IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

HART INTERCIVIC, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 1:09-cv-678
	:	
DIEBOLD, INCORPORATED and ELECTION SYSTEMS & SOFTWARE, INC.	:	
	:	
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

On behalf of Hart InterCivic, Inc., by

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LEGAL PROPOSITIONS URGED

I. THE PLAINTIFF IS ENTITLED TO SUE FOR AND HAVE INJUNCTIVE RELIEF UNDER THE CONDITIONS AND PRINCIPLES OF EQUITY.

II. PRELIMINARY INJUNCTIVE RELIEF IS AVAILABLE WHERE THE PRINCIPLES OF EQUITY ARE SATISFIED

A. THE PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS;

B. DENIAL WILL RESULT IN IRREPARABLE HARM TO THE PLAINTIFF;

C. GRANTING THE RELIEF WILL NOT RESULT IN EVEN GREATER IRREPARABLE HARM TO THE DEFENDANT;

D. GRANTING TEMPORARY RELIEF IS IN THE PUBLIC INTEREST.

III. PRELIMINARY RELIEF SIMILAR TO THE ORDER REQUESTED BY PLAINTIFF HAS BEEN GRANTED IN CIRCUMSTANCES SIMILAR TO THOSE PRESENT IN THIS CASE.

IV. A PRELIMINARY INJUNCTION MUST BE SPECIFIC ENOUGH TO MEET THE REQUIREMENTS OF *FED. R. CIV. P.* 65(d).

Plaintiff, Hart InterCivic, Inc. ("Hart"), through its undersigned counsel, submits this Memorandum of Points and Authorities in support of its Verified Motion for Temporary Restraining Order or Preliminary Injunction against defendants, Diebold, Incorporated ("Diebold") and Election Systems & Software, Inc. ("ES&S"), and states:

I. THE PLAINTIFF IS ENTITLED TO SUE FOR AND HAVE INJUNCTIVE RELIEF UNDER THE CONDITIONS AND PRINCIPLES OF EQUITY

According to 15 U.S.C. § 26, Hart is

> entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity ....

In *Winter v Natural Resources Defense Council, Inc*., 555 U.S. ___,129 S.Ct. 356 (2009), the U.S. Supreme Court held that a preliminary injunction must be based on the competing claims of injury and the consequences of granting or withholding the requested relief on the public. "A preliminary injunction is an extraordinary remedy never awarded as of right," *Id.* at 376 quoting Munaf v. Green, 533 U.S. ___, ___, 128 S.Ct. 2207 (2008) (slip op. at 12), and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. (citation omitted).

The Court observed that the principles of equity require that

> [a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter, 129 S.Ct. at 374.

In each case of a motion for preliminary injunction, "courts 'must balance the competing

claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* quoting Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987). "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Id.* at 376-377 quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-312 (1982).

In this Circuit, the precedent regarding the analysis of a request for preliminary injunctive relief is well settled. "'One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties,'" *Kos Pharmaceuticals, Inc. v. Andrix Corp.*, 369 F.3d 700, 708 (3rd Cir. 2004) quoting Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3rd Cir. 1990). Preliminary injunctive relief is available where the plaintiff can establish four conditions:

> A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.

Kos, 369 F.3d at 708 citing Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3rd Cir. 1999); see also Williamson V. Correctional Med. Services, Inc., No. 07-4425, 304 Fed. Appx. 36, 2008 U.S. App. LEXIS 26283 (3rd Cir. Dec. 23, 2008).

A district court's grant of a preliminary injunction is reviewed on appeal to determine "'whether there has been an abuse of discretion, a clear error of law, or a clear mistake on the facts,'" *McKeesport Hospital v. The Accreditation Council for Graduate Medical Education*, 24 F.3d 519, 523 (3rd Cir. 1994) citing Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 198 (3rd Cir. 1990), depending on the nature of the claimed error. Legal conclusions and the application of law to the facts are reviewed de novo, findings of facts for clear error, and the

ultimate decision to grant or deny the preliminary injunction for an abuse of discretion. See *Maldonado v. Houstoun*, 157 F.3d 179, 183 (3rd Cir. 1998). The "fundamental preliminary injunction requirements" are "a likelihood of success on the merits and the probability of irreparable harm if relief is not granted ...," in the absence of which a preliminary injunction cannot stand. *McKeesport Hosp*., 24 F.3d at 523.

