UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC., and GIANT INDUSTRIES, INC., Defendants.	)))))))))))))))	Civil Action No. 07cv352 JH/ACT

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, petitions the Court, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for a temporary restraining order, and ultimately a preliminary injunction, restraining and enjoining defendants Paul L. Foster and Western Refining, Inc. (in combination, "Western"), including their domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from acquiring through a merger or otherwise any stock, assets, or other interest, either directly or indirectly, of or from defendant Giant Industries, Inc. ("Giant"), or its domestic and foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures; thereby maintaining the status quo during the pendency of an administrative proceeding challenging defendant Western's proposed acquisition of Giant that will be promptly commenced by the Commission pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15. U.S.C. §§ 18 and 21; and alleges:

I.

JURISDICTION AND VENUE

1. Jurisdiction is based upon Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and upon 28 U.S.C. §§ 1337 and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by Act of Congress to bring this action. Venue is proper under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), under 28 U.S.C. § 1391(b) and (c), and under Section 12 of the Clayton Act, 15 U.S.C. § 22.

2. Defendants are engaged in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. Western and Giant supply gasoline and diesel fuel throughout northern New Mexico and within this District. Western and Giant are engaged in, among other things, the refining and bulk supply of gasoline to consumers in northern New Mexico.

II.

THE PARTIES

3. The Commission is an administrative agency of the United States Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq*., with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, and Section 5 of the FTC Act.

4. Defendant Paul L. Foster is an individual doing business at 6500 Trowbridge Drive, El Paso, Texas 77905. Mr. Foster is the ultimate parent entity of Western Refining, Inc.

5. Defendant Western Refining, Inc. is a Delaware corporation headquartered at 6500 Trowbridge Drive, El Paso, Texas 77905. Western is an independent crude oil refiner and marketer of refined products and operates primarily in the Southwest region of the United States, including Arizona, New Mexico, and west Texas.

6. Defendant Giant Industries, Inc. is a Delaware corporation headquartered at 23722 North Scottsdale Road, Scottsdale, Arizona, 85255. Giant is an independent crude oil refiner and marketer of refined products and operates primarily in Virginia, Maryland, North Carolina, New Mexico, Arizona, and Colorado.

III.

SECTION 13(b) OF THE FTC ACT

7. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> (b) Whenever the Commission has reason to believe –
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public –
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a

> temporary restraining order or a preliminary injunction may be granted without bond . . . .

IV.

THE PROPOSED ACQUISITION AND THE COMMISSION'S RESPONSE

8. Pursuant to an Agreement and Plan of Merger, by and among Western, Giant, and "New Acquisition Corporation," a wholly-owned subsidiary of Western, dated August 26, 2006, Western agreed to acquire Giant for approximately $1.4 billion in cash. The agreement was subsequently amended on November 12, 2006 (the "Acquisition"). Upon completion of the Acquisition, Giant will become a wholly-owned subsidiary of Western.

9. On April 10, 2007, the Commission authorized the commencement of this action under Section 13(b) of the FTC Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b). The legality of the Acquisition under Section 7 of the Clayton Act and Section 5 of the FTC Act, and the appropriate remedy, in the event liability is found, will be determined by the Commission through an administrative proceeding and will be subject to judicial review.

10. Defendants have advised the Commission that, in the absence of a court order to the contrary, they will consummate the Acquisition after 11:59 p.m. on April 13, 2007. Defendants rejected the Commission's request to stipulate to a temporary restraining order pending this Court's ruling on the Commission's request for a preliminary injunction.

11. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and preliminary injunction are in the public interest and that it has

reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act because the Acquisition may substantially lessen competition in the relevant markets alleged in this Complaint.

V.

BULK SUPPLY OF LIGHT PETROLEUM PRODUCTS TO NORTHERN NEW MEXICO

12. Motor gasoline, diesel fuels, and jet fuel (collectively "light petroleum products") are examples of fuels used in automobiles and other vehicles. They are produced from crude oil at refineries in the United States and throughout the world. There is no substitute for gasoline as a fuel for automobiles and other vehicles designed to use gasoline. Similarly, there is no substitute for diesel fuel for vehicles designed to use diesel fuel, or for jet fuel for airplanes designed to use jet fuel.

13. Light petroleum products are transported in bulk from the producing refineries to markets where the products are demanded. Bulk shipments typically involve volumes in excess of 5,000 barrels up to one million or more barrels via ocean-going tankers. The size of pipeline shipments are generally in the range of 5,000 to 50,000 barrels.

