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**IN THE SUPREME COURT OF THE STATE OF HAWAII**

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LCP-MAUI, LLC,

*Plaintiff-Appellee/Respondent,*

vs.

AMANDA D. TUCKER AKA AMANDA DAWN TUCKER  
AKA AMANDA D. TUCKER-MEUSE,

*Defendant-Appellant/Petitioner,*

and

UNITED STATES OF AMERICA, DIRECTOR OF TAXATION, STATE OF HAWAII,  
VIC ZAPIEN, DUSTIN P. MEUSE, and DOES 1 through 20 inclusive,

*Defendants/Respondents.*

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To the Intermediate Court of Appeals of the State of Hawaii in CAAP-15-0000109  
(Fujise, Presiding, Ginoza and Chan, JJ.)  
On Appeal from the Second Circuit Court in Civil No. 12-1-0462(3)  
(The Honorable Joseph E. Cardoza, Presiding)

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**APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE  
FEBRUARY 28, 2018 SUMMARY DISPOSITION ORDER AND THE  
MARCH 29, 2018 JUDGMENT ON APPEAL ENTERED BY THE  
INTERMEDIATE COURT OF APPEALS IN CAAP-15-0000109**

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**IN THE SUPREME COURT OF THE STATE OF HAWAII**

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### **A. QUESTION PRESENTED**

Did the ICA commit grave errors of fact and law, requiring reversal pursuant to HRS Section 602-59(b)(1) and (2), by its affirming the Hawaii judge-made practice of calculating deficiency judgments by merely mathematically subtracting the net proceeds of a judicial foreclosure at sale confirmation from the amount owed to a foreclosing plaintiff regardless of any evidence of the true value of the foreclosed property at sale confirmation, inconsistent by analogy with this Court's decisions in Kondaur Capital Corp. v. Matsuyoshi, 136 Haw. 227, 361 P.3d 454 (2015) (requiring evidence of good faith fair market valuation at nonjudicial foreclosure auctions), and Santiago v. Tanaka, 137 Haw. 137, 366 P.3d 612 (2015) (abhorring forfeitures of equity at nonjudicial foreclosure sales), additionally in violation of the Due Process Clauses of both the Hawaii and United States Constitutions?

### **B. SUMMARY OF PRIOR PROCEEDINGS**

On March 1, 2015, Petitioners filed a Notice of Appeal challenging the Second Circuit's "Order Granting Plaintiff LCP-Maui, LLC's Motion for Determination of Deficiency Amount, Filed November 12, 2014" in the amount of \$1,293,835.69 (Exhibit 1) and Judgment thereon (Exhibit 2).

On February 28, 2018, the ICA entered a "Summary Disposition Order" affirming the decision of the Second Circuit Court (Exhibit 3), avoiding the merits of Petitioner's claims, reasoning that since Petitioner had not challenged the method for calculating her deficiency judgment when summary judgment had been granted, she was precluded from doing so in her appeal from the order confirming sale, and the ICA entered Judgment on Appeal on March 29, 2018 (Exhibit 4).

Within 30 days from the entry of said ICA Judgment, excluding the concluding weekend, Petitioner now timely applies to this Court for review and reversal.

### **C. STATEMENT OF THE CASE**

Petitioner owned eight Maui properties, owing supposedly over \$7,000,000 including interest at the time of sale confirmation. Over objection, the sale of all eight properties was confirmed. The result was an order and a deficiency judgment entered on January 29, 2014 in the amount of \$1,293,835.69, based entirely upon mechanically subtracting the net sales proceeds for all eight properties from the total amount claimed owed, after which on March 1, 2015, Dr. Tucker filed her notice of appeal.

In opposing that mechanical method of determining a foreclosure deficiency judgment, Petitioner requested that the lower court first determine the fair market value of

each of the eight properties and use that in its calculations instead of the net forced sale proceeds, but was completely ignored.

Her foreclosing plaintiff had supposedly secured her properties from an assignment from the FDIC for a substantial price discount following the receivership of her original lender, and sued Petitioner for the face amount of all of her mortgages combined after a public sale, newspaper advertised in tiny print on three consecutive Sundays,

#### **D. REASONS WHY CERTIORARI SHOULD BE GRANTED**

##### **1. Hawaii's Judge-Made Deficiency Calculus Results in Forfeitures**

During the Great Depression, Hawaii Courts like courts in other jurisdictions grappled with the perceived unfairness of forcing a foreclosure auction sale in a down economy. Ultimately, a common law practice was adopted whereby an upset sale price was set at a judicially determined value and the bidding at auction began at that price.

The Hawaii Supreme Court in 1933 in Wodehouse v. Hawaiian Trust Co., 32 Haw. 835, 852-853 (1933), however, announced what were thought to be appropriate procedures for selling properties at a foreclosure sale and subsequently ratification at confirmation, as follows:

In determining what an upset price, if any, should be, or, at a later stage of the case, whether a sale should be confirmed, it is the value at the time of foreclosure and not the value at the time of the execution of the mortgage which is to be ascertained; and by value is meant what the property will bring at public auction or private sale (as may be authorized or required by the terms of the mortgage itself) after due publication of notice and after a reasonable time sufficient to permit efforts to interest all reasonably available prospective bidders.

Hawaii appellate courts since 1933 have interpreted Wodehouse to mean that “[t]he lower court's authority to confirm a judicial sale is a matter of equitable discretion” and “[i]f the highest bid is so grossly inadequate as to shock the conscience, the court should refuse to confirm.” Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983).

The reasoning behind this rule is based partly on ensuring that neither party gets a windfall, and partly upon upholding the stability of judicial sales. See Hoge v. Kane, 4 Haw. App. 533, 540, 670 P.2d 36, 40 (1983). The fair or true value of a property for the completely separate purpose of awarding a deficiency judgment after confirmation of sale

is a totally different issue however, pertaining not to the auction price but thereafter to the market value of the property in determining the loss if any to the foreclosing plaintiff.

Hawaii Courts matter-of-factly have merely routinely assumed when determining and enforcing foreclosure deficiency judgments that the confirmed sale price minus the net proceeds of sale controls and mathematically determines by subtraction the monetary deficiency amount awarded a foreclosing plaintiff without taking into account and considering the evidence of true market value at time of sale confirmation, again not for the purpose of confirming the forced auction sale, but for the second and separate purpose of calculating thereafter the true loss of the foreclosing plaintiff as well as any surplus equity rightfully the property of the foreclosed borrower(s).

