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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

FEDERAL TRADE COMMISSION, Plaintiff, v. ALOHA PETROLEUM, LTD., and TRUSTREET PROPERTIES, INC., Defendants.	CV05 00471 HG KSC

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PURSUANT TO

SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiff, Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, brings this action for a temporary restraining order and a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to restrain and enjoin defendant Aloha Petroleum, Ltd. ("Aloha"), including its 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 Trustreet Properties, Inc. ("Trustreet"), or its domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures. The proposed acquisition by Aloha of the petroleum-related assets of Trustreet, if allowed to proceed, may substantially lessen competition in the markets for: (1) the marketing of gasoline by bulk suppliers, as defined herein, in Hawaii or geographic subdivisions thereof, and in particular the sale of gasoline by bulk suppliers to nonintegrated retailers as defined herein; and (2) the retail sale of gasoline on Oahu or geographic subdivisions thereof.

The purpose of this action, pursuant to Section 13(b) of the Federal Trade Commission Act, is to maintain the status quo during the pendency of an administrative proceeding challenging defendant Aloha's proposed acquisition of the petroleum-related assets of defendant Trustreet, that will be commenced by the Commission pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21.

I.

JURISDICTION

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.

2. Aloha and Trustreet 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. Aloha and Trustreet are bulk suppliers of gasoline and are engaged in, among other things, (a) the marketing of gasoline, including through intracorporate transfer to its integrated retailers and through sale to nonintegrated retailers for resale in the State of Hawaii, and (b) the sale of gasoline to consumers at retail on Oahu. All gasoline sold in Hawaii originates elsewhere and enters Hawaii from outside the State, either in the form of crude oil or refined gasoline.

II.

VENUE

3. 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. Aloha and Trustreet transact business and are found within the District of Hawaii. This action involves, in part, the threatened loss of competition in the marketing of gasoline to retailers, in particular sales to nonintegrated retailers, and in the sale of gasoline to consumers at retail within the District of Hawaii. Defendants jointly own a petroleum storage facility ("terminal") in the District of Hawaii and each defendant operates gasoline service stations located within the District of Hawaii, Aloha under the "Aloha" brand, and Trustreet under the "Mahalo" brand.

III.

THE PARTIES

4. 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 for enforcing, *inter alia*, Section 7 of the Clayton Act and Section 5 of the FTC Act.

5. Defendant Aloha is a corporation organized and existing under the laws of the State of Hawaii, with its principal place of business at 1132 Bishop Street, 17th Floor, Honolulu, Hawaii 96813.

6. Defendant Trustreet is a corporation organized and existing under the laws of the State of Maryland, with its principal place of business at 450 S. Orange Avenue, Orlando, Florida 32801.

IV.

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. . . .

V.

THE PROPOSED ACQUISITION AND THE COMMISSION'S RESPONSE

8. Pursuant to an Asset Purchase Agreement dated February 22, 2005, Aloha proposes to acquire the petroleum-related assets of Trustreet in Hawaii in a transaction valued by Aloha at approximately $18 million (the "Acquisition").

9. On July 26, 2005, 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 proposed acquisition during the pendency of administrative proceedings to be commenced by the Commission.

10. Defendants have advised the Commission that, in the absence of a court order to the contrary, they will consummate the proposed merger after 11:59 p.m. on July 28, 2005.

11. In authorizing the commencement of this action, the Commission determined that such an injunction is in the public interest and that it has reason to believe that the proposed 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.

VI.

TRADE AND COMMERCE

12. Hawaii has no petroleum pipeline connections to the mainland. There are two refineries on Oahu that can, between them, supply all of the gasoline demand for the State of Hawaii. These refineries are owned by Chevron Corporation ("Chevron") and Tesoro Corporation ("Tesoro").

13. Gasoline, whether refined in Hawaii or imported from elsewhere, must be stored in tanks at "terminals" on Oahu, from which it can be delivered into trucks via racks for distribution to individual gasoline stations on Oahu or shipped by barge to neighbor islands.

14. Apart from the terminals owned by the two refiners, Chevron and Tesoro, there exist only two other competitively significant terminals on Oahu capable of receiving gasoline imports. The first is owned by Royal Dutch Shell plc ("Shell"). The second is jointly owned by defendants Aloha and Trustreet (the "Barbers Point" terminal). A third terminal owned by ConocoPhillips has effectively exited the market: ConocoPhillips, which has sold its retail stations, is committed to closing and dismantling the terminal in the coming months. A

fourth terminal owned by the Hawaii Fuels Facility Consortium is used only for jet fuel and is not available to store gasoline. There are no terminals on any of the other Hawaiian islands that are economically capable of receiving out-of-state gasoline imports.

15. Both Aloha and Trustreet have the right and ability to use the Barbers Point terminal to import cargoes of gasoline or to store gasoline obtained from the refiners on Oahu. No one else has the right to use the Barbers Point terminal.

16. The ability to import cargoes of gasoline is necessary to obtain a competitive bulk supply price, *i.e.*, "import-parity price," from the refiners on Oahu.

17. Bulk suppliers are entities that have the ability to procure, store, market, and distribute large quantities of gasoline. Bulk suppliers include refiners and owners or operators of gasoline terminals. Gasoline wholesalers or "jobbers" that lack the ability to refine or import the gasoline which they then sell do not fall within the definition of a bulk supplier.

