No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

HAWAIIUSA FEDERAL CREDIT UNION,

Plaintiff-Appellee/Respondent,

v.

JONNAVEN JO MONALIM and MISTY MARIE MONALIM,

Defendants-Appellants/Petitioners,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA, by its Board of Directors, KO OLINA COMMUNITY ASSOCIATION, INC., a Hawaii nonprofit corporation, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 1-10, DOE GOVERNMENTAL UNITS 1-10,

Defendants.

On Appeal from the Circuit Court of the First Circuit
(Civil No. 10-1-1388-06 BIA -- The Honorable Bert I. Ayabe, Presiding)

♦♦♦♦♦

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE MAY 17, 2018 SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS AND THE AUGUST 16, 2018 JUDGMENT THEREON

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A. QUESTIONS PRESENTED

Did the ICA commit grave errors of fact and law, in violation of Hawaii Public Policy and the Due Process Clauses of the Hawaii State Constitution and United States Constitution, requiring reversal pursuant to both HRS Section 602-59(b)(1) and (2), by (a) its affirming the Circuit Court's granting of a foreclosure deficiency judgment in the amount of $493,282.04 entered almost five years after confirmation of sale despite the Circuit Court's earlier summary judgment and decree of foreclosure specifying that any deficiency judgment shall be determined at the time of sale confirmation, and (b) doing so without holding an evidentiary hearing to determine either the delay prejudice to the Petitioners or the true value of the property at time of sale confirmation notwithstanding the amount of the confirmed winning bid?

B. SUMMARY OF PRIOR PROCEEDINGS

On June 24, 2010, Respondent filed a foreclosure complaint against Petitioners (R. at 21). An auction sale was confirmed on December 22, 2011 (R. at 499-518). Yet Respondent waited until January 12, 2016 before filing for a deficiency judgment (R. at 544-611), even though the Circuit Court's August 29, 2011 Decree of Foreclosure in its paragraph 11, on its page 3, drafted and proposed by Respondent's counsel, had ordered that if it wanted a deficiency judgment it must request the amount at sale confirmation, which Respondent in 2011 chose not to do, ostensibly waiving that right:

> Plaintiff may request a deficiency judgment in its favor against Defendant MONALIM, jointly and severally, for the amount of the deficiency which shall be determined at the time of confirmation and have immediate execution thereafter.

Following a February 23, 2016 motion hearing, the Circuit Court granted Respondent's belated motion and entered a $493,282.04 deficiency judgment over the legal objections of Petitioners' counsel and the sworn Joint Declaration of the Petitioners themselves in, set forth below in purely human terms:

> 1. We are Husband and Wife and Joint Borrowers/Defendants in this action, and we each make the within statements based upon our own personal firsthand knowledge.
>
> 2. Since the confirmation of sale in this foreclosure case in 2011, after there being no deficiency judgment requested by the Plaintiff, in reliance thereon after waiting close to a year we abandoned our plan to file a Chapter 7 Bankruptcy Petition to discharge the otherwise anticipated deficiency judgment and began the difficult financial task of rebuilding our family's lives.

3. Jonnaven started a roofing company and Misty started a cleaning business, and we have begun saving for our Daughter's college tuition.

4. We have also started to rebuild our credit, with approximately only a few months to go this June 2016 to clear the 2010 foreclosure case off of our credit reports.

5. The news alone of this sudden new filing has devastated our lives, and the relief requested will wipe out all of the financial gains that we have struggled to make since the confirmation of sale, which threatened deficiency judgment would have been easily avoided through our intended filing of bankruptcy in late 2011 had the Plaintiff not abandoned its moving for a deficiency judgment more than four years ago.

The Circuit Court also refused to hold an evidentiary hearing, not only on Petitioners' objection based on laches, *supra*, but also to determine what the fair market value of the foreclosed property actually was at time of sale confirmation *for deficiency judgment purposes as opposed to confirmation of sale purposes* (1) notwithstanding the foreclosure blight and (2) notwithstanding the Respondent's credit-bid blight on the foreclosed auctioned property, both blights understood to deter competitive bidding

Petitioners' timely appealed the deficiency judgment determination (R. at 720-730). Nevertheless the ICA on May 17, 2018 entered a Summary Disposition Order (Exh. "A"), affirming the deficiency judgment and an August 16, 2018 Judgment (Exh. "B") thereon.

