EXHIBIT A

ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation

Civ. No. 06-623-SLR

PRELIMINARY JURY INSTRUCTIONS – DAMAGES PHASE

JURY INSTRUCTION NO. 1

INTRODUCTION

Now that you have been sworn in, I have the following preliminary instructions for guidance on your role as jurors in this case.

This is a lawsuit arising under the federal antitrust laws known as the Sherman Act and the Clayton Act. The lawsuit was filed in 2006 by two related companies -- ZF Meritor LLC and Meritor Transmission Corporation. I will refer to both of them as "Meritor." Meritor is the Plaintiff in this lawsuit. Meritor sued the Defendant company named Eaton Corporation, which I will refer to as "Eaton."

Meritor and Eaton manufactured and sold heavy duty truck transmissions in North America. Prior to Meritor entering the market, Eaton was and remained at all applicable times the only major supplier of heavy duty truck transmissions in North America. These heavy duty transmissions are purchased by four truck manufacturers that will be referred to throughout trial as "OEMs" (which stands for "Original Equipment Manufacturers"). The four OEMs are the only direct purchasers of heavy duty truck transmissions, with the ultimate consumers being the truck buyers.

Eaton entered into long-term agreements or contracts, called "LTAs," with each of the OEMs. These LTAs were of an extended duration, and contained provisions such as high market share commitments, which required each of the OEMs to purchase nearly all of its heavy duty

truck transmissions from Eaton in order to obtain rebates and avoid risk of contract cancellation. The LTAs also contained requirements that Eaton's transmissions be published as the standard/preferred supplier, and in some cases the exclusive offering, in the OEM's product catalogs, called databooks.

Meritor brought this lawsuit against Eaton, alleging that it had violated three antitrust laws. The purpose of the antitrust laws is to preserve free and unfettered competition in the marketplace. The antitrust laws rest on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress. In bringing this lawsuit, Meritor alleged that Eaton had monopoly power in the North American market for heavy duty truck transmissions and that Eaton used that power, through its LTAs with the OEMs and other conduct, to prevent Meritor from competing for business, causing injury to Meritor. Meritor also asserted that Eaton, individually and also in concert with the OEMs, engaged in anticompetitive conduct to acquire and maintain monopoly power in the market and to impede competition.

The trial of this case has been split into two parts, with a different jury for each part. This is the second part – the damages phase. After the first trial (the liability phase), the first jury decided in favor of Meritor. It found that the relevant market was heavy duty truck transmissions in North America, and that Eaton had monopoly power in that market. It further found that Eaton broke three antitrust laws, and that each of Eaton's violations of law caused Meritor injuries. Specifically, the first jury found that:

-- Eaton willfully acquired and maintained monopoly power in the relevant market by engaging in anticompetitive acts or practices, in violation of Section 2 of the Sherman Act. Anticompetitive acts are acts, other than competition on the merits, which have the effect of

preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market. The first jury also found that:

-- Eaton's contracts (the LTAs) with the OEMs and other conduct unreasonably restrained trade or foreclosed competition in a substantial portion of the relevant market, in violation of Section 1 of the Sherman Act; and that

-- Eaton's contracts with the OEMs constituted de facto exclusive dealing contracts, and Eaton entered into a sufficient number of such contracts so as to substantially lessen competition or tend to create a monopoly in the heavy duty truck transmissions market in North America, in violation of Section 3 of the Clayton Act.

The first jury also found that, with respect to each of these violations of law, the competitive harms associated with Eaton's unlawful conduct outweighed any competitive benefits articulated by Eaton. And that jury found that each of Eaton's violations caused Meritor to suffer antitrust injuries to its business or property since March 28, 2002.

These findings are conclusive. They are binding on this jury. You are not to reconsider them. The verdict form from the liability phase trial, and well as the instructions I gave that jury for completing that form, are part of the record in the damages phase trial. They will be available to you during your deliberations at the close of evidence.

Your job as the damages phase jury is to enforce the antitrust laws, in light of the verdict from the liability phase. In this case, you have one thing to decide and one thing only, according to these instructions and the instructions that I will give you at the end of the trial. You must decide the dollar amount of damages which Meritor suffered as a result of Eaton's illegal conduct.

JURY INSTRUCTION NO. 2

DUTY OF JURY

It will be your duty to decide what the facts are, based solely on the evidence as presented at trial. You, and you alone, are the judges of the facts. You will have to apply those facts to the law as I will instruct you at the close of evidence. You must follow that law whether you agree with it or not.

You are the judges of the facts. I will decide which rules of law apply to this case. Nothing I say or do during the course of the trial is intended to indicate what your verdict should be.

With respect to the evidence, the evidence from which you will find the facts will consist of the testimony of witnesses and documents and other things admitted into evidence. Some of the documents and testimony that were admitted as evidence in the liability phase trial will also be used as evidence during this damages phase trial. Evidence from the liability phase trial is entitled to the same consideration and is to be judged, insofar as possible, in the same way as evidence being admitted for the first time during this damages phase trial. In addition, the evidence may include certain facts as agreed to by the parties or as I instruct you.

In the course of the case, you may hear previously taken deposition testimony. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers from each party may ask questions. A court reporter is present and records the questions and answers. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify at trial.

You will also hear testimony taken from the first part of the case – the liability phase. That testimony was taken during the first trial, the witness was placed under oath and swore to tell the truth, and the lawyers from each party were able to ask questions. A court reporter was present and recorded the questions and answers. Testimony from the liability phase trial is entitled to the same consideration, and is to be judged, insofar as possible, in the same way as if the witness had been present to testify in this trial.

In judging the facts, it will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness' testimony to accept or reject.

In the course of the trial, you will also hear from expert witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – that person is called an expert witness -- is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it and how much weight to give that testimony.

Another point on evidence: Because pre-trial fact discovery in this case basically ended in early 2009, and in light of other legal reasons, you may not see or hear much or any evidence about events over the last few years. This is a matter of legal procedure, and you are to draw no inference, positive or negative, about any such matters not included in the evidence.

Certain things are not evidence. Statements, arguments and questions by lawyers are not evidence. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe testimony or exhibits being offered into evidence are not admissible under the Rules of Evidence. You should not be influenced by a lawyer's objection or by my ruling on the objection. If I sustain or uphold the objection, and find the matter is not

admissible, you should ignore the question or other item of evidence. If I overrule an objection and allow the matter in evidence, you should consider the testimony or other item of evidence as you would any evidence. If I instruct you during the trial that some item of evidence is admitted for a limited purpose, you must follow that instruction and consider the evidence for that purpose only. I will instruct you further during the trial if this happens.

Now, a few words about your conduct as jurors. You should not reach any conclusions as to the issues presented until all the evidence is in and you have been given your final instructions. You may write questions down and give them to my courtroom deputy. She will give the questions to me and I will pass them along to the attorneys, who may or may not try to incorporate your questions into their examinations.

Finally, you must only consider the evidence presented in the courtroom. Anything you see or hear outside the courtroom is not evidence and must be disregarded. You are to decide this case solely on the evidence presented here in the courtroom. Do not read or listen to anything touching on this case, or on the antitrust laws generally, that is not admitted into evidence, except as I allow. By that I mean, if there may be a newspaper or internet article or radio or television report relating to this case or the antitrust laws, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own, or speak to anyone other than as I specifically allow, on matters relating to this case or to the antitrust laws in general, including on the telephone, in person, on the internet or through social media.

The proceedings during the trial will be transcribed by court reporters; however, it is not the practice of this Court to make the trial transcripts available to jurors. You must rely on your own recollection of what testimony was presented and how credible that testimony was.

If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils and paper. If you do take notes, please keep them to yourself until the end of the trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note-taking. First, note-taking is permitted, but it is not required. You are not required to take notes. How many notes you want to take, if any, is entirely up to you. Second, please make sure that note-taking does not distract you from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said, and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations. Third, your notes are memory aids; they are not evidence. Notes are not a record or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes.

Now – and this does not have to do with note-taking – please wear your juror identification tags every day so that the parties can avoid engaging you in conversation, thereby bringing your impartiality into question. Once the trial has begun, the attorneys will have three opportunities to talk to you. The first opportunity is the opening statement. During the opening statements, the attorneys will introduce their respective stories to you. As I've already instructed, what the lawyers say is not evidence, but, because evidence has already been admitted in the liability phase, the lawyers may show or tell you about evidence in their opening statements. It will be up to you to determine whether the evidence – including the testimony of the witnesses

and the admitted documents – supports what the lawyers say in their opening statements. The second opportunity that the lawyers have to talk to you is during transition statements. Lawyers are permitted to make transition statements whenever they call a witness to the stand, to introduce the witness and to briefly explain the relevance of the witness' anticipated testimony. Finally, after all the evidence is in, the lawyers will offer closing arguments to summarize and interpret the evidence for you and to tie the evidence to their story. I will then give you instructions on the law and describe for you the damages matters you must resolve. You will then retire to the jury room to deliberate on your verdict.

EXHIBIT B

ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation

Civ. No. 06-623-SLR

PRELIMINARY JURY INSTRUCTIONS – DAMAGES PHASE

JURY INSTRUCTION NO. 1

INTRODUCTION

Now that you have been sworn in, I have the following preliminary instructions for guidance on your role as jurors in this case.[1]

This is a lawsuit arising under the federal antitrust laws known as the Sherman Act and the Clayton Act. The lawsuit was filed in 2006 by two related companies -- ZF Meritor LLC and Meritor Transmission Corporation. I will refer to both of them as "Meritor." Meritor is the Plaintiff in this lawsuit. Meritor sued the Defendant company named Eaton Corporation, which I will refer to as "Eaton."[2]

Meritor and Eaton manufactured and sold heavy duty truck transmissions in North America.[3] Prior to Meritor entering the market, Eaton was and remained at all applicable times the only major supplier of heavy duty truck transmissions in North America.[4] These heavy duty transmissions are purchased by four truck manufacturers that will be referred to throughout trial as "OEMs" (which stands for "Original Equipment Manufacturers").[5] The four OEMs are the

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[1] Preliminary Jury Instructions from Liability Trial.