14. Bulk light petroleum products are delivered by waterborne vessels or pipelines into product terminals used for storage and distribution or further pipeline shipment. Road transport of gasoline or diesel fuel is relatively expensive due to the volume and weight of the product, and is not an economic substitute for water vessel or pipeline transportation of bulk shipments over great distances.

15. Light petroleum products are transported from product terminals to final distribution points (retail gasoline stations or other wholesale delivery points) by tanker trucks

each capable of carrying about 9,000 gallons, the equivalent of almost 200 barrels. Producing refineries, whether or not connected to a refined products pipeline terminal, may also provide distribution services to wholesale customers from light petroleum product terminal tanks located at such refineries.

VI.

LIMITED NUMBER OF BULK SUPPLIERS TO NORTHERN NEW MEXICO

16. Giant owns and operates two refineries, and their adjacent terminals, in northern New Mexico, one in Bloomfield and the other in Ciniza, from which it supplies bulk gasoline and diesel fuel to New Mexico, Arizona, Utah, and Colorado. Giant also owns a petroleum products terminal in Albuquerque, from which it supplies bulk gasoline and diesel fuel to northern New Mexico.

17. Giant supplies its Albuquerque product terminal by truck from Giant's New Mexico refineries and from the Plains Pipeline – a common carrier pipeline transporting light petroleum products north from El Paso to Albuquerque and south from El Paso to Juarez, Mexico. The Plains Pipeline is owned by Plains All American Pipeline, L.P. and originates at the Western refinery terminal in El Paso.

18. Western owns and operates a single refinery complex located in El Paso. The refinery produces primarily high value transportation fuels, including gasoline, diesel fuel, and jet fuel. From its refinery, Western supplies these products to Albuquerque, El Paso, west Texas, Tucson, Phoenix, and Juarez, Mexico. Western supplies gasoline and diesel fuel in bulk quantities from its El Paso refinery to Albuquerque via the Plains Pipeline on which Western has historical shipping rights.

19. The Plains Pipeline currently operates at full capacity, which means that current shippers are allocated space on a pro rata basis according to their historical shipping volumes. As a result, by regulated tariff, the pipeline allocates only five percent of the pipeline's total volume to potential new shippers. Consequently, the volume available to any one individual new shipper is limited to a maximum of about 350 barrels per day.

20. Holly Corporation ("Holly") owns and operates a refinery complex (the "Navajo refinery") in Artesia, New Mexico. Holly ships light petroleum product from its Navajo refinery to northern New Mexico via the Four Corners Pipeline, a common carrier pipeline leased and operated by Holly Energy Partners, L.P. ("HEP"), a Holly affiliate. The Four Corners Pipeline originates at Holly's refinery in Artesia, delivers some product to HEP's terminal in Moriarty about 40 highway miles southeast of Albuquerque, and terminates at a HEP terminal in Bloomfield near one of Giant's refineries. Holly's refinery is the only supply source for product shipped on the Four Corners Pipeline. Holly also ships product to HEP's terminal in El Paso from its Navajo refinery via HEP's Artesia-to-Orla-to-El Paso Pipeline and a pipeline running directly from Artiesia to El Paso. From HEP's El Paso terminal, Holly – like Western and Giant – uses its historical shipping rights on the Plains Pipeline to ship light petroleum products to a terminal owned by HEP in Albuquerque.

21. ConocoPhillips owns and operates a refinery in Borger, Texas. ConocoPhillips ships bulk light petroleum products to Albuquerque via the ATA Pipeline, a common carrier pipeline that ConocoPhillips co-owns with NuStar Energy, L.P ("NuStar"), which until recently was known as Valero, L.P.

22. Valero Energy Corporation ("Valero") owns and operates a refinery in McKee, Texas. Valero ships bulk light petroleum products to northern New Mexico on the ATA Pipeline owned by ConocoPhillips and NuStar. The ATA Pipeline originates at Valero's refinery and terminates at ConocoPhillips' and NuStar/Valero L.P.'s storage terminals in Albuquerque. ConocoPhillips' Borger refinery and Valero's McKee refinery are the only two suppliers with access to the ATA Pipeline to Albuquerque.

23. Two other firms currently supply northern New Mexico with bulk light petroleum products via pipeline. Neither firm can increase its bulk supply of all light petroleum products to northern New Mexico in response to a small output decrease from the five significant bulk suppliers (Giant, Western, ConocoPhillips, Valero, and Holly).

VII.

THE NATURE OF COMPETITION

24. Although there are seven current bulk suppliers of light petroleum products to northern New Mexico, only five of these suppliers are currently capable of responding to a small decrease in the volume of gasoline and diesel fuel supply to Albuquerque terminals, and thus should be counted as bulk supply competitors for light petroleum product sales to northern New Mexico: Giant, Western, ConocoPhillips, Valero, and Holly.

