UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

ZF MERITOR LLC and MERITOR TRANSMISSION CORPORATION, Plaintiffs, v. EATON CORPORATION, Defendant.	Civil Action No. 06-623-SLR **REDACTED PUBLIC VERSION**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

APPENDIX

EXHIBIT	DOCUMENT DESCRIPTION	APPENDIX PAGE RANGE
1	DX 0308	000001 - 000002
2	July 29, 2009 Hearing Transcript	000003 - 000020
3	March 6, 2013 David DeRamus Deposition Transcript	000021 - 000125
4	February 17, 2009 DeRamus Expert Report	000126 - 000320
5	March 13, 20009 David DeRamus Deposition Transcript	000321 - 000414
6	DX 0043	000415 - 000416
7	January 12, 2009 Antonio Lopes Deposition Transcript	000417 - 000490
8	DX 0287	000491
9	DX 0400	000492 - 000494
10	DX 0310	000495 - 000496
11	DX 0503	000497 - 000516
12	DX 0383	000517 - 000518
13	DX 0443	000519 - 000520
14	DX 0004	000521 - 000530
15	January 9, 2009 Richard Martello Deposition Transcript	000531 - 000623
16	DX 0722	000624
17	November 24, 2008 Mark Kollasch Deposition Transcript	000625 - 000688
18	DX 0303	000689 - 000694
19	August 27, 2009 Hearing Transcript	000695 - 000709
20	January 16, 2013 DeRamus Amended Expert Report	000710 - 765

Eaton Corporation ("Eaton") respectfully submits this memorandum in support of its motion for judgment as a matter of law. Plaintiffs' failure to proffer admissible damages evidence means they have failed to prove a required element of all of their claims. That failure is fatal *even if* their damages model was reliable, and it is not, because they have proffered no means for the jury to disaggregate business losses attributable to Eaton's lawful, lower prices (which the Third Circuit has now held is not a valid basis for liability) from damages caused by Eaton's non-price conduct (which the Third Circuit has said is a valid basis).[1] The failure to disaggregate, by itself, renders Plaintiffs' damages too speculative to get to a jury.[2]

The problem is exacerbated here because Plaintiffs did not ask for a verdict form that differentiated between Eaton's prices and its non-price conduct (or, indeed, any of the different types of non-price conduct). Thus, critical fact-findings that would normally be established by a verdict are now unknown. For example, did the first jury think all four contracts were unlawful, or only one or two of them? Was the first contract (Paccar, July 2000) unlawful, or only the last one (VolvoMack, October 2002)? Did the jury believe all databook terms in all of the contracts were unlawful, or only some of them, and which ones? Nor did the jury delineate *when* Eaton's conduct, whatever it was, caused Plaintiffs antitrust injury. It simply found injury at some unidentified time "since March 28, 2002." D.I. 217.

These are not academic questions. They are the factual predicates necessary for a sound and reliable damages estimate. Clayton Act Section 4 and long-standing Supreme Court case law only permit juries to award damages that are attributable to *unlawful* conduct. But here, a

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[1] Eaton has filed a *petition for certiorari* asking the Supreme Court to reverse the Third Circuit's ruling that the "non-price" conduct at issue can be a legally sufficient basis for a violation of the antitrust laws. For purposes of this brief only, however, Eaton will use the phrase non-price conduct as it was used by the Third Circuit.

[2] Eaton simultaneously files a motion to exclude Dr. De Ramus's amended opinion testimony.

second jury considering damages would be left to guess which conduct the first jury considered unlawful and when it caused plaintiffs antitrust injury.

As a result, any proper re-trial would necessarily have to include the highly intertwined issues of both liability (and, in particular, antitrust injury) *and* damages. And any proper verdict form would need to ask the jury to render its verdict only on specific non-price conduct and to delineate if and when that conduct caused Plaintiffs antitrust injury. But here, that is moot: even if a subsequent liability and damages jury could theoretically render a verdict on the precise non-price conduct at issue and when it cause antitrust injury, Plaintiffs would still have no valid damages proof. That is because their expert's damages opinion is based on [redacted] of Eaton's conduct on an [redacted] Ex. 3 at App. 117 [redacted]. In other words, it includes losses caused by Eaton's lawful, lower, prices and by Eaton's non-price conduct, such as innovation, better service, and better resale value, which goes far beyond the non-price conduct identified by the Third Circuit as sufficient to affirm this Court's denial of Eaton's Rule 50 motion. Plaintiffs' failure to disaggregate those losses would thus inevitably require judgment as a matter of law even if both liability and damages were re-tried.[3]

This is a problem of Plaintiffs' own creation. It was not inevitable. But, when the case was bifurcated, they chose not to ask for a special verdict form which set out specific, individual anticompetitive acts and when they caused antitrust injury. They also chose to proffer a damages opinion based on "the totality" of Eaton's "aggregate" conduct without disaggregating losses attributable to Eaton's lawful competitive conduct, such as its lower, above-cost prices, or to Plaintiffs' own self-inflicted quality and other problems. In the words of this Court, plaintiffs decided to "just throw[] everything that happened during this three years into the mix . . . and hop[e] anti-

