IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

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

DEFENDANT EATON CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR CERTIFICATION OF ORDERS FOR IMMEDIATE INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B)

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I.
INTRODUCTION

Plaintiffs' Opposition to Eaton's Motion for Certification of Orders for Immediate Interlocutory Appeal under 28 U.S.C. § 1292(b) (D.I. 272) raises essentially three objections to certification, none of which has any merit. First, Plaintiffs assert that this motion is not timely, ignoring the fact that Eaton filed the current motion less than one month after the Court denied Eaton's motion for entry of a final appealable judgment. Second, Plaintiffs misapply the legal standards and applicable case law to argue that there is no "substantial ground for difference of opinion" over a "controlling question of law" in this case. But as demonstrated in Eaton's opening brief, a true—not hypothetical—conflict exists between the Court's extension of Third Circuit law to this single-product case and subsequent appellate precedent applying the price-cost test where the plaintiff's alleged antitrust injury is linked to the defendant's price reductions or discounts. The applicability of the price-cost test is a controlling question of law because reversal of the liability judgment would be required if the Third Circuit agrees with Eaton that the test governs here. Finally, Plaintiffs argue that an interlocutory appeal will not "materially advance" this litigation. To the contrary, prompt appellate review of the important legal issues raised by the liability determination will provide essential clarity and avoid wasteful litigation.

II.
PLAINTIFFS' ASSERTION THAT EATON ENGAGED IN UNDUE DELAY IS MERITLESS

A. Interlocutory Appeal Of Earlier Orders Was Not Appropriate

Plaintiffs assert that Eaton's motion for certification of the Orders for interlocutory appeal is "five years too late," arguing that Eaton should have sought certification as long ago as 2006, when the Court denied Eaton's motion to dismiss, or in 2009, when the Court denied Eaton's motion for summary judgment. (D.I. 272 at 4.) Interlocutory appeal of those orders,

however, was not appropriate and would have been premature. In ruling on the motion to dismiss, the Court simply concluded that it "[could not] dismiss a case based on the defendant's characterization of the relevant facts at this stage of the proceedings." (D.I. 17 at 2.) Likewise, the Court's May 14, 2009, order denying Eaton's motion for summary judgment did not address the applicability of the price-cost test. The Court allowed full briefing only on the statute of limitations issue because it "had concluded . . . that a motion practice related to the merits of plaintiff's antitrust claims was not appropriate," and ultimately found that "there remain genuine issues of material fact regarding the LTAs and whether their use constitutes exclusionary conduct . . . or can be justified as a valid business practice." (D.I. 108 at 1-2.) Those orders did not address or resolve any of the controlling questions of law now at issue, so certification for interlocutory appeal under 28 U.S.C. § 1292(b) would have been inappropriate.

In entering the judgment of liability against Eaton and denying Eaton's motion for judgment as a matter of law, this Court concluded that an antitrust plaintiff challenging a competitor's market-share discount agreements need not satisfy a price-cost test in order to establish antitrust injury or to show that the conduct was anticompetitive. (D.I. 259 at 17.) Eaton therefore promptly asked the Court to enter an appealable final judgment in order to allow immediate appellate review of these controlling issues of law. (D.I. 262, 263.) In light of Plaintiffs' failure to produce admissible evidence of damages and their long-ago withdrawal from the market (which deprived them of standing to seek injunctive relief), Eaton reasonably believed that entry of final judgment was appropriate, and therefore pursued that result as the most direct and judicially efficient avenue for achieving immediate appellate review. When the Court declined to proceed in that manner (*see* D.I. 268), Eaton promptly sought certification under § 1292(b).

B. Eaton's Motion For Certification Is Timely

Eaton filed this motion on July 8, 2011, less than one month after the Court's denial of Eaton's motion for entry of an appealable final judgment revealed the need for § 1292(b) certification in order to permit immediate appellate review.[1] Section 1292(b) imposes no time limit on the district court's authority to certify orders, and the Advisory Committee Note to Federal Rule of Appellate Procedure 5(a) explicitly states that the Court may amend its orders to include the required certification "at any time." Fed. R. App. Proc. 5, Advisory Comm. Note to 1967 Adoption of Rule 5(a). Yet Plaintiffs claim that Eaton should be precluded from seeking interlocutory appeal because its motion is "untimely." (D.I. 272 at 4.)