[2] Preliminary Jury Instructions from Liability Trial, edited slightly.

[3] Preliminary Jury Instructions from Liability Trial, edited slightly.

[4] New.

[5] Preliminary Jury Instructions from Liability Trial, edited slightly.

only direct purchasers of heavy duty truck transmissions, with the ultimate consumers being the truck buyers.[6]

Eaton entered into long-term agreements or contracts, called "LTAs," with each of the OEMs. These LTAs were of an extended duration, and contained provisions such as high market share commitments, which required each of the OEMs to purchase nearly all of its heavy duty truck transmissions from Eaton in order to obtain rebates and avoid risk of contract cancellation. The LTAs also contained requirements that Eaton's transmissions be published as the standard/preferred supplier, and in some cases the exclusive offering, in the OEM's product catalogs, called databooks.[7]

Meritor brought this lawsuit against Eaton, alleging that it had violated three antitrust laws.[8] The purpose of the antitrust laws is to preserve free and unfettered competition in the marketplace. The antitrust laws rest on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.[9] In bringing this lawsuit, Meritor alleged that Eaton had monopoly power in the North American market for heavy duty truck transmissions and that Eaton used that power, through its LTAs with the OEMs and other conduct, to prevent Meritor from competing for business, causing injury to Meritor. Meritor also asserted that Eaton, individually and also in concert with the OEMs, engaged in anticompetitive conduct to acquire and maintain monopoly power in the market and to impede competition.[10]

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[6] New.

[7] New.

[8] New.

[9] Final Jury Instructions from Liability Trial.

[10] Preliminary Jury Instructions from Liability Trial, edited slightly.

The trial of this case has been split into two parts, with a different jury for each part. This is the second part – the damages phase. After the first trial (the liability phase), the first jury decided in favor of Meritor. It found that the relevant market was heavy duty truck transmissions in North America, and that Eaton had monopoly power in that market. It further found that Eaton broke three antitrust laws, and that each of Eaton's violations of law caused Meritor injuries.[11] Specifically, the first jury found that:

-- Eaton willfully acquired and maintained monopoly power in the relevant market by engaging in anticompetitive acts or practices, in violation of Section 2 of the Sherman Act.[12] Anticompetitive acts are acts, other than competition on the merits, which have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market.[13] The first jury also found that:

-- Eaton's contracts (the LTAs) with the OEMs and other conduct unreasonably restrained trade or foreclosed competition in a substantial portion of the relevant market, in violation of Section 1 of the Sherman Act;[14] and that

-- Eaton's contracts with the OEMs constituted de facto exclusive dealing contracts, and Eaton entered into a sufficient number of such contracts so as to substantially lessen competition or tend to create a monopoly in the heavy duty truck transmissions market in North America, in violation of Section 3 of the Clayton Act.[15]

The first jury also found that, with respect to each of these violations of law, the competitive harms associated with Eaton's unlawful conduct outweighed any competitive

[11] New.

[12] Liability Trial Verdict Form.

[13] Final Jury Instructions from Liability Trial.

[14] Liability Trial Verdict Form.

[15] Liability Trial Verdict Form.

benefits articulated by Eaton. And that jury found that each of Eaton's violations caused Meritor to suffer antitrust injuries to its business or property since March 28, 2002.[16]

These findings are conclusive. They are binding on this jury. You are not to reconsider them. The verdict form from the liability phase trial, and well as the instructions I gave that jury for completing that form, are part of the record in the damages phase trial. They will be available to you during your deliberations at the close of evidence.[17]

Your job as the damages phase jury is to enforce the antitrust laws, in light of the verdict from the liability phase.[18] In this case, you have one thing to decide and one thing only, according to these instructions and the instructions that I will give you at the end of the trial.[19] You must decide the dollar amount of damages which Meritor suffered as a result of Eaton's illegal conduct.[20]

JURY INSTRUCTION NO. 2

DUTY OF JURY

It will be your duty to decide what the facts are, based solely on the evidence as presented at trial. You, and you alone, are the judges of the facts. You will have to apply those facts to the law as I will instruct you at the close of evidence. You must follow that law whether you agree with it or not.[21]

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[16] Liability Verdict Form.

[17] New.

[18] New.

[19] Preliminary Jury Instructions from Liability Trial, edited slightly.

[20] New.

[21] Preliminary Jury Instructions from Liability Trial.

You are the judges of the facts. I will decide which rules of law apply to this case. Nothing I say or do during the course of the trial is intended to indicate what your verdict should be.[22]

With respect to the evidence, the evidence from which you will find the facts will consist of the testimony of witnesses and documents and other things admitted into evidence.[23] Some of the documents and testimony that were admitted as evidence in the liability phase trial will also be used as evidence during this damages phase trial. Evidence from the liability phase trial is entitled to the same consideration and is to be judged, insofar as possible, in the same way as evidence being admitted for the first time during this damages phase trial.[24] In addition, the evidence may include certain facts as agreed to by the parties or as I instruct you.[25]

In the course of the case, you may hear previously taken deposition testimony. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers from each party may ask questions. A court reporter is present and records the questions and answers. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify at trial.[26]

You will also hear testimony taken from the first part of the case – the liability phase. That testimony was taken during the first trial, the witness was placed under oath and swore to tell the truth, and the lawyers from each party were able to ask questions. A court reporter was

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[22] Preliminary Jury Instructions from Liability Trial.

[23] Preliminary Jury Instructions from Liability Trial.

[24] New – modeled off of Preliminary Jury Instructions from Liability Trial re: deposition testimony.

[25] Preliminary Jury Instructions from Liability Trial.

[26] Preliminary Jury Instructions from Liability Trial.

present and recorded the questions and answers. Testimony from the liability phase trial is entitled to the same consideration, and is to be judged, insofar as possible, in the same way as if the witness had been present to testify in this trial.[27]

In judging the facts, it will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness' testimony to accept or reject.[28]

In the course of the trial, you will also hear from expert witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – that person is called an expert witness -- is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it and how much weight to give that testimony.[29]

Another point on evidence: Because pre-trial fact discovery in this case basically ended in early 2009, and in light of other legal reasons, you may not see or hear much or any evidence about events over the last few years. This is a matter of legal procedure, and you are to draw no inference, positive or negative, about any such matters not included in the evidence.[30]

Certain things are not evidence. Statements, arguments and questions by lawyers are not evidence. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe testimony or exhibits being offered into evidence are not admissible under the Rules of Evidence. You should not be influenced by a lawyer's objection or by my ruling on the objection. If I sustain or uphold the objection, and find the matter is not

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[27] New – modeled off of Preliminary Jury Instructions from Liability Trial re: deposition testimony.

[28] Preliminary Jury Instructions from Liability Trial.

[29] Preliminary Jury Instructions from Liability Trial.

[30] New.

admissible, you should ignore the question or other item of evidence. If I overrule an objection and allow the matter in evidence, you should consider the testimony or other item of evidence as you would any evidence. If I instruct you during the trial that some item of evidence is admitted for a limited purpose, you must follow that instruction and consider the evidence for that purpose only. I will instruct you further during the trial if this happens.[31]

Now, a few words about your conduct as jurors. You should not reach any conclusions as to the issues presented until all the evidence is in and you have been given your final instructions. You may write questions down and give them to my courtroom deputy. She will give the questions to me and I will pass them along to the attorneys, who may or may not try to incorporate your questions into their examinations.[32]

Finally, you must only consider the evidence presented in the courtroom. Anything you see or hear outside the courtroom is not evidence and must be disregarded. You are to decide this case solely on the evidence presented here in the courtroom. Do not read or listen to anything touching on this case, or on the antitrust laws generally, that is not admitted into evidence, except as I allow. By that I mean, if there may be a newspaper or internet article or radio or television report relating to this case or the antitrust laws, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own, or speak to anyone other than as I specifically allow, on matters relating to this case or to the antitrust laws in general, including on the telephone, in person, on the internet or through social media.[33]

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[31] Preliminary Jury Instructions from Liability Trial.

[32] Preliminary Jury Instructions from Liability Trial.

[33] Preliminary Jury Instructions from Liability Trial, edited slightly.

The proceedings during the trial will be transcribed by court reporters; however, it is not the practice of this Court to make the trial transcripts available to jurors. You must rely on your own recollection of what testimony was presented and how credible that testimony was.[34]

If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils and paper. If you do take notes, please keep them to yourself until the end of the trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note-taking. First, note-taking is permitted, but it is not required. You are not required to take notes. How many notes you want to take, if any, is entirely up to you. Second, please make sure that note-taking does not distract you from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said, and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations. Third, your notes are memory aids; they are not evidence. Notes are not a record or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes.[35]

Now – and this does not have to do with note-taking – please wear your juror identification tags every day so that the parties can avoid engaging you in conversation, thereby bringing your impartiality into question. Once the trial has begun, the attorneys will have three opportunities to talk to you. The first opportunity is the opening statement. During the opening

[34] Preliminary Jury Instructions from Liability Trial.

[35] Preliminary Jury Instructions from Liability Trial.

statements, the attorneys will introduce their respective stories to you. As I've already instructed, what the lawyers say is not evidence,[36] but, because evidence has already been admitted in the liability phase, the lawyers may show or tell you about evidence in their opening statements.[37] It will be up to you to determine whether the evidence – including the testimony of the witnesses and the admitted documents – supports what the lawyers say in their opening statements. The second opportunity that the lawyers have to talk to you is during transition statements. Lawyers are permitted to make transition statements whenever they call a witness to the stand, to introduce the witness and to briefly explain the relevance of the witness' anticipated testimony. Finally, after all the evidence is in, the lawyers will offer closing arguments to summarize and interpret the evidence for you and to tie the evidence to their story. I will then give you instructions on the law and describe for you the damages matters you must resolve. You will then retire to the jury room to deliberate on your verdict.[38]

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[36] Preliminary Jury Instructions from Liability Trial.

[37] New.

[38] Preliminary Jury Instructions from Liability Trial.

