

Complaint

IN THE MATTER OF

PAR PETROLEUM CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. C-4522; File No. 141 0171
Complaint, May 8, 2015 – Decision, May 8, 2015

This consent order resolves concerns relating to the \$107 million acquisition by Par Petroleum Corporation (“Par”) of Koko’oha Investments, Inc.’s subsidiary, Mid Pac Petroleum, LLC (“Mid Pac”). Only four firms – Par, Chevron Corporation, Mid Pac and Aloha Petroleum, Ltd. – provide Hawaii with bulk supply of Hawaii-grade gasoline blendstock, *i.e.*, gasoline that has not yet been blended with ethanol to make finished gasoline. Par and Chevron own refineries in Hawaii that produce the gasoline blendstock. Mid Pac and Aloha either buy their bulk supply from Par and Chevron or import product. These four firms also own or control access to all of the Hawaii terminals that store bulk volumes of Hawaii-grade gasoline blendstock. The complaint alleges that the merger would reduce competition and lead to higher prices for bulk supply of Hawaii-grade gasoline blendstock, ultimately increasing the price of gasoline for Hawaii consumers. The consent order requires Par to terminate the storage and throughput rights it acquires from Mid Pac for the Barbers Point terminal within five days after the merger is completed. Par will retain rights to load a limited number of tanker trucks at the Barbers Point terminal, but it must obtain prior FTC approval to modify these rights or enter into any new agreement at the Barbers Point terminal.

Participants

For the *Commission*: *Nathan Chubb, Anna Kertesz, Marc Schneider, and Brian Telpner.*

For the *Respondent*: *Marc Schildkraut, Cooley LLP; and Mark Bennett, Starn O’Toole Marcus Fisher.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Par Petroleum Corporation (“Respondent” or “Par”) has agreed to acquire 100% of the outstanding voting securities of Koko’oha Investments, Inc. (“Koko’oha”), which owns all of the

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membership interests of Mid Pac Petroleum, LLC (“Mid Pac”), in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. THE RESPONDENT

1. Respondent Par is a publicly-traded corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 800 Gessner Road, Suite 875, Houston, Texas 77024.

2. Respondent, a diversified energy company, is engaged in, among other things, the refining, bulk supply, transportation, and marketing of refined petroleum products in Hawaii through its wholly-owned subsidiary, Hawaii Independent Energy, LLC.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

4. Pursuant to an Agreement and Plan of Merger (“Agreement”) dated June 2, 2014, Respondent Par proposes to acquire Koko’oha for \$107 million (the “Acquisition”).

III. THE RELEVANT MARKET

5. The relevant line of commerce in which to analyze the competitive effects of the Acquisition is the bulk supply of Hawaii-grade gasoline blendstock (“HIBOB”).

6. Refineries produce HIBOB from crude oil. HIBOB is the only gasoline blendstock that, when combined with ethanol,

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yields gasoline that meets the standards and specifications of Hawaii law. No substitute exists for HIBOB for motor vehicles that must use Hawaii-grade gasoline.

7. Bulk supply means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels. Bulk suppliers of HIBOB deliver HIBOB into gasoline terminals for storage and local distribution or further pipeline or marine shipment. No alternative exists to the bulk supply of HIBOB.

8. The relevant geographic market in which to assess the competitive effects of the Acquisition is the state of Hawaii. Bulk suppliers refine HIBOB in, or import it into, Hawaii.

IV. THE STRUCTURE OF THE MARKET

9. Two refineries located in Hawaii produce bulk supply of HIBOB. Out-of-state imports to Hawaii via ocean-going vessels are also sources of bulk supply of HIBOB. Firms that can receive imports of HIBOB by virtue of their access to local terminals are bulk suppliers.

10. Respondent Par owns one of two refineries in Hawaii that provide bulk supply of HIBOB; Chevron Corporation (“Chevron”) owns the other refinery. Aloha Petroleum, Ltd. (“Aloha”) owns and operates Barbers Point Terminal (“Barbers Point Terminal”) in Hawaii. Barbers Point Terminal is the only terminal in Hawaii not owned by one of the local refiners that can economically import bulk supply of HIBOB. Mid Pac can import bulk supply of HIBOB at Barbers Point Terminal by virtue of a long-term terminaling agreement with Aloha.

