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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HU HONUA BIOENERGY, LLC, a Delaware limited liability company,

Plaintiff,

v.

HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawaii corporation; HAWAIIAN ELECTRIC COMPANY, INC., a Hawaii corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii corporation,

Defendants.

Civil No. 16-00634 JMS-KJM

OBJECTIONS TO ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF HU HONUA BIOENERGY, LLC'S MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT AND FOR PERMISSIVE JOINDER; CERTIFICATE OF SERVICE

[Request for Judicial Notice and Declaration of Rex Y. Fujichaku filed concurrently]

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OBJECTIONS TO ORDER GRANTING IN PART AND DENYING IN PART LEAVE TO FILE AMENDED COMPLAINT

I. INTRODUCTION AND SUMMARY OF OBJECTIONS

The Ninth Circuit has repeatedly emphasized the "extreme liberality" with which district courts must approach motions for leave to amend, with "the consideration of prejudice to the opposing party" carrying the "greatest weight." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051–52 (9th Cir. 2003). Yet Judge Mansfield's Order (ECF 243) denies, based *solely* on supposed "futility," much of Hu Honua's motion for leave to amend its complaint to clarify and update its antitrust claims. In particular, the Order denies Hu Honua's requests to add a claim for injunctive relief under Clayton Act § 7 and to update its Sherman Act § 2 claims, finding that Hu Honua's additions fail for lack of antitrust injury and are barred by the statute of limitations.

In these respects, the Order is contrary to law and clearly erroneous. In fact, the Order effectively gives the Hawaiian Electric Defendants (collectively, "HECO") *carte blanche* to engage in monopolistic conduct—conduct that has already inflicted serious harm on the wholesale market for firm electric power, including reducing generating capacity and output to the point of repeated blackouts on Hawaii Island. The Order mistakenly relies on this Court's 2018 rulings about the purported speculativeness of harm to the *retail* market (*i.e.*, the impact on the retail price of electricity), Order at 27, ignoring the anticompetitive conduct's

dramatic effects on the *wholesale* market on which Hu Honua accordingly focuses (*i.e.*, the impact on the wholesale generation of electricity). The Order also misapplies the Court's prior decisions (and ignores the impact of intervening authority) with respect to the effect of regulation on antitrust liability. And the Order applies a statute of limitations *defense* and penalizes Hu Honua for merely waiting, as mandated by Circuit precedent, to sue for injunctive relief to remedy the acquisition of Hamakua, HECO's biggest independent rival for generation of firm electric power on Hawaii Island, until Hu Honua faced an imminent injury from the acquisition. The Order (at 35) relies on these very same erroneous grounds to deny Hu Honua's request to name three affiliates of the HECO Defendants—and identifies no failure to satisfy Rule 20(a)'s permissive joinder standard—so it is equally objectionable.

None of this is permitted under Ninth Circuit law—particularly given the liberal amendment standard. Hu Honua timely filed its motion after the conditional settlement it reached with the HECO Defendants in May 2017 unwound last year. And its proposed Third Amended and Supplemental Complaint ("TAC") properly updates and clarifies Hu Honua's allegations to account for factual developments since the operative complaint was filed. Hu Honua respectfully objects to the Order to the extent it denies Hu Honua's motion and asks that the Court sustain these Objections and grant leave to amend and supplement the complaint either in the form

of the TAC or a Revised TAC that reflects important post-motion factual developments. *See* Declaration of Rex Y. Fujichaku ("Decl."), Ex. I. Hu Honua also requests oral argument and leave to file a reply in support of these Objections.[1]

II. ARGUMENT

A. The Order's Antitrust Injury Ruling Is Contrary to Law

The Order ruled that "no set of facts can be proved" that would plausibly show antitrust injury from the Hamakua acquisition.[2] Order at 25–34. This is contrary to law and clearly erroneous. The TAC pled classic antitrust injury; neither state nor federal regulation provides any antitrust immunity here or otherwise negates antitrust injury.

1. The TAC Pleads Antitrust Injury in the Relevant Wholesale Firm Power Generation Market

There are "four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct

[1] Because the Order rests on "futility grounds," *id.* at 35, *de novo* review applies under 28 U.S.C. § 636 and the Order should have been styled as a "recommendation." Hu Honua Reply (ECF 237) at 6 n.2. But even under the clearly erroneous and contrary to law standard, Hu Honua's Objections should be sustained.