EXHIBIT C

ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation

Civ. No. 06-623-SLR

PRELIMINARY JURY INSTRUCTIONS – DAMAGES PHASE

Members of the Jury:

Now that you have been sworn in, I have the following preliminary instructions for guidance on your role as jurors in this case.

Case Factual Background

This lawsuit arises out of a dispute between companies relating to the sales of certain parts—transmissions for heavy duty trucks—that were sold during the applicable time period to companies who made heavy duty trucks for sale and use in North America. This lawsuit was brought by two separate companies in 2006. These companies are Meritor Transmission Corporation, and ZF Meritor LLC. While both Meritor and ZF Meritor have the word "Meritor" in their name, they are separate entities both in fact and for purposes of this trial.

I will refer to Meritor Transmission Corporation as "Meritor" and I will refer to ZF Meritor LLC as "ZFM." Because both of these companies brought this case, they will be referred to as the "Plaintiffs". The Plaintiffs, Meritor and ZFM, brought this suit against Eaton Corporation, which I will refer to as "Eaton" or "Defendant." The Plaintiffs brought claims in this lawsuit against Eaton under certain federal antitrust laws known as the Sherman Act and the Clayton Act, which I will describe to you in greater detail in a few minutes.

Meritor, ZFM, and Eaton, were at various times, between 1989 and 2007, competitors with each other. Each one manufactured and sold heavy duty truck transmissions to truck manufacturers, who used these transmissions, together with many other parts such as engines,

axles, and brakes, to build finished trucks. In this case, you will hear these truck manufacturers being referred to as "Original Equipment Manufacturers" or "OEMs." The only customers for the transmissions being manufactured and sold by Eaton, ZFM and Meritor were these OEMs. During the time period most relevant to this case, there were only four OEMs who bought essentially all of these transmissions. These OEMs will be referred to as Freightliner, Paccar, International and Volvo/Mack.

Plaintiff Meritor historically sold several different parts to the OEMs other than transmissions. Meritor began selling transmissions after it acquired the transmission business from another company by the name of Rockwell in 1989, and sold two models of manual transmissions, known as 9-speed and 10-speed transmissions, solely for use in the manufacture of line-haul trucks by the OEMs. Line-haul trucks are trucks used for longer distance routes that you may have heard of as either "tractor-trailer trucks" or "eighteen-wheelers." Meritor competed with Eaton in selling these line-haul transmissions from the early 1990's until June of 1999. Meritor ceased selling transmissions in June of 1999 when it sold its transmission business into the Joint Venture, ZFM, although it continued to sell other parts. Plaintiff Meritor re-entered the transmission market in 2004 until it ceased selling them again in 2007.

Plaintiff ZFM was a company formed in June of 1999 and was a competitor of Eaton in the sales of line-haul transmissions until it exited the market in December of 2003. ZFM was a joint venture of two companies: Meritor and ZF AG. ZF AG is a manufacturer of automated mechanical transmissions, located in Germany. ZF AG must not be confused with ZFM. They are completely different companies. ZF AG, the German company, is not a plaintiff in this case. ZF AG did not bring suit against Eaton in this case, and it has not made any claims for antitrust violations against Eaton. ZF AG had developed and was selling an automated mechanical

transmission in Europe beginning in the mid-1990's, but had never sold a transmission product in the United States. One purpose of this new company, ZFM, was to immediately begin to sell a new updated version of Meritor's two 9- and 10-speed manual transmissions, known as the "G" platform, and, soon thereafter import ZF's automated transmission from Germany, make some necessary modifications, and begin selling it to OEMs in the U.S. ZFM introduced the ZF modified automated transmission, known as the Freedomline, for the first time in the middle of 2001. ZFM continued to sell these three products until it was dissolved by Meritor and ZF AG in December of 2003.

Eaton has been in the business of designing, manufacturing and selling heavy duty truck transmissions since at least the early 1950's to the present time. 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. Eaton had a large number of different models of transmissions that were purchased and used by the OEMs in building different types of heavy duty trucks: line-haul trucks—the long distance 18-wheelers; vocational trucks, which are used in high performance services such as logging and mining; and specialty trucks that are used for shorter distances such as school buses and fire trucks.

Beginning in the mid-1990's it was common for the OEMs to enter into multi-year supply agreements with truck part manufacturers. Eaton had multi-year agreements with the OEMs to sell transmissions, and Meritor had such an agreement with Freightliner. Such contracts were not limited to the sales of transmissions. In addition to its multi-year agreements to sell transmissions, Meritor also had multi-year agreements for the sale of other truck parts, such as axles and brakes.

Eaton entered into new supply agreements for the sale of transmissions with the four major OEMs between July 2000 and November 2002. These agreements were with Paccar in July of 2000, with Freightliner in November of 2000, with International in February of 2001, and with Volvo/Mack in November of 2002. These OEM agreements or contracts were of a longer duration, from 5 to 7 years in length, than past agreements, and contained new provisions, which required each of the OEMs to purchase a high percentage of its heavy duty truck transmissions from Eaton in order to obtain additional rebates ranging from .35% to 3% and, for Volvo/Mack, to keep the agreement's lower prices in effect. Some of the multi-year supply agreements, referred to as "LTAs," also contained requirements that certain of Eaton's transmissions be published as the "standard" or "preferred" transmissions in the OEM's product catalogs, called databooks, which were made available to truck purchasers, while other Eaton, ZFM, and Meritor transmissions were available as "options".

Plaintiffs' Claims

Meritor and ZFM brought this lawsuit against Eaton in the fall of 2006, several years after ZFM dissolved, alleging that these new agreements with the OEMs, which Eaton entered into over a two and one-half year period, taken together, were anticompetitive, in that they amounted to de facto exclusive dealing contracts. By entering into all four of these agreements, Plaintiffs alleged that Eaton violated the federal antitrust laws. The purpose of the antitrust laws is to preserve free and unfettered competition in the marketplace. The antitrust laws rest on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress. Therefore, a violation of the antitrust laws may cause injury to competition in such ways as I have just described. In addition, the law permits competitors who believe that injury to competition may have had a direct effect upon them and caused them monetary losses to make a claim in court and have the opportunity to prove whether they suffered any monetary loss and the amount of such loss.

In bringing this lawsuit, Meritor and ZFM alleged that Eaton had acquired monopoly power in the North American market for heavy duty truck transmissions and that Eaton used that power, through the new OEM agreements, to prevent other competitors, such as Meritor and ZFM from freely competing for transmission sales to the OEMs, causing them to incur lost profit damages. Eaton contended that its agreements with the OEMs benefited customers with lower prices; that it provided a wider-range of high-quality transmissions; and that it undertook significant efforts to expand its output, continue innovating, and to lower its manufacturing costs and the OEMs' engineering and truck assembly costs. It contended that this conduct was pro-competitive and, as a result, it denied Meritor's and ZFM's claims. More specifically, Eaton contended that it did not have the power to control prices to its OEM customers and, in fact, that

the OEMs exercised substantial market power over the prices that Eaton was able to obtain for its transmissions. Eaton also denied that it harmed its OEM customers or acted anticompetitively.

The First "Liability" Trial and the Jury's Findings

The trial of this case was split by the Court into two parts. The first part, which was called the "liability trial," took place before a different jury in the fall of 2009. I will refer to the jury in the first trial as the "liability trial jury." After hearing evidence concerning Plaintiffs' claims and Eaton's defenses to those claims, the liability trial jury decided in favor of Meritor and ZFM.

It found that Eaton entered into OEM agreements that were anticompetitive and, thereby, violated the antitrust laws. The jury verdict form did not ask about any particular agreements, instead asking only whether Eaton entered into "contract(s)" that were anticompetitive and constituted "de facto exclusive dealing." There has been no finding by the liability trial jury in this case that any individual agreement by itself, or any particular provisions of any individual agreement, were anticompetitive taken alone.

The liability trial jury also determined that Eaton's violation of the antitrust laws caused injury to competition and to Plaintiffs. However, that jury did not determine a specific date or dates upon which such injuries may have occurred. The liability trial jury's verdict found only that such injury occurred at some time "since March 28, 2002." As discussed in more detail later, antitrust "injury" is different from antitrust "damages." The liability trial jury did not determine whether such injury caused Plaintiffs to suffer monetary damages nor did the jury determine the amount of such monetary damages, if any.

Specifically, the liability trial jury found that:

1. Eaton willfully acquired and maintained monopoly power in the North American heavy duty truck transmission market by engaging in anticompetitive acts or practices, in violation of Section 2 of the Sherman Act;

2. Eaton entered into contract(s) with the OEMs on or after July 2000, and engaged in other associated conduct that unreasonably restrained trade or foreclosed competition in a substantial portion of the North American heavy duty truck transmission market, in violation of Section 1 of the Sherman Act; and that

3. An unspecified number of Eaton's contracts with the OEMs constituted de facto exclusive dealing contracts, and Eaton entered into a sufficient number of such contracts so as to substantially lessen competition or tend to create a monopoly in the heavy duty truck transmissions market in North America, in violation of Section 3 of the Clayton Act.

The liability trial jury also found that, with respect to each of these violations of law, that the harm to competition associated with Eaton's unlawful conduct outweighed any competitive benefits proved by Eaton. Finally, the liability trial jury found that each of Eaton's violations caused Plaintiffs to suffer antitrust injury to their businesses or properties at some time after March 28, 2002.

There are certain facts that you must accept as true for purposes of this trial:

1. At all times, both before and after the contracts were in effect, the prices that Eaton charged for transmissions under the contracts were lower than ZFM's prices and not anticompetitive.

2. The jury did not find any anticompetitive conduct by Eaton prior to the four OEM contracts between 2000 and 2002. Moreover, while the jury found that Plaintiffs suffered antitrust injury since March 28, 2002, the jury did not specify the specific point in time that such injury occurred after March 28, 2002.

It is up to you, as jurors, therefore, to determine when, after March 28, 2002, the contracts caused Plaintiffs antitrust injury and whether they suffered any damages. You should

therefore assume that Eaton's success before that time, and Plaintiffs' lack of success, was the result of competition in the market, overall market effects, or other factors, and was not the result of any anticompetitive conduct.

