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' OBJECTIONS REGARDING "CAUSATION AND DAMAGES" PRELIMINARY JURY INSTRUCTIONS

Consistent with the Court's instructions on June 18, 2014, Plaintiffs are submitting proposed revisions to the Court's Preliminary Jury Instructions (attached as Exhibit A). While Plaintiffs' other suggested revisions require only brief additional commentary, Plaintiffs explain below why the Court should not give its proposed "Causation and Damages" preliminary instructions. Plaintiffs object to those proposed instructions on multiple grounds, relating particularly to the bifurcated and antitrust nature of this trial where violations and antitrust injuries already have been established. Indeed, given the issues raised by these proposed instructions, Plaintiffs submit that the Court should defer providing any substantive instructions on damages, burden of proof or causation until final jury instructions are given to the jury.

Plaintiffs respectfully submit that the proposed "Causation and Damages" instructions violate a range of Supreme Court and Third Circuit decisions, and directly conflict with the damages decisions recently issued by the Court in this case, in the following ways:

1. The instructions would require Plaintiffs to prove that Eaton's unlawful conduct caused them injuries: "Plaintiffs bear the burden of showing that their injuries were caused by defendant's unlawful conduct . . . as opposed to any other factors. If you find that plaintiffs' injuries were caused by factors other than defendant's unlawful conduct, then you must return a verdict for defendant." However, the liability phase jury, upheld by the Third Circuit, already has found that defendant's unlawful conduct caused Plaintiffs antitrust injuries. *See* D.I. 217 (Liability Phase Verdict Sheet); D.I. 367 (May 29, 2014 Pretrial Stipulation and Order).

As the Third Circuit explained in reversing a nominal damages verdict in a bifurcated antitrust case at the behest of the plaintiff, it is error, indeed error of Constitutional magnitude, even implicitly to allow the damages phase jury to reconsider the prior jury's findings of causal injury. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993). Commenting on the preliminary instructions by the District Court in that case, and finding a "clear violation of the Seventh Amendment" (*id.* at 1185), the Third Circuit stated in *Lower Lake Erie*:

> Since the jury found that [plaintiff] had suffered damage to its property by the conspiracy, in order not to violate the Seventh Amendment, the role of the second jury should have been limited to determining the amount of damages [plaintiff] incurred from acts taken in furtherance of the conspiracy. Nonetheless the Seventh Amendment prohibition against reexamination of the issue of fact of damage was compromised soon after the damages jury was empaneled. Upon seating the jury, the district court informed it that "the defendant will be entitled to defense on the ground that these damages have not been established *or that any damages that they might have suffered stem from causes other than the antitrust conspiracy claim*." This comment, although not starkly objectionable, set the tone for the overlap of causation questions which the damages jury was permitted to hear.

Id. at 1183 (emphasis in original); *see also Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 813 (3d Cir. 1984) (second jury not "to evaluate or decide factual issues that were involved in the first trial"); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (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 case as established on appeal."). In light of the cases cited above, not only is the Court's proposed instruction incorrect, but the Court should give the proposed instruction set forth in the footnote below (and suggested in the attached revision) expressly advising this jury that it is not allowed to reconsider the findings of the liability phase jury.[1]

2. In addition, the proposed requirement that "Plaintiffs bear the burden of proving damages ***with reasonable certainty***" (emphasis added) contravenes a long list of Supreme Court and Third Circuit decisions recognized by this Court in its recent *Daubert* and summary judgment opinions, as well as decisions from other Circuits. In order to encourage enforcement of the antitrust laws, and to avoid allowing the defendant to benefit from the disruption its own wrongdoing has caused, the courts have established that an antitrust "plaintiff's proof of damages will be evaluated under a more lenient standard." *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 212 (3d Cir. 1983). An antitrust plaintiff need only present a "just and reasonable estimate of the damage based on relevant data," *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), and need not prove damages with "the kind of concrete, detailed proof" available in other contexts, so long as the damages are

[1] Plaintiffs request that the Court add: "The decisions of the liability trial jury, as expressed by the verdict in that part of the case, are conclusive and you may not reconsider them. For purposes of performing your duties you must accept those decisions as correct." To avoid disputes among the parties, the above language quotes *Eaton's* proposal with respect to this topic. *See* D.I. 372, Exhibit B, at 21.

not based on "mere speculation or guess." *See* D.I. 373 (Memorandum) at 2 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)); D.I. 337 (Memorandum) at 5 (same); *accord Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946); *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927).