Within 30 days from the entry of said ICA Judgment, Petitioners now timely apply to this Court for review and reversal.

C. STATEMENT OF THE CASE

Petitioners' succinctly argued six points on appeal, all of which the ICA rejected:

1. Its deficiency judgment award was contrary to the law of the case, the lower court specifically requiring in its foreclosure decree, never amended, that any deficiency judgment "shall" be requested at time of sale confirmation;

2. The Credit Union had waived any deficiency judgment award by not apply at time of sale confirmation as required ("shall") in the lower court's foreclosure decree;

3. The Credit Union was guilty of laches, not applying for a deficiency judgment at time of sale confirmation as required ("shall") in the lower court's foreclosure decree;

4. The Credit Union's delay in not applying for a deficiency judgment at time of sale confirmation as required ("shall") in the lower court's foreclosure decree irreparably prejudiced Monalim who reasonably relied upon the Credit Union's waiver in fact;

5. The lower court's refusal to conduct an evidentiary hearing concerning the reasons for the Credit Union's delay and the resulting prejudice caused to Monalim by the Credit Union's delay in not applying for a deficiency judgment at time of sale confirmation as required ("shall") in the lower court's foreclosure decree was irreparably an abuse of discretion; and/or

6. The lower court's refusal to conduct an evidentiary hearing to determine the fair market value of the foreclosed property at time of sale confirmation, thus unfairly inflating the amount of the belated deficiency judgment notwithstanding the foreclosure and credit-bidding blight on the foreclosed property, violated the Due Process guaranties embedded within the Hawaii State Constitution and the United States Constitution and various consumer protections proscribing unfair and deceptive business practices, unclean hands, the covenant of good faith and fair dealing, and unconscionability.

D. REASONS WHY CERTIORARI SHOULD BE GRANTED

There are six major contradictions in the ICA Summary Disposition Order, which highlight six independent yet to some extent interrelated reasons why this Court's review and reversal are mandatorily required, paralleling Petitioner's six major points on appeal listed above, lest inconsistency be thought to be an appellate virtue when affecting the lives of Hawaii residents.

1. The Deficiency Judgment Violated the Law of the Case

Hawaii Circuit Courts are bound by their prior judgments, a form of *res judicata* called *the law of the case*, absent compelling circumstances, Nozawa v. Operating Eng'Rs Local Union No. 3, 142 Haw. 331, 342, 418 P.3d 1187 (2018), yet despite the quasi-discretionary/jurisdictional fact that the Circuit Court in the same foreclosure case had entered a foreclosure decree earlier commanding that any deficiency judgment had not only to be requested but had to be determined at time of sale confirmation, the Circuit Court went ahead more than five years later to grant a deficiency judgment without even referencing any cogent reasons to do so, *albeit* slightly reducing the amount requested, and even though the prior 2011 foreclosure decree was drafted and proposed by Respondent's own legal counsel.

The first material contradiction in the ICA's Summary Disposition Order is that whereas with respect to the judge-made method of determining deficiency judgments, criticized in Petitioners' sixth objection, *infra*, while the ICA held Petitioners' bound to the specific language found in the foreclosure decree setting forth that ancient calculus as

controlling because it was in the unappealed foreclosure decree, the ICA inconsistently cavalierly choose to ignore the equally specific language in the foreclosure decree pertaining to the timing of any deficiency judgment as somehow not controlling.

2. The Deficiency Judgment Violated the Law of Waiver

The failure to assert legal rights is considered to represent a waiver as a matter of law, Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 117 Haw. 174, 200, 177 P.3d 884 (2008), *reversed on other grounds*, 556 U.S. 1162 (2009). The fact that Respondent waited nearly four years before moving for a deficiency judgment despite its right to do so having been extinguished by express words found in its own crafted foreclosure decree entered in 2011, was ignored by the ICA, explaining only that the Petitioner at any time could have moved to dismiss to bring closure to the proceedings, SDO at 5.

The second material contradiction in the ICA's Summary Disposition Order is that whereas it found no waiver of a known right in Respondent's situation nearly four years after its known right to a deficiency judgment had knowingly expired, the ICA concluded that Petitioners had been on notice of the deficiency amount since 2011 and therefore could not complain, having waiver the right to do so earlier, SDO at 5.

