Nos. SCWC-12-0000758 and SCWC-12-0000070

IN THE SUPREME COURT OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,

Plaintiff-Appellee/Respondent,

vs.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually,

Defendants-Appellants/Petitioners.

To the Intermediate Court of Appeals of the State of Hawaii
(Foley, Presiding Judge, Fujise and Ginoza, JJ.)
(Civil No. 09-1-2523-10, First Circuit Court, Judge Ayabe, Presiding)

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APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE APRIL 29, 2016 MEMORANDUM OPINION OF THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII AND ITS MAY 26, 2016 JUDGMENT ON APPEAL

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A. QUESTIONS PRESENTED

Did the ICA commit grave errors of fact and law, requiring reversal pursuant to HRS Section 602-59(b)(1), in violation of the Due Process Clauses of both the Hawaii State Constitution and the Constitution of the United States of America, in its affirming of the orders and judgments below, by:

1. Declining to consider a timely appeal of a Presiding Judge's refusal to ethically recuse himself owning stock of a foreclosing bank which he disclosed in his Hawaii Supreme Court Certified Financial Statement while failing to disclose it to the parties, and also failing to disclose that his Wife, an attorney, had represented another party in the case hostile to the loan borrower and guarantor, and that he had made political campaign contributions to a material witness in the case whose credibility he would have to assess, who was also hostile party to the loan borrower and guarantor in a closely related case who he went to law school with and who he described as his "good friend," nevertheless refusing when challenged to disqualify himself by applying the wrong recusal standard in concluding over objection that he believed he could decide the cases fairly?

2. Declining to consider a timely appeal of a Presiding Judge's refusal to hold an evidentiary hearing following confirmation of sale to determine a foreclosed property's actual market value at time of confirmation before awarding a deficiency judgment, which is Hawaii's judge-made procedure, merely subtracting sale net proceeds from the loan amount with arrearages owed in calculating the amount of deficiency judgments, causing windfall profits for foreclosing mortgagees contrary to the judicial practice in the majority of States, which is a determination entirely different than whether a successful high bid shocks the conscience of the Court or not?

3. Declining to consider a timely appeal of a Presiding Judge's approval of the contractual standing of a third party who has purchased an assignment of loans and guaranties who had agreed in writing beforehand as a condition of the purchase specifically not to foreclose and not to seek a deficiency judgment, who nevertheless proceeds to do so, defrauding a loan borrower and guarantor?

B. PRIOR PROCEEDINGS

The ICA rejected Petitioner's consolidated appeal from the lower court's confirmation of sale and deficiency judgment on April 29, 2016 in a Memorandum Opinion (Exhibit "A"), entering Judgment on Appeal on May 25, 2016 (Exhibit "B").

This Application is being filed within 60 days following the entry of the Judgment on Appeal, pursuant to Rule 40.1(a)(3) of the Hawaii Rules of Appellate Procedure.

C. STATEMENT OF THE CASE

The ICA begins its factual recitals mistakenly, Opinion at 3 n.3, by openly taking its facts from the lower court's summary judgment order, when in fact everything material and complained of in this Consolidated Appeal happened *afterwards*.

There is no way that anyone could possibly understand what actually happened below by reading the ICA Opinion, and no one could possibly summarize the complex facts underlying this controversy in only 12 pages allowed by court rules for this Application or to list all record references, for which reason this Court is requested, as it should do, to review Petitioners' Opening Brief, the text of which is set forth in Exhibit "C" (backed up by its 100 supporting exhibits).

Summarizing, Fuchs, a New York resident and the Founder of Home Box Office, vacationing in Hawaii, falling in love with Hawaii, later invested nearly $100 million in a luxury development on the Big Island, borrowing as Guarantor more than $70 million from local banks headed by the Bank of Hawaii (BOH). The additional Petitioner is his company as the Borrower.

It is a spectacular development and a beautiful contribution to Hawaii, but due to the mortgage crisis of 2008 sales slumped, refinancing of mega loans proved impossible, causing the matured remainder of slightly less than $24 million to default, eventually resulting in foreclosure.