This judge-made procedure, however, completely ignores reality -- that due especially to the recent housing market collapse still plaguing areas of Hawaii, foreclosing plaintiffs have the ability, for instance, to credit bid for much more than the property is usually worth, thus scarring away and effectively depressing competition due to such unused power and thus to in effect "rig" auction sales, enabling foreclosing plaintiffs to recover property at less than true market value, while at the same time using their artificial auction sales price to secure a windfall profit over and above what is actually owed, even double recoveries, by adding onto its below-market purchase a sizeable deficiency judgment, or even worse, to wipe out a foreclosed borrower's surplus equity in the property.

Thus, by "flipping" the property after an auction sale, a foreclosing plaintiff has made, even relatively immediately, more than what it was actually owed, and more than what it had even loaned or paid for any interim loan assignment to it, or to sell to friends and relatives at below market prices, sometimes being assigned by or to it during the foreclosure process itself, all of such instances witnessed by the undersigned in foreclosure cases.

The result is frequently that borrowers are penalized beyond what their foreclosing plaintiff actually lost and subject to confiscatory judgments and forfeiture without a hearing to determine actual loss and thus actual liability or any surplus equity.

Ironically, the very unfairness that English Courts of Equity, in instituting public auctions, sought to remedy so as to save equity for English homeowners, which

procedures Hawaii Courts adopted without legislation, seeking to eliminate forfeitures, has become the standard consequence of judicial foreclosure auctions in Hawaii.

What for foreclosing plaintiffs has frequently produced a windfall profit, our Courts unthinkingly rubber-stamping a mere mechanical calculation, has greedily maximized foreclosing plaintiff's profits at the expense of borrowers and guarantors, a heretofore unexamined judicial procedure in Hawaii in judicial foreclosures, a harsh and unfair forfeiture, harming Hawaii's overall economy as well by depressing local real estate markets selectively through the automatic lowering of comparable sales based upon artificially lower foreclosure sale prices.

## **2. The Majority of State Jurisdictions Have Rejected Hawaii's Deficiency Approach**

At first, State Courts nationally appear to have blindly allowed foreclosing plaintiffs windfall profits often through bloated deficiency judgments, concluding that otherwise it would be an unconstitutional impairment of capital and interference with the right to contract under Article I, Section 10, Clause 1 of the United States Constitution, viewing money exclusively, and not property, to be what lenders had bargained for in the event of default.

In 1941, the United States Supreme Court in Gelfert v, National City Bank of New York, 313 U.S. 221 (1941), however finally gave authoritative approval to the constitutionality of States preventing "sacrificial prices" by their regulating the amount of deficiency judgments either by statute or by the exercise of their equity jurisdiction.

Today, many State Legislatures have passed anti-confiscatory deficiency statutes, requiring that after a foreclosure auction their State Courts must hold a separate evidentiary hearing to determine the "fair value," or "true value" as some jurisdictions call it, of the foreclosed property which is not necessarily the "auction price" even if the "auction price" does not shock the conscience of the court, a distinction completely overlooked by Hawaii Courts.

And more recently, many State Courts have not waited for their State Legislatures to pass anti-deficiency statutes protecting borrowers from what they have concluded is gross unfairness and confiscatory forfeiture procedures, especially when those forfeiture procedures are judge-made in their jurisdictions, but have acted *on their own* to correct obvious injustices; e.g.:

In Pearman v. West Point National Bank, 887 S.W.2d 366, 368 (Ky. Ct. App. 1994), the Kentucky Court of Appeals on its own refused to allow a mortgagee to recover any deficiency judgment whatsoever where a foreclosing mortgagee that had purchased the property at two-thirds of its actual value was awarded a large deficiency judgment, and then contracted to sell the property for slightly more than the amount of money it had in the property while seeking nevertheless to enforce its deficiency award, that Court concluding that the foreclosing plaintiff breached the covenant of good faith and fair dealing implied within every mortgage contract, the breach resulting in non-enforcement of the deficiency.

The same result occurred at the initiative of the Colorado Court of Appeals in First National Bank of Southeast Denver v. Blanding, 885 P.2d 324 (Colo. Ct. App. 1994) (lack of good faith bid by a mortgage holder requires full adjustment of the deficiency amount).

In Wansley v. First National Bank of Vicksburg, 566 So.2d 1218, 1224 (Miss. 1990), the Mississippi Supreme Court held that a foreclosing mortgagee must show more than just a difference between the net sale proceeds and the amount of the indebtedness to be entitled to a deficiency judgment, but must affirmatively show the property's true value was insufficient to satisfy what the mortgagee had in the property, which requires both a prior determination of adequacy of auction price after confirmation, as well as true value of the property for deficiency purposes after confirmation.

Whereas, while an inadequate winning bid price may not be enough to defeat an auction sale, it is considered nevertheless grounds for denying even in its entirety a request for a subsequent deficiency judgment in many jurisdictions; see, e.g.: In re Slizyk, 2006 WL 2506489 (Bankr. M.D. Fla.) ("the amount for which mortgaged property sells at during a properly conducted sale is neither conclusive as to the value of the property nor the right to a deficiency judgment"); see also, Barnard v. First National Bank of Okaloosa County, 482 So.2d 534 (Fla. 1986); Savers Federal Savings & Loan Association v. Sandcastle Beach Joint Venture, 498 So.2d 519 (Fla. 1986); see also for a Hawaii-based historical analysis, Georgina W. Kwan, Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i, 24 U. Haw. L. Rev. 245, 261 (2001).

Hawaii is now said to be in the minority of States with confiscatory deficiency judgment procedures, Sostaric v. Marshall, 234 W. Va. 449, 766 S.E.2d 396 (2014).

### **3. The Hawaii Judge-Made Deficiency Procedures Are Contrary to Hawaii Case Law**

Hawaii Courts have failed to yet directly address such fundamental unfairness despite their equitable responsibilities to enforce the implied covenant of good faith and fair dealing in judicial foreclosures, while other State Courts in denying deficiency judgments in excess of fair value recoveries in exercise of their equity jurisdiction have applied that very equitable requirement that every promise made contains an implied covenant of good faith and fair dealing.

Foreclosure deficiency practices in Hawaii Courts have fostered and shielded from view an unregulated and heretofore unexamined a low visibility, multi-million dollar thieves market where foreclosing plaintiffs are in effect officially encouraged to steal money from otherwise defenseless and highly vulnerable borrowers in many heretofore unseen ways, extracting double or even triple recoveries at times through government guarantees against loss or from nonrecourse insurance when in securitized trusts, while forcing others into otherwise unnecessary bankruptcy filings, some borrowers ironically entitled instead to surplus awards when true market value is considered.