3. The Deficiency Judgment Violated the Law of Laches

A foreclosure action is a proceeding equitable in nature and governed by the rules of equity, Beneficial Hawaii, Inc. v. Kida, 96 Haw. 289, 312, 30 P.3d 895, 918 (2001), one fundamental tenet of which is the law of laches, Small v. Badenhop, 67 Haw. 626, 640, 701 P.2d 647, 656-657 (1985), preventing a party to unfairly sit of its rights to the prejudice of opposing parties and not lack due diligence, especially in court proceedings where it is further subjected to sanctions for failure to prosecute, including involuntary dismissal, HRCP Rule 41(b)(1). The law of laches was, however, cavalierly ignored by the ICA, Petitioners' objection based on delay prejudice, *supra*, rejected by the ICA on the basis that statutory interest was slightly shaved.

The third material contradiction in the ICA's Summary Disposition Order is that not only did the ICA fail to consider the entire harm done to and prejudice experienced by the Petitioners, but in reducing slightly the accrued statutory interest, it recognized the inequity without requiring an evidentiary hearing below, instead making that prejudice calculation on appeal without the factual record before it to do so, while contradicting the extensive

record of prejudice within Petitioners' contrary sworn Joint Declaration, *supra*, contrastingly actually of record.

4. The Deficiency Judgment Violated the Law of Estoppel

Petitioners had a right to and did reasonably rely on the language of the foreclosure decree, *supra*, extinguishing the right of Respondent to a deficiency determination after the confirmation hearing, and certainly later after the passage of four or five years; such detrimental reliance estops one from asserting to another party's disadvantage a right inconsistent with a position previously taken by the party, and estoppel by acquiescence as here does not even require a showing of detrimental reliance or prejudice, Harrison v. Casa De Emdeko, 142 Haw. 218, 232, 418 P.3d 559 (2018).

The fourth material contradiction in the ICA's Summary Disposition Order is similar to its third material contradiction regarding the law of laches, *supra*, wherein the ICA is content to conclude that there is no statute of limitations for seeking a deficiency judgment in Hawaii, unlike in some other States, a logic that chases its own tail, since both laches and estoppel are in effect two equitable forms of statutes of limitations, reducing the time permitted to exercise an otherwise valid right.

5. The Deficiency Judgment Violated the Rules of Evidence

The ICA ventured to make factual determinations beyond the record before it, upholding the Circuit Court in its slight reduction of statutory interest without the Circuit Court itself conducting an evidentiary hearing; nevertheless the ICA, without the ability to itself conduct an evidentiary hearing violated the rules of evidence by being unable to weigh the evidence nor assess the credibility of witnesses and meanwhile the Circuit Court similarly conducted no evidentiary hearing before pulling a deficiency number out of the hat, as it were, whereas half a million dollars was and remains at stake, In the Interest of Doe, 95 Haw. 183, 197, 20 P.3d 616 (2001) ("it is not the province of the appellate court to reassess the credibility of the witnesses or the weight of the evidence," which however assumes unlike here that there was any noted below).

The fifth material contradiction in the ICA's Summary Disposition Order is that it mistakenly faults Petitioners for supposedly not having requested an evidentiary hearing below, inconsistently not only despite the fact that Petitioners are the only ones below that provided any sworn evidence of prejudice whatsoever upon which a deficiency judgment amount in such circumstances could be judiciously derived, but also because it is the ICA

that in the absence below of any contrary evidence questioning prejudice had a duty to remand for an evidentiary hearing and not make its own findings without an evidentiary record before it or upholding lower court discretion as it did in the absence of any evidentiary record to base that lower court discretion on.

6. The Deficiency Judgment Violated Due Process of Law

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.

This 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, as the ICA did in this Appeal, continue to 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 bid exceptionally low and 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.

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, that is 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, which 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.

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; *see, e.g.*: Pearman v. West Point National Bank, 887 S.W.2d 366, 368 (Ky. Ct. App. 1994); First National Bank of Southeast Denver v. Blanding, 885 P.2d 324 (Colo. Ct. App. 1994); Wansley v. First National Bank of Vicksburg, 566 So.2d 1218, 1224 (Miss. 1990); In re Slizyk, 2006 WL 2506489 (Bankr. M.D. Fla.); 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).

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).

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 as Public Policy 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).

And inconsistently, this Court has always abhorred forfeitures of the very kind happening almost every day in our Circuit Courts in foreclosure cases, 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 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.

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," it is also an obvious unconstitutional deprivation of Due Process of Law, supported by ample applicable 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 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.