This Trial: The "Damages Trial"

This trial, for which you have been chosen to serve as jurors is the second trial in this proceeding, which I will refer to as the "damages trial." By referring to this as the "damages trial," I am not implying that Plaintiffs were damaged or that you must find damages for Plaintiffs. The purposes of the "damages trial" is to give Plaintiffs the opportunity to prove whether damages occurred as a result of injury to competition, what type of damages may have been sustained by Plaintiffs, whether Eaton caused such damages, whether those damages can be calculated in monetary terms, and if so, the actual amount of such damages. It is plaintiff's burden to prove that such damages exist.

These issues of damages were ***not*** a subject of the liability trial. Therefore, the liability trial jury did not hear evidence, consider or decide whether Plaintiffs were entitled to damages as a result of anticompetitive conduct. Nor did they consider or decide when such damages may have begun to occur, or the dollar amounts of such damages, if any.

The verdict form from the liability trial is part of the record in this trial. It will be available to you during your deliberations at the close of evidence. 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, even though you may disagree with them.

However, whether Plaintiffs suffered any non-speculative damages that were caused solely by Eaton's conduct and, if so, the amount of those damages and when they began and ended, is the subject of this trial. It lies solely with you, as jurors, to decide these questions, based upon the evidence presented to you over the next several days and the instructions of law that I will give you at the conclusion of all of the evidence to guide your deliberations.

Damages – Burden of Proof

Now, I will give you some preliminary instructions to assist you in understanding the evidence that you are about to hear concerning the issue of damages.

The Plaintiffs in this case, Meritor and ZFM, each individually, at all times during this trial, have the sole burden of proving any damages claimed by them that may have directly resulted from the anticompetitive conduct found to have existed by the liability trial jury. In doing so, they must satisfy the following burdens of proof:

1. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, that they suffered the specific type of damages to their businesses or properties that was directly caused by the anticompetitive multi-year supply agreements;

2. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, when the actual effects of the anticompetitive conduct, which directly caused them to suffer damages, began and ended;

3. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, that type of damages proven can be compensated in monetary terms; and

4. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable certainty, the amount, in dollars, of the damages actually suffered, and when they began and ended.

Plaintiffs' proof must be based upon credible factual evidence they present to you and may not be based on speculation or guesswork. If Plaintiffs rely upon estimates or projections, they must be reliable and reasonable, based upon the factual evidence and not merely conjecture.

Damages – Expert Witnesses

You will hear testimony from expert witnesses in this case. These experts were retained by the parties to present evidence related to damages. These experts have been retained by the parties to assist in presenting each parties' positions on damages and may provide you with calculations and other information normally used by experts. You are free to accept or reject their testimony in part or in its entirety. You are the sole judges of the credibility of witnesses, including expert witnesses. If an expert witness provides any opinion of damages, it is your responsibility to determine the credibility, reliability and reasonableness of such estimates. In determining the issues related to damages, you are not bound by the testimony of any expert or experts. If you find the testimony or the calculations of any expert to be unreliable you may disregard that expert's testimony or calculations altogether.

Damages – Causation

The type of damages Plaintiffs claim and the amount of such damages in dollars must be a direct result of the anticompetitive activity determined by the liability trial jury. In other words, the damages claimed must be the direct result of the anticompetitive conduct. The damages claimed by Plaintiffs may not be the result of other legal or competitive conduct by Eaton.

If there are two or more causes for any loss that Plaintiffs have claimed to have suffered, Plaintiffs have the sole burden of proving the actual portion of loss suffered as a result of the anticompetitive conduct as opposed to legal competitive activities, market forces in general, or actions taken by Plaintiffs themselves, such as poor business decisions or the failure to respond to fair and rigorous competition, which may have contributed to Plaintiffs' claimed "losses."

Damages - Disaggregation

If the amount of damages solely attributable to anticompetitive activity cannot be separated by you from the amount of harm caused by other factors except through guesswork or speculation, then you may not award any damages.

Damages – Mitigation

As a matter of law, Plaintiffs have an obligation in an antitrust case to take all reasonable steps to compete in the market and to take any commercially reasonable measures available to them to limit the damages that may result from the anticompetitive conduct. The Plaintiffs may not increase their damages through inaction. Eaton, in this case, may offer evidence that Plaintiffs failed or refused to take reasonable and available actions to compete in the market which would have had the effect of creating or increasing the damages that they now claim. Eaton has the burden of proving that Plaintiffs failed to take such actions by a preponderance of the evidence. If you determine that Eaton has met such a burden, then the damages you calculate must be reduced in whole or in part as a result of Plaintiffs' failures to act reasonably.

Damages – All of the Evidence Must be Considered

Although, as I have said, Plaintiffs have the burden of proving every element of damages by a preponderance of the evidence, you must consider all of the evidence presented by the Plaintiffs and Eaton during this trial in determining whether Plaintiffs have satisfied their burdens of proof.

Damages – Actual Business Losses Not Penalties

Your duty in determining damages in this case, if any, is to determine only the actual losses to Plaintiffs' businesses or properties that resulted from Eaton's anticompetitive conduct as carefully and accurately as possible. You may not increase such damages by assessing additional damages or any type of penalty or other type of exemplary or punitive damages,

regardless of how you may feel about Eaton's conduct. Any additional or other damages that may be assessed against Eaton after you reach your determination are solely within the province of this Court and the statutory laws.

Facts of This Case

The jury in the liability trial heard a substantial amount of evidence over the course of the five-week trial. Some of the evidence is not relevant to your deliberation here, but some of the evidence may be relevant to your consideration in this trial.

In addition to the facts that I have already given you describing the parties and the verdict from the liability trial, there are certain other facts presented at the liability trial that are relevant to your consideration of this case. These facts include:

[***Insert if any***]

The parties have also stipulated to certain facts that they have agreed upon in advance of this trial which I will now read to you:

[Insert if Applicable]

The Evidence and Your Duty as Jurors

It will be your duty to decide what the facts are, based solely on the evidence as presented at trial. You, and you alone, are the judges of the facts. You will have to apply those facts to the law as I will instruct you at the close of evidence. You must follow that law whether you agree with it or not. However, nothing I say or do during the course of the trial is intended to indicate what your verdict should be.

With respect to the evidence, the evidence from which you will find the facts will consist of the testimony of witnesses and documents and other things admitted into evidence. Some of the documents and testimony that were admitted as evidence in the liability trial will also be used as evidence during this damages trial. Evidence from the liability trial is entitled to the same consideration and is to be judged, insofar as possible, in the same way as evidence being admitted for the first time during this damages trial. In addition, the evidence may include certain facts as agreed to by the parties or as I instruct you.

In the course of the case, you may hear previously taken deposition testimony. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers from each party may ask questions. A court reporter is present and records the questions and answers. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify at trial.

As I have previously stated, you will also hear testimony taken from the first part of the case – the liability trial. That testimony was taken during the first trial, the witness was placed under oath and swore to tell the truth, and the lawyers from each party were able to ask questions. A court reporter was present and recorded the questions and answers. Testimony

from the liability trial is entitled to the same consideration, and is to be judged, insofar as possible, in the same way as if the witness had been present to testify in this trial.

In judging the facts, it will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness' testimony to accept or reject.

As previously mentioned, you will also hear from expert witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – that person is called an expert witness – is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it and how much weight to give that testimony.

Another point on evidence: because pre-trial fact discovery in this case basically ended in early 2009, and in light of other legal reasons, you may not see or hear much or any evidence about events over the last few years. This is a matter of legal procedure, and you are to draw no inference, positive or negative, about any such matters not included in the evidence.

Certain things are not evidence. Statements, arguments and questions by lawyers are not evidence. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe testimony or exhibits being offered into evidence are not admissible under the Rules of Evidence. You should not be influenced by a lawyer's objection or by my ruling on the objection. If I sustain or uphold the objection, and find the matter is not admissible, you should ignore the question or other item of evidence. If I overrule an objection and allow the matter in evidence, you should consider the testimony or other item of evidence as you would any evidence. If I instruct you during the trial that some item of evidence is admitted

for a limited purpose, you must follow that instruction and consider the evidence for that purpose only. I will instruct you further during the trial if this happens.

Conduct as Jurors

Now, a few words about your conduct as jurors. You should not reach any conclusions as to the issues presented until all the evidence is in and you have been given your final instructions. You may write questions down and give them to my courtroom deputy. She will give the questions to me and I will pass them along to the attorneys, who may or may not try to incorporate your questions into their examinations.

You must only consider the evidence presented in the courtroom. Anything you see or hear outside the courtroom is not evidence and must be disregarded. Do not read or listen to anything touching on this case, the parties, or on the antitrust laws generally, that is not admitted into evidence, except as I allow. By that I mean, if there may be a newspaper or internet article or radio or television report relating to this case, or the parties, or the antitrust laws, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own, or speak to anyone other than as I specifically allow, on matters relating to this case, or the parties, or to the antitrust laws in general, including on the telephone, in person, on the internet or through social media.

The proceedings during the trial will be transcribed by court reporters; however, it is not the practice of this Court to make the trial transcripts available to jurors. You must rely on your own recollection of what testimony was presented and how credible that testimony was.

If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils and paper. If you do take notes, please keep them to yourself until the end of the trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note-taking. First, note-taking is permitted, but it is not required. You are not required to take notes. How many

notes you want to take, if any, is entirely up to you. Second, please make sure that note-taking does not distract you from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said, and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations. Third, your notes are memory aids; they are not evidence. Notes are not a record or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes.

Now – and this does not have to do with note-taking – please wear your juror identification tags every day so that the parties can avoid engaging you in conversation, thereby bringing your impartiality into question.

Course of the Trial

Once the trial has begun, the attorneys will have three opportunities to talk to you. The first opportunity is the opening statement. During the opening statements, the attorneys will introduce their respective stories to you. As I've already instructed, what the lawyers say is not evidence, but, because evidence has already been admitted in the liability phase, the lawyers may show or tell you about evidence in their opening statements. It will be up to you to determine whether the evidence – including the testimony of the witnesses and the admitted documents – supports what the lawyers say in their opening statements. The second opportunity that the lawyers have to talk to you is during transition statements. Lawyers are permitted to make transition statements whenever they call a witness to the stand, to introduce the witness and to briefly explain the relevance of the witness' anticipated testimony. Finally, after all the evidence is in, the lawyers will offer closing arguments to summarize and interpret the evidence for you and to tie the evidence to their story. I will then give you instructions on the law and describe for you the damages matters you must resolve. You will then retire to the jury room to deliberate on your verdict.