[3] There is no injunctive relief left. The Third Circuit reversed this Court's injunction. *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 300 (3d Cir. 2012).

trust theory floats to the top." Ex. 19 at App. 700 (Aug. 27, 2009 hearing). The result is that Eaton's motion for judgment as a matter of law should be granted.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs ZF Meritor LLC and Meritor Transmissions Corporation (collectively, "ZFM") filed suit in this Court against Eaton alleging that supply agreements between Eaton and OEM truck manufacturers violated Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. On May 11, 2009, after the completion of fact and expert discovery, Eaton moved to exclude the testimony of Dr. David DeRamus ("DeRamus"), ZFM's proffered expert. On August 20, 2009, this Court excluded DeRamus's damages testimony, finding his opinion "unreliable[.]" *ZF Meritor LLC v. Eaton Corp.*, 646 F. Supp. 2d 663, 666-67 (D. Del. 2009).

The Court held a trial on liability alone and the jury found Eaton liable on October 8, 2009, despite this Court's finding that "each customer remained free to buy HD transmissions from other suppliers, including ZFM," and that "at all times relevant to this dispute, Eaton's average prices were lower than [ZFM's] average prices." *Id.* at 665. Plaintiffs did not ask for a verdict form that delineated what precise Eaton conduct was unlawful or when that conduct caused ZFM antitrust injury.[4] On March 10, 2011, the Court denied Eaton's renewed motion for judgment as a matter of law. On August 4, 2011, the Court awarded ZFM zero dollars in light of its failure of proof on damages. On December 16, 2011, Eaton appealed the denial of its Rule 50

[4] The verdict sheet merely asked in broad terms whether ZFM proved that Eaton entered into a "contract, combination, or conspiracy . . . that unreasonably restrained trade" or "constituted *de facto* exclusive dealing arrangements," or whether Eaton committed acts that amounted to an "unlawful acquisition or maintenance of monopoly power." There is thus no way to determine whether the jury thought that *all* or only *some* of the LTAs (or databook terms in the LTAs) were anticompetitive (or something else altogether). These unknown answers are significant, given the Third Circuit's recognition that the LTAs did not all contain the non-price terms it identified, *ZF Meritor*, 696 F.3d at 265 (only two of four LTAs "gave Eaton the right to terminate the agreements if the share penetration goals were not met"), and that some ZFM transmissions remained in all of the OEMs' databooks at least until ZFM dissolved. *Id.*

motion, and on February 1, 2012, ZFM cross-appealed.

On September 28, 2012, a divided Third Circuit affirmed in part and reversed in part. The majority agreed with this Court that "[a]t all times relevant to this case, Eaton's average prices were lower than ZFM's average prices, and on several occasions, ZFM declined to grant price concessions requested by OEMs." *ZF Meritor*, 696 F.3d at 266-67. The majority also recognized that "Eaton never priced at a level below its costs" held that "prices are unlikely to exclude equally efficient rivals unless they are below cost." *Id.* at 267, 281; *see also id.* at 275 ("generally, above-cost prices are not anticompetitive"), 278 ("the Supreme Court has created a safe harbor for above-cost discounting"). Nonetheless, the majority affirmed the denial of Eaton's Rule 50 motion based on Eaton's purported non-price conduct. *Id.* at 277, 281. Finally, the majority affirmed this Court's exclusion of ZFM's damages expert in its entirety and agreed that DeRamus's opinion "bore insufficient indicia of reliability." *Id.* at 291. The Court remanded for this Court to assess whether DeRamus's after-the-fact amended damages opinion, submitted months after the close of fact and expert discovery, could pass muster under the Federal Rules of Evidence and *Daubert, Joiner,* and their progeny. *Id.* at 301. In light of that open issue remaining to be resolved on remand, the Court did not rule on Eaton's alternate request that a new trial, if any, should encompass both liability and damages.[5]

SUMMARY OF ARGUMENT

1. The Supreme Court has repeatedly mandated (and the Third Circuit held here) that unilaterally set above-cost prices are lawful and cannot give rise to antitrust injury or damages. As a result, an antitrust plaintiff must separate out business losses caused by lawful prices (or other lawful conduct) from damages caused by the ***unlawful*** acts of the defendant. *Bruns-*

[5] *See also* Response and Reply Brief of Appellant/Cross-Appellee Eaton Corporation, at 12 n.2.

wick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); 15 U.S.C. §15(a) (plaintiff may recover damages caused only "by reason of anything forbidden in the antitrust laws").

