor Transmission, in both his original Report and his Amended Report Dr. DeRamus refers to ZF Meritor and Meritor Transmission collectively as "ZFM" or "Plaintiffs." DeRamus Report, attached as Exhibit A to D.I. 359 (Eaton's Appendix) at APP_0006; DeRamus Amended Report, attached as Exhibit B to D.I. 359 (Eaton's Appendix) at APP_0198, 202 ("calculating ZFM's damages," defined to include both plaintiffs). Indeed, throughout the case until now, this Court, the Third Circuit and

Eaton have regularly referred to Plaintiffs collectively for purposes of both liability and damages.[1]

Using both ZF Meritor and Meritor Transmission data (*see, e.g.*, Eaton's App., Ex. B at APP_0214, 0217, 0223, 229), Dr. DeRamus calculated plaintiffs' lost profits through February 2009 (the date of his original Report) and lost enterprise value as of February 2009. *Id.* at APP_0202. As Dr. DeRamus explained, he used February 2009 as the date of his lost enterprise value calculation because he had sufficient actual data to calculate lost profits up through the date of his report. *Id.* at APP_0223. For no time period do Dr. DeRamus's lost profits calculations and his lost enterprise value calculations claim overlapping damages.[2] *Id.* at APP_0202, 0221.

In the liability phase of the trial, the Court instructed the jury that:

> The joint venture [ZF Meritor] operationally dissolved at the end of 2003. Meritor again made certain manual transmissions after that time and acted as the sales agent for ZFAG's automated mechanical transmissions. In 2006, Meritor stopped making manual transmissions, although it continued to market ZFAG's automated mechanical transmission, the FreedomLine.

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[1] *See, e.g.*, *ZF Meritor LLC v. Eaton Corp.*, 769 F. Supp. 2d 684, 694 (D. Del. 2011), *aff'd*, 696 F.3d 254 (3d Cir. 2012) ("Members of the jury were free to judge the credibility of the witnesses and evidence, and eventually decided that plaintiffs' injuries flowed from anticompetitive conduct embodied within the LTAs."); *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 289 (3d Cir. 2012) ("Eaton's conduct unlawfully foreclosed a substantial share of the HD transmissions market, which otherwise would have been available for rivals, including Plaintiffs"); D.I. 308 (Eaton Mar. 25, 2013 Daubert Br.) at 1 (defining Plaintiffs collectively as "ZFM").

[2] Thus, two of Eaton's citations are wholly inapposite. In *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971), the court rejected an effort by the plaintiff to recover both going concern value and lost profits for a period of time *after* the date of the going concern valuation. In *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1374-75 (9th Cir. 1986), the plaintiff did not go out of business and the court held that since the plaintiff was awarded an injunction (not present here) there was no need for a monetary damages award for the period which was redressed by injunctive relief.

D.I. 243 (Final Jury Instructions) at 3934:3-12; a*ccord* D.I. 230 (Tr. Trans. - Kline) at 519:20-521:13; D.I. 232 (Tr. Trans. - Lutz) at 1005:10-16; D.I. 240 (Tr. Trans. - Gosnell) 3030:20-3031:8.

The liability phase jury found that Eaton's unlawful actions caused antitrust injuries to both plaintiffs. *E.g.*, Jury Verdict Question #4 ("Did plaintiffs prove, by a preponderance of the evidence, that defendant's unreasonable restraint of trade caused plaintiffs to suffer antitrust injuries to their business or property . . . ."). In upholding the liability verdict, the Third Circuit stated that: "After ZF Meritor's departure, Meritor remained a supplier of HD transmissions and became a sales agent for ZF AG to ensure continued customer access to the FreedomLine. However, . . . Meritor exited the business in January 2007." *See ZF Meritor*, 696 F.3d at 267. Indeed, Meritor Transmission's data show that it sold its last transmission in approximately September 2007. *See* Hackett Decl. at Ex. 1; *see also* Eaton App. Ex. B at APP_0223 at 32 (Table B) (showing actual units sold through FY 2007). And, in April 2007, Volvo/Mack wrote: "We just killed *ArvinMeritor's transmission business* with this contract." D.I. 319 (Apr. 22, 2013 Hackett Decl.) at Ex. 12 (PTX 272) (emphasis added).

In its 2013 *Daubert* motion, Eaton argued that Dr. DeRamus had to stop the running of lost profits damages, and calculate lost enterprise value damages, as of December 2003, when ZF Meritor ceased operations. D.I. 308 (Eaton Mar. 25, 2013 Daubert Br.) at 17; D.I. 332 (Eaton May 1, 2013 Daubert Reply Br.) at 3; D.I. 355 (Mot. For Permission) at 6. In its Reply on that motion, Eaton stated that it had raised the issue of Dr. DeRamus's choice of time periods in its original *Daubert* motion in 2009. D.I. 332 at 5 n.2 ("Eaton raised these arguments in its challenge to DeRamus's original report. D.I. 123 [sic] at 16 (The appropriate measure of

damages . . . is (1) lost profits up to the time of exit; and (2) going concern value as of the business at exit.")).