EXHIBIT D

ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation

Civ. No. 06-623-SLR

PRELIMINARY JURY INSTRUCTIONS – DAMAGES PHASE

~~**JURY INSTRUCTION NO. 1**~~

~~**INTRODUCTION**~~

Members of the Jury:

Now that you have been sworn in, I have the following preliminary instructions for guidance on your role as jurors in this case.

Case Factual Background

This ~~is a lawsuit arising under the federal antitrust laws known as the Sherman Act and the Clayton Act. The lawsuit was filed in 2006 by two related companies -- ZF Meritor LLC and Meritor Transmission Corporation. I will refer to both of them as "Meritor." Meritor is the Plaintiff in this lawsuit. Meritor sued the Defendant company named Eaton Corporation, which I will refer to as "Eaton."~~lawsuit arises out of a dispute between companies relating to the sales of certain parts—transmissions for heavy duty trucks—that were sold during the applicable time period to companies who made heavy duty trucks for sale and use in North America. This lawsuit was brought by two separate companies in 2006. These companies are Meritor Transmission Corporation, and ZF Meritor LLC. While both Meritor and ZF Meritor have the word "Meritor" in their name, they are separate entities both in fact and for purposes of this trial.

I will refer to Meritor Transmission Corporation as "Meritor" and I will refer to ZF Meritor LLC as "ZFM." Because both of these companies brought this case, they will be referred to as the "Plaintiffs". The Plaintiffs, Meritor and ZFM, brought this suit against Eaton Corporation, which

I will refer to as "Eaton" or "Defendant." The Plaintiffs brought claims in this lawsuit against Eaton under certain federal antitrust laws known as the Sherman Act and the Clayton Act, which I will describe to you in greater detail in a few minutes.

Meritor, ZFM, and Eaton, were at various times, between 1989 and 2007, competitors with each other. Each one manufactured and sold heavy duty truck transmissions ~~in North America. Prior to Meritor entering the market, Eaton was and remained at all applicable times the only major supplier of heavy duty truck transmissions in North America. These heavy duty transmissions are purchased by four truck manufacturers that will be referred to throughout trial as "OEMs" (which stands for~~to truck manufacturers, who used these transmissions, together with many other parts such as engines, axles, and brakes, to build finished trucks. In this case, you will hear these truck manufacturers being referred to as "Original Equipment Manufacturers"~~).~~ or "OEMs." The ~~four OEMs are the only direct purchasers of heavy duty truck~~only customers for the transmissions~~, with the ultimate consumers being the truck buyers.~~ being manufactured and sold by Eaton, ZFM and Meritor were these OEMs. During the time period most relevant to this case, there were only four OEMs who bought essentially all of these transmissions. These OEMs will be referred to as Freightliner, Paccar, International and Volvo/Mack.

Plaintiff Meritor historically sold several different parts to the OEMs other than transmissions. Meritor began selling transmissions after it acquired the transmission business from another company by the name of Rockwell in 1989, and sold two models of manual transmissions, known as 9-speed and 10-speed transmissions, solely for use in the manufacture of line-haul trucks by the OEMs. Line-haul trucks are trucks used for longer distance routes that you may have heard of as either "tractor-trailer trucks" or "eighteen-wheelers." Meritor competed with Eaton in selling these line-haul transmissions from the early 1990's until June of 1999.

Meritor ceased selling transmissions in June of 1999 when it sold its transmission business into the Joint Venture, ZFM, although it continued to sell other parts. Plaintiff Meritor re-entered the transmission market in 2004 until it ceased selling them again in 2007.

Plaintiff ZFM was a company formed in June of 1999 and was a competitor of Eaton in the sales of line-haul transmissions until it exited the market in December of 2003. ZFM was a joint venture of two companies: Meritor and ZF AG. ZF AG is a manufacturer of automated mechanical transmissions, located in Germany. ZF AG must not be confused with ZFM. They are completely different companies. ZF AG, the German company, is not a plaintiff in this case. ZF AG did not bring suit against Eaton in this case, and it has not made any claims for antitrust violations against Eaton. ZF AG had developed and was selling an automated mechanical transmission in Europe beginning in the mid-1990's, but had never sold a transmission product in the United States. One purpose of this new company, ZFM, was to immediately begin to sell a new updated version of Meritor's two 9- and 10-speed manual transmissions, known as the "G" platform, and, soon thereafter import ZF's automated transmission from Germany, make some necessary modifications, and begin selling it to OEMs in the U.S. ZFM introduced the ZF modified automated transmission, known as the Freedomline, for the first time in the middle of 2001. ZFM continued to sell these three products until it was dissolved by Meritor and ZF AG in December of 2003.

Eaton has been in the business of designing, manufacturing and selling heavy duty truck transmissions since at least the early 1950's to the present time. 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. Eaton had a large number of different models of transmissions that were purchased

and used by the OEMs in building different types of heavy duty trucks: line-haul trucks—the long distance 18-wheelers; vocational trucks, which are used in high performance services such as logging and mining; and specialty trucks that are used for shorter distances such as school buses and fire trucks.

Beginning in the mid-1990's it was common for the OEMs to enter into multi-year supply agreements with truck part manufacturers. Eaton had multi-year agreements with the OEMs to sell transmissions, and Meritor had such an agreement with Freightliner. Such contracts were not limited to the sales of transmissions. In addition to its multi-year agreements to sell transmissions, Meritor also had multi-year agreements for the sale of other truck parts, such as axles and brakes.

Eaton entered into ~~long-term agreements or contracts, called "LTAs," with each of the OEMs. These LTAs were of an extended duration~~new supply agreements for the sale of transmissions with the four major OEMs between July 2000 and November 2002. These agreements were with Paccar in July of 2000, with Freightliner in November of 2000, with International in February of 2001, and with Volvo/Mack in November of 2002. These OEM agreements or contracts were of a longer duration, from 5 to 7 years in length, than past agreements, and contained new provisions ~~such as high market share commitments~~, which required each of the OEMs to purchase ~~nearly all~~a high percentage of its heavy duty truck transmissions from Eaton in order to obtain additional rebates ~~and avoid risk of contract cancellation. The LTAs~~ranging from .35% to 3% and, for Volvo/Mack, to keep the agreement's lower prices in effect. Some of the multi-year supply agreements, referred to as "LTAs," also contained requirements that certain of Eaton's transmissions be published as the "standard~~/~~" or "preferred ~~supplier, and in some cases the exclusive offering,~~" transmissions in the OEM's product

catalogs, called databooks, which were made available to truck purchasers, while other Eaton, ZFM, and Meritor transmissions were available as "options".

Plaintiffs' Claims

Meritor and ZFM brought this lawsuit against Eaton~~, alleging that it had violated three~~ in the fall of 2006, several years after ZFM dissolved, alleging that these new agreements with the OEMs, which Eaton entered into over a two and one-half year period, taken together, were anticompetitive, in that they amounted to de facto exclusive dealing contracts. By entering into all four of these agreements, Plaintiffs alleged that Eaton violated the federal antitrust laws. The purpose of the antitrust laws is to preserve free and unfettered competition in the marketplace. The antitrust laws rest on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress. Therefore, a violation of the antitrust laws may cause injury to competition in such ways as I have just described. In addition, the law permits competitors who believe that injury to competition may have had a direct effect upon them and caused them monetary losses to make a claim in court and have the opportunity to prove whether they suffered any monetary loss and the amount of such loss.

In bringing this lawsuit, Meritor and ZFM alleged that Eaton had acquired monopoly power in the North American market for heavy duty truck transmissions and that Eaton used that power, through ~~its LTAs with the OEMs and other conduct~~the new OEM agreements, to prevent other competitors, such as Meritor and ZFM from freely competing for ~~business~~transmission sales to the OEMs, causing ~~injury to Meritor. Meritor also asserted that Eaton, individually and also in concert with the OEMs, engaged in anticompetitive conduct to acquire and maintain monopoly power in the market and to impede competition~~them to incur lost profit damages. Eaton contended that its agreements with the OEMs benefited customers with lower prices; that it provided a wider-range of high-quality transmissions; and that it undertook significant efforts to expand its

output, continue innovating, and to lower its manufacturing costs and the OEMs' engineering and truck assembly costs. It contended that this conduct was pro-competitive and, as a result, it denied Meritor's and ZFM's claims. More specifically, Eaton contended that it did not have the power to control prices to its OEM customers and, in fact, that the OEMs exercised substantial market power over the prices that Eaton was able to obtain for its transmissions. Eaton also denied that it harmed its OEM customers or acted anticompetitively.

The First "Liability" Trial and the Jury's Findings

The trial of this case ~~has been split into two parts, with a different jury for each part. This is the second part – the damages phase. After the first trial (the liability phase), the first jury decided in favor of Meritor. It found that the relevant market was heavy duty truck transmissions in North America, and that Eaton had monopoly power in that market. It further found that Eaton broke three antitrust laws, and that each of Eaton's violations of law caused Meritor injuries. Specifically, the first jury found that:~~was split by the Court into two parts. The first part, which was called the "liability trial," took place before a different jury in the fall of 2009. I will refer to the jury in the first trial as the "liability trial jury." After hearing evidence concerning Plaintiffs' claims and Eaton's defenses to those claims, the liability trial jury decided in favor of Meritor and ZFM.

It found that Eaton entered into OEM agreements that were anticompetitive and, thereby, violated the antitrust laws. The jury verdict form did not ask about any particular agreements, instead asking only whether Eaton entered into "contract(s)" that were anticompetitive and constituted "de facto exclusive dealing." There has been no finding by the liability trial jury in this case that any individual agreement by itself, or any particular provisions of any individual agreement, were anticompetitive taken alone.

