IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action No. 07-cv-352 JB/ACT**
	)	
WESTERN REFINING, INC., et al.,	)	
	)	
Defendants.	)	

MOTION OF THE FEDERAL TRADE COMMISSION FOR AN INJUNCTION PENDING APPEAL PURSUANT TO FED. R. CIV. P. 62(c) OR, IN THE ALTERNATIVE, AN INJUNCTION PENDING RESOLUTION BY THE COURT OF APPEALS OF AN EMERGENCY MOTION FOR AN INJUNCTION

Plaintiff Federal Trade Commission ("FTC" or "Commission") hereby moves this Court, pursuant to Fed. R. Civ. P. 62(c), for an order enjoining the proposed a transaction among defendants Paul L. Foster, Western Refining, Inc. ("Western"), and Giant Industries, Inc. ("Giant"), in which Western proposes to acquire Giant, pending appellate review of the denial of the Commission's motion for preliminary injunction. In the alternative, the Commission requests that the Court temporarily enjoin the acquisition pending a determination by the Court of Appeals of an emergency application in that court by the Commission for an injunction pending appeal. Unless this Court (or, upon subsequent application, the Court of Appeals) grants an injunction pending appeal, defendants will be free to consummate the proposed transaction after noon MDT, Thursday May 31.[1]

[1] Defendants have agreed not to consumate their proposed transaction until noon MDT, Thursday, May 31. Since the Commission does not know if it is practicable for this Court to rule on the Rule 62(c) motion prior to this deadline, the Commission, simultaneously with filing this motion, filed its Notice of Appeal and shortly will be filing an emergency motion for a stay pending injunction with the Tenth Circuit pursuant to FRAP 8 and Tenth Cir. R. 8.1.

This Court's denial of the Commission's motion for preliminary injunction raises substantial issues for the Court of Appeals to resolve. An injunction pending appeal is necessary to preserve the *status quo*, which would otherwise be irreparably altered. Moreover, an injunction pending appeal would prevent irreparable injury to consumers and to competition.

ARGUMENT

I. THE LEGAL STANDARD FOR AN INJUNCTION PENDING APPEAL

In determining whether to issue an injunction pending appeal, courts have traditionally considered four factors: (1) the movant's likelihood of success on the merits on appeal; (2) the threat the movant will be irreparably harmed absent such an injunction; (3) whether the opposing parties will be harmed by an injunction; and (4) the risk of harm to the public interest. *FTC v. Mainstream Mktng Svcs, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); 10th Cir. R. 8.1. Where – as is the case here – the "harm" factors tip strongly in favor interim relief, the movant need only demonstrate it has raised "questions going to the merits so serious, substantial, difficult, and doubtful as make the issue ripe for litigation and deserving of more deliberate investigation," and not that its success on appeal is more probable than not. *Id.*, *quoting Prairie Band of Potawatomi Indians v. Pierce*, 252 F.3d 1234, 1246-57 (10th Cir. 2001). *See also AARP v. EEOC*, 390 F. Supp. 2d 437, 462-63 (E.D. Pa. 2005) ("where the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the grant of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay"); *Thiry v. Carlson*, 891 F. Supp. 563, 566 (D. Kan. 1995) (same). Moreover, the requested injunction pending appeal can serve as "breathing space * * * without implying that the district court was insecure

about the judgment he had made." *FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1077 (D.C. Cir. 1981), and a court may properly stay its own order "when the equities of the case suggest that the status quo should be maintained." *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Judged by the foregoing standards, the injunction requested by the Commission should be granted. Indeed, Circuit Courts have found that District Courts erred by refusing to grant an injunction pending appeal where, after the District Courts denied the Commission's motion for preliminary injunctive relief, a merger that would upset the status quo could be consummated prior to the resolution of an appeal on the merits. *FTC v. H.J. Heinz Co.*, 2000 WL 1741320 (D.C. Cir. 2000) (once one competitor takes over the other, a merger is impossible to undo as a practical matter); *FTC v. Weyerhauser Co.*, 648 F.2d 739 (D.C. Cir. 1981); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976).

II. THE COMMISSION HAS PRESENTED A SUBSTANTIAL CASE ON THE MERITS

Although this Court ultimately found in favor of the defendants in denying the Commission's motion for preliminary injunction, there can be little question that this case raises substantial issues about the proposed Western-Giant merger. For example, there are questions as to whether: the elasticity of demand for gasoline in the Albuquerque market is such that an additional1400 barrels per day will depress prices paid by consumers by approximately ten cents per gallon; Flying J is a potential bulk supplier to the market; the amount of bulk gasoline transported by truck to the Albuquerque market; whether the Plains pipeline will be expanded and, if it is, if the expansion can be completed in a relatively short time frame, and if there are

any potential bulk gasoline suppliers to the Albuquerque market who do not currently have access to any of the three pipelines that serve the Albuquerque market.

