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 MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE

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August 18, 2011

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Eaton Corporation ("Eaton") submits this Memorandum In Response To Order To Show Cause pursuant to the Court's August 4, 2011 Order. The Court should not enter a permanent injunction because two critical requirements for injunctive relief - - that Plaintiffs have standing and that they will suffer irreparable injury without an injunction - - are entirely missing here. They are missing because Plaintiffs dissolved their joint venture nearly eight years ago and stopped making and selling heavy duty truck transmissions nearly five years ago. In short, as this Court correctly found, Plaintiffs "are no longer in business and are unable to directly benefit from an injunction." (D.I. 279 at 8 n. 1.) Plaintiffs are, thus, entirely unaffected by Eaton's current contract terms (and will be entirely unaffected by any injunction). The Court cannot grant injunctive relief - - or even weigh the balance of harms against Eaton and the public - - because Plaintiffs do not have standing to obtain injunctive relief and will not suffer irreparable harm without it. Binding Supreme Court and Third Circuit precedent bars injunctive relief based upon the hypothetical "possibility that plaintiffs may one day reenter the market." (*Id*.)

To the extent that the Court attempts to weigh the public interest and the substantial harm that an injunction would impose on Eaton and third parties - - and it should not even reach that issue, given Plaintiffs' utter failure to prove standing and irreparable injury - - it should weigh in the balance that it heard no evidence at trial from any member of the public complaining about Eaton's rebates or calling for an injunction. To the contrary, the Court heard substantial evidence from some members of the public - - the OEMs themselves - - establishing that they *benefited* from the contracts and Eaton's rebates, and that they passed on some of those benefits to their customers in the form of lower prices. Eaton respectfully submits that the public interest would be poorly served by abrogating contract terms that benefit the OEMs and their

customers while permitting Eaton to keep its manufacturing costs lower than they would be otherwise.

Eaton and each OEM spent substantial time negotiating the LTAs. The record evidence demonstrates that volume rebates were not acceptable to the OEMs because the enormous fluctuation in demand for heavy duty trucks makes it exceptionally difficult for them to predict the volume of trucks they will sell each year (and, thus, the volume of transmissions they will buy), and that the rebates provide the OEMs with lower prices that they pass on to their customers. The record evidence thus strongly suggests that an injunction would substantially disrupt each of the LTAs and eliminate above-cost rebates that *lower* the price of transmissions for the OEMs and for their customers - - a result that is decidedly not in the public interest - - and would make it more difficult for Eaton to keep its manufacturing costs at the low levels the OEMs demand.

If the Court is inclined to enter an injunction despite this evidence, Eaton submits that any injunction should be stayed pending resolution of the appeal or, alternatively, that Eaton and the OEMs should be given six months to re-open and simultaneously re-negotiate these complex LTAs before any injunction is implemented. Finally, Eaton submits that if the Court enters an injunction, it must ensure that the injunction is narrowly tailored to apply only to the precise business and products at issue in this case (*i.e.*, Eaton's Class 8 linehaul and vocational truck transmissions) and not to the myriad unrelated products that Eaton manufactures for industries ranging from trucks to aerospace to electrical to hydraulics.

ARGUMENT

A plaintiff can only obtain injunctive relief if it establishes that it has standing and *each* of the following four elements: (1) success on the merits; (2) that it "will be irreparably

injured by the denial of injunctive relief;" (3) that an injunction would be in the public interest; and (4) that a grant of the injunction will not cause even greater harm to the defendant or third parties. (D.I. 279 at 6 (citing *Gucci Am., Inc. v. Daffy's, Inc.*, 354 F.3d 228, 236-37 (3d Cir. 2003))); *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975).

Standing and all four elements are required. *Scicchitano v. Mt. Carmel Area School Bd.*, 46 Fed.Appx. 667 (3rd Cir. 2002) ("In order to have standing to seek injunctive relief, the plaintiff must show that (1) she is ***likely to suffer future injury***, (2) she is likely to be injured by the defendant, and (3) the relief she seeks will ***likely prevent the injury from occurring***") (emphasis added); *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461, 478 (3d Cir. 1997) ("Only if the plaintiff produces evidence sufficient to show that ***all four factors*** favor preliminary relief would the court issue a preliminary injunction") (emphasis added); *see also New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) ("The injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that ***all four factors*** favor preliminary relief") (emphasis added); *Merchant & Evans, Inc. v. Roosevelt Building Products, Inc.,* 963 F.2d 628, 633 (3d Cir. 1992) ("The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that ***all four factors*** favor preliminary relief") (emphasis added); *Temple Univ. v. White*, 941 F.2d 201, 214 (3rd Cir. 1991) ("only after a showing both of irreparable injury and inadequacy of legal remedies, and a balancing of competing claims of injury and the public interest.").[1]