[2] The Hamakua acquisition is the only conduct specifically discussed in this section of the Order. Hu Honua objects to the ruling as applied to any other alleged conduct. This Court's 2018 rulings were focused on alleged antitrust conspiracy claims against defendants with whom Hu Honua has settled. As the Court had previously indicated in its initial 2018 ruling, "the court is not specifically ruling on whether any claims (antitrust or otherwise) are stated (or not) as to the Hawaiian Electric Defendants." ECF 137 at 19 n.11.

unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Ellis v. Salt River Project*, 24 F.4th 1262, 1273 (9th Cir 2022); Order at 26. The Order does not question the allegation that the Hamakua acquisition—by which HECO acquired a wholesale market share in excess of 90%—was an unlawful merger or that a threat of injury was alleged. Order at 17–18. Thus, only the two remaining requirements for antitrust injury are at issue, and Hu Honua has satisfied each.[3]

Hu Honua's injury from the Hamakua acquisition is of the type the antitrust laws were intended to prevent. The merger was both horizontal (because HECO and Hamakua were competitors) and vertical (because Hamakua was a HECO supplier). It expanded HECO's monopoly power in the market for wholesale firm power generation on Hawaii Island—"HECO's market share [increased] from nearly 69% to a level above 90%"—and enhanced its post-merger incentives and ability to favor Hamakua and "foreclose and impede competition by existing and potential independent power producers in the relevant market." TAC ¶ 132. Courts have long recognized that the antitrust laws are intended to prevent such mergers, *particularly by monopolists*, that threaten to foreclose competition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 323–24 (1962) ("The primary vice of a vertical merger … is

[3] Antitrust injury is one element of antitrust standing. *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 456–57 (9th Cir. 2012). The Order does not purport to find any defect in any other element of Article III or antitrust standing.

that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition which deprives rivals of a fair opportunity to compete.").[4]

Hu Honua's alleged injury also flows from that which makes the merger unlawful. To be clear, this showing is laser focused on what makes the merger unlawful in the relevant *wholesale* market. In 2018, this Court was concerned that Hu Honua's "allegations of antitrust injury rely in significant part on harm to retail consumers," ECF 137 at 28 n.15, and that this alleged *retail* market injury—"consumers paying supra-competitive prices"—was "speculative." ECF 183 at 23; ECF 137 at 30–31. But with the benefit of over five years of post-merger experience, Hu Honua's TAC now comprehensively rests its allegations of antitrust injury on manifest harm to the relevant *wholesale* market.[5]

The TAC pleads abundant direct evidence of harm. HECO has slashed output

[4] *See also Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 691 (9th Cir. 1976) ("danger" from vertical merger is "vertical foreclosure"); *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1053 (5th Cir. 2023) ("significantly increased incentive to crowd out … competitors" sustained prima facie case of unlawful vertical merger by monopolist); U.S. Dep't of Just. & FTC, Merger Guidelines, Guideline 5 at 13–18 (Dec. 18, 2023), *available at* https://www.justice.gov/atr/2023-merger-guidelines (mergers lessen competition when merged firm has "both the ability and incentive to limit access … so as to weaken or exclude some of its rivals"; merged firm's monopoly power "alone" suffices to show this).

[5] To be sure, injury to retail customers has also materialized. Consumer rates have increased by almost 50%. TAC ¶ 113. In any event, a business plaintiff need not allege harm to the "ultimate consumers" to plead antitrust injury. *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 832–33 (9th Cir. 2022).

in the wholesale market, with an almost 10% decline in the "amount of net firm generating capacity." TAC ¶ 111. HECO's "facilities and plants serving the relevant market have become increasingly outdated, and of diminished quality and reliability." *Id.* ¶ 110. The Hamakua plant "ceased acting as an independent competitor" as it was absorbed into HECO's monopoly. *Id.* ¶¶ 12, 107–08. "HECO's energy reserve margin has deteriorated and fallen below safe and reliable target levels." *Id.* ¶ 11. As various judicially noticeable facts make clear, the situation has only turned more dire since Hu Honua filed its motion. *See* Hu Honua's Request For Judicial Notice ("RJN"). In the first few months of 2024 alone, the lack of adequate firm power supply in the wholesale market has caused HECO to initiate multiple rolling blackouts, leaving thousands without power. Decl. Exs. A, B, D. And in fact, just this week, shortly after HECO urged customers "to reduce their electricity use" because HECO cannot, with competition excluded from the wholesale market, generate "enough supply to meet electricity demand," an outage left more than 20,000 customers without power. *Id.* Exs. C, D. This failure of supply to meet demand is a hallmark of harm to competition. "[O]utput reductions are one common kind of anticompetitive effect in antitrust cases." *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015). Deterioration in quality and reliability is another hallmark, regardless of any impact on price. *Ohio v. Am. Express Co.*, 585 U.S. 529, 542 (2018) ("decreased quality in the relevant market" is "[d]irect evidence of

anticompetitive effects"); *see also FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53–55 (D.D.C. 2022) (harm to competition alleged where mergers "did not lead to higher prices, [but] they did lead to poorer services and less choice").