The resulting, additional unfair financial pressure on families foreclosed on due to such confiscatory procedures have been especially troubling for homeowners in Hawaii given our large homeless population.

For Hawaii Courts have long recognized the special importance to the welfare of society of protecting a family's "single most important asset," its residence, not only from an economic point of view, but also for its inherent social values, as its location often determines where children go to school, where families worship, where borrowers vote, where family and friends reside, and where the elderly spend their remaining years, in the absence of which, especially as a result of unfair foreclosure deficiency judgments, borrowers may become dependent on public housing and welfare, if available, and parental control may be lost and marriages often break up as a result, and in the experience of the undersigned suicide can be the result; see Sawada v. Endo, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

Inconsistently, this Court has always abhorred forfeitures of the very kind happening almost every day in our Circuit Courts, and despite that fact that this Court while applying such good faith and fair dealing requirements to *nonjudicial* foreclosure auctions has inadvertently left such unfair and bad faith confiscatory judge-made



procedures in *judicial* foreclosures unregulated, despite your groundbreaking decisions, for example, in Kondaur Capital Corp. v. Matsuyoshi, 136 Haw. 227, 361 P.3d 454 (2015) (requiring evidence of good faith fair market valuation at nonjudicial foreclosure auctions), and Santiago v. Tanaka, 137 Haw. 137, 366 P.3d 612 (2015) (abhorring forfeitures of equity at nonjudicial foreclosure sales).

Importantly, such Hawaii judge-made protections ironically are even more important in judicial as opposed to nonjudicial foreclosures, for in nonjudicial foreclosures, now enjoying such protections, there are no deficiency judgments yet do safeguard surpluses, unlike judicial foreclosures.

#### **4. The Hawaii Judge-Made Deficiency Calculus Further Violates Due Process of Law**

Despite the majority of States now rejecting Hawaii's mechanical foreclosure deficiency judgment approach for awarding deficiency judgments without a hearing to determine a foreclosing plaintiff's actual loss, calling it "grossly unfair" and "confiscatory" and "abusive" and a "forfeiture" and an "unconscionable windfall" and "unjust enrichment," no State Court has yet to consider it to be an obvious unconstitutional deprivation of Due Process of Law, despite ample applicable supporting federal case law precedents.

For example, Fuentes v. Shevin, 407 U.S. 67, 81 (1972), the United States Supreme Court held that one paramount purpose of the Due Process Clause and the requirement of an adequate hearing is "to protect [a person's] use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property."

The United States Supreme Court, moreover, has recognized that there may be procedures set up to return wrongfully taken property, or provide damages for the taking, but "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82.

A timely hearing before property is taken from an individual is a fundamental principle of Due Process of Law; see, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976). The well-known test announced in Eldridge determines the adequacy of a pre-deprivation process by balancing "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The Hawaii Courts' judge-made deficiency judgment determination procedures clearly are deficient on all three of those grounds. When this framework is applied to the Hawaii Courts' procedures for determining deficiency amounts following confirmation of sale, it is obvious that Due Process has been and is being extensively violated without conducting a separate actual loss and fair value hearing as the majority of States now do.

The private interest that is affected is an individual's money, the most literal and unassailable of all the definitions of "property" expressly grafted onto the Due Process Clause.

Moreover, as described above, there is no procedure provided or allowed in Hawaii to challenge, at a subsequent evidentiary hearing after confirmation of sale, the value of property received by a foreclosing plaintiff bidding at its own auction or the foreclosing plaintiff's actual loss. This opens the door to the type of multifaceted fraudulent abuses that have become standard industry practice in Hawaii, with Hawaii Courts finding themselves blindly looking the other way, allowing themselves to become collection agencies for crooks.

A foreclosing plaintiff can easily sell the rights to foreclose to a third party, and frequently does, which then low balls its bidding at the auction, thereby obtaining property at a steep discount, exactly what happened in this case. The same third party can then obtain a deficiency judgment based on the original debt, rather than the amount paid to acquire the debt or the true value of the property transferred to it or to a related party of its.

The way this process is applied clearly deprives individuals of their money with no hearing at all to determine the fairness of the amount taken, and no procedure to rectify that unfairness.

The risk of deprivations of Due Process of Law through such Hawaii Court procedures is therefore unacceptably great. Similarly, there is obvious value in a hearing to determine the fairness of the deficiency amount based upon at least the fair value of property received versus the actual loss if any to the foreclosing plaintiff, whereas the often stated concern regarding sanctity of judicial sales would not be affected by this type of evidentiary hearing, not involving re-opening of auctions. And adding a fair value/actual

loss hearing determination would not amount to setting an upset price at a foreclosure auction, which the Wodehouse Court was apparently wary of.

The resulting violation of Due Process is not only procedural, but substantive as well. "Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

The application of substantive due process has been the source of much debate in Federal Courts. The former Justice Scalia, while a judge for the Court of Appeals for the Third Circuit, explained that there are two types of state action that may be challenged under this theory, legislative and non-legislative acts. Nicholas v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000):

To summarize: when a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action (such as an adverse employment decision), we must look, as a threshold matter, to whether the property interest being deprived is "fundamental" under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used.

In the mortgage foreclosure context, the United States Supreme Court has recognized that allowing a foreclosing entity to collect a double recovery is constitutionally impermissible, stating that "[m]ortgagees are constitutionally entitled to no more than payment in full." Gelfert, 313 U.S. at 233. (Emphasis added) That says it all.

Addressing deficiency judgments, the United States Supreme Court in Gelfert further noted that "[t]he 'fair and reasonable market value' of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss," *id.* at 234. Concerning the process of determining a deficiency judgment, especially during times of economic depression, the United States Supreme Court concluded, although the question here was not directly before it, *id.* at 232-233:

And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees collecting more than their due . . . . Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

It is constitutionally unfair and a violation of Due Process of Law for a mortgagee to be able to suppress auction sale prices and then recover more than it should in the form of a deficiency judgment. A mortgagee should not recover more than it is owed by taking advantage of outdated procedures, originally intended ironically by English Courts of Equity to protect borrowers and not to punish them.

The disparity between market value and a forced sale price has been recognized in numerous cases over the years, but has nothing to do with how a deficiency judgment should be determined *after* a confirmed sale. Even in 1994, when the real estate market was not nearly as depressed as it has been now, the United States Supreme Court held:

[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value. "The market value of ... a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.

BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38 (1994).