In view of the substantial questions raised by this case, and because – as discussed below – the remaining factors favor an injunction, the Court should maintain the *status quo*, and thereby protect the public interest, until these important questions are resolved by the Court of Appeals.

III. THERE WILL BE IRREPARABLE HARM SHOULD A STAY PENDING APPEAL BE DENIED

If this injunction is denied, the defendants will be free to consummate the proposed transaction immediately. The Commission will then be effectively foreclosed from obtaining adequate relief if the transaction is ultimately found to be illegal in the administrative proceeding commenced by the Commission on May 3, 2007. This is so because divestiture is the only possible relief, yet it has historically proven difficult to determine how to split an ongoing operation into two viable entities when attempting to construct and enforce a divestiture order after the fact. *FTC v. Dean Foods* Co., 384 U.S. 597 606 n.5 (1966) ("experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture."). *See also FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Exxon Corp*, 636 F.2d 1336 (D.C. Cir. 1980) ("Mergers and acquisitions are often followed by a commingling of assets and other substantial changes in the structures of the enterprises involved. Once those changes occur, it is often impossible for the Government to compel a return to the status quo, and the legality of the challenged merger or acquisition may become essentially a moot question."). Indeed, the inherent deficiency of post-merger divestiture orders is the very reason Congress gave the Commission power to seek pre-consummation injunctive relief in cases

such as this. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001) ("*Heinz II*").

Here, restoring competition through a divestiture following an administrative proceeding would be extremely difficult if not impossible. The elimination of Giant from the market will disrupt its longstanding relationships with its distributors or "jobbers." Tr, at 386-87, 506, 510-11, 519. The record indicates that Western will abandon the crude oil contract that Giant established for its new crude oil pipeline and use an alternative source. Tr. 740-41. Western indicates that it intends to consolidate operations post-merger, eliminating Giant personnel and infrastructure. Tr. 739-41, 761. Once Western has control of Giant's assets, absent interim injunctive relief by the Court, there is nothing to prevent Western from taking actions that will make impossible meaningful relief in the event that the Commission prevails on this appeal and in the administrative proceeding. Finally, it may be difficult to find a purchaser for Giant's assets in the event a forced divestiture.

IV. DEFENDANTS WILL NOT BE IRREPARABLY HARMED BY THE ENTRY OF AN INJUNCTION PENDING APPEAL

Defendants will not be irreparably harmed by the brief delay occasioned by the Commission's appeal of this Court's order. The same physical assets (refineries, pipelines, and service stations) that Western proposes to purchase now will still be available to it if, following an appeal on the merits, the Tenth Circuit should refuse to enjoin the merger during the pendency of an administrative proceeding before the Commission. The Commission expects to seek an expedited appeal from the Court of Appeals so any incremental delay occasioned by the grant of injunctive relief will cause little, if any, damage. Thus, if defendants in their opposition contend that their financing commitments expire on May 31, if this was good deal for their financiers

when the deal was announced and has remained so over the past several months, there is no cognizable reason why the transaction would not remain a good deal for the several weeks that it would take an expedited appeal to be heard and resolved. *See Heinz II*, 246 F.3d at 726 (court rejected defendants' claim of irreparable harm, observing that "[i]f the merger makes economic sense now, the [defendants] have offered no reason why it would not do so later"). The brief delay this appeal would have on defendants' plans is far outweighed by the substantial public interest in maintaining free, open, and competitive markets.

V. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST

Denial of an injunction pending appeal would undermine the strong public interest in effective enforcement of the antitrust laws interest by denying the public the benefit of full and complete relief should the Commission ultimately prevail. Moreover, substantial harm to competition will likely occur during the pendency of this appeal, the administrative proceeding, and any subsequent appeals. As the Commission has demonstrated in its submissions supporting its motion for a preliminary injunction, there is compelling evidence that, as a direct result of the elimination of competition between Western and Giant in the bulk supply of gasoline to the northern New Mexico market, significant new volumes of gasoline will not be delivered into this market, resulting in higher prices to consumers. Indeed, the testimony of Dr. White indicated that consumers will pay approximately $1,000,000 per week for gasoline at the resulting supra-competitive prices. *See* Tr. 650-51 (consumer loss of approximately $50 million per year).

In the face of such likely consumer harm and because of the deficiencies inherent in the remedy of divestiture, the public interest will be harmed if Western and Giant do not remain independent competitors while the Court of Appeals assesses the merits of this Court's denial of

the Commission's motion for preliminary injunction.

CONCLUSION

For the reasons identified above, the Commission requests that the Court grant an injunction pending the appeal of the order granting defendants' motion to dismiss. In the

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of May, 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:

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