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[1] Eaton cites both preliminary and permanent injunction cases because the standard "is essentially the same[.]" *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987), *cited with approval in Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008); *Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.*, 645 F.3d 26, 33 (1st Cir. 2011)

I. PLAINTIFFS LACK STANDING TO SEEK INJUNCTIVE RELIEF.

Because Plaintiffs "are no longer in business and are unable to directly benefit from an injunction" (D.I. 279 at 8 n. 8.), they lack standing to seek injunctive relief. It is undisputed that ZF Meritor LLC dissolved in 2003 - - nearly eight years ago - - and that Plaintiffs stopped making and selling transmissions nearly five years ago in late 2006. (D.I. 231 at Tr. 867:3-6 (stipulated facts); D.I. 230 at Tr. 624:9-11 (Kline); D.I. 230 at Tr. 521:2-21 (Kline).) Indeed, Plaintiffs conceded during the recent status conference that "[w]e've been out of the business," but vaguely referred to "conversations" among unidentified employees "contemplat[ing]" "***possibly*** getting back in[.]" (July 25, 2011 Hearing Tr. at 12:18-13:9.) Conjecture about "possible" future entry is insufficient to confer standing or warrant injunctive relief as a matter of law.

Indeed, *two years ago now*, the Court reached the same conclusion: "if you weren't a competitor, I'm not sure how you would have standing for an injunctive relief." (Aug. 27, 2009 Hearing Tr. at 13:11-16.) That is dispositive. Plaintiffs who are long out of business are not entitled to injunctive relief because they lack standing and face no real and immediate threat of injury. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) ("standing to seek the injunction . . . depended on whether he was likely to suffer future injury"); *Thomas v. Jones*, 2011 WL 1892112 at *1 (3rd Cir. 2011) ("to have standing to bring [claims for injunctive relief], [plaintiff] must show that 'he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and ***the injury or threat of injury must be***

(same). The only difference is that a plaintiff seeking a preliminary injunction need only establish a likelihood of success on the merits, while a plaintiff seeking a permanent injunction needs to show actual success.

both real and immediate, not conjectural or hypothetical'") (emphasis added); *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir. 1990) ("[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged ... conduct and [that] the injury or threat of injury [is] both 'real and immediate,' not 'conjectural' or 'hypothetical'") (quoting *Lyons*, 461 U.S. at 95).

Other courts also deny injunctive relief where, as here, the plaintiff lacks standing because it has long been out of business. *E.g., In Re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999) ("Rainy Lake is out of business and therefore lacks standing to seek injunctive relief"); *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 404 (7th Cir. 1993) ("all but one of the plaintiffs have gone out of business, and thus, cannot show threatened loss or damage by the defendants' conduct"); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 2003 U.S. Dist. LEXIS 17231, at *31 (S.D.N.Y. Sept. 30, 2003) ("Since Intimate is no longer in business and there is no evidence before this Court supporting any threat of continuing injury, injunctive relief is not available.").

II. PLAINTIFFS HAVE NOT SATISFIED THE IRREPARABLE INJURY REQUIREMENT.

Injunctive relief must be denied for the additional reason that Plaintiffs have not proffered proof of any injury they will suffer without an injunction, let alone irreparable injury.[2] That is because there is no such proof: Plaintiffs exited the transmission business years before

[2] Indeed, they have never claimed "irreparable" harm and, instead, claimed extraordinarily inflated - - and entirely unreliable - - damages in order to "repair" their harm. Plaintiffs thus had an adequate remedy at law for their claimed injury, but submitted "insufficient and unreliable" damages testimony and "the worst expert report I ever read in all my years on the bench." (D.I. 279 at 4; Aug. 27, 2009 Hearing Tr. at 5:24.)

trial, they are entirely unaffected by Eaton's current contracts, and they face no imminent and ongoing harm from the rebate terms.[3]