## **5. The ICA Erred in Refusing To Address the Deficiency Issue**

The ICA concluded that Petitioner's failure to include the deficiency issue in her first appeal in CAAP-14-0000513 from the summary judgment challenging the July 29, 2014 "Conclusion of Law No. 4," while contesting her foreclosure summary judgment, the lower court granting her foreclosing plaintiff the right to a deficiency judgment based on "the difference between the amount owed to LCP-Maui under the Notes and Mortgages, and the foreclosure sale proceeds applied thereto."

Yet nowhere in the lower court's prior summary judgment deliberations below was that deficiency judgment calculation even discussed, briefed, ruled on, or even addressed (see the Official Transcript for December 18, 2013 set forth in Exhibit 5), just slipped adroitly into the lower court's conclusions.

While it is true that Conclusions of Law No. 4 was entered by the lower court ("LCP-Maui is entitled to a deficiency judgment under the Notes and Mortgages for the difference between the amount owed to LCP-Maui under the Notes and Mortgages, and the foreclosure sale proceeds applied thereto"), it was prepared by LCP-Maui and merely rubber-stamped *verbatim* by the lower court without even one syllable or one punctuation mark being changed.

Such "adopted findings of fact and conclusions of law" – when lower courts merely swallow whole proposed findings and conclusions prepared by prevailing parties as was done here -- have always been subject to great mistrust as explained by the United States Supreme Court in United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 and no. 4 (1964) (rubber stamping adopted findings "has been denounced by every court of appeals save one" as "an abandonment of the duty and trust" placed in judges).

Such mechanically "adopted findings of fact and conclusions of law" are furthermore considered contrary to sound judicial policy, causing disrespect for the judiciary as explained by the United States Court of Appeals for the Ninth Circuit in Photo Electronics Corp. v. England, 581 F.2d 772, 776-777 (9th Cir. 1978) ("wholesale adoption of the prevailing party's proposed findings complicates the problems of appellate review. . . [It raises] the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves. These concerns have caused us to call for more careful

scrutiny of adopted findings . . . . We scrutinize adopted findings by conducting a painstaking review of the lower court proceedings and the evidence”).

Moreover, it is only the right to a deficiency judgment if included within a foreclosure decree that must be appealed at that time, whereas the actual amount of any deficiency remains appealable after the entry of the amount of the deficiency which is what Petitioner did. It is only upon a determination of the amount of a deficiency, if any, that the method used becomes relevant, germane, and appealable.

Petitioner here is not appealing LCP-Maui’s right to a deficiency judgment, but challenging the constitutionality of and contractual and statutory method by which her deficiencies were calculated after summary judgment was awarded against her.


And here we are dealing with a constitutional procedural and substantive due process right protected by both the Hawaii and United States Constitutions immune from such uninformed waiver; Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999).

**E. CONCLUSION**

The issues raised in this Application for Writ of Certiorari are of grave public importance, involving the otherwise actual loss by Hawaii residents of tens of millions of dollars and more of homeownership equity.

The ICA decision challenged above should be urgently reviewed by this Court and set aside, this Court’s Matsuyoshi and Santiago decisions should be applied to judicial as well as to nonjudicial foreclosures alike, our lower courts should be instructed to hold an evidentiary hearing after confirmation of sale to determine fair value, and this Court’s holding should be based not only on good faith and fair dealing, but on Due Process requirements as well, which should be ordered applied to all active judicial foreclosure cases and to those cases where Hawaii deficiency judgments are still being enforced.

DATED: Honolulu, Hawaii, April 28, 2018.

  
GARY VICTOR DUBIN  
FREDERICK J. ARENSMEYER  
Attorneys for Petitioner  
Amanda Tucker

# **EXHIBIT 1**

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H. FERNANDEZ-KAHAKAUWILA, CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

LCP-MAUI, LLC,

Plaintiff,

vs.

AMANDA D. TUCKER AKA AMANDA  
DAWN TUCKER AKA AMANDA D.  
TUCKER-MEUSE; UNITED STATES OF  
AMERICA; DIRECTOR OF TAXATION,  
STATE OF HAWAII; VIC ZAPIEN; and  
DOES 1 through 20 inclusive,

Defendants.

CIVIL NO. 12-1-0462 (3)  
(Foreclosure)

JUDGMENT

(Re: Order Granting Plaintiff LCP-Maui,  
LLC's Motion For Determination Of  
Deficiency Amount, Filed November 12,  
2014)

HEARING:

DATE: December 10, 2014

TIME: 8:30 a.m.

JUDGE: Honorable Joseph E. Cardoza

No trial date set.

JUDGMENT

Pursuant to: (i) Rules 58 and 54(b) of the Hawaii Rules of Civil Procedure, (ii) the Findings of Fact, Conclusions of Law, and Order Granting LCP-Maui, LLC's Renewed Motion for Summary Judgment and for Decree of Foreclosure, entered in this matter on January 29, 2014

I hereby certify that this is a full, true and  
correct copy of the Original.

1357189

  
Clerk, Second Circuit Court



("FOF/COL"), (iii) the Judgment On Findings Of Fact, Conclusions Of Law, and Order Granting LCP-Maui, LLC's Renewed Motion For Summary Judgment and For Decree Of Foreclosure Filed June 17, 2013, filed on March 20, 2014 ("**Confirmation Order**"), and (iv) the Order Granting Plaintiff LCP-Maui-LLC's Motion for Determination of Deficiency Amount, Filed November 12, 2014 entered approximately concurrently with this Judgment ("**Deficiency Order**"),

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT is entered in favor of Plaintiff LCP-MAUI, LLC (n.k.a. Legacy Capital Partners, LLC ("**LCP-Maui**")) and against Defendant Amanda D. Tucker aka Amanda Dawn Tucker aka Amanda D. Tucker-Meuse ("**Tucker**"), as follows:

1. The deficiency amount owed by Tucker and due LCP-Maui is \$1,293,835.69 as of November 10, 2014 ("**Deficiency Amount**")

2. Statutory post-judgment interest at the rate of 10% per annum shall accrue on the Deficiency Amount until the date of payment in full.

3. This Judgment disposes of all claims, counterclaims, and/or cross-claims that have been, or could have been brought in the above-entitled action. There are no more remaining parties and/or claims in this action.

4. The Court retains jurisdiction regarding entitlement to attorneys' fees and costs via post-judgment motion.

5. This judgment is entered pursuant to Rules 54(b) and 58 of the Hawaii Rules of Civil Procedure. There is no just reason for delay, and this Judgment shall be entered as a final judgment.

4. Pursuant to 54(b) of the Hawaii Rules of Civil Procedure, the Court determines and directs that this order is a final judgment, and there is no just reason for delay.