11. The Acquisition would weaken the threat of imports as a constraint on local refiners’ HIBOB bulk supply prices. By acquiring Mid Pac’s storage rights at Barbers Point Terminal, Par could limit Aloha’s use of the terminal to import bulk supply of HIBOB. The Acquisition likely would increase prices for bulk supply of HIBOB, and, ultimately, gasoline prices for Hawaii consumers.

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V. BARRIERS TO ENTRY

12. Entry into the relevant line of commerce in the relevant section of the country would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Current bulk suppliers have no incentive to create a new competitor by offering terminal access.

VI. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by increasing the likelihood that Respondent Par would unilaterally exercise market power; and
- b. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining competitors in the relevant market.

VII. VIOLATIONS CHARGED

14. The Agreement described in Paragraph 4 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 4, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of May, 2015, issues its Complaint against Respondent.

By the Commission, Commissioner Wright dissenting.

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DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Par Petroleum Corporation of 100% of the outstanding voting securities of Koko’oha Investments, Inc., which owns all of the membership interests of Mid Pac Petroleum, LLC, and Respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement (“Consent Agreement”) containing consent order, an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Par Petroleum Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place

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of business located at 800 Gessner Road, Suite 875, Houston, Texas 77010.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER**I.**

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Respondent” means Par Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Par Petroleum Corporation including Hawaii Independent Energy, LLC (and after the Acquisition, Koko’oha Investments, Inc., and Mid Pac Petroleum, LLC) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger by and among Par Petroleum Corporation, Bogey, Inc., Koko’oha Investments, Inc., and Bill D. Mills, dated as of June 2, 2014.
- D. “Aloha” means Aloha Petroleum, Ltd., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Hawaii, with its offices and principal place of business located at 1132 Bishop Street, Suite 1700, Honolulu, Hawaii 96813.
- E. “Amended Honolulu Terminal Agreement” means the Terminalling Agreement between Aloha Petroleum, Ltd. and Tesoro Hawaii Corporation (now known as

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Hawaii Independent Energy, LLC), executed on September 23, 2010, relating to the storage and throughput of petroleum products at Aloha's terminal located at 789 N. Nimitz Highway, Honolulu, Hawaii 96817, including the First Amendment To Terminalling Agreement between Aloha Petroleum, Ltd. and Hawaii Independent Energy, LLC, dated January 28, 2015, attached to this Order as Confidential Appendix B.

- F. "Barbers Point Terminal" means Aloha's petroleum products storage facility located at 91-119 Hanua Street, Kapolei, Hawaii 96707.
- G. "Barbers Point Terminal Agreement" means the Terminalling Agreement between Aloha Petroleum, Ltd. and Mid Pac Petroleum, LLC, dated September 30, 2005, (including any amendments), relating to the Barbers Point Terminal, attached to this Order as Confidential Appendix A.
- H. "Bulk Supply" means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels.
- I. "Mid Pac" means Mid Pac Petroleum, LLC, a wholly-owned subsidiary of Koko'oha Investments, Inc., and a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 1100 Alakea Street, 8th Floor, Honolulu, Hawaii 96813.
- J. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

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II.**IT IS FURTHER ORDERED** that:

- A. No later than five (5) days after the closing date of the Acquisition, Respondent shall terminate the Barbers Point Terminal Agreement; *provided, however*, that Respondent may retain rights necessary to load petroleum products at the Barbers Point Terminal truck rack pursuant to the Amended Honolulu Harbor Terminal Agreement.
- B. Respondent shall not, without the prior approval of the Commission, (i) modify the Amended Honolulu Terminal Agreement relating to storage or throughput at Barbers Point Terminal or (ii) enter into any new agreement relating to storage or throughput at Barbers Point Terminal; *provided, however*, that Respondent may agree to renew or extend the term of the Amended Honolulu Terminal Agreement without prior approval.
- C. The purpose of this Order is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint, by preserving flexibility for Hawaii-grade gasoline blendstock imports at Barbers Point Terminal.

III.**IT IS FURTHER ORDERED** that:

- A. Respondent shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Person, corporate or non-corporate, or in any assets engaged in Bulk Supply of Hawaii-grade gasoline blendstock in the state of Hawaii; *provided, however*, that this Paragraph III.A. shall not apply to acquisitions of (i) pipeline throughput rights; (ii) barges or other vessels that transport Hawaii-grade gasoline blendstock only

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between or among islands in Hawaii; or (iii) petroleum product terminals or other storage facilities not capable of receiving imports of at least 150,000 barrels of petroleum products in a single delivery from out of state on ocean-going vessels.