2. Thus, the Third Circuit, and every Circuit that has addressed the issue, has ruled that when defendant's lawful acts and other, unrelated factors, such as a plaintiff's self-inflicted wounds or bad luck, contribute to the plaintiff's injury in addition to the defendant's alleged unlawful conduct, the plaintiff ***must*** separate out damages caused by the defendant's unlawful conduct from its losses caused by defendant's lawful conduct or by plaintiff's own shortcomings. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir.1975); *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1163-64 (7th Cir. 1983).

3. A plaintiff's failure to disaggregate its damages renders them too speculative to get to a jury as a matter of law. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) ("the jury may not render a verdict based on speculation or guesswork"). As a result, judgment in the defendant's favor must be granted. *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1373 (9th Cir. 1992).

4. Here, the Third Circuit held that Eaton's prices were above cost at all times and, therefore, lawful because they fell within the Supreme Court's "safe harbor" and were "unlikely to exclude equally efficient rivals." *ZF Meritor*, 696 F.3d at 278, 281. Yet DeRamus concedes that his amended damages opinion utterly fails to separate out business losses that resulted from Eaton's legitimate above-cost price competition (or, for that matter, legitimate innovation or improvements in quality and service).[6] These are real world facts that contributed to ZFM's lost business, by its own account. As this Court noted in connection with DeRamus's first opinion,

[6] He also conceded that he failed to separate out business losses caused by ZFM's self-inflicted wounds, including the loss of Ryder and other major "multi-year fleet business" following ZFM's decision to reduce its rebates in 1999 and "significant" warranty problems throughout its brief existence.

"it did not sound to me, in going through 150 pages, that Dr. [DeRamus] took into account much of anything negative in terms of plaintiffs' struggle to maintain its competitive edge in this market." Ex. 2 at App. 9 (June 29, 2009 hearing). Because DeRamus's amended damages opinion again utterly fails to account for these real-world facts, it is too speculative to get to a jury. As a result, judgment as a matter of law should be granted because ZFM has no valid proof on a required element of its claims.

5. Because ZFM did not ask for a jury verdict form that would have allowed the first jury to explain precisely *what* the anticompetitive conduct was and precisely *when* it caused ZFM antitrust injury, the verdict could not and did not draw those crucial lines. The jury found only that injuries began at some unspecified time "since March 28, 2002," and gave no indication of what specific price or non-price conduct caused those injuries. D.I. 217. Thus, one can only speculate as to whether the jury believed that Eaton's prices were unlawful or, whether it found only non-price conduct was unlawful (and if the latter, *what* non-price conduct), or all of the above. The Third Circuit, however, has now held that the prices were lawful. DeRamus's amended opinion underscores the problem. He simply assumes, contrary to the verdict and to other assumptions he himself makes, that all of Eaton's conduct ("the totality") was unlawful after July 1, 2000 (and that ZFM's damages began on March 28, 2002). He also assumes that all of ZFM's lost market share, and therefore its purported damages, was caused by [redacted]. Ex. 3 at App. 117. And he makes those assumptions even though the Third Circuit has already held that some of Eaton's conduct was lawful (its lower, but above-cost prices) and the jury held that none of ZFM's injuries started on March 28, 2002 (they started at some unidentified time after March 28).

A separate damages-only trial, therefore, is impossible. Without more granular determi-

nations about the scope of liability and the timing of injury, a new jury could only speculate about those facts. It cannot assess damages without knowing the contours of liability, and only a liability trial would permit the jury to know those contours without guesswork. This would not only prejudice Eaton and compromise its fundamental statutory and constitutional rights, it would be inconsistent with the Third Circuit's opinion (which found Eaton's prices lawful) and would risk inconsistency with the original verdict if, for example, a second jury were to agree with DeRamus that all of ZFM's damages are attributable to unlawful Eaton conduct that actually affected ZFM beginning on March 28, 2002 (when the first jury found an affect only at an unidentified time after March 28, 2002). The only alternative to outright dismissal is a new trial covering both liability and damages. While theoretically possible, that alternative is now moot, because any new trial would founder on the absence of a reliable expert opinion; indeed, even if it *were* reliable in some ways (and it is not), DeRamus's failure to disaggregate losses attributable to Eaton's lower, lawful prices means that his damages opinion would be too speculative to allow a new jury addressing both liability and damages to determine damages solely for the non-price conduct that the Third Circuit held could be a proper basis for liability. Either way, further proceedings are unwarranted and the Court should grant judgment as a matter of law.