25. The current shippers on the Plains Pipeline could not respond to higher Albuquerque prices or reduced supply of light petroleum products by sending more total light petroleum products on that pipeline because the pipeline is already at full capacity. However, each of these firms (except one that ships only gasoline) could to some extent increase the

amount of gasoline it sends to Albuquerque on the Plains Pipeline by substituting gasoline for other light petroleum products currently shipped.

26. Holly, ConocoPhillips, and Valero are large bulk suppliers of light petroleum products with large refineries in or near New Mexico connected to pipelines with significant unused capacity running to the Albuquerque area. However, limited supply responsiveness suggests these firms are unlikely to competitively constrain any small output reduction or price increase for light petroleum products or gasoline after the Acquisition.

27. The unavailability of additional shipping space on the Plains Pipeline for current shippers and the unavailability of economically viable volume on that pipeline for new shippers, increases the likelihood that there would be little or no supply response from the other relevant suppliers to Albuquerque to a future small reduction by the combined Western/Giant in the supply of light petroleum products or gasoline to northern New Mexico.

VIII.

ABSENT ITS ACQUISITION BY WESTERN, GIANT WILL SOON INCREASE THE SUPPLY OF GASOLINE TO NORTHERN NEW MEXICO

28. Giant's two New Mexico refineries are landlocked and currently depend on a declining local crude oil supply. The reduction in crude supply has forced Giant to reduce the rate at which its refineries can refine crude oil into light petroleum products by about 30 percent over the last ten years.

29. In 2005, in an effort to solve its declining crude oil supply and utilization issues, Giant purchased from Shell Oil Company an idle 424-mile long pipeline running from Jal, New Mexico to Bisti, New Mexico, near its two refineries. With the pipeline and new crude oil

supply, Giant publicly announced that the new pipeline will become operational during the second quarter of 2007, with the refineries processing the new crude supply by the end of the second quarter of 2007.

30. Once Giant brings the two refineries up to full utilization, production levels of light petroleum products at the refineries will increase significantly. Giant currently competes with pipeline deliveries to Albuquerque terminals by trucking from its New Mexico refineries. If Giant allocates the new production proportionately to its current marketing areas, this should result in Giant delivering substantially more gasoline to the Albuquerque/Santa Fe area. This substantial increase in gasoline supply to northern New Mexico would spur price competition in that market, causing the prices paid to Giant and other bulk suppliers of light petroleum products in northern New Mexico to fall significantly below where they would have been otherwise.

IX.

WESTERN HAS BOTH THE INCENTIVE AND THE MEANS TO LIMIT ANY INCREASE IN THE SUPPLY OF GASOLINE TO NORTHERN NEW MEXICO AFTER ACQUIRING GIANT

31. Western historically sells more gasoline and diesel fuel at Albuquerque prices than does Giant. Consequently, a combined Western/Giant has more exposure to Albuquerque prices than does Giant alone. After acquiring Giant, Western could find it profitable to reduce, by re-directing to other areas, some volume of light petroleum products that, absent the Acquisition, would have been supplied to the northern New Mexico market. Reducing the amount of light petroleum products supplied to northern New Mexico will increase prices for those products.

32. There are a number of potential mechanisms by which Western, after acquiring Giant, could reduce the total supply of bulk light petroleum products or bulk gasoline to northern New Mexico. Included among the many possible mechanisms is diverting to other markets any of Giant's potential additional gasoline supply for Albuquerque and Santa Fe.

33. Another potential method by which Western could reduce the total supply of bulk light petroleum products or gasoline to northern New Mexico would be to shift some of its current Plains Pipeline shipments between gasoline and diesel fuel. This would allow Western to reduce the amount of gasoline or diesel fuel reaching Albuquerque without ceding space on the Plains Pipeline to other shippers who could use the space to replace Western's reduced supply.

X.

LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

34. Western's acquisition of Giant is an acquisition of "all or part of the stock" and "all or any part of the assets" of Giant, within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

35. The Commission is likely ultimately to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed Acquisition, that the proposed Acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act. In particular, the Commission is ultimately likely to succeed in demonstrating, *inter alia*, that:

a. The relevant product markets in which the competitive effects of the proposed Acquisition may be assessed include the bulk supply of light petroleum products (and the bulk supply of any single petroleum product contained therein) to northern New Mexico.

b. The relevant geographic market within which to assess the competitive effects of the proposed Acquisition are the following counties (collectively "northern New Mexico"), and narrower markets contained therein: Bernalillo, Guadalupe, Los Alamos, Mora, Rio Arriba, San Miguel, Sandoval, Sante Fe, Taos, Torrance, and Valencia. The Acquisition will adversely affect light petroleum product and gasoline customers acquiring wholesale supply in northern New Mexico.