- B. The prior notification required by this Paragraph III. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph III. may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order no later than (i) thirty (30) days

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from the date this Order is issued; and (ii) one (1) year after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger, or consolidation of Respondent; or
- C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

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VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 8, 2025.

By the Commission, Commissioner Wright dissenting.

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CONFIDENTIAL APPENDIX A

**[Redacted From The Public Record, But Incorporated By
Reference]**

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CONFIDENTIAL APPENDIX B

**[Redacted From The Public Record, But Incorporated By
Reference]**

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**Introduction**

The Federal Trade Commission (“Commission”) has accepted from Par Petroleum Corporation (“Par”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from Par’s proposed acquisition of 100% of the outstanding voting securities of Koko’oha Investments, Inc. (“Koko’oha”), which owns all of the membership interests of Mid Pac Petroleum, LLC (“Mid Pac”). Under the terms of the proposed Decision and Order (“Order”) contained in the Consent Agreement, Par must terminate its acquired storage and throughput rights at Aloha Petroleum, Ltd.’s (“Aloha”) Barbers Point Terminal (“Barbers Point Terminal”).

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make the Order final.

The Parties

Par, a publicly-traded diversified energy company based in Houston, Texas, engages in the refining, bulk supply, transportation, and marketing of petroleum products in Hawaii through its wholly-owned subsidiary, Hawaii Independent Energy, LLC (“HIE”). HIE owns and operates the 94,000 barrel-per-day Kapolei refinery on Oahu and refined product terminals in Hawaii. HIE markets gasoline through its Tesoro-branded retail locations and wholesale and retail sales to third parties.

Koko’oha, through its wholly-owned subsidiary Mid Pac, engages in the bulk supply, marketing, and distribution of petroleum products in Hawaii. Mid Pac owns and operates refined products terminals and is the exclusive licensee of the “76” gasoline brand in Hawaii. Mid Pac markets gasoline through

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its branded retail locations and wholesale and retail sales to third parties.

The Proposed Acquisition

Pursuant to an Agreement and Plan of Merger dated June 2, 2014, Par proposes to acquire Koko'oha for \$107 million (the "Acquisition"). The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for bulk supply of Hawaii-grade gasoline blendstock ("HIBOB") in the state of Hawaii.

The Relevant Market

The relevant product market in which to analyze the competitive effects of the Acquisition is the bulk supply of HIBOB. Refineries produce HIBOB from crude oil. HIBOB is the only gasoline blendstock that, when combined with ethanol, yields gasoline that meets the standards and specifications of Hawaii law. No substitute exists for HIBOB for motor vehicles that must use Hawaii-grade gasoline.

Bulk supply means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels. Bulk suppliers need bulk volumes of gasoline blendstock (either through their own refinery operations or through imports) and terminal capacity. Bulk suppliers deliver bulk supply of HIBOB into gasoline terminals for storage and local distribution, or for further pipeline or marine shipment. No alternative exists to the bulk supply of HIBOB.

The relevant geographic market in which to assess the competitive effects of the Acquisition is Hawaii. Bulk suppliers refine HIBOB in, or import it into, Hawaii.

The Structure Of The Market

Bulk supply of HIBOB comes from either the two local refineries or imports from out of state via ocean-going vessels.

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Par and Chevron Corporation (“Chevron”) are the only local refiners. Non-refiners Aloha and Mid Pac can supply bulk volumes to Hawaii, for distribution throughout the state, by receiving imported HIBOB cargoes through Barbers Point Terminal. This is the only terminal in Hawaii not owned by a local refiner that can receive full waterborne cargoes of HIBOB from out of state. By virtue of a long-term storage and throughput agreement, Mid Pac holds substantial storage and throughput rights at Barbers Point Terminal, which provides Mid Pac with sufficient terminal access to handle and distribute imported HIBOB cargoes. The four bulk suppliers – Par, Mid Pac, Chevron, and Aloha – own or control access to all of the Hawaii gasoline terminals that handle bulk volumes of HIBOB.

Effects Of The Acquisition

The Acquisition is likely to substantially lessen competition and lead to higher prices for bulk supply of HIBOB in Hawaii. The potential for competitive harm from the Acquisition stems from the importance of imports in establishing HIBOB prices. Although Aloha and Mid Pac typically buy bulk supply of HIBOB from Par and Chevron, Aloha and Mid Pac use their import capabilities to obtain favorable HIBOB bulk supply prices from the local refiners. Aloha and Mid Pac’s import capabilities serve to constrain local refiners’ bulk supply prices of HIBOB.