DATED: Wailuku, Maui, JAN 28 2015

/S/ JOSEPH E. CARDOZA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

GARY V. DUBIN  
ANDREW CHIANESE  
Attorneys for Defendant AMANDA D. TUCKER

LCP-Maui, LLC v. Amanda D. Tucker, et al., CIVIL NO. 12-1-0462 (3), Second Circuit Court, State of Hawaii: ORDER GRANTING PLAINTIFF LCP-MAUI, LLC'S MOTION FOR DETERMINATION OF DEFICIENCY AMOUNT, FILED NOVEMBER 12, 2014

# **EXHIBIT 2**

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Attorneys for Plaintiff  
LCP-MAUI, LLC

FILED

2015 JAN 29 AM 11:34

M. FERNANDEZ-KAHAKAUWILA, CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

LCP-MAUI, LLC,

Plaintiff,

vs.

AMANDA D. TUCKER AKA AMANDA  
DAWN TUCKER AKA AMANDA D.  
TUCKER-MEUSE; UNITED STATES OF  
AMERICA; DIRECTOR OF TAXATION,  
STATE OF HAWAII; VIC ZAPIEN; and  
DOES 1 through 20 inclusive,

Defendants.

CIVIL NO. 12-1-0462 (3)  
(Foreclosure)

ORDER GRANTING PLAINTIFF LCP-  
MAUI, LLC'S MOTION FOR  
DETERMINATION OF DEFICIENCY  
AMOUNT, FILED NOVEMBER 12, 2014

HEARING:


DATE: December 10, 2014

TIME: 8:30 a.m.

JUDGE: Honorable Joseph E. Cardoza

No trial date set.

I hereby certify that this is a full, true and  
correct copy of the Original.

  
Clerk, Second Circuit Court

**ORDER GRANTING PLAINTIFF LCP-MAUI, LLC'S MOTION FOR  
DETERMINATION OF DEFICIENCY AMOUNT, FILED NOVEMBER 12, 2014**

Plaintiff LCP-MAUI, LLC's ("*LCP-Maui*") Motion for Determination of Deficiency Amount ("*Motion*") came on for hearing before the Honorable Joseph E. Cardoza on December 10, 2014. Stephanie E.W. Thompson, Esq. appeared on behalf of LCP-Maui, and Andrew Chianese, Esq. appeared on behalf of Defendant Amanda D. Tucker aka Amanda Dawn Tucker aka Amanda D. Tucker-Meuse ("*Tucker*").

Having been duly informed of the status of the case, and the records and files herein, and upon consideration of the Motion, the memorandum in support, the declarations and exhibits attached thereto, the records and files herein, and argument of counsel, and good cause appearing therefore,

THE COURT HEREBY ORDERS, ADJUDGES AND DECREES THAT THE MOTION IS GRANTED as follows:

1. LCP-Maui is entitled to a deficiency judgment pursuant to the Findings of Fact, Conclusions of Law, and Order Granting LCP-Maui, LLC's Renewed Motion for Summary Judgment and for Decree of Foreclosure, entered in this matter on January 29, 2014;
2. The amount of the deficiency judgment in favor of LCP-Maui and against Defendant Tucker is \$1,293,835.69, as of November 10, 2014 ("*Deficiency Judgment*").
2. Statutory post-judgment interest at the rate of 10% per annum shall accrue on the Deficiency Judgment until the date of payment in full by Defendant Tucker.
3. This Court reserves jurisdiction to consider any further motion for attorneys' fees and costs; and

DATED: Wailuku, Maui, JAN 28 2015

/S/ JOSEPH E. CARDOZA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

GARY V. DUBIN  
ANDREW CHIANESE  
Attorneys for Defendant AMANDA D. TUCKER

LCP-Maui, LLC v. Amanda D. Tucker, et al., CIVIL NO. 12-1-0462 (3), Second Circuit Court,  
State of Hawaii: JUDGMENT

# **EXHIBIT 3**

Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000109  
28-FEB-2018  
07:47 AM

NO. CAAP-15-0000109

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

LCP-MAUI, LLC, Plaintiff-Appellee,  
v.  
AMANDA D. TUCKER AKA AMANDA DAWN TUCKER AKA  
AMANDA D. TUCKER-MEUSE, Defendant-Appellant,  
and  
UNITED STATES OF AMERICA; DIRECTOR OF TAXATION,  
STATE OF HAWAII; VIC ZAPIEN; DUSTIN P. MEUSE,  
Defendants-Appellees,  
and  
DOES 1 THROUGH 20, INCLUSIVE, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CIVIL NO. 12-1-0462(3))

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Ginoza and Chan, JJ.)

Defendant-Appellant Amanda D. Tucker aka Amanda Dawn Tucker aka Amanda D. Tucker-Meuse (**Tucker**) appeals from the following entered by the Circuit Court of the Second Circuit (**circuit court**)<sup>1</sup> on January 29, 2015:

(1) the "Order Granting Plaintiff LCP-Maui, LLC's Motion for Determination of Deficiency Amount, Filed November 12, 2014" (**1/29/15 Order Granting Deficiency Amount**); and

(2) the related Judgment (**1/29/15 Deficiency Judgment**) in favor of LCP-Maui, LLC (**LCP-Maui**).

---

<sup>1</sup> The Honorable Joseph E. Cardoza presided.



On appeal, Tucker contends that the circuit court erred by denying her procedural and substantive due process rights under the Hawai'i State Constitution and the United States Constitution by depriving her of property without an evidentiary hearing to determine the fair market value of her property at the time of the confirmation sale.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Tucker's points of error as follows and affirm as set forth below.

This dispute arises from a judicial foreclosure action in which Tucker appeals from the 1/29/15 Deficiency Judgment.

On November 12, 2014, after the circuit court had entered a foreclosure judgment in its favor, LCP-Maui filed its Motion for Determination of Deficiency Amount (**Deficiency Motion**). On December 3, 2014, Tucker filed her opposition to the Deficiency Motion arguing that LCP-Maui's Deficiency Motion was in violation of due process of law and that an evidentiary hearing should be held to determine fair market value of the subject properties at the time of the sale confirmation. The circuit court subsequently entered the 1/29/15 Order Granting Deficiency Amount and the 1/29/15 Deficiency Judgment in favor of LCP-Maui and against Tucker in the amount of \$1,293,835.69.

Tucker asserts in this appeal that the process in Hawai'i for determining deficiency judgments violates her procedural due process rights. Tucker argues that in calculating the deficiency judgment, an evidentiary hearing should have been held to determine the fair market value of the foreclosed properties and such fair market value should have then been used to calculate the applicable deficiency.