c. Western and Giant are two of only a handful of competitors in the bulk supply of light petroleum products, including gasoline, in northern New Mexico. Only five bulk suppliers could increase bulk supply volumes of light petroleum products to northern New Mexico in response to a small but significant and nontransitory output decrease. Those five suppliers are Western, Giant, ConocoPhillips, Holly, and Valero. Similarly, only six bulk suppliers could increase bulk supply volumes of gasoline to northern New Mexico in response to a small but significant and nontransitory output decrease.

d. The effect of the proposed Acquisition, if consummated, may be substantially to lessen competition in the relevant markets by, among other things:

(i) The Acquisition would combine two of the five significant bulk suppliers of light petroleum products to northern New Mexico, substantially increasing concentration in an already highly concentrated market for the bulk supply of light petroleum products to northern New Mexico, would eliminate the existing substantial competition between Western and Giant, and would substantially reduce competition in the market for the bulk supply of light petroleum products to northern New Mexico.

(ii) The Acquisition would combine two of the six significant bulk suppliers of gasoline to northern New Mexico, substantially increasing concentration in an already highly concentrated market for the bulk supply of gasoline to northern New Mexico, would eliminate the existing substantial competition between Western and Giant, and would substantially reduce competition in the bulk supply of gasoline to northern New Mexico.

(iii) The Acquisition would eliminate Giant as a "maverick" in the bulk supply of gasoline to northern New Mexico, creating a combined firm with reduced incentives to expand its supply of gasoline to northern New Mexico.

(iv) The Acquisition increases the likelihood that Western will reduce the amount of bulk light petroleum products it supplies to northern New Mexico. The other bulk suppliers of light petroleum products are unlikely to respond in a way to make Western's output reduction unprofitable.

(v) The Acquisition increases the likelihood of competitor coordination in the bulk supply of light petroleum products (and the bulk supply of any single petroleum product contained therein including gasoline). Following the Acquisition, Western could more easily coordinate profitably with one or more of the few remaining significant bulk suppliers of light petroleum products, including gasoline, to restrict output or raise prices.

e. Substantial and effective entry into the relevant markets is difficult.

36. The reestablishment of Western and Giant as independent viable competitive entities if they were to merge would be difficult, and it likely would be difficult, if not impossible, to restore the businesses as they originally existed. Furthermore, it is likely that substantial interim harm to competition would occur even if suitable divestiture remedies could be devised.

37. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Commission requests that the Court:

1. Temporarily and preliminarily enjoin defendants Paul L. Foster, Western Refining, Inc., and Giant Industries, Inc., and all affiliates of defendants, from taking any further steps to consummate, directly or indirectly, their proposed Acquisition, or any other acquisition of stock, assets, or other interest, either directly or indirectly;

2. Retain jurisdiction and maintain the status quo pending the issuance of an administrative complaint by the Commission challenging such acquisition, and until such complaint is dismissed by the Commission or set aside by a court on review, or until the order of the Commission made thereon has become final; and

3. Award such other and further relief as the Court may determine to be proper and just, including costs.

Dated: April 12, 2007

WILLIAM BLUMENTHAL
General Counsel

JEFFREY SCHMIDT
Director

DAVID P. WALES, JR.
Deputy Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

DEYONNA YOUNG (Bar No. 29-80)
Assistant Attorney General,
Litigation Division (Antitrust)
Office of the New Mexico Attorney General
Special Deputy to the Federal Trade Commission
111 Lomas N.W., Suite 300
Albuquerque, N.M. 87102
(505) 222-9089

THOMAS LANG (Bar. No. 07-39)
PETER RICHMAN
MARC W. SCHNEIDER
KEITHA L. CLOPPER
ANDREA E. RYAN
ERIC M. SPRAGUE
NANCY E. TURNBLACER
KAREN KAZMERZAK
JODIE M. WILLIAMS

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 326-3665

Electronically Filed

/s/ Thomas Lang (Bar. No. 07-39)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

Marc G. Schildkraut, Counsel for Defendants Paul L. Foster and Western Refining, Inc.
Heller Ehrman, LLP
1717 Rhode Island Avenue, N.W.
Washington, DC 20036
marc.schildkraut@hellerehrman.com
(202) 912-2140

Tom D. Smith, Counsel for Defendant Giant Industries, Inc.
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
tdsmith@jonesday.com
(202) 879-3971

______/s/______________
Thomas J. Lang, Attorney for Movant