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' STATEMENT ACCOMPANYING THEIR PROPOSED PRELIMINARY JURY INSTRUCTIONS FOR THE DAMAGES PHASE TRIAL

Pursuant to the Court's request at the January 14, 2014 conference, *see* Tr. of Jan. 14, 2014 Status Conference at 33-34, 39, Plaintiffs ZF Meritor LLC and Meritor Transmission Corporation (together, "Plaintiffs") and Defendant Eaton Corporation ("Eaton") have exchanged proposed preliminary jury instructions. While the parties have been able to agree with respect to a few issues, their proposals have major differences.

Plaintiffs' proposal is derived principally from (1) the preliminary jury instructions the Court used in the liability phase trial, and (2) the completed liability phase jury verdict sheet and final instructions the Court gave with regard to that sheet. Eaton's 25 pages of proposed preliminary jury instructions, on the other hand, seek to retry issues that were decided against it by the liability phase jury, contravene decisions by this Court and the Third Circuit, and are replete with slanted, argumentative statements that are not appropriate for preliminary jury instructions.

Plaintiffs provided Eaton with their proposed preliminary jury instructions on April 4, 2014. Eaton provided its proposed preliminary instructions to Plaintiffs on April 18, 2014. The

parties discussed having a meet and confer regarding their alternate proposals, but, despite numerous attempts by Plaintiffs to schedule such a meeting, Eaton would not commit to a date or ultimately attend a meet and confer at all.[1] Mindful of the Court's statements at the January 14th status conference, Plaintiffs thus submit their proposal to the Court at this time.

Plaintiffs' proposed preliminary jury instructions are attached hereto as Exhibit A. An annotated version of Plaintiffs' proposal, citing the sources for their proposed instructions, is attached as Exhibit B. Eaton's April 18 proposed preliminary instructions are attached as Exhibit C. A comparison of Plaintiffs' proposal and Eaton's proposal, showing the few places where Plaintiffs and Eaton agree in concept, is attached as Exhibit D.

I. Procedural Background

At the beginning of the liability phase trial, the Court gave the jury preliminary instructions, including a background of Plaintiffs' claims and Eaton's defenses. D.I. 229 (Tr. Transcript at 160:1-169:18). After the presentation of evidence, the Court provided final instructions, D.I. 214, as well as the jury verdict sheet. The liability phase jury found in favor of Plaintiffs. *See* Completed Jury Verdict Sheet, D.I. 216.

After the case was remanded for further proceedings on damages, the Court instructed the parties to file pretrial motions by May 1, 2013. *See* Nov. 28, 2012 Status Conference Transcript at 8:22-9:5. Plaintiffs filed a Motion Regarding Nature and Scope of Trial, setting forth its proposals for the handling of the damages phase of the bifurcated trial. D.I. 307. The Court granted that Motion on December 20, 2013. D.I. 338.

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[1] This is part of an ongoing pattern by Eaton with respect to the parties' pretrial activities. As shown in the attached correspondence, Eaton has refused to engage in discussions regarding the scope of the trial or the parties' pretrial submissions. *See* Email Correspondence between J. Hackett and J. Ostoyich, May 6, 2014; letter from J. Hackett to J. Ostoyich May 10, 2014 (attached collectively as Exhibit F).

II. The Conceptually Agreed Upon Instructions

A. Verdict Form

Plaintiffs and Eaton agree that the damages phase jury should be given a copy of the completed verdict sheet from the liability phase trial to use during its deliberations. Ex. B at 4; Ex. C at 10. The parties also agree that the jury should be instructed that the liability phase trial jury's findings are conclusive and cannot be reconsidered. *Id.* At the same time, however, Eaton asks the Court to impeach the correctness of the liability verdict. Ex. C at 10 ("For purposes of performing your duties you must accept those decisions as correct, ***even though you may disagree with them***.") (emphasis added)).

B. Duty of the Jurors

The parties generally agree with respect to the "Duty of the Jurors" section of the preliminary jury instructions, which, in Plaintiffs' proposal, comes almost directly from the Court's prior preliminary jury instructions. *See* Ex. B 4-9; Ex. C at 16-18.