18. Gasoline is sold to the public on Oahu by both "integrated" and "nonintegrated" retailers. Integrated retailers include service stations that are either owned by or affiliated with refiners or terminal owners. The integrated retailers operating on Oahu are defendant Aloha, defendant Trustreet under the "Mahalo" brand, Chevron, Tesoro, and Shell. Nonintegrated retailers are independent of refiners and terminal owners. The nonintegrated retailers operating on Oahu include Costco Wholesale Corporation ("Costco"), Mid Pac Petroleum LLC ("Mid Pac") under the name "Union 76," Finova Hawaiian Holdings LLC under the name "Lex Brodie's" ("Lex Brodie's"), and Fastop Petroleum Marketing, Inc. (d.b.a. "Freedom Gasoline" ("Freedom")).

19. Except with respect to non-retail entities such as the government or commercial end-users, Chevron does not supply and has not bid on the supply of gasoline, directly or via independent jobbers, to nonintegrated retailers. Shell

does not supply gasoline, directly or otherwise, to any non-Shell branded retail entities. Only Tesoro, Aloha, and Trustreet supply or have bid on the supply of gasoline to both integrated and nonintegrated retailers. The nonintegrated retailers on Oahu generally charge lower retail prices than, and constrain the prices charged by, Chevron, Shell, and Tesoro.

COUNT I

LOSS OF COMPETITION IN THE MARKETING OF GASOLINE BY BULK SUPPLIERS

20. As alleged below, Aloha's acquisition of the petroleum-related assets of Trustreet will further concentrate an already concentrated market in the marketing of gasoline by bulk suppliers in Hawaii, especially sales to nonintegrated retailers, and substantially lessen competition in that market.

A. Relevant Product Market

21. The marketing of gasoline by bulk suppliers, including intra-corporate transfers to integrated retailers, is a relevant product market and line of commerce in which to analyze the competitive effects of this acquisition.

B. Relevant Geographic Market

22. The relevant geographic markets in which to analyze the competitive effects of this acquisition on the marketing of gasoline by bulk suppliers are the State of Hawaii and geographic subdivisions thereof. Nonintegrated retailers have no alternative but to purchase gasoline from Hawaiian bulk suppliers.

C. Concentration

23. The proposed acquisition would substantially increase market concentration in the already highly concentrated market for marketing of gasoline by bulk suppliers, and in particular sales to nonintegrated retailers. Overall, the pre-acquisition Herfindahl-Hirschman Index ("HHI") is 2524 and post-acquisition would rise by 220 points to an HHI of 2744.

D. Effects of the Proposed Acquisition in the Marketing of Gasoline by Bulk Suppliers

24. The effect of the proposed acquisition, if consummated, may be to lessen competition substantially in the marketing of gasoline by bulk suppliers, and in particular sales to nonintegrated retailers, by eliminating competition from Trustreet from those markets, reducing from five to four the number of bulk suppliers in Hawaii and from three to two the number of bulk suppliers selling to nonintegrated retailers.

25. Timely entry into Hawaii by a new bulk supplier sufficient in magnitude and scope to deter or counteract the anticompetitive effects of the proposed acquisition is unlikely.

COUNT II

LOSS OF COMPETITION IN THE SALE OF GASOLINE AT RETAIL

26. Aloha and Trustreet are two of the lowest-priced retailers of gasoline on Oahu. A combination of Aloha and Trustreet would put Aloha behind only Chevron in terms of retail market share.

A. The Relevant Product Market

27. For consumers, there are no substitutes for gasoline. Accordingly, the retail sale of gasoline is a relevant product market and line of commerce in which to analyze the competitive effects of this acquisition.

B. The Relevant Geographic Market

28. The relevant geographic markets in which to analyze the competitive effects of this acquisition on the retail sale of gasoline is no larger than Oahu and geographic subdivisions thereof. Trustreet's entire retail network is located on Oahu. It is impractical for consumers on Oahu to travel elsewhere, including to neighbor islands, for gasoline.

C. Concentration

29. The proposed acquisition would substantially increase concentration in retail gasoline markets on Oahu and in geographic subdivisions thereof. Aloha business records note in particular that at some locations Aloha and Mahalo stations competitively constrain one another.

D. Effects of the Proposed Acquisition on the Retail Supply of Gasoline

30. Trustreet, through its Mahalo stations, and Aloha are the lowest priced integrated retailers of gasoline. Trustreet is Aloha's closest competitor. The proposed acquisition would eliminate competition between the defendants at retail and would likely result in an increase in prices to consumers.

31. Timely entry into the relevant markets sufficient in magnitude and scope to deter or counteract the anticompetitive effects of the proposed acquisition, is unlikely.

VII.

LIKELIHOOD OF SUCCESS ON THE MERITS

32. The Commission is likely 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 as set forth in Counts I and II, Paragraphs 21 through 31, *supra.*]

VIII.

NEED FOR RELIEF

33. The reestablishment of Trustreet as an independent viable competitive entity if its petroleum-related assets in Hawaii were to be acquired by and merged with Aloha would be difficult, and there is a substantial likelihood that it would be impossible to restore the two companies as they currently exist. Further, it is likely that substantial interim harm to competition would occur even if suitable divestiture remedies could be devised.

34. 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 defendant Aloha, including its domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, and joint ventures, from taking any further steps to consummate, directly or indirectly, the proposed acquisition of Trustreet, or any other acquisition of stock, assets, or other interest, either directly or indirectly, in Trustreet;

(2) Order the defendants to 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;

(3) Retain jurisdiction over this matter 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

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

Dated: 7-27-05

Respectfully Submitted,

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