The Supreme Court and Third Circuit bar injunctions premised upon conjectural and hypothetical harm. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) ("***[T]he . . . 'possibility' standard is too lenient***. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction") (first emphasis added); *Thomas*, 2011 WL 1892112 at *1 (threat of injury "must be both real and immediate, ***not conjectural or hypothetical***'"); *Roe*, 919 F.2d at 864 (threat of injury must be "both 'real and immediate,' ***not 'conjectural' or 'hypothetical'***"). The Court's finding - - that there was a "possibility" Plaintiffs "may one day" re-enter the market, (D.I. 279 at 8 n. 1) - - thus bars injunctive relief on its face. Plaintiffs' vague references to "conversations … contemplat[ing]" "***possibly*** getting back in" to the transmission business are thus insufficient to establish the likelihood of suffering irreparable injury. (July 25, 2011 Hearing Tr. at 12:18-13:9.) Indeed, it was clear two years ago from the testimony of Plaintiffs' lead trial witness that Plaintiffs had not taken concrete steps to re-enter the linehaul transmission business. (Sept. 15, 2009, Kline Direct Testimony, Trial Tr. at 523:11-13 ("Q. I take it at this point, you have not decided to invest the money to get back into the business? A. We have not made any decision at this point.").) Injunctive relief is unavailable as a matter of law to remedy such hypothetical and conjectural "possibilities."

III. A PERMANENT INJUNCTION WOULD IMPOSE SUBSTANTIAL HARM ON EATON AND THE PUBLIC.

[3] Eaton does not address the specific terms of the current contracts because each contract must be kept confidential under its terms. If the Court desires details regarding the contract terms, Eaton will provide them under seal.

Because Plaintiffs lack standing and fail the irreparable injury requirement, the Court should not weigh the public interest benefits of an injunction against the harm to Eaton. Those last two factors are only considered if the plaintiff has standing and establishes both actual success on the merits *and* that it will suffer irreparable injury without an injunction. "In earlier cases, we have held that these latter two factors should be taken into account only when they are relevant[.]" *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994); s*ee also Shapp*, 521 F.2d at 147 ("In addition to the two above noted preconditions, 'the district court 'should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.'").

The Court heard no evidence at trial from any member of the public complaining about the rebates or calling for an injunction. To the contrary, the only trial testimony from members of the public was from the OEMs - - who testified they received numerous ***benefits*** from the LTAs, including the lower prices provided by the rebates. Indeed, the Court found that "at all times relevant to the dispute, Eaton's average prices were lower than Meritor's average prices." (D.I. 144 at 3.); *see also* (Tr. 2908:4-8 (Lundahl) ("the purpose of the rebate levels in contracts are to achieve lowest -- highest total value to Paccar. It achieves recognition by the supplier for increased share percentage at Paccar, and it's used in a variety -- in numerous of our contracts"); Tr. 3424:13-17 (Floyd) ("Q: And I take it one of the reasons he's recommending is because of savings that PACCAR was able to negotiate during the course of this negotiation? A: Yes.").)

The Court also heard substantial testimony that each LTA took months to negotiate, that the OEMs wanted rebates, but were not willing to commit to volume-based

rebates because the cyclical demand for heavy duty trucks fluctuates too wildly, and that market-share based rebates - - although not guarantees - - at least made it likely that Eaton would obtain sufficient volume to keep its manufacturing costs lower, again benefiting its customers. (Tr. 2589:5-9 (Davis) ("no one in the industry could predict how many trucks they're going to build, because as we mentioned before, this market is quite volatile. It's quite cyclical. So they suggested that they could give us a higher percentage of their build"); 2588:20-25 (Davis) ("the concept was that if they could provide more volume to us, that we could translate that volume into lower cost base inside of our plants, and with that lower cost base, come up with the funds and the revenue to give them more competitive pricing, which is what they were asking for.").)

This evidence demonstrates that the balance of the harms favors keeping Eaton's current LTAs intact and the rebates in place, because an injunction abrogating the rebates would provide no cognizable benefit to Plaintiffs and would be worse for Eaton, the OEMs, and the OEMs' customers. Indeed, the record contains a significant amount of evidence that the OEMs lowered the price of transmissions to *their* customers as a result of the rebates and other contractual benefits Eaton provided. *E.g.*, (Tr. 2379-80 (Mark Lampert) ("If … one component was a lower cost than another component, it's common for us to pass that savings on to the customer."); Tr. 2447 (Tony Lopes) ("in many cases" the cost savings in the contract with Eaton were passed on to truck purchasers); Tr. 2475 (Tony Lopes) ("anything that's good for me should be good for the end user"); Tr. 1680 (John Spanke) ("The OEMs would use the rebates to provide concessions to truck deals.").