II. PRELIMINARY INJUNCTIVE RELIEF IS AVAILABLE WHERE THE PRINCIPLES OF EQUITY ARE SATISFIED

A. The Plaintiff Is Likely To Succeed On The Merits

The court must first correctly determine that the plaintiff is likely to succeed on the legal merits of its claim. *Maldonado*, 157 F.3d 179 (3rd Cir. 1998) (error to enter a preliminary injunction where an erroneous legal standard was applied to analyze the merits of an Equal Protection and Privileges and Immunities claim).

Likelihood of success on the merits is a threshold requirement to be determined before further proceedings on a preliminary injunction. *Schering-Plough Healthcare Products, Inc. v. Neutrogena Corp.*, No. 09-268, 2009 U.S. Dist. LEXIS 69799 (D. Del., August 6, 2009) (No need to address the issue of irreparable harm where plaintiff failed to demonstrate the requisite likelihood of success on Lanham Act claim).

"It is the plaintiff's burden, in seeking injunctive relief, to show a likelihood of success on the merits." *Boyer v. Commissioner*, No. 06-694, 2009 U.S. Dist. LEXIS 66335 at *4 (D. Del. July 30, 2009) citing Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86 (3rd Cir. 1992).

Where a motion for preliminary injunction is brought by the Federal Trade Commission under its authority under 15 U.S.C. § 53(b), it must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation." *Federal Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001).

Although the present action is brought by a private party under 15 U.S.C. § 26 and not by an antitrust enforcement agency, the present posture arises because the transacting parties failed to consult with the antitrust authorities before consummating the September 2 acquisition. Under the circumstances, the interests of equity and the public interest commend the application of the *Heinz* standard by this court when evaluating plaintiff's likelihood of success in connection with its motion for preliminary relief.

B. Denial Will Result In Irreparable Harm To The Plaintiff

The plaintiff must also demonstrate that if the requested preliminary relief is denied plaintiff will be irreparably harmed. "An injunction may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights. ... The relevant inquiry is whether the movant is in danger of suffering irreparable harm at the time the preliminary injunction is to [be] issued." *Abraham v. Commissioner*, No. 08-311, 2009 U.S. Dist. LEXIS 58452 at (D. Del. July 8, 2009) (quotation omitted, alteration added).

"'Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of good will.'" *Kos*, 369 F.3d at 726 quoting Pappan Enters., Inc. v. Hardee's Food Sys., Inc. 143 F.2d 800, 805 (3rd Cir. 1998).

"In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the *only* way of protecting the plaintiff from harm." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91, (3rd Cir. 1992) quoting Instant Air Freight Co. v. C.F. Air Freight, Inc. 882 F.2d 797, 801 (3rd Cir. 1989) (citations omitted, emphasis in original). Thus, the court can only issue a preliminary injunction where no adequate alternative permanent injunctive or legal remedy is available.

C. Granting the Relief Will Not Result in Irreparable Harm to the Defendant

Where plaintiff has demonstrated irreparable harm, the court must balance the plaintiff's hardship with the harm that defendant will suffer if the preliminary injunction is granted, "to ensure that the issuance of an injunction would not harm the [defendant] more than a denial would harm the [plaintiff]." *Opticians Ass'n of Am. v. Indep. Opticians of Am*., 920 F.2d 187, 192 (3rd Cir. 1990) (alteration added).

However, "a party can hardly claim to be harmed [where] it brought any and all difficulties occasioned by the issuance of an injunction upon itself." *Id*. at 728 (quotation omitted, alteration in original). The Third Circuit has often recognized that "the injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought that injury upon itself." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co*., 290 F.3d 578, 596 (3rd Cir. 2002); see also *Kos*, 369 F.3d at 728.