BOH at first admirably acted responsibly, willing to substantially discount the remaining principal, at first freely worked amicably with Fuchs and his counsel as they tried to find a buyer.

A buyer, Respondent's parent company, Hawaii Renaissance Builders LLC, was finally introduced to Fuchs' by his own lawyers who had represented him in his earlier loan negotiations with BOH and other related litigation concerning the development, but thereafter BOH finally filed for foreclosure after other buyers could not be found, resulting in extended litigation within the foreclosure action, including against Fuchs' Homeowner Associations who Fuchs claimed had interfered with one such sale.

Eventually agreement was reached between Fuchs, BOH, and Respondent's parent, Hawaii Renaissance Builders LLC, permitting its parent company to purchase the loans and guaranties from BOH for $17.5 million of which total Fuchs agreed to provide $1.5 million as the parent insisted that the property was only worth $16 million, in consideration for which the loans and the guaranties were to be cancelled and the foreclosure case dismissed.

However, Respondent's parent company double-crossed Fuchs, and on the eve of closing Fuchs' own prior attorneys, now representing Respondent's parent company against Fuchs, falsely

told BOH behind Fuchs' back that Fuchs was refusing to put up his $1.5 million, inducing BOH which at first refused without Fuchs' written approval to sell the loans and guaranties to Respondent's parent for $17.5 million, requiring an indemnity should it be sued by Fuchs.

Respondent was then assigned the loans and guaranties and substituted in as foreclosing mortgagee and proceeded to foreclose, purchasing the property with a credit bid of $10 million, for a property that only months earlier Respondent had claimed was worth $16 million, and on top of that was awarded an escalating deficiency judgment of $21.6 million.

Thus Respondent was awarded real property worth at least $16 million and a deficiency judgment of $21.6 million running at 10% a year – for a grand total of $37.6 million, after investing $17.5 million approximately one year earlier, a profit in excess of $20.1 million dollars.

There were as expected no other bidders at the foreclosure auction, as Respondent obviously could have credit bid above $25 million, the amount of principal and interest on its face supposedly then due, scaring off potential competitive bidders.

Fuchs responded by filing a separate lawsuit against Respondent, Respondent's parent company and Fuchs' former attorneys who alleged had defrauded Fuchs; that lawsuit was assigned to the same judge presiding over the foreclosure action.

Efforts by Fuchs to sue Respondent, Respondent's parent company, and his former attorneys who defrauded him in the new case were immediately denied by the Presiding Judge who dismissed the Complaint while at the same time all discovery was being denied; Petitioners responded by filing of a First Amended Complaint before the order dismissing the original Complaint could be entered, keeping their new action alive.

Meanwhile, efforts by Fuchs to have his Presiding Judge, after the confirmation of sale, consider the true market value of the property in determining any deficiency judgment at the time of confirmation notwithstanding the rigged credit bidding process were also denied.

It was at that point that Fuchs' counsel received information from Internet sources that the judge presiding over both the foreclosure case and his new lawsuit owned stock in the foreclosing bank, and upon searching the Hawaii Certified Financial Disclosure Statements posted on the Internet it was learned that indeed he did, his having certified to this Court that he personally owned between $25,000 and $50,000 of the foreclosing bank's stock, set forth in Exhibit "D".

It was also discovered that the Presiding Judge's Wife had represented at least one of the three Association that were parties to the foreclosure case, which Associations Petitioners had sued

in the foreclosure case, and that the Presiding Judge was a "good friend" of one of the defendant parties in the new case who in the past the Presiding Judge had given political campaign contributions to.

None of the above appearances of impropriety had been disclosed during either case.

Attempting to resolve the matter respectfully, Petitioners' counsel wrote Fuchs' Presiding Judge, requesting his recusal in both cases, and presented Fuchs' Presiding Judge with a detailed report by a banking expert confirming that the outcome of the foreclosure case could have a significant impact on the bank's stock, highlighting the magnitude of the conflict.