In response, LCP-Maui argues that this appeal should be dismissed for lack of jurisdiction because Tucker was required to raise her due process issues in a prior appeal. Specifically, Tucker previously appealed and challenged the circuit court's "Findings of Fact, Conclusions of Law, and Order Granting LCP-Maui, LLC's Renewed Motion for Summary Judgment and For Decree of

Foreclosure" filed on January 29, 2014 (1/29/14 FOF/COL/Order), and the related Judgment filed on March 20, 2014 (3/20/14 Foreclosure Judgment), which resulted in appellate case CAAP-14-0000513 (First Appeal). LCP-Maui, LLC v. Tucker, No. CAAP-14-0000513, 2016 WL 3615281 (Hawaii App. Jun. 30, 2016). In the First Appeal, Tucker raised various issues challenging the foreclosure decree and judgment in favor of LCP-Maui, but did not raise any point of error relating to Tucker's liability for a deficiency judgment or how a deficiency judgment would be calculated. Id. at \*1.

However, the 1/29/14 FOF/COL/Order addressed the method by which the deficiency judgment would be determined, specifically in conclusions of law (COL) No. 4, which provided:

LCP-Maui is entitled to a deficiency judgment under the Notes and Mortgages for the difference between the amount owed to LCP-Maui under the Notes and Mortgages, and the foreclosure sale proceeds applied thereto; provided, however, that a deficiency judgment shall not be entered against Defendant Tucker unless and until authorized by the Bankruptcy Court or otherwise permitted under bankruptcy law.

(Emphasis added.) Moreover, the related 3/20/14 Foreclosure Judgment specified that "[t]he provisions of the [1/29/14 FOF/COL/Order], which include a decree of foreclosure, an order of sale, and an adjudication as to the entitlement to a deficiency judgment among other things, are incorporated herein." (Emphasis added.)

As LCP-Maui argues, some case law suggests that in this circumstance, the appeal should be dismissed for lack of appellate jurisdiction. See Security Pacific Mortg. Corp. v. Miller, 71 Haw. 65, 783 P.2d 855 (1989); Citicorp Mortg., Inc. v. Bartolome, 94 Hawaii 422, 16 P.3d 827 (App. 2000). More recently, however, in Mortg. Elec. Registration Sys., Inc. v. Wise, 130 Hawaii 11, 304 P.3d 1192 (2013), the Hawaii Supreme Court exercised appellate jurisdiction but held in a judicial foreclosure action that challenges to a foreclosure judgment were barred by *res judicata* where the defendants failed to appeal from the initial foreclosure judgment.

In this case, similar to Wise, we exercise appellate jurisdiction but hold that Tucker is precluded from challenging the method of calculating her deficiency judgment. LCP-Maui's right to a deficiency judgment and the method for calculating the deficiency judgment were adjudicated and set forth in the 1/29/14 FOF/COL/Order, and incorporated into the related 3/20/14 Judgment. In the instant appeal, although Tucker timely appealed from the subsequent 1/29/15 Deficiency Judgment, she is only entitled to challenge the errors unique to that 1/29/15 Deficiency Judgment. See Id. at 16, 304 P.3d at 1197; see also Ke Kailani Partners, LLC v. Ke Kailani Dev. LLC, Nos. CAAP-12-0000758 and CAAP-12-0000070, 2016 WL 2941054, at \*7 (Haw. App. Apr. 29, 2016) (Mem. Op.), cert. denied, 2016 WL 4651424, at \*1 (Haw. Sept. 6, 2016) (holding, *inter alia*, that appellants had waived their challenge to the method used to determine a deficiency judgment by dismissing a prior appeal from a foreclosure order that had set forth the entitlement to a deficiency judgment and the method for determining the amount).

In sum, the 1/29/15 Deficiency Judgment in this case did not adjudicate the method by which the deficiency would be calculated, but rather was incident to the enforcement of the earlier 3/20/14 Foreclosure Judgment. See Wise, 130 Hawai'i at 16, 304 P.3d at 1197.

Therefore, IT IS HEREBY ORDERED that the Judgment, entered on January 29, 2015, in the Circuit Court of the Second Circuit is affirmed.


DATED: Honolulu, Hawai'i, February 28, 2018.

On the briefs:

Gary Victor Dubin,  
Frederick J. Arensmeyer,  
Dan J. O'Meara,  
for Defendant-Appellant.

Sharon V. Lovejoy,  
Stephanie E.W. Thompson,  
for Plaintiff-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge

# **EXHIBIT 4**

Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000109  
29-MAR-2018  
01:34 PM

NO. CAAP-15-0000109  
IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

LCP-MAUI, LLC, Plaintiff-Appellee,  
v.  
AMANDA D. TUCKER AKA AMANDA DAWN TUCKER AKA AMANDA D. TUCKER-  
MEUSE, Defendant-Appellant,  
and  
UNITED STATES OF AMERICA; DIRECTOR OF TAXATION, STATE OF HAWAII;  
VIC ZAPIEN; DUSTIN P. MEUSE, Defendants-Appellees,  
and  
DOES 1 THROUGH 20 INCLUSIVE, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CIVIL NO. 12-1-0462(3))

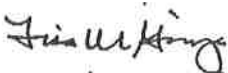
JUDGMENT ON APPEAL

(By: Ginoza, J., for the court<sup>1</sup>)

Pursuant to the Summary Disposition Order of this court entered on February 28, 2018, the Judgment entered by the Circuit Court of the Second Circuit on January 29, 2015, is affirmed.

DATED: Honolulu, Hawaii, March 29, 2018.

FOR THE COURT:

  
Associate Judge

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<sup>1</sup> Fujise, Presiding Judge, Ginoza and Chan, JJ.

# **EXHIBIT 5**

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII  
Electronically Filed  
Intermediate Court of Appeals  
CAAP-14-0000513  
20-NOV-2014  
03:52 PM

2010-2 SFR VENTURE, LLC  
Plaintiff,  
vs.  
AMANDA D. TUCKER, et al.  
Defendant.

Civil No. 12-1-0462  
TRANSCRIPT OF  
PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JOSEPH P. CARDOZA, Circuit Court  
Judge presiding Wednesday, December 18, 2013. Further  
Hearing On LCP Maui, LLC's Renewed Motion For Summary  
Judgment And For Interlocutory Decree Of Foreclosure.