The liability trial jury also determined that Eaton's violation of the antitrust laws caused injury to competition and to Plaintiffs. However, that jury did not determine a specific date or dates upon which such injuries may have occurred. The liability trial jury's verdict found only that such injury occurred at some time "since March 28, 2002." As discussed in more detail later, antitrust "injury" is different from antitrust "damages." The liability trial jury did not determine

whether such injury caused Plaintiffs to suffer monetary damages nor did the jury determine the amount of such monetary damages, if any.

Specifically, the liability trial jury found that:

~~—~~1. Eaton willfully acquired and maintained monopoly power in the ~~relevant~~North American heavy duty truck transmission market by engaging in anticompetitive acts or practices, in violation of Section 2 of the Sherman Act~~. Anticompetitive acts are acts, other than competition on the merits, which have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market. The first jury also found that:~~;

~~—~~2. Eaton~~'s contracts (the LTAs~~ entered into contract(s) with the OEMs on or after July 2000, and engaged in other associated conduct that unreasonably restrained trade or foreclosed competition in a substantial portion of the ~~relevant~~North American heavy duty truck transmission market, in violation of Section 1 of the Sherman Act; and that

~~—~~3. An unspecified number of Eaton's contracts with the OEMs constituted de facto exclusive dealing contracts, and Eaton entered into a sufficient number of such contracts so as to substantially lessen competition or tend to create a monopoly in the heavy duty truck transmissions market in North America, in violation of Section 3 of the Clayton Act.

The ~~first jury also found that, with respect to each of these violations of law, the competitive harms associated with Eaton's unlawful conduct outweighed any competitive benefits articulated by Eaton. And that jury found that each of Eaton's violations caused Meritor to suffer antitrust injuries to its business or property since March 28, 2002.~~ liability trial jury also found that, with respect to each of these violations of law, that the harm to competition associated with Eaton's unlawful conduct outweighed any competitive benefits proved by Eaton. Finally, the

liability trial jury found that each of Eaton's violations caused Plaintiffs to suffer antitrust injury to their businesses or properties at some time after March 28, 2002.

There are certain facts that you must accept as true for purposes of this trial:

1. At all times, both before and after the contracts were in effect, the prices that Eaton charged for transmissions under the contracts were lower than ZFM's prices and not anticompetitive.

2. The jury did not find any anticompetitive conduct by Eaton prior to the four OEM contracts between 2000 and 2002. Moreover, while the jury found that Plaintiffs suffered antitrust injury since March 28, 2002, the jury did not specify the specific point in time that such injury occurred after March 28, 2002.

It is up to you, as jurors, therefore, to determine when, after March 28, 2002, the contracts caused Plaintiffs antitrust injury and whether they suffered any damages. You should therefore assume that Eaton's success before that time, and Plaintiffs' lack of success, was the result of competition in the market, overall market effects, or other factors, and was not the result of any anticompetitive conduct.

This Trial: The "Damages Trial"

This trial, for which you have been chosen to serve as jurors is the second trial in this proceeding, which I will refer to as the "damages trial." By referring to this as the "damages trial," I am not implying that Plaintiffs were damaged or that you must find damages for Plaintiffs. The purposes of the "damages trial" is to give Plaintiffs the opportunity to prove whether damages occurred as a result of injury to competition, what type of damages may have been sustained by Plaintiffs, whether Eaton caused such damages, whether those damages can be calculated in monetary terms, and if so, the actual amount of such damages. It is plaintiff's burden to prove that such damages exist.

These ~~findings are conclusive. They are binding on this jury. You are not to reconsider them. The verdict form from the liability phase trial, and well as the instructions I gave that jury for completing that form, are part of the record in the damages phase trial. They will be available to you during your deliberations at the close of evidence.~~

~~Your job as the damages phase jury is to enforce the antitrust laws, in light of the verdict from the liability phase. In this case, you have one thing to decide and one thing only, according to these instructions and the instructions that I will give you at the end of the trial. You must decide the dollar amount of damages which Meritor suffered as a result of Eaton's illegal conduct.~~

~~**JURY INSTRUCTION NO. 2**~~

~~**DUTY OF JURY**~~issues of damages were ***not*** a subject of the liability trial. Therefore, the liability trial jury did not hear evidence, consider or decide whether Plaintiffs were entitled to damages as a result of anticompetitive conduct. Nor did they consider or decide when such damages may have begun to occur, or the dollar amounts of such damages, if any.

The verdict form from the liability trial is part of the record in this trial. It will be available to you during your deliberations at the close of evidence. 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, even though you may disagree with them.

However, whether Plaintiffs suffered any non-speculative damages that were caused solely by Eaton's conduct and, if so, the amount of those damages and when they began and ended, is the subject of this trial. It lies solely with you, as jurors, to decide these questions, based upon the evidence presented to you over the next several days and the instructions of law that I will give you at the conclusion of all of the evidence to guide your deliberations.

Damages – Burden of Proof

Now, I will give you some preliminary instructions to assist you in understanding the evidence that you are about to hear concerning the issue of damages.

The Plaintiffs in this case, Meritor and ZFM, each individually, at all times during this trial, have the sole burden of proving any damages claimed by them that may have directly resulted from the anticompetitive conduct found to have existed by the liability trial jury. In doing so, they must satisfy the following burdens of proof:

1. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, that they suffered the specific type of damages to their businesses or properties that was directly caused by the anticompetitive multi-year supply agreements;

2. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, when the actual effects of the anticompetitive conduct, which directly caused them to suffer damages, began and ended;

3. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable degree of certainty, that type of damages proven can be compensated in monetary terms; and

4. Plaintiffs must prove, by a preponderance of the evidence and to a reasonable certainty, the amount, in dollars, of the damages actually suffered, and when they began and ended.

Plaintiffs' proof must be based upon credible factual evidence they present to you and may not be based on speculation or guesswork. If Plaintiffs rely upon estimates or projections, they must be reliable and reasonable, based upon the factual evidence and not merely conjecture.

Damages – Expert Witnesses

You will hear testimony from expert witnesses in this case. These experts were retained by the parties to present evidence related to damages. These experts have been retained by the parties to assist in presenting each parties' positions on damages and may provide you with calculations and other information normally used by experts. You are free to accept or reject their testimony in part or in its entirety. You are the sole judges of the credibility of witnesses, including expert witnesses. If an expert witness provides any opinion of damages, it is your responsibility to determine the credibility, reliability and reasonableness of such estimates. In determining the issues related to damages, you are not bound by the testimony of any expert or experts. If you find the testimony or the calculations of any expert to be unreliable you may disregard that expert's testimony or calculations altogether.

Damages – Causation

The type of damages Plaintiffs claim and the amount of such damages in dollars must be a direct result of the anticompetitive activity determined by the liability trial jury. In other words,

the damages claimed must be the direct result of the anticompetitive conduct. The damages claimed by Plaintiffs may not be the result of other legal or competitive conduct by Eaton.

If there are two or more causes for any loss that Plaintiffs have claimed to have suffered, Plaintiffs have the sole burden of proving the actual portion of loss suffered as a result of the anticompetitive conduct as opposed to legal competitive activities, market forces in general, or actions taken by Plaintiffs themselves, such as poor business decisions or the failure to respond to fair and rigorous competition, which may have contributed to Plaintiffs' claimed "losses."

Damages - Disaggregation

If the amount of damages solely attributable to anticompetitive activity cannot be separated by you from the amount of harm caused by other factors except through guesswork or speculation, then you may not award any damages.

Damages – Mitigation

As a matter of law, Plaintiffs have an obligation in an antitrust case to take all reasonable steps to compete in the market and to take any commercially reasonable measures available to them to limit the damages that may result from the anticompetitive conduct. The Plaintiffs may not increase their damages through inaction. Eaton, in this case, may offer evidence that Plaintiffs failed or refused to take reasonable and available actions to compete in the market which would have had the effect of creating or increasing the damages that they now claim. Eaton has the burden of proving that Plaintiffs failed to take such actions by a preponderance of the evidence. If you determine that Eaton has met such a burden, then the damages you calculate must be reduced in whole or in part as a result of Plaintiffs' failures to act reasonably.

Damages – All of the Evidence Must be Considered

Although, as I have said, Plaintiffs have the burden of proving every element of damages by a preponderance of the evidence, you must consider all of the evidence presented by the Plaintiffs and Eaton during this trial in determining whether Plaintiffs have satisfied their burdens of proof.

Damages – Actual Business Losses Not Penalties

Your duty in determining damages in this case, if any, is to determine only the actual losses to Plaintiffs' businesses or properties that resulted from Eaton's anticompetitive conduct as carefully and accurately as possible. You may not increase such damages by assessing additional damages or any type of penalty or other type of exemplary or punitive damages, regardless of how you may feel about Eaton's conduct. Any additional or other damages that may be assessed against Eaton after you reach your determination are solely within the province of this Court and the statutory laws.

Facts of This Case

The jury in the liability trial heard a substantial amount of evidence over the course of the five-week trial. Some of the evidence is not relevant to your deliberation here, but some of the evidence may be relevant to your consideration in this trial.

In addition to the facts that I have already given you describing the parties and the verdict from the liability trial, there are certain other facts presented at the liability trial that are relevant to your consideration of this case. These facts include:

[*Insert if any*]

The parties have also stipulated to certain facts that they have agreed upon in advance of this trial which I will now read to you:

[Insert if Applicable]

The Evidence and Your Duty as Jurors

It will be your duty to decide what the facts are, based solely on the evidence as presented at trial. You, and you alone, are the judges of the facts. You will have to apply those facts to the law as I will instruct you at the close of evidence. You must follow that law whether you agree with it or not. ~~You are the judges of the facts. I will decide which rules of law apply to this case. Nothing~~However, nothing I say or do during the course of the trial is intended to indicate what your verdict should be.

With respect to the evidence, the evidence from which you will find the facts will consist of the testimony of witnesses and documents and other things admitted into evidence. Some of the documents and testimony that were admitted as evidence in the liability ~~phase~~ trial will also be used as evidence during this damages ~~phase~~ trial. Evidence from the liability ~~phase~~ trial is entitled to the same consideration and is to be judged, insofar as possible, in the same way as evidence being admitted for the first time during this damages ~~phase~~ trial. In addition, the evidence may include certain facts as agreed to by the parties or as I instruct you.

