UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

COMPLAINT FOR TEMPORARY RESTR/T1hESTR/0 EMC3 0 TN ()CC29 0 TdD <</MCII

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 hea

> 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.

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

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.

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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

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