FACTUAL BACKGROUND

I. PLAINTIFFS' FAILURE TO DISAGGREGATE IS A FAILURE OF PROOF ON A REQUIRED ELEMENT OF THEIR CLAIMS

A. The Third Circuit Held That Eaton's Lower Prices Were Lawful

Following a steep drop in demand for trucks in 1999-2000, OEMs signed long-term agreements ("LTAs") under which Eaton committed to various price reductions, including incremental rebates that in some cases were conditioned on the OEM's achievement of share-penetration targets. The Third Circuit held that "[a]t all times relevant to this case, Eaton's aver-

age prices were lower than ZFM's average prices, and on several occasions, [ZFM] declined to grant price concessions requested by OEMs." *ZF Meritor*, 696 F.3d at 266. Eaton's "low prices may, in fact have been an inducement for the OEMs to enter into the LTAs,"[7] but the Court noted that the OEMs always "remained free to buy [transmissions] from any other HD transmission manufacturer." *ZF Meritor*, 696 F.3d at 267. The Court held that Eaton's prices were "above-cost" and "unlikely to exclude an equally efficient rival[.]" *Id.* at 275, 281. The Court noted that "the Supreme Court has created a safe harbor for above-cost discounting" and that safe harbor applies to all above cost prices, including "rebate programs[] which condition the discounts or rebates on the customer's purchasing of a specified volume or a specified percentage of its requirements from the seller." *Id.* at 275.[8]

The Third Circuit thus affirmed the denial of Eaton's Rule 50 motion only because "price itself was not the clearly predominant mechanism of exclusion." *Id.* at 266-67, 277. The Court based this conclusion on non-price aspects of the LTAs that it viewed as distinct from the lawful effect of Eaton's prices in allowing it to win business, including: (1) the LTAs' duration and penetration targets; (2) databook positioning that allegedly "block[ed] customer access" to ZFM's products; (3) the greater economies of scale that Eaton possessed because of ZFM's low-

[7] Indeed, DeRamus admitted in his first report and deposition that Eaton's average prices for all transmissions was always lower than ZFM's, Ex. 5 at App. 333-34, 395, and trial testimony from all four OEMs showed that they purchased from Eaton because its lower prices were more attractive than ZFM's prices. D.I. 237 at 2345:3-6 (Sharp) ("this is our strategy to lower our costs"). VolvoMack chose Eaton because it offered "better pricing" and a better "overall commercial package." D.I. 238 at 2457:8-14 (Lopes).

[8] As the Third Circuit found, ZFM, in contrast, "declined to grant price concessions requested by the OEMs," *ZF Meritor*, 696 F.3d at 266, despite warnings that it would lose business. For example, International asked for a 2% price reduction in August 2001, which it renewed in December 2001, and it increased its request to 5% in 2002. ZFM refused all three requests. D.I. 230 at 659:14-660:12 (Kline) ("my interpretation of that [request] is simply take profit from our pocket, put it in theirs . . . And we declined to contribute to their profits").

er market share; and (4) Eaton's "position as a supplier of necessary products" (*i.e.*, customer preference). *Id.* at 277. The jury verdict, however, did not identify any of this non-price conduct, nor differentiate between Eaton's lawful prices and any other Eaton conduct.

B. ZFM Fails To Disaggregate Business Losses Attributable To Eaton's Lawful, Lower Prices

On January 16, 2013, DeRamus submitted an amended damages report. As in his first report, DeRamus's amended damages opinion fails to separate out damages that resulted from Eaton's ***lawful***, above cost prices from the non-price conduct identified by the Third Circuit as anticompetitive. Instead, he improperly attributes all of ZFM's purported damages to [redacted]. Ex. 3 at App. 117. Thus, his econometric model has a [redacted] for [redacted] beginning on July 1, 2000, signifying his view that all Eaton conduct of whatever kind was anticompetitive on that date and thereafter.

In his amended report and deposition, DeRamus has said that Eaton's prices were [redacted] from Eaton's non-price conduct. Ex. 20 at App. 725. But his opinion is flatly inconsistent with the Third Circuit's ruling which expressly differentiated between Eaton's price and non-price conduct. He also claims that Eaton's lower prices were not the cause of ZFM's damages, *id.* at App. 726, but that is a brand new position DeRamus concocted for his amended report. His original report—like his testimony at trial—made it clear that his opinion was that "Eaton's pricing behavior" operated as an "anticompetitive restraint" that amounted to "exclusionary conduct." Ex. 4 at App. 175, 180, 226; *see also* D.I. 236 at 1893:16-25 (DeRamus) (opining that Eaton's pricing conduct "foreclose[d]" ZFM because it would have had to "counter" Eaton's rebates with discounts of its own; "ZF Meritor has to go to the truck buyers and say—and offer them $200 credit or more to—to get them to take their transmission over somebody else").) Moreover, ZFM's closing argument to the jury highlighted its view that Eaton's

"anticompetitive" prices drove the OEMs to "exclude" ZFM. (D.I. 244 at 3819: 25-3820:2 ("the OEMs were trying to hit those targets to get their money from Eaton"), 3831:23-3832:6, 3842:5-14, 3856:15-23, 3863:16-19 (closing)).

The bottom line is that it is now clear that Eaton's above-cost prices were lawful. The Third Circuit held that they fall within the Supreme Court's "safe harbor for above-cost discounting" which exists because above-cost prices are "generally not anticompetitive" and "unlikely to exclude" efficient rivals. *ZF Meritor*, 696 F.3d at 275, 278. ZFM's suit survived only because of certain non-price conduct. And, in any event, DeRamus concedes he made no attempt to isolate the amount of damages attributable to Eaton's non-price conduct from losses attributable to Eaton's lawful, lower prices (or any other unrelated factors). His answer was a flat [redacted] when asked whether he [redacted] Ex. 3 at 117.