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.

The ICA concluded as its sixth material contradiction that Petitioners failed to challenge the language of the foreclosure decree which embodied the judge-made deficiency formula criticized here as an unconstitutional forfeiture.

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, just slipped adroitly into the lower court's conclusions, prepared by Respondent's counsel 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 Petitioners did. It is only upon a determination of the amount of a deficiency, if any, that the method used becomes relevant, germane, and appealable.

Petitioners here are not appealing Respondent's right to a deficiency judgment, but challenging, *inter alia*, the constitutionality of and contractual and statutory method by which their deficiency was calculated after summary judgment was awarded against them.

And here we are dealing with a constitutional procedural 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, in many instances adding to homelessness.

The ICA decision challenged above should be urgently reviewed by this Court and set aside for all six independent yet related reasons, 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 true 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 not only determined but also enforced.

DATED: Honolulu, Hawaii; September 17, 2018.

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EXHIBIT "A"

NO. CAAP-16-0000807

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HAWAIIUSA FEDERAL CREDIT UNION, Plaintiff-Appellee,
v. JONNAVEN JO MONALIM; MISTY MARIE MONALIM,
Defendants-Appellants,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH
VILLAS AT KO OLINA, by its Board of Directors;
KO OLINA COMMUNITY ASSOCIATION, INC., a Hawaii
nonprofit corporation; Defendant-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS
1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10;
DOE GOVERNMENTAL UNITS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 10-1-1388)

SUMMARY DISPOSITION ORDER
(By: Ginoza, C.J., Fujise and Chan, JJ.)

Defendants-Appellants Jonnaven Jo Monalim and Misty Marie Monalim (collectively, the **Monalims**) contest the following entered by the Circuit Court of the First Circuit[1] (**circuit court**) on October 13, 2016:

(1) the "Order Granting in Part and Denying in Part Plaintiff HawaiiUSA Federal Credit Union's Motion for Deficiency

[1] The Honorable Bert I. Ayabe presided.

Judgment Against [the Monalims] Filed January 12, 2016" (**10/13/16 Order Granting Deficiency Amount**); and

(2) "Deficiency Judgment Against [the Monalims] in Favor of Plaintiff[-Appellee] HawaiiUSA Federal Credit Union [(**HawaiiUSA**)]" (**10/13/16 Deficiency Judgment**).

On appeal, the Monalims contend[2] that (1) HawaiiUSA was guilty of laches; (2) the circuit court erred in its refusal to conduct an evidentiary hearing regarding HawaiiUSA's delay in seeking a deficiency judgment; and (3) the circuit court erred by denying the Monalims procedural and substantive due process rights under the Hawai'i State Constitution and the United States Constitution by depriving them of property without an evidentiary hearing to determine the fair value of the 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 the Monalims' points of error as follows and affirm as set forth below.

This dispute arises from a judicial foreclosure in which the Monalims appeal from the 10/13/16 Deficiency Judgment.

On January 12, 2016, after the circuit court entered a foreclosure judgment in its favor and approximately four years after confirmation of the sale of the Property, HawaiiUSA filed its "Motion for Deficiency Judgment Against [the Monalims]"

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[2] The Monalims also argue in their points of error section that: the 10/13/16 Deficiency Judgment "was contrary to the law of the case" and HawaiiUSA's delay in seeking a deficiency judgment "irreparably prejudiced" the Monalims because they relied on HawaiiUSA's waiver. However, contentions not argued on appeal are deemed waived. Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(7); In re Guardianship of Carlsmith, 113 Hawai'i 236, 246, 151 P.3d 717, 727 (2007) (noting that an appellate court may "disregard a particular contention if the appellant makes no discernible argument in support of that position") (internal quotation marks, brackets omitted, and citation omitted).

(**1/12/16 Deficiency Motion**). On February 16, 2016, the Monalims filed their opposition to the 1/12/16 Deficiency Motion arguing that HawaiiUSA's Deficiency Motion was untimely and in violation of due process of law, and, that an evidentiary hearing should be held to determine the fair market value of the subject property. The circuit court subsequently entered the 10/13/16 Order Granting Deficiency Amount and the 10/13/16 Deficiency Judgment in favor of HawaiiUSA and against the Monalims in the amount of $493,282.04.