The Presiding Judge immediately acknowledged that he took the matter to be serious and convened a status conference with the parties, but despite the several grounds supporting recusal, informed the parties that his Wife then owned the stock for his daughter, not him, contradicting however his Certified Report to this Court, and refused to answer any questions, concluding that he subjectively thought he could still judge the two cases fairly; of course he had already ruled in favor of the foreclosing bank also awarded a deficiency judgment, and had dismissed the original Complaint in the new lawsuit.

Fuchs then filed a formal motion for disqualification in both cases and seeking reconsideration all prior orders and judgments entered, which motion the Presiding Judge denied, giving the remaining pending adjudication of the First Amended Complaint in the new lawsuit back to the Chief Judge who assigned that case to another judge in the same Court, who later dismissed the First Amended Counterclaim.

But before dismissing the new action, the newly assigned judge permitted Petitioners to take discovery in the new action in the form of four oral depositions, and the sworn testimony in those four depositions proved Petitioners' claims that they had been defrauded by Respondent's parent company from whom Respondent received an assignment of Petitioners' loans and guaranties.

Specifically, *inter alia*, one or more of the deponents acknowledged as eye-witnesses, for instance, that Petitioners had been parties to the sale agreement between BOH and Respondent's parent which had otherwise been denied by the lower court, that Petitioners had performed all of their obligations under that sale agreement, and that Respondent's parent had secretly aborted the closing by misrepresenting Fuchs' intentions to BOH, causing BOH mistakenly to allow Respondent's parent to run off with the loans and guaranties and to breach its contract with

Petitioners and to foreclose and seek a deficiency judgment through Respondent – conclusive evidence remaining at the heart of Petitioners' substantive case.

Petitioners understandably appealed in both cases: in this Consolidated Appeal from the foreclosure and deficiency judgment, and in CAAP-13-0004290 appealing from the dismissal of the First Amended Complaint in the new action.

Years later the Appeal in CAAP-13-0004290 was recently dismissed on a technicality, set forth in Exhibit E", claiming that the Appeal was supposedly untimely, as a result of the parties to that Appeal including Petitioners not having been notified that the final order and judgment dismissing the First Amended Complaint had been entered until the time in which the filing of a notice of appeal was allowed had expired.

The dismissal of the Appeal in CAAP-13-0004290, coming after an unprecedented two last minute recusals two years after a merits panel was assigned to the Appeal, set forth in Exhibit "F", was challenged in this Court with Fuchs then filing an application for writ of certiorari, the text of which is set forth in Exhibit "G", but this Court without explanation refused review, as set forth in Exhibit "H", after a timely 30-day extension to file an application for writ of certiorari approved by the Clerk of this Court had been granted following a denial of reconsideration by the ICA.

Respondent's counsel in opposition to the writ application in SCWC-13-0004290 raised a new technical argument, that HRAP Rule 40.1(a)(1) as amended did not permit such 30-day extensions following ICA motions for reconsideration, a truly nonsensical proposition since upon the filing of any motion for reconsideration the ICA could change its mind, altering its decision in whole or in part, rendering any prior application for a writ of certiorari a meaningless waste of time for this Court and for the parties.

Indeed, HRAP Rule 2 allows the ICA to suspend the time it is allowed pursuant to HRAP Rule 40(d) to act on a motion for reconsideration, which it frequently does and which it did in Fuchs' Appeal in CAAP-13-0004290, as set forth in Exhibit "I", which would mean that an application for writ of certiorari would have to be acted upon by this Court, as statutorily required pursuant to HRS § 602-59(c), before a motion for reconsideration might be decided by the ICA, since HRAP Rule 2 applies only to this Court's Rules and not to statutory deadlines.

Coincidentally, the ICA Order dismissing the Appeal in CAAP-12-004290 was entered on March 20, 2016, the motion for reconsideration was timely filed on April 5, 2016, and the Order suspending time to act on the motion for reconsideration was entered on April 12, 2016 extending

the time the ICA had to act on the motion for reconsideration to May 16, 2016, in other words after the time to file an application for writ of certiorari in this Court in CAAP-13-0004290 according to Respondent's argument in that Appeal, as if inducing Petitioners there to have waited before seeking review here.