The threat that HECO would actively use Hamakua to displace Hu Honua has now become reality, again depriving the wholesale market of what is desperately needed to satisfy the energy needs of Hawaii Island: reliable firm power that "the Hu Honua Facility stands ready *today* to generate." TAC ¶ 13 (emphasis added). By contrast, the Hamakua plant has turned in "[p]oor performance in recent years" and now suffers from serious reliability issues, resulting in "reserves much tighter than forecast." Decl. Ex. G at 4–5. In February, the entire Hamakua plant went on forced outage, a status that continues to the present. *Id.* Ex. H. Having been foreclosed by a monopolist's failing plant, Hu Honua's "alleged injuries, therefore, flow from that which allegedly makes Defendants' conduct unlawful: limiting output below levels dictated by consumer demand." *City of Oakland*, 20 F.4th at 457.

Without any discussion of this overwhelming evidence of anticompetitive harm, the Order found no "causal connection between Hu Honua's purported injuries and the claimed anticompetitive effects of the Hamakua acquisition." Order at 33. According to the Order, "Hu Honua's asserted injuries stem from its inability to sell wholesale power to HELCO, and the fact that the PUC has authorized only HELCO to purchase and resell wholesale power on the Big Island." *Id.* But Hu Honua's

inability to sell *is the antitrust injury* (*i.e.*, foreclosure) that flows from the alleged antitrust violation. *PLS.com*, 32 F.4th at 840 (plaintiff "adequately alleged antitrust injury" where conduct "prevented [it] from gaining a foothold in the market and ma[de] it virtually impossible for new competitors to enter"). HELCO's monopsony status is what gives HECO the ability to favor its illegally acquired plant (Hamakua) in the market for the *sale of wholesale firm power*, where HECO is supposed to face *competition as a matter of state policy*. *Illumina*, 88 F.4th at 1051 & n.10 (declining to hold merger must increase defendant's ability to foreclose to be unlawful, as this would effectively exempt acquisitions by monopolists and entail "perverse" results).

The Order does not remotely suggest Hu Honua is challenging procompetitive conduct; "[n]othing in the record indicates that a finding of antitrust injury under the circumstances of this case would punish behavior that the antitrust laws are designed to promote." *Glen Holly Ent., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 375 (9th Cir. 2003); *see also City of Oakland*, 20 F.4th at 457 ("[T]he proper focus is on whether the [plaintiff's] injuries flow from a decrease in competition among *producers*."). Although the Order (at 33–34) conceives this as a breach of contract case, Hu Honua is being foreclosed now when it has no contract. And in any event, the Ninth Circuit has made it very clear that contract disputes do not absolve electric utilities from antitrust liability: "We are not convinced that antitrust liability may not be predicated on conduct which also happens to create a contract dispute, … But in this case,

[plaintiff] is not simply claiming that [defendant utility] breached its contract. Instead, [plaintiff] is claiming that [defendant] acted anticompetitively and without a legitimate business reason." *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1368 (9th Cir. 1992). Here, as in *City of Vernon*, any contract dispute "is beside the point" and "does not grant [defendant] the freedom to act anticompetitively." *Id.*

2. PUC Regulation Does Not Preclude Antitrust Injury

The Order holds that "[b]ecause of the PUC's pervasive regulation of the local electric utility industry, Hu Honua does not, and cannot, claim antitrust injury arising from the alleged anticompetitive effects of the challenged acquisition." Order at 33. This sweeping holding is *not* anchored in the state-action immunity doctrine (the Order does not even mention that doctrine). And for good reason: HECO's admission that "the acquisition itself was not subject to PUC approval," Order at 29, alone defeats state-action immunity. *Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1195 (9th Cir. 2001).

The Order's holding that the acquisition is nonetheless shielded from antitrust scrutiny is legally erroneous. First, it mistakenly relies on this Court's prior finding that Hu Honua's "alleged injury—consumers being forced to pay supra-competitive prices for power—was both speculative and controlled by the PUC." Order at 27 (quoting ECF 183 at 13). As discussed above, Hu Honua's allegations of antitrust injury do not now rest on this basis. *Supra* pp. 5–7. There is nothing speculative

about the anticompetitive harm in the wholesale market, or the PUC's inability to control or prevent the Hamakua transaction or the subsequent adverse market effects.