DeRamus admits that his amended expert report utterly fails to measure and separate out business lost because of Eaton's lawful, lower prices from any of its non-price conduct (whether in or outside the jury verdict). That failure alone means ZFM cannot prove a required element of its claims and is sufficient to mandate judgment in Eaton's favor.

C. ZFM Fails To Disaggregate Business Losses Attributable To Its Own Self-Inflicted Wounds

As discussed in more detail in Eaton's Motion to Exclude Opinion Testimony of Dr. De-

Ramus, ZFM also encountered other significant issues causing lost sales and much lower market share between mid-1999 (when ZFM was formed) and December 2003 (when it dissolved). For example, ZFM lost substantial business in 1999 and early 2000—before even the first of the contracts at issue. By July 2000, ZFM's share had thus already plummeted from 16.1% to 12% because of numerous factors that had ***nothing*** to do with any of Eaton's non-price conduct (as not one of the contracts at issue was in place). Ex. 14 at App. 524. ZFM's president reported to the Board of Directors that its poor performance resulted from such unrelated factors as:

> (i) poor product quality image, (ii) a decrease in Ryder business, (iii) turnover in the Company's sales organization, (iv) an increase in sales of Eaton Autoshift, (v) the push towards 13-speed transmissions, particularly by Freightliner, (vi) multi-year fleet business lost due to competitive equalization cutbacks in early 1999, and (vii) controlled distribution.

Id.; *see also* Ex. 15 at App. 540, 572-74 ("we lost business due to competitive equalization cutbacks to fleets"; "we had to control the distribution because we couldn't give them everything they wanted."). ZFM admitted that some of those factors had multi-year effects on its business. For example, ZFM lost Ryder and other multi-year fleet business as a result of these issues. *Id.* at App. 573 ("It was lost business.").

DeRamus again fails to disaggregate these and other factors that led ZFM to lose sales throughout its life and that are attributable only to self-inflicted wounds and bad luck, including:

- The housing crash and financial crisis and the resulting prolonged downturn in demand for heavy duty trucks that began in 1999, the year ZF Meritor was formed. Ex. 16 at App. 624; D.I. 233 at 1205:1-6 (Martello);
- ZF Meritor's lack of a full product line, despite the fact that the OEMs consistently requested that it do so and stated repeatedly that ZF Meritor needed a full product line to effectively compete with Eaton. Ex. 15 at App. 608-09 ("All OEM's have told ZFM that we do not have a broad enough product line to be a partner of choice");
- Customers' frustration with ZF Meritor's warranty system, ONTRAC, because it improperly denied claims based on purported "drive error." Ex. 17 at App. 665; and
- ZF AG's $39 million claim against Meritor for "misrepresent[ing]" the "quality of the G Platform" manual transmissions and failing "to adequately design and test" them. D.I. 232 at 1053:13-1055:8, 1058:2-4, 1058:22-25 (Lutz); Ex. 18 at App. 693.

DeRamus's original damages estimates—which this Court struck as "unreliable," "not at all connected to the real world," and "the kind of extravagant greed that makes everything look suspect"—did not consider any of these factors. Ex. 19 at App. 699. Not surprisingly, his amended report also ignores all of these real-world facts and once again utterly fails to disaggregate business losses attributable to these problems from damages attributable to the specific non-price conduct identified by the Third Circuit.

ARGUMENT

I. ZFM'S FAILURE TO DISAGGREGATE REQUIRES JUDGMENT AS A MATTER OF LAW IN EATON'S FAVOR

An antitrust plaintiff must prove that its damages were caused by the ***unlawful*** acts of the defendant. *See* 15 U.S.C. § 15 ("by reason of anything forbidden in the antitrust laws"). It is essential that damages reflect ***only*** the losses directly attributable to unlawful competition—if a plaintiff has incurred financial loss from the lawful activities of a competitor, then no damages may be recovered under the antitrust laws. This is the essence of "antitrust injury," as set forth by the Supreme Court: "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts *unlawful*." *Brunswick Corp.*, 429 U.S. at 489 (emphasis in original). Otherwise, defendants would pay treble damages for entirely lawful conduct. *Coleman Motor*, 525 F.2d at 1353 (excluding expert and reversing verdict because "[t]he damages figures advanced by plaintiff's expert may be substantially attributable to lawful competition").