And in fact in any event the ICA upon reconsideration in CAAP-13-0004290 did issue a new, more elaborate decision, *albeit* still dismissing, set forth in Exhibit "J", but which added different grounds for dismissal and hence that altered the content of Petitioners' application for a writ of certiorari for that separate Appeal.

Surely, such a decision making dilemma created by any such limited interpretation of HRAP Rule 40.1(3) for our appellate courts would be nonsensical and should be corrected.

Meanwhile, as a result of Petitioners not now having an adequate remedy at law in related Appeal No. CAAP-13-0004290 for the redress of the due process and equal protection violations of their constitutional rights there, Petitioners will be seeking relief in this Court *via* a petition for writ of mandamus, which is the reason for including this analysis herein to the extent it bears on the application for writ of certiorari here, if for nothing more than just another example of the mistreatment of these Petitioners thus far in our appellate courts.

D. REASONS WHY CERTIORARI SHOULD BE GRANTED

First Grave Error of Fact and Law:

The Hawaii Intermediate Court of Appeals Committed Reversible Error by Mistakenly Declining To Consider a Timely Appeal of a Presiding Judge's Refusal To Ethically Recuse Himself in This Case in Violation of Petitioners' Right To Due Process of Law Pursuant to the Hawaii State Constitution and the Constitution of the United States of America.

Petitioners' Presiding Judge was a disqualified jurist in both cases, owning stock in the foreclosing bank, his Wife having represented parties before him adverse to Petitioner in the foreclosure case, and his self-described good friend and law school contemporary to whom he gave political financial campaign contributions, a material witness in one case adverse to Petitioners whose credibility he would have to judge and a party in the other case again adverse to Petitioners; *see* In re Conduct of Jordan, 290 Or. 669, 624 P.2d 1074 (1981) ("the impartiality of Judge Jordan 'might reasonably be questioned' . . . inclined to believe the testimony offered").

Yet Petitioners' Presiding Judge never disclosed any of those facts, but when challenged refused to disqualify himself, applying his own subjective standard, when the test is an objective one, what a reasonable person would conclude was an appearance of impropriety; *see* United States

v. Champlin, 388 F. Supp. 2d 1177, 1182 (D. Haw. 2005) ("the test is 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000)").

For nearly one hundred years this Court has agreed, holding that any stock ownership in a party automatically requires recusal or disqualification, Thomson v. McGonagle, 33 Haw. 565 (1935) ("it is settled that a stockholder of a corporation has a 'pecuniary interest' in an action in which the corporation is interested in its individual capacity . . . and it follows that Mr. Justice Peters is disqualified to sit in this cause").

This Court has held that even small stock holdings require disqualification. In Carey v. The Discount Corp., Ltd., 35 Haw. 811, 813 (1941), this Court disqualified a judge based on his wife's ownership of stock in a bank, which in turn owned stock in the corporate defendant, which in turn could diminish the dividends paid to the judge's wife. While this Court in Carey may have been cautious given the indirect interest, it did address the facts present in the case: "If the bank were a party to the within cause the justice would unquestionably be disqualified." *Id.* at 814. This Court in Carey also explained: "The degree to which the income payable to Mrs. Peters will be affected may be very small. Plaintiff-appellant characterizes it as trivial and microscopic. But the degree of interest in immaterial. Any interest however small has been held sufficient to render a judge disqualified." *Id.* at 813

The United States Supreme Court in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863, 865 (1988), explained its abhorrence to such an anathema to due process of law, that when a jurist holds any financial interest in a party before him "we must continually bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice".' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (citation omitted). * * * * to promote confidence in the judiciary by avoiding even the appearance of impropriety."

And in Tumey v. Ohio, 273 U.S. 510, 522-523 (1927), the United States Supreme Court held it is a violation of the Due Process Clause of the Fourteenth Amendment for a state judge to preside over an action in which he has an interest in one of the litigants or the matter in controversy. *See also* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) ("the Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice"). "Due process requires an impartial tribunal"

and "the cold neutrality of an impartial judge," Peters v. Jamieson, 48 Haw. 247, 255, 262, 387 P.2d 575 (1964) (disqualification based on totality of conduct).