The Acquisition would weaken the threat of imports and relax a competitive constraint on HIBOB bulk supply prices. Although the Acquisition reduces from four to three the number of bulk suppliers of HIBOB, the increase in concentration from the loss of Mid Pac does not give rise to competitive concerns. Mid Pac’s ability to command import parity pricing makes it a bulk supply market participant, but the evidence did not show that Mid Pac’s participation in bulk supply or downstream markets is competitively significant. However, Par’s acquisition of Mid Pac’s storage rights at Barbers Point Terminal would result in Par and Aloha sharing access to the terminal. Through these acquired rights, Par could limit Aloha’s use of the terminal and hamper Aloha’s ability to import bulk supply of HIBOB, thus weakening Aloha’s ability to use its import capabilities to obtain better bulk supply prices. With Aloha as a weakened competitor, Par could unilaterally exercise market power post-merger or increase the

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likelihood and degree of coordination between Par and Chevron. As a result, the Acquisition likely would increase the price of bulk supply of HIBOB, which would ultimately lead to higher gasoline prices for Hawaii consumers.

Entry Conditions

Entry into the relevant line of commerce in the relevant section of the country would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. The prospect of new entry through construction of a refinery or import-capable terminal is extremely remote, given the financial, regulatory, and logistical challenges such entry would need to surmount. It is also unlikely that a new entrant would import HIBOB to counteract the competitive harm described above, as current bulk suppliers have no incentive to offer terminal access to create or support entry by a new bulk supply competitor.

The Decision And Order

The Order resolves the competitive concerns raised by the Acquisition by preserving flexibility for HIBOB imports at Barbers Point Terminal. The Order requires Par to terminate its rights at Barbers Point Terminal within 5 days after the closing date of the Acquisition. The Order allows Par to retain only those rights necessary to load a limited number of tanker trucks at Barbers Point Terminal truck rack. These rights would not interfere with the storage and handling of full cargoes of imported HIBOB at Barbers Point Terminal. The Commission must approve any modification to Par's rights to load products at Barbers Point Terminal or any new agreement relating to storage or throughput rights at Barbers Point Terminal. Par may renew or extend the agreement that permits the loading of tanker trucks at Barbers Point Terminal truck rack, without prior Commission approval.

In addition, the Order obligates Par to provide the Commission prior written notice of an acquisition of any leasehold, ownership, or any other interest in any assets engaged in the bulk supply of HIBOB in Hawaii. In light of the post-acquisition structure of the HIBOB bulk supply market, Par's

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future acquisition of any interest enumerated above could raise competitive concerns that may warrant careful investigation by the Commission. However, Par may acquire, without prior written notice, rights or assets not used for bulk supply, which would not result in an increase in concentration in the relevant market. Specifically, the Order excludes from prior written notice the acquisitions of: (i) pipeline throughput rights, (ii) barges or other vessels engaged only in inter-island movement of HIBOB, or (iii) petroleum product terminals or other storage facilities that are unable to receive at least 150,000 barrels of petroleum products in a single delivery from out of state on ocean-going vessels. The acquisition of these rights or assets would not raise competitive concerns in the bulk supply of HIBOB in Hawaii.

To ensure Par's compliance with the Order, Par must submit periodic compliance reports and give the Commission prior notice of certain events that might affect its compliance obligations arising from the Order. Lastly, the Order terminates after 10 years.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Order or to modify its terms in any way.

Statement of the Commission

STATEMENT OF THE COMMISSION

The Commission has reason to believe the proposed acquisition of Koko’oha Investment Inc.’s wholly-owned subsidiary Mid Pac Petroleum, LLC by Par Petroleum Corporation is likely to substantially lessen competition in the bulk supply of Hawaii-grade gasoline blendstock, in violation of Section 7 of the Clayton Act. The transaction is likely to impede the ability of Aloha Petroleum, Ltd., the only remaining bulk supplier without a local refinery, to use imports to constrain the local refiners’ bulk supply prices. Par has agreed to settle the Commission’s charges. Our remedy counteracts the alleged potential anticompetitive effects of the proposed acquisition without eliminating any of the efficiencies from the combination of Par and Mid Pac.