APPEARANCES:

SHARON LOVEJOY, Esq. Attorney for the Plaintiff  
733 Bishop Street  
Suite 1900  
Honolulu, Hawaii

DAN O'MEARA, Esq. Attorney for the Defendants  
55 Merchant Street  
Suite 3100  
Honolulu, Hawaii

TRANSCRIBED BY:  
Beth Kelly, RPR, CSR #235  
Court Reporter

Beth Kelly, CSR #235  
Court Reporter

1 WEDNESDAY, DECEMBER 18, 2013

2 THE CLERK: Calling Civil Number 12-1-0462,  
3 2010-2 SFR Venture, LLC versus Amanda D. Tucker, et  
4 cetera, et al., for further hearing on LCP Maui, LLC's  
5 renewed motion for summary judgment and for interlocutory  
6 decree of foreclosure.

7 MS. LOVEJOY: Good morning, your Honor,  
8 Sharon Lovejoy for plaintiff, LCP Maui.

9 MR. O'MEARA: Your Honor, Dan O'Meara for  
10 defendant Tucker.

11 THE COURT: All right. Good morning. I was  
12 just handed a document that was filed this morning at 8:15  
13 entitled, defendant Amanda D. Tucker's notice of oral  
14 request for judicial notice to be made at the December  
15 18th, 2013 hearing.

16 I obviously haven't had a chance to read it,  
17 but at any rate I just thought I'd note for the record  
18 that I just received this.

19 You're asking that I take judicial notice of  
20 a motion being filed today in bankruptcy case 12-02052 in  
21 the United States Bankruptcy Court for the District of  
22 Hawaii. And this is a -- well, it -- page two of the  
23 submission filed this morning sets forth the title of that  
24 motion.

25 Well, let's just deal with the issue of



1 judicial notice first. Anything you want to say about  
2 that?

3 MR. O'MEARA: Your Honor, the filing was made  
4 because, part of the reason why LCP Maui is --

5 THE COURT: Well, you know what, actually let  
6 me do this. What's your position on taking judicial  
7 notice of this? It's actually not filed yet, so.

8 MS. LOVEJOY: Your Honor, so there's nothing  
9 to take judicial of. I have no problem whatsoever your  
10 Honor taking judicial notice of all of the bankruptcy  
11 filings relating to (inaudible) Tucker. And I have no  
12 problem with that, but this is a dollar short and a day  
13 late, and I don't think really has any bearing on those  
14 that's pending in front of your Honor now.

15 THE COURT: You know, that's my problem. I  
16 see it's actually not part of the bankruptcy file as we --

17 MR. O'MEARA: No, your Honor, it's going to  
18 be filed because what it -- to summarize what the essence  
19 of it is, is that LCP Maui is the plaintiff in -- the  
20 substituted plaintiff in this action. The reason they're  
21 substitute plaintiff in this action is because of a  
22 decision by the Bankruptcy Court that reached a settlement  
23 agreement, which basically said that LCP Maui was in  
24 effect the owner of this -- the holder of this mortgage.

25 Since that's not before this Court, we're

1 filing in the Bankruptcy Court because we think there's  
2 several, many defects with respect to that, to their  
3 standing as their appointment as the owner of the  
4 mortgage.

5           And those are what -- and the notion is if,  
6 in fact, the Bankruptcy Court agrees with us and finds  
7 that LCP Maui is not the appropriate party that may be  
8 deemed the owner of the original of the mortgage, then  
9 obviously that would impact this case, because you'd have  
10 a plaintiff who doesn't exist for purposes of this case,  
11 which is why this was filed -- this is being filed in  
12 Bankruptcy Court. That's the long and the short of it.

13           THE COURT: All right. Well, respectfully,  
14 the Court's going to decline to take judicial notice of  
15 the document that's anticipated to be filed as part of the  
16 bankruptcy case.

17           I do recognize though that this was the  
18 central or one of the central arguments made by defendants  
19 that there was the intent to take some action before the  
20 Bankruptcy Court which may impact this particular  
21 proceeding. And that particular issue has been fully  
22 briefed by the parties.

23           At any rate, this is your motion. So --

24           MS. LOVEJOY: Yes, your Honor --

25           THE COURT: I -- go ahead. I'm sorry.

1 MS. LOVEJOY: Feel free.

2 THE COURT: That's all right. I'm sorry.

3 MS. LOVEJOY: Okay. So we filed this motion  
4 in June of this year. There have been defective --

5 THE COURT: You know, actually, let me,  
6 because this may be -- you know, I have reviewed what's  
7 been filed. And I might as well tell you what my  
8 inclination on this is.

9 And, of course, I know the parties are aware  
10 of the fact that I did continue this hearing to allow  
11 parties to conduct discovery, but it's been represented by  
12 the Court that discovery has not and apparently will not  
13 be conducted.

14 And I do recognize one of the arguments is  
15 that there may be some action taken by the Bankruptcy  
16 Court, but obviously that hasn't occurred yet because the  
17 Bankruptcy Court actually hasn't even received the request  
18 for or the motion that's in question.

19 So my inclination today is to hear this  
20 motion and to grant this motion. That's just my  
21 inclination. So I have reviewed what you've submitted.

22 MS. LOVEJOY: I -- then why don't we do this  
23 for expedience. Let counsel address issues and I'll  
24 respond.

25 THE COURT: Fine. Thank you.

1           MR. O'MEARA: Your Honor, part of the -- in  
2 (inaudible) some of the discovery, part of the discovery  
3 attempted was by the depositions, out-of-state  
4 depositions --

5           THE COURT: Right.

6           MR. O'MEARA: -- through this Court is a more  
7 difficult process. You have to get a commission. You  
8 have to go to the other state and comply with their laws.

9           If we are able to go forward with our  
10 pleading in Bankruptcy Court, our belief taking deposition  
11 out-of-state is much more streamlined, much more  
12 expeditious way for us to do it, because we'll have  
13 Federal subpoena, Federal -- we can take a deposition  
14 under a Federal case which cuts through a lot of the  
15 problems of getting the out-of-state deposition.

16           So part of our discovery will be expedited if  
17 the Bankruptcy Court is inclined to consider our motion.

18           The risk to this Court and to this proceeding  
19 is that if we are successful in consideration and  
20 prevailing in this bankruptcy pleading, you could have  
21 inconsistent decisions. This Court would have a  
22 foreclosure going forward with this particular plaintiff,  
23 whereas in our view, if that plaintiff isn't really the  
24 appropriate party for any number of reasons that probably  
25 have been raised already, but they're raised in even more

1 detail in ways that the Bankruptcy Court wasn't aware,  
2 including deposition we took of the CEO of the (inaudible)  
3 Bank, original lender.