In the federal system owning even one share of stock in a party requires automatic recusal.

Try explaining that to a foreclosure client were in federal court recusal would have been constitutionally mandated, yet across Punchbowl Street less than a few hundred feet away owning 600 shares of a foreclosing bank's stock valued between $25 and $50 thousand was here considered irrelevant to the maintenance of judicial integrity and public respect in the Hawaii State Judiciary.

Nor can a judge in the federal judiciary merely divest himself or herself of such stock ownership, which Petitioners' Presiding Judge did not and has not done, or sever parties from the case and continue to preside, Shell Oil Co. v. United States, 672 F.3d 1283, 1291 (Fed. Cir. 2012) ("because the judge's wife owns shares in the parent company of Texaco and Union Oil . . . requires recusal" and "the judge's decision to *sua sponte* sever Texaco and Union Oil did not satisfy the statutory requirement of disqualifying himself from the entire proceeding").

The standards of judicial ethics should be no different in Hawaii than in the federal system, especially since constitutional due process rights to an impartial tribunal are implicated.

Rule 2.11(a)(2)(C) and 2.11(a)(3) of the Hawaii Revised Code of Judicial Conduct requires that judges *shall* be disqualified in situations that create the appearance of impropriety, including but not limited to where a judge or a family member "has more than a *de minimis* interest that could be substantially affected by the proceeding" or an "economic interest in the subject matter."

States adopting the same Code of Judicial Conduct as has Hawaii have found such stock ownership in and of itself mandating automatic disqualification.

For instance, the Arkansas Supreme Court rejected the *de minimis* excuse in Huffman v. Arkansas Judicial Discipline and Disability Commission, 344 Ark. 274, 281-282, 42 S.W.3d 386, 344 (2001) ("while there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percentage of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest mentioned in Canon 3E(1)(c) ignores the more basic issue of appearance of impropriety").

See also White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E.2d 889 (2000) ("a judge who holds stock in a corporation that is a party to a suit should recuse herself from the case"); failure to disclose is similarly viewed as automatic disqualification, the New Hampshire Supreme Court held

in Blaisdell v. City of Rochester, 135 N.H. 598, 593-594, 609 A.2d 388 (1992), "it is the judge's responsibility to disclose, *sua sponte*, all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned. . . . Neither the client nor his attorney have any obligation to investigate the judge's impartiality; * * * * we hold that a judge's failure to disclose to the parties the basis for his or her disqualification under Canon 3C ["appearance of impropriety"] will result in a disqualification of the judge."

The ICA, however, never even addressed any of these ethical or *de minimis* issues, instead declining to rule based on two technical grounds, Opinion at 12-13, arguing first that a Rule 60(b) motion must be filed within 10 days of the judgment sought to be reversed, citing Lambert v. Lua, 92 Haw. 228, 234, 990 P.2d 126, 132 (App. 1999), and second that the notice of appeal with respect to the order denying disqualification below was filed one day late. Neither ground is valid.

First, unlike Lambert, there is no 10-day bar to seeking to set aside a judgment as the express terms of Rule 60(b) allow a minimum of one year, and when the orders and judgments entered here on April 23, 2012 and before, stock ownership mandating disqualification was not even known until May 11, 2012 (see Exhibit "K") and not yet appealable; the ICA cannot overturn laws of physics.

Moreover, The need for redressing such wrongs *no matter how long it takes to surface*, was subsequently articulately explained by Justice Black in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944): "[T]ampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigants."

This Court has reaffirmed that important timeless principle, in Kawamata Farms v. United Agri Products, 86 Haw. 214, 256-257, 948 P.2d 1055 (1997) ("fraud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment," quoting approvingly from Southwest Slopes, Inc. v. Lum, 81 Haw. 501, 511, 918 P.2d 1157 (App. 1996), and in Matsuura v. E.I. du Pont de Nemours and Co., 102 Haw. 149, 157-158, 73 P.3d 687 (2003) ("HRCP Rule 60(b)(3) . . . reflects this court's preference for judgments on the merits over finality of judgments procured through fraud").