HECO proffered after-the-fact Affiliate Transaction Requirements as evidence of PUC oversight of the Hamakua acquisition, ECF 226 at 4, 23, overlooking that these expressly provide that "*[n]othing* … [herein] shall confer immunity from state or federal antitrust laws," and that "[s]anctions imposed … for violations of these Requirements *do not affect or preempt antitrust liability*, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, *antitrust remedies may also be sought in federal or state court to cure anti-competitive activities*." ECF 226-5 § IV.J (emphasis added). This flatly refutes HECO's erroneous view that the PUC's "setting of rates, and its control of entry into the market is a comprehensive regulatory scheme," Order at 29 (quoting ECF 226 at 27–28), that negates antitrust injury as a matter of law. *See Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 728 (9th Cir. 1981) ("comprehensive regulatory scheme" does not imply immunity absent evidence "the agency actually exercised its authority to regulate the conduct in question").

That Hu Honua's injuries were suffered in a market the PUC has designed to be competitive further cements why antitrust injury is not foreclosed here. *See Ellis*, 24 F.4th at 1276 (utility not immune from antitrust liability when state policy was to "*promote* competition" rather than "curtail it"). As the Hawaii Supreme Court

recently confirmed, "[t]he PUC's 2006 adoption of the Framework for Competitive Bidding … generally requires electric utilities to use a *competitive* bidding process to acquire 'a future generation resource or block of generation resources.'" *Matter of Maui Elec. Co.*, 150 Hawai'i 528, 535, 506 P.3d 192, 199 (2022) (emphasis added). The Order ignores *Maui Electric* (and the Framework more generally). But as the Ninth Circuit made clear in *Ellis*, where, as here, a state "expresses a general policy favoring competition," a utility defendant may not invoke state regulatory immunity to antitrust claims. 24 F.4th at 1277. The Order contravenes *Maui Electric* in a second respect, too. There, the Hawaii Supreme Court confirmed that "courts" (rather than the PUC) are "the right forum to litigate antitrust claims," 150 Hawai'i at 534, 506 P.3d at 198, as the PUC regulations cited above recognize. Yet the Order effectively holds that the courts are *unavailable* to Hu Honua. Hawaii law bars this result just as much as federal precedent. The Order fails to recognize this. *Compare* Order at 10 n.1 (applying ruling to Hawaii state antitrust claims), *with* ECF 137 at 45 (not reaching Hawaii claims), *and* ECF 183 at 27 (same).

The Order identifies no Ninth Circuit case that would justify a categorical legal bar on antitrust enforcement under the rubric of "antitrust injury" when regulatory immunity is lacking. That is not surprising, as the Ninth Circuit has held in no equivocal terms that "regulation in an antitrust case *in other than an immunity context*" raises factual issues that cannot be resolved at the pleadings stage.

Phonetele, 664 F.2d at 742 (emphasis added).[6] In *Phonetele*, in reversing the district court's holding that a common carrier's "status as a regulated" entity barred antitrust claims as a matter of law, the Ninth Circuit reasoned that "[t]he logic of complying with a regulatory mandate … has internal limits which do not justify any and all acts ostensibly taken in response to" the regulatory scheme. *Id.* at 737, 743. The "dictates of [the] regulatory scheme under which [the] defendant operates may be used to establish a *factual defense*" "at trial," but cannot justify dismissal on the pleadings. *Id.* at 737 n.56, 738. These principles were reiterated in *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992), an antitrust case against a regulated utility defendant. There, the court observed that while "regulatory context" impacts the antitrust analysis, it does "*not* give utilities carte blanche to behave in anticompetitive ways." *Id.* at 1377 (emphasis added). *City of Anaheim* went on to hold that because of that context, "something more than general intent should be required to establish a Sherman Act violation"—namely "specific utility intent to serve its monopolistic purposes." *Id.* at 1378. The allegations in the TAC plainly satisfy this standard.

The Order also misreads *Ellis*, a case in which the Ninth Circuit reversed the

[6] *Phonetele* rejected both state and federal implied-immunity arguments and state-action immunity. 664 F.2d at 726–38; *see also Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) (state-action immunity posed "a factual [question] which is inappropriately resolved in the context of a motion to dismiss.").

district court for holding that antitrust claims were barred by state-action immunity when an electric utility suppressed competition from independent solar-energy system producers. *Id.* at 1276. The Order first finds *Ellis* "inapplicable" because the utility defendant in that case was "not regulate[d]," unlike HECO. Order at 32. That is incorrect: in *Ellis*, the alleged anticompetitive conduct at issue was undertaken pursuant to the utility defendant's "ratemaking authority … to set rates that are 'just and reasonable'" (*i.e.*, conduct that *is* regulated). 24 F.4th at 1275.