Plaintiffs cite no case law to support their assertion that a motion for certification filed less than one month after certification became appropriate is untimely. In *Shulick v. Credit Bureau Collection Services*, No. 02-1127, U.S. Dist. Lexis 15545 (E.D. Pa. July 28, 2003), the court declined to grant certification where the defendant delayed filing for over two months without explanation and, "more importantly," the statutory factors for certification under § 1292(b) were not met. *Id.* at *3. Likewise in *Weir v. Propst*, 915 F. 2d 283 (7th Cir. 1990), the

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[1] A ruling on liability that does not resolve associated remedial issues is not a final judgment. *See Riley v. Kennedy*, 553 U.S. 406, 419 (2008) ("an order resolving liability without addressing a plaintiff's requests for relief is not final"); *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 744 (1976) (judgments "where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291"). Thus, the Court's entry of liability and denial of Eaton's motion for judgment of a matter of law are not final, appealable orders, because they did not address Plaintiffs' request for damages and injunctive relief. Nor could they be rendered appealable pursuant to Rule 54(b), because this is not a case in which "one or more, but fewer than all" of the claims have been finally decided. Fed. R. Civ. Proc. 54(b); *see* 15B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3915.2 (2d ed. 2011 update) ("Rule 54(b) does not afford an escape from the rule that appeal cannot be taken from a determination of liability that leaves matters of remedy to be resolved. Rule 54(b) allows entry of judgment only upon final disposition of at least one claim, or of all claims involving at least one party. A determination of liability alone is no more final for purposes of entering judgment under Rule 54(b) than for an independent appeal under § 1291.").

court considered the timeliness of a motion for certification filed more than two months after entry of an order that would have been appealable as of right under 28 U.S.C. § 1291 if the defendant had filed its notice of appeal within 30 days. The court concluded that interlocutory appeal was inappropriate, noting that the defendant appeared to be using § 1292(b) to circumvent the 30-day time limit for appeals under § 1291. *Id.* at 285. *Weir*'s only relevance to this case is its observation that it is "commonplace for the district judge to be asked to certify an order for immediate appeal under section 1292(b) after—and not necessarily immediately after—he has issued the order." *Id* at 286.

Plaintiffs err in suggesting that interlocutory appeal is somehow inappropriate in the context of post-trial proceedings because, they claim, damages may remain to be tried.[2] In fact, the permissibility of interlocutory appeal in such circumstances is well established. *See DeMasi v. Weiss*, 669 F.2d 114, 123 (3d. Cir. 1982) (noting that if liability was established in bifurcated proceeding then controlling questions raised by a discovery order could be certified for appeal under § 1292(b) before proceeding to damages phase); *see also Russ-Tobias v. Penn. Bd. of Prob. and Parole*, No. Civ.A.04-0270, 2006 WL 516771, at *32 (certifying for interlocutory appeal a post-trial order requiring further trial proceedings). Plaintiffs' procedural objections to certification are thus without merit.

III.
A SUBSTANTIAL DIFFERENCE OF OPINION AS TO CONTROLLING QUESTIONS OF LAW EXISTS

Plaintiffs assert that there is no substantial difference of opinion justifying certification of these Orders because the Third Circuit in *LePage's Inc. v. 3M*, 277 F.3d 365 (3d Cir. 2002) (en

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2 *See* D.I. 270, Ex. 1, October 20, 2009 Response to Email Request for Emergency Relief ("I do not intend to address damages until liability has been finally resolved by the Third Circuit.").

banc) ("*LePage's*"), and this Court in reliance on that decision, have rejected the notion that the price-cost test applies here. Further, Plaintiffs assert that Eaton raises no controlling question of law because the price-cost test is purportedly inapplicable to Plaintiffs' "exclusive dealing" and Sherman Act Section 1 and Clayton Act Section 3 claims. Both of these arguments are based on a misunderstanding of the applicable case law and the standards under § 1292(b).

A. Genuine Doubt and Conflicting Precedent Exist As To The Correct Legal Standard To Apply In This Case

As Plaintiffs note, the JMOL Order rejected application of a price-cost test on the authority of the Third Circuit's decision in *LePage's*. (D.I. 272 at 6.) But the fact that this Court disagreed with Eaton's argument does not mean that a "substantial difference of opinion" cannot exist. The pertinent question is whether "there is genuine doubt or conflicting precedent as to the correct legal standard." *Bradburn Parent Teacher Store, Inc. v. 3M*, No. CIV.A.02-7676, 2005 WL 1819969, at *4 (E.D. Pa. Aug. 2, 2005). That standard is clearly satisfied by uncertainty over the correct standard within the circuit in which the order was issued, or by a conflict between that circuit and the Supreme Court or another circuit. *See Fiscus v. Combus Finance AG*, No. 03-1328, 2006 WL 2845736, at *3 (D.N.J. Sept. 28, 2006) ("The difference of opinion must be legally significant (e.g., that courts disagree as to the applicable legal standard) . . . A moving party's citation to numerous conflicting decisions on the same issue, for example, can constitute a sufficient basis for the finding that substantial differences of opinion exist."); *S.E.C. v. Lucent Technologies, Inc.*, No. 04-2315, 2009 WL 4508583, at *10 (D.N.J. Nov. 16, 2009) (finding a "substantial difference of opinion" existed where "the Third Circuit has not resolved which test is to be used in this Circuit, and other circuits have adopted [other] tests.").