And upon disqualification, all flawed prior orders and judgments are held subject to reversal whenever entered; *see* Liljeberg, 486 U.S. at 868 ("there is a greater risk in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues"); Shell,

672 F.3d at 1293 ("we vacate Judge Smith's final judgment in favor of Shell Oil and Arco, as well as the summary judgment orders on which it was premised"); Blaisdell, 135 N.H. at 594, ("it would be inconsistent with the goals of our code to require certain standards of behavior for the judiciary in the interest of avoiding the appearance of impropriety, but then to allow a judge's ruling to stand when those standards have been violated. **** [W]e vacate all existing orders"); *see* Nordic PCL Construction, Inc. v. LPIHGC, LLC, 136 Haw. 29, 358 P.3d 1 (2015); Noel Madamba Construction LLC v. Romero, 137 Haw. 1, 364 P.3d 518 (2015) (why should Hawaii Judges be held to lesser ethical disclosure and appearance of impropriety standards than Hawaii arbitrators?).

Second, Petitioners' counsel attempted to file the notice of appeal regarding disqualification on August 30, 2012, but was prevented from doing so because of a malfunction within JEFS, which was immediately brought to the Clerk's attention in voice mail messages and in writing, as set forth in Exhibit "L", which was formally noted in the docket sheet by the Clerk, set forth in Exhibit "M", the Clerk personally assuring Petitioner's counsel that the Court had a procedure for rectifying such JEFS-caused problems and not to worry. See Declaration of Gary Victor Dubin attached.

That problem with JEFS in its infancy occurred almost four years ago as was the filing of Petitioners' Jurisdictional Statement, yet it was never brought to Petitioners' attention before now, when that issue could have been resolved in 2012 with the Clerk and/or this Court more easily.

Second Grave Error of Fact and Law:
The Hawaii Intermediate Court of Appeals Committed Reversible Error by Mistakenly Declining To Consider a Timely Appeal of a Presiding Judge's Refusal To Hold an Evidentiary Hearing Following Confirmation of a Foreclosure Sale To Determine a Foreclosed Property's Actual Market Value at Time of Confirmation Before Awarding a Deficiency Judgment in This Case in Violation of Petitioners' Right To Due Process of Law Pursuant to the Hawaii State Constitution and the Constitution of the United States of America.

While most States differentiate between *the auction price* and *the fair value* of foreclosed property for deficiency purposes, as explained by the West Virginia Supreme Court of Appeals in Sostaric v. Marshall, 234 W.Va. 449, 766 S.E.2d 396 (2014), the Opinion in which is set forth in Exhibit "N", Hawaii Courts have yet to recognize the obvious distinction between the two, which has broad fundamental constitutional due process implications, needing no more illustration than *via* the facts here, resulting in a more than $20 million deficiency judgment, yielding for Respondent after also being awarded the real property free and clear a total of $37.6 million, after investing $17.5 million approximately one year earlier, for a net profit in excess of $20.1 million dollars.

Other State Courts have with *or without* legislation struck down the judge-made "calculator" procedures used by Hawaii Courts; they have done so on grounds of fairness and equity. Petitioners are the first to also challenge such mechanical procedures as violations of due process of law which in this case resulted in tens of millions of dollars in windfall profits unless reversed, for as the United States Supreme Court stated in Gelfert v. National City Bank of New York, 313 U.S. 221, 233 (1941), "[m]ortgagees are constitutionally entitled to no more than payment in full."

Once again, the ICA refused to address the merits of this issue also, instead claiming, Opinion at 13-14, one that Petitioners waived this constitutional challenge because of contrary language in the now unappealed summary judgment order, two that supposedly Petitioners introduced no evidence in the record of the fair value of the property at confirmation, and three that Hawaii provides an opportunity to challenge the fairness of the auction price at sale confirmation as to whether the highest bid price shocks the conscience of the Court. ICA is mistaken.