As it does now, Eaton last year relied on *Farmington*, 421 F.2d 61, *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 175 F.3d 18 (1st Cir. 1999), and the Antitrust Law Developments treatise. D.I. 332 (Eaton May 1, 2013 Daubert Reply Br.) at 2-4. In its December 20, 2013 opinion, the Court addressed this argument. It stated that "defendant contends that DeRamus improperly projects years of lost profits after the dissolution of plaintiff ZF Meritor LLC, and compounds such damages by then adding on a lost enterprise value." D.I. 337 (Dec. 20, 2013 Mem. and Order) at 5. After analyzing the parties' authorities, the Court rejected Eaton's position:

> In reviewing Dr. DeRamus' amended report in the context of a finding of antitrust injury, I decline to exclude such evidence, as his approach generally has support in the law and in the record . . . . Plaintiffs assert that Meritor Transmission continued in the market into 2007 and that, based on case law, plaintiffs should be able to extend the time frame for lost profits until a date at or near trial (February 2009), with a going concern value calculated from that date . . . . I conclude from the above that Dr. DeRamus' calculations, based on his time frame, are not invalid as a matter of law.

D.I. 337 (Dec. 20, 2013 Mem. and Order) at 7-9 (citing *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 825 F.2d 1360, 1363-64 (4th Cir. 1987)). Eaton does not mention the Court's December 20th decision, much less challenge its validity.

ARGUMENT

An antitrust plaintiff may recover both lost profits and lost enterprise value (sometimes called going concern value), as long as the time periods for those two elements do not overlap. *See, e.g.*, *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931); *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971). While Eaton asserts that

such claims are "mutually exclusive" (D.I. 358 at 1), it conceded exactly this proposition in its *Daubert* motion;[3] and its leading case recognizes that: "[t]he principle that an antitrust plaintiff may recover both actual lost profits and diminution in value of its business is well established." *Coastal Fuels*, 175 F.3d at 27 (citing *Story Parchment*, 282 U.S. 555 at 561-67); a*ccord* ABA, 1-9 Antitrust Law Developments (Seventh) 9C (stating that a plaintiff "may recover both lost past profits and going concern value"). That was exactly the approach Dr. DeRamus took.

I. THE LAW DOES NOT REQUIRE PLAINTIFFS TO CALCULATE LOST ENTERPRISE VALUE AS OF 2003

To try to support its argument that Dr. DeRamus should be required to calculate lost enterprise value as of 2003, Eaton selectively quotes from *Heatransfer*, 553 F.2d 964. D.I. 358 at 8. That case, however, supports Dr. DeRamus's methodology. The plaintiff there did not go out of business, but reduced the scope of its business and concentrated on aftermarket sales. *Heatransfer* at 987 n.20. Defendants nevertheless argued that lost enterprise value should be calculated as of the date of the decision to reduce the business (April 1970), rather than as of a date near trial. *Id.* The Fifth Circuit, adopting the district court's findings, rejected that argument:

> **Lost Capital Value**
> Defendants ask the Court to remit a portion of the damages awarded by the jury that may be attributable to lost capital value. This request is premised upon their argument that lost capital value should be calculated as of April, 1970, the date that Lende decided to concentrate on marketing the Heatransfer unit in the "aftermarket," rather than the date of trial . . . .
>
> Lost capital value is to be determined at the date that a business ceases to do business. In the instant case, plaintiff's decision in April, 1970, is *no indication that plaintiff ceased doing business altogether*. In this regard, the evidence

[3] Eaton May 1, 2013 Daubert Reply Br. (D.I. 332 at 5 n.2) ("The appropriate measure of damages . . . is (1) lost profits up to the time of exit; and (2) going concern value as of the business at exit.").

> demonstrated that Heatransfer continued to compete in the relevant market long after the April, 1970, date . . . .

553 F.2d at 987 n.20 (emphasis added) (citing *Farmington*, 421 F.2d 61).

Similarly here, the evidence is undisputed that, after ZF Meritor ceased operations, Meritor Transmission picked up the business and continued it into 2007, D.I. 230 (Tr. Trans. - Kline) at 519:20-521:13; D.I. 232 (Tr. Trans. - Lutz) at 1005:10-16; D.I. 240 (Tr. Trans. - Gosnell) 3030:20-3031:8, selling both FreedomLine and manual transmissions. *See* Hackett Decl., Ex. 1. This continuation is not surprising, since Meritor Transmission had been in the heavy duty transmission business for a decade before the advent of the joint venture, and had transferred its business to the joint venture upon its formation. D.I. 229 (Tr. Trans. - Kline) at 340:1-341:12; 373:7-374:17; D.I. 240 (Tr. Trans. - Gosnell) 2985:11-2986:1. Eaton has no basis to claim that plaintiffs' request for lost profits damages must end as of 2003. D.I. 337 (Dec. 20, 2013 Mem. and Order) at 8-9.