III. Plaintiffs' Proposed Preliminary Jury Instructions

As shown in Exhibit B, Plaintiffs' proposed preliminary jury instructions primarily are derived from the Court's preliminary and final jury instructions from the liability phase trial, and the completed liability phase jury verdict sheet. *See* Ex. B. The proposed instructions also include a brief factual background for the damages phase jury (*see* Ex. B, 1-2), a summary of the liability phase jury's findings (*see* Ex. B at 3-4), and instructions relating to proceedings in the damages phase of this bifurcated trial (*see* Ex. B at 4-9). For instance, Plaintiffs have included instructions to explain that evidence from the liability phase trial may be used during the damages phase trial. *See* Ex. B, text accompanying n.24 and n.27.

Plaintiffs' proposed preliminary jury instructions also contain a sentence explaining that fact discovery ended before the liability trial, and that therefore the jury may not hear much (if

any) evidence about market events after 2009. *See* Ex. B, text accompanying n.30. If Eaton persists with its effort to offer evidence regarding post-2009 market developments as described in its March 4, 2014 letter to the Court (D.I. 350), Plaintiffs understand that such issues may be addressed at the pretrial conference on June 5th.

Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed preliminary jury instructions.

IV. Eaton's Proposal

A. Eaton's Proposed Jury Instructions Are Inconsistent With the Liability Verdict, the Law, and the Role of Preliminary Jury Instructions

Eaton's proposed preliminary jury instructions go far beyond the bounds of appropriate preliminary jury instructions. Plaintiffs highlight below their main objections to Eaton's proposals.

Eaton's proposal includes a long, argumentative statement that is inconsistent with the liability phase jury verdict, the Court's instructions in the liability phase, the Third Circuit's decision in this case, and the Court's December 20, 2013 Opinion and Order denying Eaton's *Daubert* motion. *See* Ex. C at 1-6. Eaton will have the opportunity appropriately to tell the damages phase jury its version of the case to the extent it is not inconsistent with, without limitation, the liability jury's findings, the law, and Court rulings in this case. *See Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 813 (3d Cir. 1985) (in bifurcated antitrust case, the second jury should not "evaluate or decide factual issues that were involved in the first trial").

In *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993), a bifurcated antitrust case, a jury decided liability in favor of plaintiffs. During the subsequent damages phase of the trial, the district court allowed the defendant to ask the damages phase jury

to second-guess the implicit (not explicit, as here) finding of injury by the liability jury. The Third Circuit reversed and ordered a new damages trial, holding that "the role of the second jury should have been limited to determining the amount of damages . . . ." *Id*. at 1183. Instead, the judge in the damages phase trial had allowed the jury to hear an "overlap of causation questions," which the Third Circuit held was impermissible given the finding of liability in the previous phase of the trial. *Id*. at 1183-85.

The doctrine of the law of the case also precludes each of Eaton's proposals that was made and rejected (explicitly or implicitly) by the Third Circuit. *See Huber v. Taylor*, 532 F.3d 237, 246 n.5 (3d Cir. 2008) (party cannot relitigate on remand an issue that was explicitly or implicitly decided by the appellate court); *Bolden v. Se. Penn. Transp. Auth.*, 21 F.3d 29, 23 (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.").

Eaton's proposals repeatedly break these rules. For example, although the liability jury held that Eaton acquired or maintained its monopoly through unlawful conduct (D.I. 216 at 3), Eaton asks the Court to instruct the jury that: "***Due to its long history in the transmission business and its large number of transmission products,*** Eaton was the largest manufacturer and seller of all types of heavy duty truck transmissions in North America from 1989 through 2009." (emphasis added). Further, Eaton's description of its long term agreements ("LTAs") with the OEMs attempts to isolate each LTA in an undisguised attempt to relitigate issues that Eaton lost during the liability trial. Ex. C at 4. *See* D.I. 243 (Tr. Trans. at 3790:4-3790:18).