In the course of the case, you may hear previously taken deposition testimony. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers from each party may ask questions. A court reporter is present and records the questions and answers. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify at trial.

~~You~~As I have previously stated, you will also hear testimony taken from the first part of the case – the liability ~~phase~~trial. That testimony was taken during the first trial, the witness was placed under oath and swore to tell the truth, and the lawyers from each party were able to ask

questions. A court reporter was present and recorded the questions and answers. Testimony from the liability ~~phase~~ trial is entitled to the same consideration, and is to be judged, insofar as possible, in the same way as if the witness had been present to testify in this trial.

In judging the facts, it will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness' testimony to accept or reject.

~~In the course of the trial~~As previously mentioned, you will also hear from expert witnesses. When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field – that person is called an expert witness – is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it and how much weight to give that testimony.

Another point on evidence: ~~Because~~because pre-trial fact discovery in this case basically ended in early 2009, and in light of other legal reasons, you may not see or hear much or any evidence about events over the last few years. This is a matter of legal procedure, and you are to draw no inference, positive or negative, about any such matters not included in the evidence.

Certain things are not evidence. Statements, arguments and questions by lawyers are not evidence. Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe testimony or exhibits being offered into evidence are not admissible under the Rules of Evidence. You should not be influenced by a lawyer's objection or by my ruling on the objection. If I sustain or uphold the objection, and find the matter is not admissible, you should ignore the question or other item of evidence. If I overrule an objection and allow the matter in evidence, you should consider the testimony or other item of evidence as you would any evidence. If I instruct you during the trial that some item of evidence is admitted

for a limited purpose, you must follow that instruction and consider the evidence for that purpose only. I will instruct you further during the trial if this happens.

Conduct as Jurors

Now, a few words about your conduct as jurors. You should not reach any conclusions as to the issues presented until all the evidence is in and you have been given your final instructions. You may write questions down and give them to my courtroom deputy. She will give the questions to me and I will pass them along to the attorneys, who may or may not try to incorporate your questions into their examinations.

~~Finally, you~~You must only consider the evidence presented in the courtroom. Anything you see or hear outside the courtroom is not evidence and must be disregarded. ~~You are to decide this case solely on the evidence presented here in the courtroom.~~ Do not read or listen to anything touching on this case, the parties, or on the antitrust laws generally, that is not admitted into evidence, except as I allow. By that I mean, if there may be a newspaper or internet article or radio or television report relating to this case, or the parties, or the antitrust laws, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own, or speak to anyone other than as I specifically allow, on matters relating to this case, or the parties, or to the antitrust laws in general, including on the telephone, in person, on the internet or through social media.

The proceedings during the trial will be transcribed by court reporters; however, it is not the practice of this Court to make the trial transcripts available to jurors. You must rely on your own recollection of what testimony was presented and how credible that testimony was.

If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils and paper. If you do take notes, please keep them to yourself until the end of the trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note-taking. First, note-taking is

permitted, but it is not required. You are not required to take notes. How many notes you want to take, if any, is entirely up to you. Second, please make sure that note-taking does not distract you from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said, and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations. Third, your notes are memory aids; they are not evidence. Notes are not a record or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes.

Now – and this does not have to do with note-taking – please wear your juror identification tags every day so that the parties can avoid engaging you in conversation, thereby bringing your impartiality into question.

Course of the Trial

Once the trial has begun, the attorneys will have three opportunities to talk to you. The first opportunity is the opening statement. During the opening statements, the attorneys will introduce their respective stories to you. As I've already instructed, what the lawyers say is not evidence, but, because evidence has already been admitted in the liability phase, the lawyers may show or tell you about evidence in their opening statements. It will be up to you to determine whether the evidence – including the testimony of the witnesses and the admitted documents – supports what the lawyers say in their opening statements. The second opportunity that the lawyers have to talk to you is during transition statements. Lawyers are permitted to make transition statements whenever they call a witness to the stand, to introduce the witness and to briefly explain the relevance of the witness' anticipated testimony. Finally, after all the evidence is in, the lawyers will offer closing arguments to summarize and interpret the evidence for you and to tie the evidence to their story. I will then give you instructions on the law and describe for you the damages matters you must resolve. You will then retire to the jury room to deliberate on your verdict.

Document comparison by Workshare Compare on Saturday, April 19, 2014 2:59:01 PM

Input:	
Document 1 ID	PowerDocs://DSMDB/3243090/4
Description	DSMDB-#3243090-v4-Damages_Trial_-_Proposed_Preliminary_Jury_Instructions
Document 2 ID	file://H:\My Documents\DC-#754206-v5-Eaton_-_Damages_Trial_Proposed_Preliminary_Jury_Instructions.DOC
Description	DC-#754206-v5-Eaton_-_Damages_Trial_Proposed_Preliminary_Jury_Instructions
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	113
Deletions	48
Moved from	2
Moved to	2
Style change	0
Format changed	0
Total changes	165

EXHIBIT E

ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation

Civ. No. 06-623-SLR

DAMAGES JURY INSTRUCTIONS

As a reminder, I will refer to both plaintiffs, Meritor and ZF Meritor, as "ZFM."

Instruction No. 1

Damages – Conclusiveness of the First Jury Verdict

As I told you at the beginning of the day, the findings of antitrust violation and injury in favor of ZFM and against Eaton are conclusive and you are not to reconsider them. This means that you are not to consider whether or not Eaton violated the law or whether or not ZFM suffered any injury as a result of Eaton's violation. Your job is to decide what damages should be awarded to ZFM as a result of that violation and injury.

ZFM is entitled to recover for all damages to its business or property after March 28, 2002 that were a direct result or likely consequence of the conduct the first jury found to be unlawful. You may not, however, award damages for injuries or losses not caused by Eaton's unlawful conduct.

Instruction No. 2

Antitrust Damages - Purpose

The law provides that ZFM should be fairly compensated for all damages to its business or property after March 28, 2002 that were a direct result or likely consequence of the conduct that the first jury found to be unlawful.

The purpose of awarding damages in an antitrust case is to put injured plaintiffs as near as possible to the position in which they would have been if the antitrust violation had not

occurred. The law does not permit you to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter Eaton from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award to ZFM an amount for attorneys' fees or the cost of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are designed to compensate ZFM for the particular injuries it suffered as a result of the violation of the law.

Instruction No. 3

Burden Of Proof -- Preponderance Of The Evidence

This is a civil case. ZFM has the burden of proving damages by what is called a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely true than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.

Preponderance of the evidence does not depend on the number of witnesses. If the evidence as to a particular element or issue is evenly balanced, the party has not proved the element by a preponderance of the evidence and you must find against that party.

Those of you who are familiar with criminal cases will have heard the term proof beyond a reasonable doubt. That burden does not apply in a civil case and you should therefore put it out of your mind in considering whether or not a party has met its burden of proof.

Instruction No. 4

Antitrust Damages - Calculation

Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inference, and instead can only be reached through guesswork or speculation, then you may not award damages.

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damages suffered by ZFM. Plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. Since ZFM has established the existence of injury proximately caused by Eaton's antitrust violations, you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable basis in the evidence for a damages award, ZFM should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.

Instruction No. 5

Damages – Lost Profits

The liability phase jury found that Eaton violated the antitrust laws and caused ZFM antitrust injuries. ZFM claims that it lost profits as a result of Eaton's antitrust violations. Lost profits are the amount of profits that ZFM lost as a result of Defendant's antitrust violations. To calculate lost profits, you must calculate net profit: the amount by which ZFM's gross revenue would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. If you find that ZFM's gross revenue would not have exceeded its costs, you

still may award damages if you find that they would have lost less in the absence of Eaton's antitrust violations.

ZFM has proposed to calculate the net profits it would have earned if there had been no antitrust violation by showing evidence of the market share it would have had in the absence of Eaton's antitrust violations. If you find that ZFM has shown reliable evidence of what its market share would have been in the absence of the antitrust violation, then you may calculate ZFM's lost profits by considering market share, evidence of the size of the market, and evidence relating to the profit margin ZFM would have secured on such sales. You may find, however, that ZFM has not shown reasonable evidence of what its market share would have been in the absence of the antitrust violation, such as if ZFM's market share was impacted by product quality, recession, prices, foreign exchange rates, or other factors. You may also find that ZFM has not shown reasonable evidence of the profit margin it would have incurred in the absence of the antitrust violation. If you find that the evidence of ZFM's market share and/or profit margins is not reasonable, and that lost profits may only be calculated using speculation or guesswork, you may not award damages for lost profits based on market share or profit margins.

Instruction No. 6

Damages – Lost Enterprise Value or Going Concern Value

The liability phase jury found that Eaton violated the antitrust laws and caused ZFM antitrust injuries. ZFM claims that, had it not been for Eaton's antitrust violations, the "lost enterprise value" or "going concern value" of its business would have been higher than it actually was as of February 2009. The most important element of going concern or company value is the expectation of future profitable operations. You may consider the anticipated future

profits of a business as a factor in determining the loss of the going concern or company value of that business.

Instruction No. 7

Damages - Multiple Violations

The first jury found in favor of ZFM on multiple violations in this action. If you find that ZFM is entitled to damages, you are to consider the question of damages together for all violations. You should consider them to be overlapping and not award damages more than once.

EXHIBIT F

Schoell, Joseph C.

Subject: FW: Pretrial Order DRAFT

From: Hackett, Jennifer
Sent: Saturday, May 03, 2014 11:09 AM
To: joseph.ostoyich@bakerbotts.com
Cc: DWebb@winston.com; FastowJ@ballardspahr.com
Subject: Re: Pretrial Order DRAFT

We have to, under the rules, meet and confer about the witness and exhibit lists. Last time we did that at the very end, before the pretrial conference, when had BOTH done our submissions. It doesn't make sense to do it otherwise. But Dan suggested that we talk in general about evidence getting in, etc., which is why I thought you brought it up as a subject for the meet and confer that you originally requested for the preliminary instructions (and we agreed to as long as it didn't push the date for submission of the instructions too far out). Regardless, I agree that further email exchanges are probably unproductive at this point. You will have our witness and exhibit lists on Monday.