The Order goes on to distinguish *Ellis* on the ground that unlike there, it "cannot reasonably [be] infer[red]" that Hu Honua's alleged injuries are "inextricably intertwined with any alleged unlawful anticompetitive scheme relating to the Hamakua plant acquisition." Order at 32. But in *Ellis*, the plaintiffs were *customers* of the utility defendant rather than the foreclosed *solar-energy system producers*. 24 F.4th at 1267. There was no question that the solar-energy producers who competed with the defendant had suffered an antitrust injury; the only question was whether the *customers'* claimed injuries were "inextricably intertwined with" the competitors' injuries. *See id.* The "inextricably intertwined" requirement simply does not apply here because Hu Honua *competes* in the relevant wholesale market. *E.g.*, TAC ¶ 126; *cf. Blue Shield of Va. v. McCready*, 457 U.S. 465, 483–84 (1982) (asking whether plaintiff's injuries were "inextricably intertwined with the injury the conspirators sought to inflict" on competition *because* plaintiff "was not a

competitor of the conspirators").

Rather than follow Ninth Circuit precedent, the Order relies on a Third Circuit case—*City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (3rd Cir. 1998)—in holding that PUC regulation bars Hu Honua's claims as a matter of law. Order at 30. But that case cannot carry the weight placed on it. At issue there was a merger between two electric utilities that were *precluded* from competing at retail under state law. *See* 147 F.3d at 260. Thus, unlike the Hamakua acquisition, the merger in *City of Pittsburgh* did not foreclose lawful competition.[7] Even so, the decision's illiberal view of antitrust standing has been heavily criticized by leading antitrust scholars, *see* Areeda & Hovenkamp, Antitrust Law ¶ 356 ("disput[ing] the Third Circuit's *Pittsburgh* conclusion that a municipality lacked standing to challenge a merger agreement between two utilities"), and other circuits have been careful to distinguish it. *E.g., Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 809 (D.C. Cir. 2001) (rejecting argument that FDA regulations precluded a generic drug manufacturer from proving antitrust injury, and distinguishing *City of Pittsburgh*).

[7] The Third Circuit cautioned that its holding was "fact specific" and that "future utility arrangements … may well pass muster for purposes of standing under the antitrust laws" given that the state legislature passed legislation after the conduct at issue to "introduce some competition among electric service providers." 147 F.3d at 260, 269; *see also In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 535 (D.N.J. 2004) (rejecting argument that a claimed injury flowed "from [a] regulatory scheme" rather than the defendants' conduct because "[a]s distinguished from the facts presented in this case, in [*City of Pittsburgh*], the regulatory scheme did not specifically provide for, nor specifically encourage competition").

3. PURPA Does Not Preclude Antitrust Injury

The Order's erroneous reliance on state regulation as a bar to antitrust injury cannot be remedied by its scant references to federal regulation. The Order recites that one reason for its holding is this Court's 2018 rulings regarding the significance of the federal Public Utility Regulatory Policies Act ("PURPA") and Hu Honua's status as a "qualifying facility" ("QF") under that Act. Order at 29. Nonetheless, the Order makes no further express reference to Hu Honua's QF status beyond stating that "Hu Honua submitted its PPA and Amended PPA, at least in significant part, under auspices of PURPA." *Id*. To the extent that this is taken to bar any antitrust injury from the Hamakua acquisition, the Order commits legal error.

As this and other Courts have recognized, PURPA expressly provides that "[n]othing in this Act … affects … the applicability of the antitrust laws to any electric utility." 16 U.S.C. § 2603(1). True, "'PURPA was not intended to … *create* antitrust liability where none existed previously,'" ECF 137 at 28 n.14 (quoting *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1204 (W.D.N.Y. 1995)), but Hu Honua does not contend that PURPA makes the Hamakua acquisition unlawful. The acquisition threatens to foreclose competition from independent power producers whether or not they are QFs.

As already discussed, Ninth Circuit precedent does not favor the wholesale exclusion of antitrust remedies where immunity is absent. Case law outside the

Ninth Circuit does not dictate a different result. Hu Honua is certainly not seeking to use the antitrust laws to force a defendant to pay *more* than PURPA requires. *Compare Kamine/Besicorp*, 908 F. Supp. at 1205 ("under PURPA, QFs could charge *no more* than the buyer's avoided cost" which "is exactly the opposite of the situation in the case at bar"); *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F. Supp. 1345, 1369 (N.D. Ga. 1986) ("Having been offered a price that is above the market rate as a result of FERC regulations, [plaintiff] is in no position to demand a still-higher price under any antitrust theory"). Nor is Hu Honua seeking to use the antitrust laws to engage in retail competition forbidden by PURPA. *Compare Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 415 & n.10 (3d Cir. 1997) (PURPA barred plaintiff QF from competing at retail).