4           If, in fact, the Bankruptcy Court looks in  
5 favor on this motion, you end up with a foreclosure by a  
6 party that ends up in bankruptcy and not end up being the  
7 party that could have or should have gone forward in the  
8 proceeding.

9           And that's -- you know, your Honor, that's a  
10 problem. That's a problem. Obviously it's not a problem  
11 today, but it is a potential problem. It's something --  
12 this is a big deal. These are -- this is seven million  
13 dollars worth of property that was taken for 2.7 million  
14 dollars. Our client never had a chance to try and take  
15 (inaudible) back that was 2.7 million dollars.

16           You know, this LCP Maui is run by a couple  
17 people that we found out look like they're going to used  
18 car lot in Fort Lauderdale, or in Florida. So the whole  
19 thing just doesn't -- it just concerns us and that's why  
20 we are, you know, obviously we're fighting this because we  
21 want to -- you know, want to make sure that this is done  
22 correctly.

23           We don't want to have to come back here if  
24 the Bankruptcy Court considers this motion and then have  
25 to start over again. So in our view there's enough

1 questions of fact that from our perspective the motion for  
2 summary judgment should be denied, or at least continued  
3 until this Bankruptcy Court decides one way or the other  
4 on this issue.

5 THE COURT: All right. Thank you.

6 Any response?

7 MS. LOVEJOY: Yes, your Honor. The  
8 Bankruptcy Court's already decided. The time to appeal,  
9 and there was a request by borrower in Bankruptcy Court to  
10 extend the time to appeal the Judge's order was denied.  
11 The time to appeal has passed.

12 As your Honor recognized, it's been at least  
13 two months that counsel for the borrower has been  
14 threatening to go back to the Bankruptcy Court to attempt  
15 to reopen things. Basically that opportunity has passed.  
16 This is just another effort at further delay. Their  
17 statements made today about the reason discovery didn't go  
18 forward was because of efforts, you know, to take  
19 out-of-state commissions (sic).

20 I would posit that that is more justification  
21 for delay. We have still never been told -- you may  
22 recall at the last hearing, I was asking that borrower be  
23 put on the record what discovery they wanted to do. Here  
24 we are two months later. I still don't know what  
25 discovery it is they're claiming they wanted to do, other

1 than of my client.

2 My client would come to Hawaii. My client's  
3 the plaintiff. My client could be deposed in Hawaii.  
4 Despite asking for dates they want depositions, we  
5 received nothing.

6 So we've produced volumes of the documents  
7 they requested at huge expense to my client. They've been  
8 given every opportunity. They have had plenty of  
9 opportunity to go to the Bankruptcy Court if they wanted  
10 to try to do something. Effectively every issue that they  
11 raise here today has been raised or they had an  
12 opportunity to raise in the Bankruptcy Court. They failed  
13 to do it.

14 And so, your Honor, summary judgment is  
15 appropriate here. We have -- we have presented to the  
16 Court all of the evidence that's necessary to support the  
17 very simple elements that need to be shown to go forward  
18 with a foreclosure sale and a -- based on a decree of  
19 foreclosure.

20 And so, your Honor, I ask that you grant the  
21 judgment -- I'm sorry, grant the motion for summary  
22 judgment, order the sale to go forward. If they receive  
23 some relief in the interim from the Bankruptcy Court, we  
24 all know that a foreclosure sale doesn't get confirmed for  
25 some period of time. It will take time to publish. It

1 will take time to get the sale of auction done. And it  
2 will take time to get the sale confirmed.

3 They'll have an opportunity, if on the off  
4 shot they're able to get Judge Ferris' ear to do something  
5 there, but.

6 THE COURT: Thank you.

7 MS. LOVEJOY: Yeah.

8 THE COURT: All right. The Court has  
9 considered the record herein and my ruling today is based  
10 on the current status of this matter, of course. And the  
11 discussion with respect to what will be attempted before  
12 the Bankruptcy Court is something that may or may not  
13 develop.

14 Based on the record before me today, the  
15 Court is going to grant the motion. I'll ask that  
16 plaintiff prepare the appropriate order. I'm going to ask  
17 that the order include that provision that plaintiff will  
18 advance the costs of publication.

19 MS. LOVEJOY: And, your Honor, for  
20 clarification, George Van Buren is currently the receiver.  
21 I believe we asked that he also be appointed the  
22 commissioner.

23 THE COURT: That's fine.

24 MS. LOVEJOY: Okay.

25 THE COURT: Thank you both very much.



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(At which time the above-entitled proceedings  
were concluded.)

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I, BETH KELLY, a Court Reporter do hereby  
certify that the foregoing pages 1 through 12 inclusive  
comprise a full, true and correct transcript of the  
proceedings had in connection with the above-entitled  
cause.

Dated this 2nd day of January, 2014.

BETH KELLY, RPR, CSR #235  
Court Reporter

Beth Kelly, CSR #235  
Court Reporter

**SCWC-15-0000109**

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**IN THE SUPREME COURT OF THE STATE OF HAWAII**

—◆—  
LCP-MAUI, LLC,

*Plaintiff-Appellee/Respondent,*

vs.

AMANDA D. TUCKER AKA AMANDA DAWN TUCKER  
AKA AMANDA D. TUCKER-MEUSE,

*Defendant-Appellant/Petitioner,*

*and*

UNITED STATES OF AMERICA, DIRECTOR OF TAXATION, STATE OF HAWAII,  
VIC ZAPIEN, DUSTIN P. MEUSE, and DOES 1 through 20 inclusive,

*Defendants/Respondents.*

—◆—  
To the Intermediate Court of Appeals of the State of Hawaii in CAAP-15-0000109  
(Fujise, Presiding, Ginoza and Chan, JJ.)

On Appeal from the Second Circuit Court in Civil No. 12-1-0462(3)  
(The Honorable Joseph E. Cardoza, Presiding)

—◆—  
**CERTIFICATE OF SERVICE**  
—◆—

---

---

I hereby certify that I duly served a true copy of the foregoing document on the date first written below via the JEFS System to the following persons noted below:

Sharon V. Lovejoy, Esq.  
Stephanie E.W. Thompson, Esq.  
733 Bishop Street, Suite 1900  
Honolulu, Hawaii 96813  
(808) 537-6100

*Attorneys for Plaintiff-Appellee  
LCP-MAUI, LLC*

DATED: Honolulu, Hawaii, April 28, 2018.

A handwritten signature in black ink, appearing to read 'G.V. Dubin', written over a horizontal line.

GARY VICTOR DUBIN  
FREDERICK J. ARENSMEYER  
Attorneys for Defendant  
Amanda Tucker