As set forth in the complaint, the competitive concerns from this acquisition stem from the unique characteristics of the Hawaiian market for bulk supply of Hawaii-grade gasoline blendstock (“HIBOB”), which is blended with ethanol to make finished gasoline. Other than Par and Chevron, Aloha is the only owner of a commercial gasoline terminal in Hawaii that is capable of receiving economical shipments of imported HIBOB – the Barbers Point terminal. Pursuant to a long-term storage and throughput agreement, Mid Pac currently shares access to Barbers Point.¹ Par and Chevron can produce more gasoline (HIBOB and other gasoline blending components) than is consumed in Hawaii, rendering imports unnecessary. However, Aloha’s ability to threaten credibly to import HIBOB constrains the prices charged by the local refiners and, ultimately, the price paid by Hawaii gasoline consumers. Aloha’s ability to threaten to import at Barbers Point thus is key to negotiations with Par and Chevron.

The Commission’s investigation uncovered evidence that Par’s acquisition of Mid Pac’s throughput and storage rights at Barbers Point would give Par the incentive and ability to reduce Aloha’s capability to constrain prices through importing, thereby increasing the price Aloha pays for bulk supply. As an incumbent

¹ Mid Pac acquired its rights to the Barbers Point terminal in 2005 after the Commission’s challenge of Aloha’s acquisition of Trustreet Properties LLP, which was Aloha’s 50 percent partner in the terminal at the time.

Statement of the Commission

local refiner that seeks to supply Aloha, Par would have an incentive to use the Barbers Point rights strategically and differently than Mid Pac. By storing substantial amounts of gasoline for an extended period, Par could reduce the size of an import cargo that Aloha could receive at the terminal. This would force Aloha to spread substantial fixed freight costs over a smaller number of barrels of gasoline, which would significantly increase its cost-per-barrel of importing. Contrary to Commissioner Wright's assertion, the evidence shows that market participants, including Aloha itself, believe Par might profitably seek to adopt this strategy.

Our reason to believe that Par would take steps leading to this competitive harm also flows from evidence and analysis suggesting that the benefits to Par of such a strategy outweigh its likely costs. The costs to Par associated with storing the amount of product necessary to tie up Aloha's import capability at Barbers Point appear modest at best. At the same time, Par stands to benefit significantly, in its bulk supply and downstream businesses, from even a slight increase in bulk supply prices.

Moreover, even if the benefit to Par depends on Chevron following Par's strategy, evidence from the investigation suggests a substantial risk that Chevron would respond in that fashion. As the only other incumbent local refiner and potential local supplier to Aloha, Chevron also stands to benefit if Aloha's import costs are increased. Regardless of where in the supply chain it occurs, any increase in prices would harm Hawaii gasoline consumers.

The proposed consent order is narrowly tailored to address these specific competitive concerns by requiring the termination of Par's acquired storage and throughput rights at Aloha's Barbers Point terminal.² There is no evidence that this particular remedy would eliminate any of the efficiencies arising from the acquisition. The prior approval and notice provisions in the proposed consent order provide additional safeguards to alert the

² Aloha and Par had entered into negotiations regarding the termination of Par's storage and throughput rights at the Barbers Point terminal before the Commission identified this as a competitive concern.

Dissenting Statement

Commission of any future agreements or acquisitions that might similarly harm competition, while imposing minimal reporting requirements on Par. Under these circumstances, we believe that the remedy furthers the public interest.

**DISSENTING STATEMENT OF
COMMISSIONER JOSHUA D. WRIGHT**

The Commission has voted to issue a Complaint and a Decision & Order against Par Petroleum Corporation (“Par”) to remedy the allegedly anticompetitive effects of Par’s proposed acquisition of Mid Pac Petroleum, LLC (“Mid Pac”). I dissented from the Commission’s decision because the evidence is insufficient to provide reason to believe Par’s acquisition will substantially lessen competition in bulk supply of Hawaii-grade gasoline blendstock (“HIBOB”) in the state of Hawaii, in violation of Section 7 of the Clayton Act.¹ I commend Staff for their hard work in this matter. Staff has worked diligently to collect and analyze evidence related to numerous product markets within the Hawaiian gasoline industry. Indeed, Staff’s thorough investigation has narrowed the scope of potential competitive concerns arising from the proposed transaction to the single theory of harm alleged in the Complaint. Based upon the evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in any relevant market. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

¹ The Complaint alleges Mid Pac and Aloha participate in the bulk supply of HIBOB by virtue of the fact that they could command import parity pricing. While I am not persuaded by that assertion, my analysis of the transaction’s likely competitive effects does not turn upon whether Mid Pac and Aloha are classified as bulk suppliers. Nor does the theory of harm articulated in the Complaint depend upon a reduction in the number of competitors in the bulk-supplied HIBOB market. I assume, *arguendo*, that the market definition articulated in the Complaint is correct and use it throughout this statement without loss of generality.