Hu Honua's status as a QF does not prevent it as a matter of law from alleging that it is an actual or potential competitor in the relevant wholesale power market. Unlike the QF plaintiff in *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 969 F. Supp. 907, 914 (D.N.J. 1997), Hu Honua has not left the court "forced to guess" the identity of the relevant market where it competes. In fact, the Order does not question that "Hu Honua may be a competitive independent power facility" in the alleged relevant *wholesale* market. Order at 30.

Finally, there is no basis on which to conclude that PURPA's so-called purchase obligation insulates a QF from injury as a matter of law, particularly when

Congress has legislated that "[n]othing in [PURPA]" affects the "applicability of the antitrust laws." It cannot be *presumed* today that QFs are unable to compete absent PURPA rights (although even foreclosure of uneconomical competitors *is* antitrust injury, *see Ellis*, 24 F.4th at 1274). This is not a case adjudicated in the "once-nascent renewable-energy sector" of the 1980s and 1990s when PURPA was in its infancy, long before "technological advances and the declining cost of facility development" led energy markets to "become more competitive and efficient, driven by the creation of new market structures and the rise of competitive independent power facilities." *Solar Energy Indus. Ass'n v. FERC,* 80 F.4th 956, 972 (9th Cir. 2023). In any event, as a competitive independent power facility, Hu Honua's QF status has not protected it from foreclosure, or restrained HECO from blocking competition using its illegally acquired Hamakua plant.[8] PURPA simply does not warrant a sweeping rule against QFs alleging antitrust injury.

B. The Order's Timeliness, Relation Back, and Joinder Rulings Are Contrary to Law

The Order's holding that Hu Honua's § 7 claim and "new Sherman Act claims" are time-barred is also contrary to law. Order at 11–24.

1. The Order Errs in Holding that the Hamakua-Related Claims Accrued Before Hu Honua Suffered Resulting Harm

[8] Hawaii's Framework for Competitive Bidding overrides state PURPA regulations. In a competitive RFP process, the Framework divests a QF of its PURPA rights in certain circumstances when it is not the winning bidder. Decl. Ex. I § VIII.B.1.a.

The Order hinges on its key holding that "Clayton Act § 7 claims challenging an acquisition accrue, and the statute begins to run, at the time of the acquisition." Order at 15. This is contrary to Ninth Circuit law. *See generally* Hu Honua Supp. Br. (ECF 242) at 1–2. Where a merger does not foreclose a competitor "immediately following the acquisition," a claim for postponed foreclosure can still accrue at a later time. *Calnetics*, 532 F.2d at 685; *see also* 15 U.S.C. § 26 (equitable claims accrue only when a merger "threaten[s]" a private party with "loss or damages"). And in *any* antitrust case, a "limitations period may start to run after the defendant's initial violation of the antitrust law, if it is 'uncertain' or 'speculative' whether the defendants' antitrust violation has injured the plaintiff at the time of the violation." *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014); *Intel Corp. v. Fortress Inv. Grp. LLC*, 2020 WL 6390499, at *21 (N.D. Cal. July 15, 2020). These rules control the result here.[9] *See* ECF 242 at 2–3.

In May 2017, Hu Honua and HECO entered into a conditional settlement and an amended PPA, under which Hu Honua would be able to operate its plant. TAC ¶ 93. Several months later, HECO acquired Hamakua. *Id.* ¶¶ 90–91. Hu Honua then faced no imminent or nonspeculative threat of foreclosure from the acquisition. Only upon Hu Honua's loss of its amended PPA in 2023 did the threat become

[9] A further "new use" exception to the limitations period also applies here, as described in the Revised TAC ¶ 154. *See Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1188–89 (N.D. Cal. 2012).

concrete and the statute of limitations begin to run. TAC ¶ 97; *see Oliver*, 751 F.3d at 1086. That was when Hu Honua moved to add a § 7 claim (and update its other antitrust claims). A plaintiff who is not foreclosed at the time of an acquisition can subsequently assert a claim for "an unlawful foreclosure commencing at a later time." *Calnetics*, 532 F.2d at 685; *see also Intel*, 2020 WL 6390499, at *20.