Thus, where other factors contribute to the plaintiff's injury in addition to the conduct that is the antitrust violation, a plaintiff's damages model ***must*** distinguish between its losses caused by the defendant's unlawful conduct and "its losses caused by other factors." *U.S. Football League v. NFL*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) (affirming exclusion of expert for

failure to disaggregate and awarding only nominal damages because "[a] plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession, or lawful factors"); *MCI Commc'ns,* 708 F.2d at 1163-64 (reversing damages award because plaintiff's model failed to disaggregate damages caused by lawful conduct). Failure to do so renders the damages model too "speculati[ve]" as a matter of law. *Bigelow*, 327 U.S. at 265.

Factors that must be disaggregated include: (1) the defendant's *lawful* practices, including practices found by the court not to violate the antitrust laws, such as Eaton's lower, above-cost prices, and (2) the plaintiff's own conduct, such as ZFM's refusal to lower prices for the OEMs; its decision to cut back on its rebates to fleets and its resulting loss of Ryder and other multi-year fleet business; its persistent [redacted] (Ex. 3 at App. 64); and ZF AG's $39 million claim against Meritor for misrepresenting the quality of its manual transmissions. *See, e.g., Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 695-96 (5th Cir. 2003) (affirming dismissal where plaintiff failed to disaggregate alleged damages attributable to conduct found to be lawful); *Nat'l Ass'n of Review Appraisers & Mortgage Underwriter v. Appraisal Found.*, 64 F.3d 1130, 1135-36 (8th Cir. 1995) (affirming summary judgment where "[a] number of highly publicized missteps and other considerations have contributed greatly to the Associations'" problems); *City of Vernon*, 955 F.2d at 1373; (affirming summary judgment where plaintiff failed to submit a disaggregated damages study); *Coleman*, 525 F.2d at 1353; *MCI Commc'ns*, 708 F.2d at 1163 (rejecting damages study that did not disaggregate losses attributed to lawful acts).

Where a plaintiff fails to separate out losses caused by the defendant's unlawful conduct from losses caused by other factors, courts routinely hold that judgment as a matter of law is re-

quired because the damages are too speculative to get to a jury. *City of Vernon*, 955 F.2d at 1371 (where "no damages ha[ve] been properly shown, there [is] an independent reason to grant summary judgment"); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1988) (granting summary judgment to defendant where plaintiffs' damages study did not disaggregate damages attributable to the alleged antitrust violation from losses attributable to other factors).

Courts in the Third Circuit have consistently followed this principle, requiring plaintiffs to separate business losses attributable to defendants' lawful conduct (or unrelated factors) from damages related to their illegal practices. For example, in *Coleman*, the Third Circuit overturned the jury's verdict when the evidence showed that the damages calculations were based in part on lawful competition by the defendant. 525 F.2d 1338. A former independent automobile dealer sued Chrysler and its factory dealers alleging that Chrysler subsidized its factory dealers at the expense of its independent dealers, and otherwise discriminated against the plaintiff. To establish damages, the plaintiff offered expert testimony that purported to project annual net earnings based upon the volume of sales that could have been expected absent the defendant's conduct, but did not separate out sales lost due to defendants' lawful conduct. *Id.* at 1351-52. The Court held that the failure of the sales projection to account for lawful competition required reversal. *Id.* Likewise, in *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa.1981), the court granted judgment for defendants based on plaintiff's failure to distinguish between defendants' lawful and unlawful acts in its damages model. The Court held that plaintiffs must identify which damages were due to the illegal conduct. *Id.* at 954, 966 ("Perhaps the most blatant defect in plaintiff's damage model for lost profits is its failure to account for any lawful competition.").

Other circuits have also consistently applied this rule. In *City of Vernon*, plaintiff brought an antitrust action against a utility alleging that the utility denied plaintiff access to power trans-

mission lines and engaged in a group boycott. 955 F.2d at 1364. The district court granted summary judgment in defendant's favor and found plaintiff's damages study "seriously flawed" because "[t]hat study failed to segregate the losses . . . caused by acts which were not antitrust violations from those that were." *Id.* at 1371-72. On appeal, the Ninth Circuit affirmed, holding the failure to separate losses caused by lawful conduct "undermined Vernon's whole case" and the district court could not "allow Vernon to go to the jury with its erroneous approach or to give it still another opportunity to refine" its study. *Id.* The Court affirmed summary judgment and denied Vernon the chance to amend its damages study. *Id.* at 1372.

Likewise, in *McGlinchy*, plaintiffs brought an action against various chemical companies alleging antitrust violations, as well as breach of contract and related tort claims. 845 F.2d at 804-05. The Shell defendants moved the court to exclude the testimony of plaintiffs' expert and enter summary judgment on the antitrust claims, reasoning that the plaintiffs' damages expert failed to offer a competent theory proving the amount of damages *actually* caused by defendants' wrongful conduct. *Id.* at 806. Specifically, the expert acknowledged at his deposition that his damages estimate "did not relate the loss to specific [unlawful] acts" by the defendant and that "the cause of the decline in sales theoretically could have been anything." *Id.* The district court granted Shell's motion, excluding plaintiffs' expert and entering judgment for Shell. *Id.* The Ninth Circuit affirmed both the exclusion and the grant of summary judgment, holding that the expert's report "was hopelessly flawed" and "would pose a great danger of misleading a jury into believing that appellants' losses" were caused by defendants. *Id.* at 807. The Court further held that summary judgment was properly granted because the appellants did not make a showing sufficient to establish the amount of damages—holding that "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case [*i.e.*, damages]." *Id.* at 808 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (internal quotations omitted)).[9]