In its recent *Daubert* opinion, the Court quoted from *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2002):

> In *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 812 (3d Cir. 1984), this court stated that '[i]n constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative." *Id.* Once a jury has found that the unlawful activity caused the antitrust injury, the damages may be determined without strict proof of what act caused the injury as long as the damages are not based on speculation or guesswork. *Id.* at 813.

D.I. 337 at 5. The Court added that: "The United States Supreme Court has noted that '[t]rial and appellate courts alike must . . . observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damages issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)." D.I. 337 at 5; *see ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012) ("[I]n the antitrust context, a damages award not only benefits the plaintiff, it also fosters competition and furthers the interests of the public by imposing a severe penalty (treble damages) for violation of the antitrust laws."); D.I. 373 at 2.

Other courts have expressly held that a "reasonable certainty" requirement does not comport with the more lenient "just and reasonable estimate" standard afforded to a plaintiff in proving antitrust damages. In *Fontana Pipe & Fabrication, Inc. v. Ameron, Inc.*, 921 F.2d 279

(9th Cir. 1990), the Ninth Circuit overturned a Magistrate's directed verdict in favor of the defendant. The Magistrate had applied a "reasonable certainty" standard to the antitrust plaintiff's proof of damages, and held that plaintiff had failed to prove its damages under that standard. In reversing the direct verdict, the Ninth Circuit stated:

> [The Ninth Circuit has] explicitly rejected the standard of "reasonable certainty" and embraced the more lenient standard of "just and reasonable estimate." Several decisions of the United States Supreme Court support this result. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931); *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946); *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 124 (1969). . . . The "reasonable certainty" standard has long been applied to measure whether there is sufficient evidence of antitrust *injury.* Injury and damages are distinct elements of an antitrust claim. *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 567 n. 5 (1981). Once injury has been demonstrated, it would be unfair to hold a plaintiff to the same burden of proof to show the extent of damages; a defendant who has caused injury should not elude judgment merely because damages are difficult to calculate. *Story Parchment,* 282 U.S. at 563; *Bigelow,* 327 U.S. at 264-65.

Id. at 279; *accord Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 358 F.2d 790, 793 (6th Cir. 1966) (rejecting the "reasonable certainty" standard for proof of antitrust damages).

3. Finally the proposed instructions would advise the jury that "***Plaintiffs bear the burden of . . . apportioning damages between lawful and unlawful causes***. If you find that there is no reasonable basis to apportion plaintiffs' injuries between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all." (emphasis added). This language also directly contradicts the Court's recent *Daubert* decision, in which it held, quoting the Third Circuit's decision in *LePage's*, that: "I reject defendant's argument that the DeRamus opinion is fatally flawed because if fails to 'disaggregate the losses attributable to Eaton's lawful, lower prices or other competitive efforts . . . from those attributable to Eaton's non-price conduct . . . . I . . . find disaggregation unnecessary, if not impossible." *Accord Bonjorno*, 752 F.2d at 813 ("When the

antitrust injury is of an indivisible nature . . . then it is unnecessary to segregate the damages according to the specific causes."); *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).

Moreover, four Supreme Court decisions establish that, if an injured antitrust plaintiff shows a decline in profits and/or values compared to that which would have existed absent the violation, it is then the defendant's burden to prove that any or all such amounts were attributable to causes other than the violation and by how much:

> The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'. . .

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-66 (1981); *accord Bigelow*, 327 U.S. at 264-65; *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 573 n.31 (1990); *Zenith Radio*, 395 U.S. at 123-24; *see also W. Geophysical Co. of Am., Inc. v. Bolt Assocs., Inc.*, 584 F.2d 1164, 1174 (2d Cir. 1978). If an antitrust plaintiff provides a rational basis upon which damages can be calculated, it has sustained its burden of proof; at that point, it is defendant's burden to demonstrate that some or all of the plaintiff's injuries are "attributable to other causes," and therefore that damages should be less. *J. Truett Payne Co.*, 451 U.S. at 565-66; *Bigelow,* 327 U.S. at 264-65; *Texaco, Inc,* 496 U.S. at 573 n.31; *Zenith Radio,* 395 U.S. at 123-24. This approach is wholly consistent with (1) the lenient standard for proving antitrust damages, and (2) the lack of any need for plaintiff to disaggregate causes of damages.

Plaintiffs respectfully request that the Court strike the proposed Causation and Damages instructions from the preliminary jury instructions.

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