An injunction would eliminate Eaton's ability to realize cost saving efficiencies provided by the market share rebates (and not available otherwise because the OEMs are not willing to accept volume thresholds). Moreover, renegotiation of the rebate terms in at least

three of the LTAs at once would be a difficult process, at best. The LTAs were staggered to begin with, negotiated at different times, had a host of different terms, and different durations. (Compl. ¶¶ 50, 56, 64.) Forcing Eaton to re-open multiple LTAs at the same time would likely place Eaton at a significant disadvantage in its contract renegotiations - - and might force Eaton to sacrifice a fair and robust negotiation process for the sake of quickly executing a contract consistent with the injunction just to get its products to market.

IV. ANY INJUNCTION SHOULD BE STAYED PENDING APPEAL AND SHOULD BE LIMITED TO EATON'S CLASS 8 LINEHAUL AND VOCATIONAL TRANSMISSIONS.

If the Court decides to issue an injunction, which Eaton respectfully submits it should not for the reasons already discussed, then Eaton requests that the Court stay any such injunction until after the Third Circuit has had the opportunity to review the final judgment.[4] Alternatively, Eaton requests that it be given a reasonable period of time to re-negotiate the rebate terms with each OEM. Given the complexity of opening up long-negotiated and complex contracts with several OEMs for immediate, simultaneous re-negotiation, Eaton believes that six months would be the minimum amount of time necessary to permit re-negotiation without severe prejudice to Eaton or the OEMs.

Finally, Eaton requests that any injunction be expressly limited to the Class 8 linehaul and vocational transmissions that were at issue in the trial. Right now, the Court's August 4, 2011 Order is not so limited and would appear to broadly enjoin "Eaton" and all of its

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[4] "The standard for ascertaining the propriety of a stay, like that governing grants of preliminary injunctions contains four elements: (1) a reasonable probability of success on appeal, (2) the prospect of irreparable injury [] if relief is not granted; (3) the possibility of harm to other interested persons and (4) the public interest." *Hoots v. Com. of Pa.*, 651 F.2d 177 (3d Cir. 1981). Eaton meets all four prongs for the reasons stated herein and in its briefing in support of its Motion for Certification of Orders for Immediate Interlocutory Appeal Under 28 U.S.C. § 1292(b). *See* D.I. 270, 278.

"affiliate[s]" in all of its many, many unrelated product lines "from linking discounts or other benefits to market penetration targets." (D.I. 279 at 8; *see also* D.I. 280.) Eaton is a diversified company that manufactures and sells thousands of products that are indisputably unrelated to its heavy duty linehaul and vocational transmissions, including products in industries ranging from electrical systems to aerospace to filtration equipment to power, construction, healthcare, and energy. Eaton even makes golf club grips. Unless the Court narrows any injunction to linehaul and vocational transmissions, all of these industries might conceivably be improperly affected. Indeed, it is well-established that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and must be "limited to the two products which were the subject of this action." *Lever Bros. Co. v. U.S.*, 981 F.2d 1330, 1338 (D.C. Cir. 1993).[5]

CONCLUSION

For the foregoing reasons, Eaton respectfully submits that Plaintiffs' long-ago decision to dissolve their joint venture and to stop making and selling heavy duty linehaul transmissions means they are entirely unaffected by Eaton's current rebate terms, lack standing to obtain an injunction, and cannot establish that they will be irreparably injured without one. In addition, any hypoethetical public benefit from an injunction would be vastly out weighed by the actual, demonstrated harm not only to Eaton, but also to its OEM customers and their customers if the rebates were eliminated. Therefore, Eaton respectfully submits that the Court should not issue an injunction.

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[5] Of course, the other factors for an injunction do not apply to any of these myriad unrelated businesses. There is no claim against them and, thus, no likelihood of success related to them, Plaintiffs cannot claim any irreparable harm in those industries, and there is no public interest in this Court addressing those industries - - which were not before the Court.

August 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 18th day of August, 2011, a copy of Defendant Eaton Corporation's Memorandum In Response To Order To Show Cause was served by electronic filing on all counsel of record.

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