First, the language in the now ancient summary judgment order concerning the determination of the deficiency judgment, if any, went beyond the scope of the order, for in Hawaii a judicial foreclosure action is split into two separately appealable parts: "(1) the decree of foreclosure and the order of sale, if the order of sale is incorporated within the decree; and (2) all other orders." Security Pacific Mortgage Corp. v. Miller, 71 Haw. 65, 70, 783 P.2d 855, 857 (1989); *see also* Hoge v. Kane, 4 Haw. App. 246, 247, 663 P.2d 645, 646–647 (1983).

Therefore, the main focus of every judicial foreclosure in Hawaii has always been the "judgment of foreclosure of mortgage or other lien and sale of foreclosed property" and, because "such judgment finally determines the merits of the controversy," all subsequent proceedings including the deficiency judgment are considered "simply incidents to its enforcement." International Savings & Loan Association, Ltd. v. Woods, 69 Haw. 11, 16-17, 731 P.2d 151, 155 (1987) (quoting MDG Supply, Inc. v. Diversified Investments, Inc., 51 Haw. 375, 463 P.2d 525 (1969), *rehearing denied,* 51 Haw. 479, 463 P.2d 525 (1969), *cert. denied,* 400 U.S. 868 (1970) and not determined in the summary judgment order as to amount.

Second, ICA ignored a 2009 $23.84 million BOH market appraisal, set forth in Exhibit "O", whereas it was Respondent's burden to show that its $10 million credit bid triggering deficiency was justified; *see* Kondaur Capital Corp. v. Matsuyoshi, 136 Haw. 227, 361 P.3d 454 (1915).

Third, the ICA ignored the difference between confirming a lower forced sale price and determining the fair value of the property at confirmation as explained in Sostaric, *supra*.

Third Grave Error of Fact and Law:

The Hawaii Intermediate Court of Appeals Committed Reversible Error by Mistakenly Declining To Consider a Timely Appeal of the Contractual Standing of a Foreclosing Mortgagee To Foreclose in This Case in Violation of Petitioners' Right To Due Process of Law Pursuant to the Hawaii State Constitution and the Constitution of the United States of America.

The ICA mistakenly looked no further than the transactional documents, concluding the Respondent having purchased the loans and guaranties had the right to foreclose, Opinion, at 10, ignoring the abundance of facts in the record showing the Petitioners were defrauded, having agreed to allow Respondent's parent to purchase such assignments solely on condition that the loans and the guaranties would be released and the foreclosure case dismissed in exchange for deeding the property to it, which instead waged a classic double cross, *supra*, at the last minute tricking BOH into releasing the loans and guaranties and then foreclosing in place of BOH.

ICA's claim that in such circumstances Petitioners were not parties to the BOH agreement and had no contractual standing to object is grave error, contrary to numerous principles of Hawaii contract law giving Petitioners standing to object and denying Respondent standing to foreclose; *see* Hayashi v. Chong, 2 Haw. App. 411, 634 P.2d 105 (1981) (separate agreements must be read together); Cosmopolitan Financial Corporation v. Runnels, 2 Haw. App. 33, 625 P.2d 390 (1981) (Hawaii trial courts, *even in the absence of any assertions or any evidence of fraud*, are bound by a "liberal approach towards the receipt of extrinsic evidence"); Honolulu Federal Savings and Loan Association v. Murphy, 7 Haw. App. 196, 201, 753 P.2d 807 (1988) ("Fraud in the inducement" to enter into a written agreement, which induces a transaction by misrepresentation of motivating factors, may be shown by parol or extrinsic evidence); Fujimoto v. Au, 95 Haw. 116, 157, 19 P.3d 699 (2001) ("Fraud vitiates all agreements as between the parties . . . . '[i]f a party's misrepresentation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable'").

E. CONCLUSION

The ICA should be reversed, whether hampered by faulty scholarship, inadequate staffing, or a misguided desire to protect fellow judges from criticism, lest our State Judiciary be discredited throughout the United States as an unfair and unconstitutional graveyard for Mainland developers.

In New York State, where all of Fuchs' assets are located, its Supreme Court has already declined, unlike Hawaii which refused a stay, to enforce the Hawaii judgments during the pendency of appellate review, including, if necessary, review by the United States Supreme Court.

DATED: Honolulu, Hawaii; July 23, 2016.

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