Rather than address this precedent, the Order (at 15) invokes *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 716–17 (D. Haw. 1964), which held that § 7 was intended to be "triggered to explode by and at the moment of acquisition," and that even "subsequent business practices [that] do injure competitors in th[e] market" do not "give rise to a claim for treble damages under Clayton § 7." *Bailey's Bakery* rested this conclusion on the basis that § 7 provided no damage remedy and thus was never intended to be implicated by events after an acquisition. *Id.* at 717. As recognized in *Kirihara v. Bendix Corp.*, 306 F. Supp. 72, 87–88 (D. Haw. 1969), this was an erroneous construction of the statute: § 7 *does* provide for damages, and does not necessarily "explode … at the moment of acquisition." To the contrary, when "'postponed' foreclosure" ripens into actual injury, "damages must be calculated *from the time the foreclosure commenced rather than from the time of the acquisition*." *Calnetics Corp.*, 532 F.2d at 685 (emphasis added); *see Oliver*, 751 F.3d at 1086–87 (when injury is "speculative," equitable claim does not accrue). It was clear error for the Order to disregard binding Ninth

Circuit precedent.[10]

This error cannot be excused by the Order's invocation of allegations originating in Hu Honua's January 2017 First Amended Complaint seeking an injunction against the Hamakua deal. Order at 16. According to the Order, by requesting such relief in the FAC, Hu Honua "was representing that, at the very least, it suffered a threat of loss or damage." *Id*. at 17. But, as the TAC makes clear, that threat of foreclosure dissipated with the settlement and amended PPA that *preceded* the merger. Until those protections were lost in 2023, Hu Honua could not have been awarded equitable relief against the 2017 acquisition. And even if a threat of foreclosure "exploded" on the date of the acquisition, injunctive claims under § 7 "are not subject to the four-year statute of limitations," Order at 13, and such a claim would not now be barred by laches for the same reason. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 717–18 (4th Cir. 2021) (laches defense in § 7 case rejected when plaintiff was "contractually protected for the foreseeable future" and when defendant "signed a series of agreements with [plaintiff] reciting their mutual desire to settle"); *see also Toyota Motor Sales, U.S.A. v. Tabari*, 610 F.3d 1171, 1183 (9th

[10] The Order (at 15) also cites two out-of-circuit cases, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000) and *Z Technologies. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014), which simply "took accrual-on-merger as a given." *See In re Evanston Nw. Corp. Antitrust Litig.*, 2015 WL 13735389, at *4 (N.D. Ill. May 28, 2015) (distinguishing *Z Techs.* on this basis). Both cases recognize the "new use" exception that applies here. *Z Techs.*, 753 F.3d at 604–05; *Concord Boat*, 207 F.3d at 1052.

Cir. 2010). Hu Honua's request for injunctive relief in the TAC can thus hardly be "futile," as the Order itself appears to recognize. *See* Order at 14 ("If Hu Honua seeks injunctive relief only, it should present that proposed amended complaint.").[11]

Finally, and at the very least, it was error to find the amendment of the § 7 and Sherman Act claims to be futile where recent facts exist that would bolster those claims and show that damage has now been inflicted. The Order recognizes that Hu Honua proffered evidence post-dating the motion, and that Hu Honua argued this proved "'postponed foreclosure,' which refutes futility of its proposed Clayton Act § 7 claim." *Id*. at 18. Yet the Order refused to consider this "new claim—based on an award of a contract to Hamakua instead of Hu Honua"—because it was "not before the Court" in the TAC. *Id*. This was error because the Ninth Circuit requires leave to amend where facts are available to support an amendment. It has "consistently ... held that leave to amend should be granted unless the district court 'determines that the pleading *could not possibly be cured* by the allegation of other facts.'" *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (emphasis added). A court abuses its discretion by denying leave to amend in the face of pertinent new facts. *Levine v. Safeguard Health Enters., Inc.*, 32 F. App'x 276, 278 (9th Cir. 2002); *Young v. Bank of N.Y. Mellon*, 2010 WL 11678502, at *2 n.2 (D.

[11] In fact, Hu Honua made it clear that it intended the TAC's § 7 claim to seek an injunction only. *See* ECF 242 at 4 n.4. Regardless, as discussed directly below, a timely damages claim under § 7 is by no means futile at this point.

Haw. May 10, 2010) (considering "facts provided in Plaintiff's declaration in deciding whether to grant Plaintiff leave to amend"). And even though decisions on whether a complaint states a claim are generally confined to the pleadings and judicially noticeable documents, courts routinely consider facts outside the pleadings in weighing *leave to amend*.

In order to demonstrate how it can further amend its complaint to state these recent facts alleging postponed foreclosure, Hu Honua has proffered a Revised TAC. Decl. Ex. J. Hu Honua respectfully requests that the Court allow this pleading to be filed (without prejudice to Defendants' right to respond thereto in due course) or, at least, allow Hu Honua to seek such leave.