II. THE LAW SUPPORTS DR. DERAMUS'S USE OF FEBRUARY 2009 FOR HIS LOST ENTERPRISE VALUE CALCULATIONS

Once Eaton's repeated misstatements regarding the time of plaintiffs' market exit are corrected, nothing is left other than the issue of whether the law prevents Dr. DeRamus from using February 2009, the time of his initial report, to calculate lost enterprise value, rather than 2007. As the Court held in December, his approach is consistent with the law. D.I. 337 (Dec. 20, 2013 Mem. and Order) at 9. Eaton's own citations show that the courts addressing such issues seek only to avoid speculation, an issue not present here.

Eaton's leading citation on this point is *Coastal Fuels*, 175 F.3d 18, a First Circuit case Eaton cited in its *Daubert* motion. *Coastal Fuels* declined to allow a more than four year gap between plaintiff's market exit and the time of its calculation of lost going concern value. In so holding, the court expressly did "not adopt a *per se* rule that four years is inherently too great

a gap. . . ." *Id.* at 28. Rather, it based its ruling on the conclusion that the plaintiff's damages claim was "very speculative" in light of the "inherently unstable" market factors involved there during that gap period, which factors the plaintiff did not even try to address. *Id.* at 28-29. Those factors included, within that period: (1) the adoption and then repeal of an excise tax, which substantially reduced sales in the relevant market, (2) entry into and exit from the market by numerous competitors, (3) a refusal to deal with plaintiff, (4) substantial price fluctuations, and (5) the withdrawal of the only local supplier to plaintiff. *Id.* at 21-22, 29-31. Eaton does not even try to claim that any such factors, or anything remotely similar, are present here to make Dr. DeRamus's calculations speculative.

The focus of *Coastal Fuels* on avoiding "very speculative" calculations is not surprising, since it relies on the prior First Circuit decision in *Farmington*, 421 F.2d 61, which this Court explicitly distinguished in its *Daubert* decision. D.I. 337 (Dec. 20, 2013 Mem. and Order) at 8-9. In *Farmington*, the First Circuit affirmed the district court's decision not to allow plaintiff to seek a 12-year period of lost profits (1956-1968) plus a going concern value calculated *ten* years after the company went out of business. 421 F.2d at 81. The *Farmington* court stated: "[t]he method urged by [plaintiff], at least as applied to this case, relies too heavily on speculation and conjecture, particularly concerning the determination of 'going concern' value so long after the company ceased to be a going concern." *Id.* In contrast, the lost enterprise valuation here was within two years after Meritor Transmission exited the business, Dr. DeRamus had actual data that allowed him to make reasonable lost profit calculations up to the time of his report, and Eaton does not even try to suggest the existence of any special factors making the calculation speculative.

Finally, Eaton is unable to distinguish *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 825 F.2d 1360, 1361 (4th Cir. 1987), which the Court cited in its *Daubert* decision. D.I. 337 (Dec. 20, 2013 Mem. and Order) at 8 n.4. There, the Fourth Circuit affirmed a jury verdict awarding damages for a "going concern" valued "several years" after the plaintiff had ceased doing business (*id*. at 1362):

> The district court did not commit error in its instructions to the jury on the proper measure of damages. The court instructed the jury that Southern Pines could be awarded damages for lost profits from the time it went out of business [in 1983] until July 31, 1985, the end of the fiscal year immediately preceding trial, along with the going concern value of the business at that date. The going concern value measures the value the business would have had at that time but for the defendant's illegal actions.

826 F.2d at 1363- 64. Here, Dr. DeRamus measured lost enterprise value as of February 2009 where plaintiff Meritor Transmission continued with the business and sold heavy-duty transmissions into 2007. Dr. DeRamus determined that his approach was more reliable because he had actual data to project lost profits up to the time of his initial report. Eaton App. Ex. B at APP_0223; D.I. 318 (Plaintiffs' Opp. at 26).[4] The law does not preclude this reasonable approach.

[4] In any event, Dr. DeRamus has explained that his calculations of lost enterprise value are not sensitive to the use of certain alternative years. *See* Eaton App. Ex. B. at APP_0223, n.99. And he has provided lost profits calculations past 2007 (Eaton App. Ex. B at APP_0218-219, APP_0225). *See Coastal Fuels*, 175 F.3d at 25 n.4 (quoting Areeda & Hovenkamp for the proposition that going concern value "'would ordinarily be the same as anticipated future profits, capitalized and discounted to the present and also discounted for future risk.'"). *See also* Eaton App. Ex. B at APP_0221. ("ZFM's damages after February 2009 can be computed either as the discounted present value of ZFM's expected future lost profits after February 2009; or, equivalently, as the lost enterprise value of ZFM caused by Eaton's anticompetitive conduct measured as of February 2009.").

CONCLUSION

The Court should deny Eaton's Motion for Partial Summary Judgment.

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May 2, 2014

CERTIFICATE OF SERVICE

I, Joseph C. Schoell, hereby certify that, on this 2nd day of May, 2014, a copy of the foregoing document was served on the following counsel of record in the manner indicated below:

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