-------- Original message --------
From: joseph.ostoyich@bakerbotts.com
Date: 05/03/2014 10:58 AM (GMT-05:00)
To: "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com>
Cc: DWebb@winston.com,FastowJ@ballardspahr.com
Subject: Re: Pretrial Order DRAFT

Jen, it may still make sense to have a meet and confer on the jury instructions and, maybe separately, on witness and exhibit lists. But until we get your complete pre-trial proposal and have a chance to digest what you are proposing, it's difficult to tell. At this point, not sure more email traffic is productive. Send us your complete proposal on Monday and we'll get back to you. We will expect a commensurate push back of our pre-trial proposal date, obviously. Joe

Sent from my iPad

On May 3, 2014, at 10:11 AM, "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com> wrote:

> That is completely contrary to what we discussed. You called to suggest a meet and confer about the proposed preliminary jury instructions because you did not want to submit separate proposals. When we spoke on the phone, we talked about raising evidentiary issues in general during that meet and confer, but I made very clear (and it was my understanding that we agreed on that) that it would have to be a general discussion on the evidence, with a further, more comprehensive meet and confer on the exhibits and designations at a later time. We were able to work cooperatively with respect to that last time, but it appears now that you no longer wish to operate as we agreed on our conference call. Given that, we will send you our exhibit and witness lists on Monday. I will note, since you keep referencing the rules, that they only require, for the first submission, that plaintiffs give defendants access to their proposed trial exhibits. As we have repeatedly discussed, our exhibit list will consist almost entirely of the exhibits admitted at trial in the liability phase. You have access to those. The rules also say that the deadlines can be modified by agreement of the parties. While I recognize (and acknowledged last night) that

we did not have such an agreement for the pretrial order itself and we miscalculated the date by 2 days, it was my understanding based on our telephone conferences that we did have such an agreement on the exhibits and designations. Given that it does not appear that you no longer wish to operate under that agreement, as I said, we will get you the exhibit list and witness list on monday and our designations as soon as we can after that.

Jen

-------- Original message --------
From: joseph.ostoyich@bakerbotts.com
Date: 05/03/2014 9:46 AM (GMT-05:00)
To: "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com>
Cc: DWebb@winston.com
Subject: Re: Pretrial Order DRAFT

Jen, the meet and confer was suggested for after we received your complete proposed per trial order. Otherwise, there is nothing to meet and confer about, as we don't know what you are proposing and, obviously, the evidence we propose to use at trial to some extent depends on what you propose. What you sent last night was not only late under the rules, but didn't contain key required elements. When do you plan to get us a complete per-trial proposal? Not sure about the preliminary instructions meet and confer at this point, but will let you know. Joe

Sent from my iPad

On May 3, 2014, at 9:38 AM, "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com> wrote:

> Joe,
> I want to make sure I understand what you mean by asking me if it's the "complete" pto draft. As I told you last night, the statement itself is complete subject to your additions and any edits based on those and Court decisions. The draft did not include our witness and exhibit list, although those obviously are part of our pretrial subnissions. I did not include them last night because you and Dan Webb and I discussed putting together a schedule for exchanging those and the designations (and indeed, when we talked about the meet and confer for the proposed preliminary instructions, we talked about having a discussion about evidence in general, with the understanding that submissions would not have been exchanged). That method worked well last time for the liability phase trial and we all agreed on the phone that it was a good way to operate in this phase as well. If you no longer wish to operate on such a schedule, please let me know and I will get you our witness and exhibit lists on Monday because those are, of course, part of our pretrial submissions. As we discussed, those lists will not be a surprise to you. We all are familiar with these documents and witnesses by now.
>
> In addition, I have not heard back from you about the meet and confer for the proposed preliminary instructions. Please let me know as soon as possible if you still would like to do that. If not, we intend to submit our proposed instructions on Friday of next week.

Please let me know as soon as possible whether you are still interested in entering into a schedule for submissions. If not, you will get our witness and exhibit lists on Monday.

Thanks,

Jen

-------- Original message --------
From: joseph.ostoyich@bakerbotts.com
Date: 05/02/2014 9:06 PM (GMT-05:00)
To: "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com>
Subject: Re: Pretrial Order DRAFT

Jen, not sure what's going on, but this is a deadline driven by the court. When are we going to get your complete pre-trial draft?

Sent from my iPad

On May 2, 2014, at 8:49 PM, "Hackett, Jennifer" <HackettJ@dicksteinshapiro.com> wrote:

> Joe --
>
> Thanks for your email today. We had a miscalculation of our dates and were planning to send this to you Tuesday, so I apologize for the delay (although I will note that I mentioned to you on the phone call last week that we were planning to submit it on Tuesday, in the context of our meet and confer discussion, and you did not say anything about the date -- but regardless, we miscalculated and I apologize). Attached is a draft pretrial order, with blanks for your sections (if any). I'm sending it to you in Word so that you can redline it if you wish. This is just a draft, and we reserve our rights to edit it as needed based on rulings by the Court, the outcomes of our meet and confers, etc.
>
> As we discussed on the phone, I will send you a draft schedule for exchange of witness lists (I still think it would be helpful to discuss live witnesses at the meet and confer next week if we are still planning to do that), exhibit lists, trial designations and exhibit designations -- I will send you that schedule over the weekend. With respect to the meet and confer on preliminary instructions, please let me know if you are still interested in doing that and if so, when (and when you plan to send us an updated draft of your proposed instructions), so that I can make arrangements.
>
> Thanks,
>
> Jen

<Plaintiffs' PTO damages phase DRAFT.doc>

DICKSTEINSHAPIRO LLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

May 10, 2014

Via Email

Joe Ostoyich
Baker Botts LLP
The Warner
1299 Pennsylvania Ave. NW
Washington DC 20004

Re: Pretrial Submissions

Dear Joe:

I got your voicemail yesterday, in which you said that Eaton intends to "seek relief from the Court" regarding Plaintiffs' witness and exhibit lists because they include more witnesses and exhibits than can be put on in an 8-day trial. Eaton's attempt to compel Plaintiffs to amend their pretrial submissions at this time (1) does not comport with the Local Rules or Judge Robinson's Trial Guidelines; (2) is unreasonable given Eaton's substantive assertions about the breadth of its intended arguments at trial; and (3) is unnecessary given the limited amount of work that is required for Eaton to respond to Plaintiffs' submissions.

As you are well aware, in the liability phase of this trial, both parties designated many more witnesses, exhibits and deposition segments than were eventually used at trial. As you are also aware, the Court's Trial Guidelines require that each party give the other 48 hours notice of the witnesses they intend to call at trial and 72 hours notice of deposition or trial designations. We all worked cooperatively under those Guidelines last time. There is nothing in the Rules or the Guidelines that requires either side to narrow their pretrial designations to only those they definitively intend to use in their cases in chief, which is understandable given that much of the evidence the parties present depends on the way in which matters evolve during trial. In any event, I attempted, by both email and in telephone conferences with you and Dan Webb, to set up an initial meet and confer, before any exchange of pretrial designations, to try and come to general parameters about those designations. Had you engaged in such a discussion, or a discussion regarding the parties' proposed preliminary jury instructions, it is possible that the scope of both parties' designations could have been narrowed by an agreement between the parties that then could have been taken to the Court. You did not follow through with those discussions, however, and now are attempting to require us to meet and confer when we do not yet have your pretrial submissions and before any rulings from the Court on the scope or method of admitting evidence.

Plaintiffs' designations for the damages phase of this trial are, in large part, responsive to the themes set forth in Eaton's expert report, proposed preliminary jury instructions, and the conversation I had with you about Eaton's intent to argue "disaggregation" (an issue which, of course, the Court and the Third Circuit have already rejected as a matter of law). For instance, Eaton is asking the Court to instruct the damages phase jury that "The damages claimed by Plaintiffs may not be the result of other legal or competitive conduct by Eaton. If there are two or more causes for any loss that Plaintiff have claimed to have suffered, Plaintiffs have the sole burden of proving the actual portion of loss suffered as a result of the anticompetitive conduct as opposed to legal competitive activities, market forces in general, or actions taken by Plaintiffs themselves, such as poor business decisions or the failure to respond to fair and rigorous competition, which may have contributed to Plaintiffs' claimed 'losses.'" Dr. Sibley points to alleged quality "problems," Plaintiffs' alleged failure to offer rebates or other incentives to customers, alleged problems arising from Plaintiffs' "lack of a full line," etc., all the while ignoring that Eaton was found in violation of the antitrust laws. It is clear from these examples and others that Eaton intends to reargue many, if not all, of the issues that were raised at the first phase. Given that, Plaintiffs prepared their pretrial submissions in such a way to protect themselves in the event the Court allows Eaton to go into those issues again. Had Eaton attended a meet and confer regarding the proposed preliminary jury instructions before requiring Plaintiffs to submit their pretrial submissions, as we discussed, it is possible that the parties could have worked through some of these issues.

Finally, I note that you did not respond to my email on Thursday stating that there is really very little for Eaton to do to respond to our designations. The deposition designations, as I stated, are the same as they were before, and many of them are already in evidence -- counter-designations and objections should therefore also be the same. We designated those witnesses we might call live and I told you that the vast majority of the exhibits we intend to use were already admitted at the liability phase. To the extent exhibits were not admitted before, they were (with very few exceptions which are identifiable by the lack of a PTX number) on Plaintiffs' original exhibit list, so the objections to those should be done as well. That only leaves trial designations, and Eaton has had those trial transcripts for years (and have known about the damages trial for 5 months). Therefore, we are unclear on the type of relief Eaton intends to seek from the Court, especially given that we do not yet have Eaton's responsive submissions or comments to Plaintiffs' proposed pretrial order.

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Plaintiffs have been and remain more than willing to engage in a meet and confer after we receive Eaton's pretrial submissions. Until then, a meet and confer would be one-sided and only advantageous to Eaton.

Sincerely,

/s/

Jennifer D. Hackett