(1) Laches

The Monalims contend that HawaiiUSA was guilty of laches because the 1/12/16 Deficiency Motion was not filed at the time of the confirmation of sale in December 2011. Instead, HawaiiUSA filed the 1/12/16 Deficiency Motion in 2016, approximately four years later. The Monalims cite to BayBank Connecticut, N.A. v. Thumlert, 222 Conn. 784, 610 A.2d 658 (1992) to argue that HawaiiUSA's delay in filing a deficiency motion prejudiced the Monalims and thus the defense of laches is applicable. Aside from a cursory mention of Thumlert, the Monalims provide no authority to support their contention.

The Monalims do not point to a statutory time limit for the filing of a deficiency judgment. Moreover, the Monalims had notice of the possibility of a deficiency judgment at the summary judgment stage and following the confirmation of the sale of the property. On August 29, 2011, the circuit court entered its "Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment as to All Claims and All Parties, Interlocutory Decree of Foreclosure and Order of Sale" (**8/29/11 FOF/COL/Order**) which stated:

> 11. At the hearing for confirmation of sale, if it appears that proceeds of the sale of the Mortgage Property are insufficient to pay all amounts due and owing to Plaintiff, Plaintiff may request a deficiency judgment in its favor and against [the Monalims], jointly and severally, for the amount of the deficiency which shall be determined at the time of confirmation and have immediate execution thereafter.

On November 9, 2011, HawaiiUSA filed its "Motion for Confirmation of Sale, Directing Distribution of Proceeds, for Deficiency Judgment, Writ of Possession and Disposal of Personal Property" (**11/9/11 Confirmation Motion**) where it moved for the circuit court to enter an order in favor of HawaiiUSA and "against [the Monalims], jointly and severally, for the amount of any deficiency, if the proceeds from the sale of the Mortgaged Property are insufficient to fully satisfy the amounts due to [HawaiiUSA]." At the hearing on the 11/9/11 Confirmation Motion, the circuit court granted HawaiiUSA's motion but the minutes provide that the Monalims' counsel objected and the circuit court ordered a further hearing on the deficiency judgment.[3] Thus, it appears that upon the Monalims' objection, a deficiency judgment amount was not determined during the hearing. The Monalims argue that because the 8/29/11 FOF/COL/Order stated that the deficiency amount "shall be determined at the time of confirmation" and it was not determined at that time, such inaction "should be enough in itself to mandate reversal[.]" However, we hold that because the Monalims objected and sought a further hearing on the deficiency judgment, this argument is without merit.

On December 11, 2011, the circuit court entered its "Order Granting Plaintiff's Motion for Confirmation of Sale, Directing Distribution of Proceeds, for Deficiency Judgment, Writ of Possession and Disposal of Personal Property Filed November 9, 2011" (**12/22/11 Confirmation Order**) and ordered that "since the proceeds from the sale of the Mortgaged Property are insufficient to fully satisfy the amounts due to [HawaiiUSA], that a motion for deficiency judgment may subsequently be filed by [HawaiiUSA] against [the Monalims], jointly and severally."

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[3] On December 1, 2011, the circuit court held a hearing on the motion for confirmation of sale. The record does not contain a transcript of the hearing. However, the minutes provide that the circuit court granted the 11/9/11 Confirmation Motion, however "[w]ith objection made by Mr. Dubin, Court ordered further hearing on deficiency judgment."

The 1/12/16 Deficiency Motion included a calculation of the deficiency amount due and owing after the sale proceeds were applied. Thus, at both the summary judgment stage and following the 12/22/11 Confirmation Order, the Monalims were on notice as to the possibility of a deficiency judgment being filed. The Monalims also were aware of the 12/22/11 Confirmation Order and the likely deficiency that would remain following the sale of the property. The Monalims fail to provide a discernable argument as to laches and they were on notice of the deficiency amount such that their contentions related to prejudice are without merit.

(2) Evidentiary hearing on prejudice

The Monalims contend that the circuit court should have held an evidentiary hearing on prejudice because the Monalims could have filed for bankruptcy and "in effect suffered no deficiency judgment at all" but for HawaiiUSA's delay in seeking a deficiency judgment. The Monalims also maintain that they sought an evidentiary hearing before the circuit court and the circuit court denied such a hearing.

With regard to the contention that a hearing on prejudice should have been held, the Monalims argue that the circuit court refused their request for such a hearing. However, the record shows that the Monalims did not request a hearing on prejudice in their opposition to HawaiiUSA's 1/12/16 Deficiency Motion or file any motions seeking such a hearing. Accordingly, the circuit court did not deny such a motion or request for a hearing.