2. The Order Inconsistently Applies the Relation-Back Rule

There is a second reason why the Order's untimeliness holding amounts to clear error: it is internally contradictory. On the one hand, the Order finds that earlier complaints asserted "at the very least … a threat of loss or damage" from the looming Hamakua acquisition, sought an injunction against the transaction, and specifically included "the key allegation that [HECO] acquired the Hamakua plant" as part of a monopolistic scheme in violation of the Sherman Act. Order at 16–17. On the other hand, the Order finds that Hu Honua's proposed addition of a claim directed at the same acquisition under § 7—which prohibits mergers that "tend to create a monopoly," 15 U.S.C. § 18—somehow concerns "new injuries and new facts." *Id.*

at 20–21.[12] But if the § 2 claim was not ripe in 2017, then as already argued above, a § 7 (or § 2) claim involving "new injuries and new facts" is perfectly timely.[13] And if the § 2 claim regarding the acquisition accrued at the time of the operative (second) amended complaint, then the addition of the § 7 claim in the currently proposed amended complaint plainly relates back.

Adding a "new legal theory tied to the same operative facts as those initially alleged" presents an "unremarkable application of the relation-back rule." *Mayle v. Felix*, 545 U.S. 644, 659 n.5 (2005). The Order's focus on whether there was notice "that Plaintiff might subsequently assert a Clayton Act § 7 claim against the acquisition," Order at 20, is not the proper question; the law focuses instead on the factual allegations driving the complaint. That Hu Honua has added details and expanded the legal claims does not change the reality that the TAC and the prior pleadings share a "core of operative facts"—namely, HECO's scheme to maintain and expand monopoly power and exclude competition on Hawaii Island. *Clipper*

[12] In "almost every" § 7 case that involves allegations of monopolization, the § 2 and § 7 claims are "conjoined." *Kirihara*, 306 F. Supp. at 86.

[13] To the extent the "new facts" involve "new Sherman Act claims" that "predate the filing of" the SAC, Order at 23 (identifying delayed plant retirements in 2013–2016 and "sham" 2015 negotiations with a different power producer), these pose no timeliness issue. These are not "claims" of injury to Hu Honua, nor are they subject to the statute of limitations—they are merely "background evidence to establish a continuing course of conduct." *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1305 (9th Cir. 1983); *see also PharmacyChecker.com LLC v. LegitScript LLC*, 614 F. Supp. 3d 796, 813–14 (D. Or. 2022).

Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1260 n.29 (9th Cir. 1982) ("a new theory … will not be time barred if" it "involves the same transaction, occurrence, or core of operative facts involved in the original claim"). And in fact HECO did *not* lack notice. "[T]he original Complaint [alleged] that 'the purchase of the HEP [Hamakua] Power Plant will expand HELCO's monopoly'" and "have a direct anticompetitive effect on energy development opportunities for [independent power producers]," Order at 20–21—allegations that *squarely provide notice* that the purchase would (in the language of § 7) tend to create an unlawful monopoly. There has been no "'attempt to change theories,'" *id*. at 24.

The Order's hyperliteral interpretation of a portion of a sentence from *Echlin v. PeaceHealth*, 887 F.3d 967 (9th Cir. 2018) cannot gut the "extreme[ly] liberal[]" application of Rule 15's relation-back doctrine, *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). In *Echlin*, the Ninth Circuit stated that "an amendment will not relate back where the amended complaint 'had to include additional facts to support the [new] claim." *Id.* at 978.[14] *Echlin* included this line not as a standalone proposition, but as a corollary to the well-established rule that, to relate back, claims must simply "'share a common core of operative facts' such that plaintiff will rely

[14] *Echlin* cites *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008), for this rule, but *Williams* did not so hold. *Williams* held only that there is no "common core of operative facts" where the new complaint "is a new legal theory depending on different facts, not a new legal theory depending on the same facts." *Id.*

on the same evidence to prove each claim." *Williams*, 517 F.3d at 1133.

Finally, Hu Honua's § 7 claim does not implicate "an entirely new set of actors." Order at 21. The same "common core of operative facts" exists with respect to Hu Honua's addition of new defendants that were created as a means of implementing the anticompetitive scheme through the acquisition of Hamakua. TAC ¶¶ 19–21, 90. Those defendants are all corporate affiliates created at the behest of HECO, *id.*, making facts relating to their actions inherently intertwined. The Order does not question that leave is proper under Rule 20(a) and overlooks the reality that no defendant can show any prejudice from the addition of new defendants who are corporate affiliates of the existing defendants.

III. CONCLUSION

For the foregoing reasons, Hu Honua's objections to the Order (ECF 243) should be sustained, and leave to amend and to add additional defendants should be granted.

DATED: Honolulu, Hawaii, April 16, 2024.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HU HONUA BIOENERGY, LLC, a Delaware limited liability company, Plaintiff, v. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawaii corporation; HAWAIIAN ELECTRIC COMPANY, INC., a Hawaii corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii corporation, Defendants.	Civil No. 16-00634 JMS-KJM **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that, on the date of filing, a true and correct copy of the foregoing was served on the following at their last known addresses:

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