Decisions of the Supreme Court subsequent to *LePage's* make clear that the price-cost test applies whenever an antitrust plaintiff's alleged injury is linked to the defendant's price

reductions or discounts. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Pac. Bell Tel. Co. v. linkLine Commc'n, Inc.*, 129 S. Ct. 1109, 1120 (2009). Outside of the Third Circuit, every other court of appeals to analyze conditional discounting practices, including market-share discounts, has applied some form of the price-cost test. *See, e.g., NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451–52, 457-58 (6th Cir. 2007) (en banc); *Virgin Atl. Airways v. British Airways PLC*, 257 F.3d 256, 261 (2d Cir. 2001); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060-63 (8th Cir. 2000); *see also Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 911 (9th Cir. 2008). Eaton, therefore, is not speculating about the possibility of a circuit conflict at "some point in the future." (*See* D.I. 272 at 6.) A conflict already exists between *LePage's* (as construed in the JMOL Order) and these other appellate decisions.

In addition, there is substantial reason to question whether *LePage's* is even applicable on the facts of this case. *LePage's* involved multi-product bundling across multiple product markets, whereas this case involves a single market. 277 F.3d at 376 ("3M further linked rebates on transparent tape with those for many other products"). The JMOL Order applied *LePage's* as the most relevant Third Circuit authority, but the Third Circuit would be free to limit *LePage's* to the bundling context. Such a holding would harmonize Third Circuit case law with the approach followed by other circuits in single-market cases. *See, e.g., Concord Boat*, 207 F.3d at 1058, 1061-62 (challenge to single-market conditional discount programs that "[a]t most … were de facto exclusive dealing arrangements" rejected because "[t]he decisions of the Supreme Court … illustrate the general rule that above cost discounting is not anticompetitive"; district court's reliance on *LePage's* rejected because it involved bundling across multiple separate product markets).

Furthermore, *LePage's* left open questions that the Third Circuit has yet to resolve. Even in the multi-product bundling context, the academic and judicial consensus supports the application of a modified version of the price-cost test known as the discount-attribution test. *See* U.S. Department of Justice, Competitive Impact Statement at 14–15, *United States v. United Reg'l Health Care, Sys.,* No. 7:11-cv-00030 (N.D. Tex. filed Feb. 25, 2011) (arguing for the application of the discount-attribution test to market-share discounts); *Cascade Health Solutions,* 515 F.3d at 911 (holding that plaintiffs challenging bundled discounts conditioned on "sole preferred provider" status must prove below-cost pricing, measured by the "discount attribution rule"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 749 & 749d, at 310, 328, 336-38 (3d ed. 2008) (endorsing discount-attribution test in context of bundled discounts). The *LePage's* court did not address the applicability of the discount-attribution test, because the defendant failed to raise it. It remains an open question, therefore, whether the Third Circuit would apply such a test—and it is undisputed here that Plaintiffs failed to satisfy any version of the price-cost test.

Given the tension between *LePage's* (as interpreted in the JMOL Order) and case law in other circuits, as well as the open question whether *LePage's* applies at all outside the context of multiple product markets, "there is genuine doubt" as to the correct legal standard to be applied here and therefore "a substantial difference in opinion" justifying interlocutory appeal.

B. The Applicability Of The Price-Cost Test Constitutes A Controlling Question Of Law

Plaintiffs assert that Eaton's motion does not implicate a controlling question of law because the price-cost test does not apply here. (D.I. 272 at 7.) A controlling question of law is one that, if decided erroneously, would lead to reversal on appeal. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d. Cir. 1974). If the Third Circuit agrees with Eaton that Plaintiffs must

satisfy the price-cost test in order to prove antitrust injury and/or exclusionary conduct, reversal would plainly be required. Accordingly, controlling questions of law clearly exist.