In *Kos*, the defendant took a "deliberate risk by proceeding despite being warned" that the use of a trademark was considered by an adverse party as infringement. As a consequence, it was "'not in a position to urge its original blamelessness as a consideration which should be persuasive to a court of equity.'" *Kos*, 269 F.2d at 729 quoting Telechron, Inc. v. Telicon Corp., 198 F.2d 903, 908 (3rd Cir 1952).

D. Granting Temporary Relief Is in the Public Interest

As the Supreme Court in *Winter* strongly emphasized, the public interest is "pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Winter*, 129 S.Ct. at 381, citing *Amoco Production Co*., 480 U.S., at 546, n. 12.

The Third Circuit has observed that the determination of the public interest is often

routine. "As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427, n.8 (3rd Cir. 1994).

However, the public interest does not reside in "the vindication of an abstract principle," *Continental Group, Inc. v. Amoco Chemicals Corp*., 614 F.2d 351, 358 (3rd Cir. 1980). The effect on the public interest considered by the Third Circuit is "not that justice be done, but that specific acts presumptively benefitting the public not be halted until the merits [can] be reached and a determination made as to what justice require[s]." *Id.* (alteration supplied).

III. PRELIMINARY RELIEF SIMILAR TO THE ORDER REQUESTED BY PLAINTIFF HAS BEEN GRANTED IN CIRCUMSTANCES SIMILAR TO THOSE PRESENT IN THIS CASE

Plaintiff claims the defendants' September 2 acquisition is unlawful under Section 7 of the Clayton Act. "'[D]ivestiture is a common form of relief' from unlawful mergers." *Federal Trade Comm'n v. Whole Foods Market*, 548 F.3d 1028, 1033 (D.C. Cir., 2008) quoting United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001). Indeed, the court is "clothed with large discretion" to fashion remedies for antitrust violations "to restore competition." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Thus, "[c]ourts may not only order divestiture but may also order relief 'designed to give the divested [firm] an opportunity to establish its competitive position.'" *Whole Foods*, 548 F.3d at 1033 quoting *Ford Motor*, 405 U.S. at 575 (alteration in original).

When an putatively unlawful merger has been consummated,

> ...the whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of "unscraambl[ing] the merged assets" often precludes "an effective order of divestiture."

Whole Foods, 548 F.3d at 1033 quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961). "At a minimum," the *Whole Foods* court observed, "the courts retain the power to preserve the *status quo nunc*, for example by means of a hold separate order, and perhaps also to restore the *status quo ante*." *Id.* at 1034 (citation omitted).

As the D.C. Circuit explained,

> A hold separate order is a form of preliminary relief which permits the challenged transaction to go forward, but requires the acquiring company to preserve the acquired company (or certain of the acquired assets) as a separate and independent entity during the course of antitrust proceedings. The aim of such an order is to maintain an acquired unit as a viable competitor while the litigation unfolds, and to safe guard 'unscrambled' the assets acquired so that they may be divested effectively should the government ultimately prevail.

Federal Trade Comm'n v. Weyerhaeuser Co., 665 F.2d 1072, 1075, n.7 (D.C. Cir. 1981) (citations omitted).

This court has observed that a "[w]hile a hold separate order may be granted where the standards for a preliminary injunction are not met, many courts will assess the propriety of the order based on the same elements as those for preliminary injunctive relief." *United States v. United Tote, Inc*., No. 90-130, 1991 U.S. Dist. LEXIS 5477 (D. Del., Jan. 11, 1991).

In *Federal Trade Comm'n v. The Pillsbury Co.*, No. 76-C-4190, 1976-2 Trade Cas. (CCH) ¶ 61,200, p70,471 (N.D. Ill. Nov. 15, 1976) (attached as Exhibit "A"), the court required the defendant to operate certain acquired assets "as a fully operative, viable, going business."

IV. A Preliminary Injunction Must Be Specific Enough to Meet the Requirements of *Fed. R. Civ. P.* 65(d)

Fed. R. Civ. P. 65(d) requires that every injunction or restraining order must state the reasons why it issued, its specific terms, and a description in reasonable detail the act or acts

restrained or required.

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