Dissenting Statement

The Complaint articulates a theory of competitive harm arising from the proposed transaction based upon the possibility that Par, a bulk supplier of HIBOB, will foreclose a potential downstream customer, Aloha Petroleum, Ltd. (“Aloha”), from its ability to import to discipline the prices of bulk-supplied HIBOB. Par’s acquisition of Mid Pac includes the latter’s storage rights at Barbers Point Terminal. Mid Pac and Aloha each currently have storage rights at Barbers Point Terminal sufficient to allow them to import HIBOB. After the merger, Par and Aloha would share access to the terminal. The theory of harm articulated in the Complaint is that Par would have the incentive and ability to use its newly acquired Mid Pac storage rights to “park” petroleum products at Barbers Point Terminal, and that this strategy would reduce or eliminate Aloha’s ability to discipline bulk supply prices by threatening to import HIBOB, thus resulting in higher HIBOB prices which would ultimately be passed on to Hawaii consumers.

The theory that Par might exclude Aloha in this way is certainly a plausible basis for further investigation. Indeed, competitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, though empirical evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign.² The question, however, is whether the record evidence supports the theory. In short, the answer is no. For Par to have the incentive and ability to engage in this strategy, it must be profitable for it to do so. Neither economic analysis nor record evidence gives me reason to believe this is so. The evidence strongly suggests such an exclusionary strategy would not be profitable without Chevron Corporation’s (“Chevron’s”) cooperation. Chevron is the only other Hawaiian refiner aside from Par capable of selling bulk supplies of HIBOB to Aloha. Such tacit or explicit coordination to exclude Aloha is highly unlikely in the HIBOB market. Furthermore, the record evidence

² See generally James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639 (2005); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi, ed., 2008).

Dissenting Statement

also indicates Aloha, the potential victim of the strategy, does not have any reason to believe Par would adopt this potentially anticompetitive strategy. Thus, I have no reason to believe that post-acquisition, Par will have the incentive and ability to raise prices of the bulk supply of HIBOB.

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. The fact that the Commission believes the proposed consent order is costless is not relevant to this determination. A plausible theory may be sufficient to establish the mere possibility of competitive harm, but that theory must be supported by record evidence to establish reason to believe its likelihood. Modern economic analysis supplies a variety of tools to assess rigorously the likelihood of competitive harm. These tools are particularly important where, as here, the conduct underlying the theory of harm – that is, vertical integration – is empirically established to be procompetitive more often than not. Here, to the extent those tools were used, they uncovered evidence that, consistent with the record as a whole, is insufficient to support a reason to believe the proposed transaction is likely to harm competition. Thus, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

Complaint

IN THE MATTER OF

AMERICAN INTERNATIONAL MAILING, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4526; File No. 152 3051**Complaint, May 20, 2015 – Decision, May 20, 2015*

This consent order concerns American International Mailing, Inc.'s ("AIM") deception of consumers regarding its participation in international privacy frameworks. AIM transports mail, parcels, and freight worldwide. The complaint alleges that AIM falsely represented that it was a "current" participant in the U.S.-EU Safe Harbor Framework when, in fact, from May 2010 until January 2015, AIM was not. Though AIM submitted its self-certification to the U.S.-EU Safe Harbor Framework in 2006, the complaint alleges that AIM failed to renew its self-certification in May 2010. The consent order prohibits AIM from misrepresenting the extent to which it participates in any privacy or data security program sponsored by the government or any other self-regulatory or standard-setting organization.

Participants

For the *Commission*: *Monique F. Einhorn.*

For the *Respondent*: *Brian McGovern, McCarthy, Leonard & Kaemmerer.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American International Mailing, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American International Mailing, Inc., is a Delaware corporation with its principal office or place of business at 3922 Vero Road, Suite 1, Baltimore Maryland 21227.
2. Respondent provides a service for transporting mail, parcels and freight worldwide.