Similarly, in *MCI*, MCI sued AT&T alleging monopolization under Section 2 of the Sherman Act, and conspiracy in restraint of trade under Section 1. 708 F.2d at 1092. It alleged 22 types of misconduct, including predatory pricing and unlawful tying. MCI claimed at trial, on the basis of a lost-profits study, that it had suffered damages of $900 million as a result of AT&T's allegedly unlawful actions. At trial, the jury found for MCI on only seven of its 22 counts—thus, like Eaton's pricing conduct here, a substantial amount of AT&T's conduct was lawful—and returned a $600 million verdict for MCI (which was then trebled to $1.8 billion). *Id.* at 1160. But MCI's lost profits study assumed that all 22 of AT&T's acts were illegal and did not establish any variation in the damages outcome if some of AT&T's acts were found to be legal. *Id.* AT&T appealed, arguing that the lost-profits study failed to separate losses caused by lawful competition from damages caused by unlawful conduct. *Id.* The Seventh Circuit rejected the damages award: "It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant. This is the essence of 'antitrust injury' as set forth by the Supreme Court." *Id.* at 1161 (internal citations omitted). The Court further held that because it was "essential" that "damages reflect only the losses directly attributable to *unlawful* competition," it would therefore be "unjust and contrary to the policies of the treble damage remedy to award MCI damages which may compensate it for the effects of such quantitatively significant *lawful* competition." *Id.* at 1161, 1164.[10]

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[9] Here, the risk is even greater than the potential for confusing the jury noted in *McGlinchy*, as DeRamus attributes all damages to [redacted], Ex. 3 at App. 117, including the lower prices that the Third Circuit has already found to be lawful.

[10] Here, as in *MCI*, if DeRamus's aggregated damages estimate (of an astounding $400 to $800 million) is permitted to stand, Eaton could face an "unjust" trebled damages award of up to $2.4

Here, DeRamus has failed to separate losses caused by Eaton's prices—which the Third Circuit found lawful—from losses caused by Eaton's non-price conduct. DeRamus completely disregards all other actual causes of ZFM's losses and instead assumes that all losses were attributable only to the [redacted] Ex. 3 at App. 117. As described above and in Eaton's Motion to Exclude, DeRamus readily admits that he ***did not*** disaggregate losses attributable to Eaton's lawful, lower prices from his damages figures. He did not disaggregate Eaton's lawful non-price conduct (such as its innovation, service levels, or reputation). He did not disaggregate the effects of ZFM's own self-inflicted wounds. DeRamus's "amended" model is precisely the type of damages study that the courts in *Coleman Motor*, *City of Vernon*, and *MCI* found to be insufficient and unreliable. It is too speculative to get to a jury, and courts routinely grant judgment for defendant as a matter of law.

II. THE POSSIBILITY OF A NEW LIABILITY AND DAMAGES TRIAL IS NOW MOOT

Even if DeRamus's damages model were reliable, and it is not, his failure to disaggregate means that he attributes *all* damages to "the totality" of Eaton's conduct, which the Third Circuit opinion rejects, and *starting* on March 28, 2002, which the first jury did not find. Instead, the Third Circuit made clear that it affirmed the denial of Eaton's Rule 50 motion only based on non-price conduct, *ZF Meritor*, 696 F.3d at 277, and it expressly carved out Eaton's lower prices because they were always above-cost and fell within the Supreme Court's "safe harbor for above-cost discounting." *Id.* at 275, 278. DeRamus's failure to disaggregate the losses attributable to the two types of conduct (one lawful, the other not) and his failure to follow the jury's verdict that ZFM's antitrust injury occurred at some time "since March 28, 2002" means he offers the jury no way to award damages only for the non-price conduct and only after it caused

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billion—for lawful, lower prices under the Third Circuit's decision.

antitrust injury—except by speculation, which is impermissible.[11] ZFM has failed to prove an element of its claims.