Plaintiffs are equally mistaken in arguing that the cases applying the price-cost test are limited to claims under Section 2 of the Sherman Act and that such a test is irrelevant to their "exclusive dealing" claim. (*See* D.I. 272 at 7.) The Supreme Court has consistently applied the price-cost test to all claims of antitrust injury based on a defendant's price discounting practices, regardless of the particular antitrust statute involved. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (Robinson-Patman Act); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 331 (1990) (Sherman Act § 1); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (Clayton Act § 7). Indeed, as the Court explained in *Atlantic Richfield*, "[w]e have adhered to this principle *regardless of the type of antitrust claim involved.*" *Id.* at 340 (emphasis added). *Weyerhaeuser* and *linkLine* make clear that the Supreme Court meant what it said in *Atlantic Richfield*: the price-cost test applies without regard to the particular antitrust statute at issue.

Plaintiffs' assertion that the price-cost test is irrelevant to their "exclusive dealing" claims is also inaccurate. The basis for Plaintiffs' "exclusive dealing" claim is the market-share discount structure reflected in Eaton's supply agreements with OEMs; it is those discounts that, according to Plaintiffs, created de facto exclusivity. (*See* D.I. 259 at 10). When, as here, the plaintiff's theory is that discounts linked to market share created de facto exclusivity, courts have made clear that the price-cost test applies. *See Concord Boat*, 207 F.3d at 1058, 1061-62 (challenge to conditional discount programs that "[a]t most … were de facto exclusive dealing arrangements" rejected because "[t]he decisions of the Supreme Court … illustrate the general rule that above cost discounting is not anticompetitive"); *see also Cascade Health*, 515 F.3d at

892 (applying price-cost test to claims attacking defendant's practice of "offer[ing] [customers] discounts of 35% to 40% on [one category of medical] services if the [customers] made [the defendant] their sole provider for all [medical] services").

IV.
AN IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

In connection with its motion for entry of final judgment, Eaton argued that the most efficient way to present the case to the Court of Appeals was for this Court to enter a final judgment awarding no relief. (D.I. 262 at 7.) In urging that result, Eaton pointed out that entry of final judgment would more directly advance the interests of judicial economy and the ultimate termination of the case than would an interlocutory appeal under § 1292(b). (*Id.* at 10.) The Court denied Eaton's motion for entry of final judgment, however, so that approach is no longer available. In light of the Court's ruling, § 1292(b) certification is now the best remaining option for advancing the ultimate termination of this case in a manner that is most consistent with considerations of judicial economy and efficiency.

Certification of this Court's orders for interlocutory appeal will allow for prompt review of fundamental liability questions by the Court of Appeals. As Eaton has consistently asserted, and the Court has previously recognized, prompt appellate review will materially advance this litigation by providing finality to the question of Eaton's liability, before the parties engage in any further, potentially wasteful, litigation before this Court. In fact, a successful appeal by Eaton would likely result in the termination of this lawsuit, saving substantial judicial time and resources. Even if Eaton obtained only partial success on appeal or simply a clarification of Third Circuit law as it applies here, the appellate ruling would guide any further proceedings in this Court and avoid wasteful litigation based on a partial misapprehension of Third Circuit law. The most efficient course forward, therefore, is for the Third Circuit to be given the opportunity

to reconcile the tensions and conflicts in the case law regarding the applicability of the price-cost test now rather than engaging in further proceedings before this Court that may prove unnecessary or have to be redone.[3]

V.
CONCLUSION

Eaton respectfully requests that this Court certify the Orders for interlocutory appeal under 28 U.S.C. § 1292(b) and stay this litigation pending such certification and appellate review.

August 1, 2011

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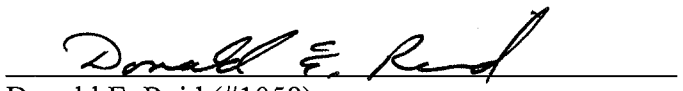

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[3] As discussed at the status conference on July 25, 2011, this Court could further advance the ultimate termination of the litigation by exercising its discretion to certify its *Daubert* ruling excluding Dr. DeRamus's damages evidence (D.I. 145) for interlocutory appeal as well. This would permit Plaintiffs to cross-appeal that issue at the same time as Eaton's appeal, thereby presenting the Third Circuit with a full range of controlling legal issues posed by this case.

CERTIFICATE OF SERVICE

I, Donald Reid, hereby certify that on the 1st day of August, 2011, a copy of Defendant Eaton Corporation's Reply Memorandum in Support of its Motion for Certification of Orders for Immediate Interlocutory Appeal was served by electronic filing on all counsel of record.

Donald E. Reid (#1058)