Relatedly, Eaton's proposal seeks to reopen the "disaggregation" issue that has been resolved against Eaton in this case. *See* Exhibit C at 7. As this Court held in denying Eaton's recent *Daubert* motion: "I reject defendant's argument that the DeRamus opinion is fatally

flawed because it fails to 'disaggregate the losses attributable to Eaton's non-price conduct.'" D.I. 337 at ¶ 7. *Accord LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (in an antitrust case in which the defendant's conduct is unlawful "taken as a whole," disaggregation of damages is "unnecessary, if not impossible"); *Bonjorno*, 752 F.2d at 813.

In addition, the Third Circuit explained:

> In sum, the LTAs included numerous provisions raising anticompetitive concerns and there was evidence that Eaton sought to aggressively enforce the agreements, even when OEMs voiced objections. Accordingly, we hold that there was more than sufficient evidence for a jury to conclude that ***the cumulative effect of Eaton's conduct*** was to adversely affect competition . . . .

ZF Meritor LLC v. Eaton Corp., 696 F.3d 254, 289 (3d Cir. 2012) (emphasis added). *Accord Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("The 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."); *ZF Meritor LLC*, 696 F.3d at 287-89 & n.20; *id.* at 320 ("[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct ***as a whole*** was procompetitive or anticompetitive.") (Greenberg, J. dissenting) (emphasis added)).

Moreover, Eaton seeks to have this Court instruct the jury on "certain facts that [the jury] must accept as true" (Ex. C at 8), none of which were part of the completed jury verdict sheet and which Plaintiffs dispute. Such contentions do not fit the role of preliminary instructions by the Court. *See, e.g.*, Rutter Group Prac. Guide Fed. Civ. Trials & Ev. Ch. 7-B, 7:3 ("After the jury has been sworn, the trial judge usually spends some time familiarizing the jurors with basic court procedures, the order of proceedings, and the roles of the court, counsel and jurors during trial.")

B. Eaton's Proposed Final Damages Instructions Are Premature

Eaton's proposal also includes very extensive and detailed final damages instructions. *See* Ex. C at 11-14. Plaintiffs contend that, consistent with the manner in which the Court instructed the jury in the liability phase, such instructions are more properly suited for the final jury instructions, rather than the preliminary jury instructions. D.I. 229 (Tr. Transcript at 160:1-169:18); D.I. 214. However, should this Court decide that it is appropriate to include such instructions regarding damages in the preliminary jury instructions, Plaintiffs propose additional preliminary instructions, which are attached hereto as Exhibit E. Plaintiffs may augment or supplement damages instructions with respect to the final jury instructions, consistent with proof expected at trial.

These proposed damages instructions are based on the ABA Model Jury Instructions and the Third Circuit's decision in *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003), tailored for this case. *See* Ex. E. Plaintiffs' proposal is a straightforward explanation of the legal principles at issue with respect to the damages determination. *See id*. Eaton's proposal, on the other hand, attempts to place a very heavy, and legally improper, burden on the Plaintiffs to prove its damages. *See Lower Lake Erie*, 998 F.2d at 1183-85; *Bonjorno*, 752 F.2d at 813. As Eaton is well aware, once (as here) the fact of injury has been proven, the plaintiff has a relaxed burden to prove the amount of damages. The Third Circuit has stated that: "[o]nce a jury has properly found causation of antitrust injury from unlawful activity," Plaintiffs' damages "may be determined without strict proof of what act caused which injury as long as the damages are not based upon speculation or guesswork." *Bonjorno*, 752 F.2d at 813. *See also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981) ("it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted") (internal citations omitted); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226,

1242 (7th Cir. 1982) ("Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial evidence and estimates of damage based on reasonable assumptions."); *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's damages instructions also attempt to remake arguments this Court and the Third Circuit already have rejected, such as disaggregation of damages. Ex. C at 13. As discussed *supra* at 5-6, Eaton's attempt to require disaggregation of damages, contrary to established case law and the law of this case, should be rejected.

V. Conclusion

Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed preliminary jury instructions.

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CERTIFICATE OF SERVICE

I, Joseph C. Schoell, hereby certify that, on this 14th 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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