Because the verdict form did not differentiate among Eaton's conduct, it is not clear if the jury improperly considered Eaton's prices or rebates unlawful or some of the non-price conduct the Third Circuit identified (or something else about the contracts). The jury would, instead, have no choice but to speculate. The only recourse would be to submit both liability and damages to the new jury, so that its damages award did not turn on speculation about liability. It is clearly impermissible to let a damages-only jury award damages for injuries caused by Eaton's lawful, lower prices. *See, e.g.*, *Coleman Motor*, 525 F.2d at 1353 (new trial on antitrust liability and damages required when "[t]he damage figures advanced by plaintiff's experts may be substantially attributable to lawful competition").[12]

That problem might theoretically be solved by a new trial encompassing both liability and damages in which a new jury was asked to reach a verdict on whether specific types of non-price conduct caused ZFM antitrust injury, and when. *See e.g.*, *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 533-35 (3d Cir. 1998) (where jury might have based its verdict

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[11] The risk that the jury based its liability decision on lawful pricing considerations is real. DeRamus focused on it at trial, *e.g.*, Tr. 1821 (ZFM was "foreclos[ed] because it had to reduce prices to "counter" Eaton's rebates), as did ZFM's closing argument. *Id.* at 3809, 3819-20 (attractiveness of Eaton's rebates). As a result, this Court understood those rebates to be the focus of ZFM's theory, JMOL Denial Order at 10, and its injunction reached *only* pricing tied to market share. DI. 279 at 8; D.I. 283.

[12] Indeed, the Supreme Court has rejected a punish-even-lawful-conduct approach in other contexts, as well; the Constitution only allows juries to award damages that bear some rational relation to the actual injuries caused by defendant's unlawful conduct. *See, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001) (rejecting punitive damages award that "may, therefore, have been influenced by an intent to deter" conduct that the Court of Appeals found to be "lawful"); *BMW v. Gore*, 517 U.S. 559, 574-75 (1996); *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1951) (As noted jurist Learned Hand opined regarding treble damages: "two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose.").

on an invalid ground, "the proper course is for us to remand for a new trial rather than attempt to divine the basis of the jury's verdict"); *McKenna v. Pac. Rail Serv.*, 32 F.3d 820, 832 (3d Cir. 1994) ("In light of our inability to divine whether the jury's verdict was premised on correct or erroneous portions of the charge, we will remand the case for retrial.").

And this Court has previously cited Supreme Court precedent limiting the situations when a partial new trial is appropriate to a situation not present here: "A partial new trial is appropriate *only* where the issue to be retried is sufficiently 'distinct and separable from the others that a trial of it alone may be had without injustice.'" *Harden v. Allstate Ins. Co.*, No. 93-513, 1996 WL 190013, at *4 (D. Del. Apr. 16, 1996) (Robinson, J.) (quoting *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931)). Here, the Third Circuit's opinion makes it clear that the issues of liability and damages are so intertwined that they are inextricable—at least when, as here, plaintiffs do not seek a special verdict form that will delineate the precise conduct that was anticompetitive and when it caused antitrust injury. The Third Circuit has repeatedly upheld this rule. *See, e.g.*, *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 455 (3d Cir. 2001) (ordering new trial on both liability and damages because "the issues of liability and damages were so intertwined as to make a fair trial on damages alone impossible"). Because a second jury would have to guess at what conduct the first jury considered anticompetitive, when it caused antitrust injury, and what amount of damages resulted, liability and damages are not "distinct and separable" and a damages-only jury could not reach a verdict without "confus[ing] its responsibilities" with those of the first jury. *Vizzini v. Ford Motor Co.*, 569 F.2d 754, 761 (3d Cir. 1977) (ordering a new trial on both liability and damages).[13]

[13] By contrast, damages-only trials are permissible only when there is no dispute or confusion about exactly what conduct can sustain damages—as when all challenged conduct has been found unlawful. *See, e.g.*, *Bonjorno v. Kaiser Aluminum & Chem. Co.*, 752 F.2d 802, 813 (3d

The need for a new jury to consider liability and damages, though, is now moot because DeRamus's opinion does not disaggregate business losses due to Eaton's lawful conduct from its non-price conduct. Thus, even if a new jury heard liability and damages evidence and reached a special verdict identifying specific non-price conduct as anticompetitive (and found that it caused ZFM antitrust injury on certain dates), ZFM would still lack sufficiently reliable damages evidence. Instead, it would have only DeRamus's "totality" of the conduct opinion which fails to separate out only the damages attributable only to the non-price conduct. It would thus leave the jury to speculate on how much of his enormous damages it should attribute to Eaton's non-price conduct versus its lawful prices (or its legitimate non-price competition or ZFM's self-inflicted wounds or bad luck).

To be clear, this was not inevitable. If the jury's verdict had articulated precisely what conduct was unlawful, then the Court could have used that as a basis to instruct the new jury as to which conduct caused antitrust injury (and when) sufficient to sustain losses could sustain damages—but only if DeRamus had a disaggregated damages model that allowed him to quantify the portion of his damages attributable to the non-price wrongs the jury found. But the verdict was in broad-form, and DeRamus did not disaggregate, so the issue is now moot. Accordingly, judgment should be granted as a matter of law.

CONCLUSION

For the reasons stated herein, judgment as a matter of law should be granted in Eaton's favor.

Cir. 1985) ("the antitrust injury [wa]s of an indivisible nature" and liability was predicated on "all of the [defendant's challenged] acts taken together").

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