Further, the circuit court did address potential prejudice to the Monalims. In its 1/12/16 Deficiency Motion, HawaiiUSA sought interest on the deficiency balance from December 30, 2011, to the date of the entry of the deficiency judgment. However in its 10/13/16 Order Granting Deficiency Amount, the circuit court denied HawaiiUSA's "request for continuing interest on Counts I and Count II, from December 30, 2011 closing date to the entry of the Deficiency Judgment as well as [Hawaii USA]

Plaintiff's request for statutory interest after the entry of the Deficiency Judgment due to the delay in filing the instant Motion." (Emphasis added). Thus, the circuit court did not permit HawaiiUSA to benefit from its delay in filing the 1/12/16 Deficiency Motion and thereby prejudice the Monalims.

Moreover, following the 12/22/11 Confirmation Order, the Monalims did not seek a dismissal under Hawai'i Rules of Civil Procedure (**HRCP**) Rule 41(b)(1) or the Rules of the Circuit Courts of the State of Hawai'i. The record shows that between the circuit court's 12/22/11 Confirmation Order and HawaiiUSA's 1/12/16 Deficiency Judgment, the Monalims did not file any motions to bring closure to the proceeding.

(3) Evidentiary hearing on amount owed

The Monalims assert that the process in Hawai'i for determining deficiency judgments violates their due process rights and in calculating the deficiency judgment, an evidentiary hearing should have been held to determine the fair market value of the foreclosed property.

In response, HawaiiUSA notes that foreclosures in this jurisdiction are bifurcated into two separate appealable parts and that the Monalims have previously filed an appeal in this case. The Monalims previously appealed and challenged the circuit court's 8/29/11 FOF/COL/Order and the related Judgment (**8/29/11 Foreclosure Judgment**) both filed on August 29, 2011, which resulted in appellate court case number CAAP-11-0000710 (**First Appeal**). HawaiiUSA Fed. Credit Union v. Monalim, No. CAAP-11-0000710, 2012 WL 4122914, at *1 (Haw. App. Sept. 19, 2012). The Monalims' First Appeal was dismissed pursuant to HRAP Rule 30 for their failure to file an opening brief or seek relief from the default of the opening brief. The Monalims also indicated that they were in the "process of circulating a stipulation for dismissal of this Appeal," however, no stipulation was filed. Id. Thus, while the Monalims had the

opportunity, they failed to raise any point of error relating to the Monalims' liability for a deficiency judgment or how a deficiency judgment would be calculated.

As noted above, the 8/29/11 FOF/COL/Order ordered that HawaiiUSA may request a deficiency judgment as follows:

> 11. At the hearing for confirmation of sale, if it appears that proceeds of the sale of the Mortgaged Property are insufficient to pay all amounts due and owing to [HawaiiUSA], [HawaiiUSA] may request a deficiency judgment in its favor and against [the Monalims], jointly and severally, for the amount of the deficiency which shall be determined at the time of confirmation and have immediate execution thereafter.

(Emphasis added).

In Mortg. Elec. Registration Sys., Inc. v. Wise, the Hawai'i 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. 130 Hawai'i 11, 304 P.3d 1192 (2013).

In this case, similar to Wise, we exercise appellate jurisdiction but hold that the Monalims are precluded from challenging the method of calculating their deficiency judgment. The Monalims' right to a deficiency judgment and the method for calculating the deficiency judgment were adjudicated and set forth in the 8/29/11 FOF/COL/Order, and incorporated into the related 8/29/11 Foreclosure Judgment. Although the Monalims timely appealed from the subsequent 10/13/16 Deficiency Judgment, they are only entitled to challenge the errors unique to that 10/13/16 Deficiency Judgment. See id. at 16, 304 P.3d at 1197; 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); see also LCP-Maui, LLC v. Tucker, No. CAAP-15-0000109, 2018 WL 1082855, at *1-2 (Haw. App. Feb. 28, 2018) (SDO) (holding that appellant was precluded from challenging the method of calculating her deficiency judgment because she previously appealed the foreclosure judgment).

Thus, the Monalims' arguments on appeal related to the issue of a delayed 1/12/16 Deficiency Motion are without merit. With respect to the arguments on appeal related to the method by which the deficiency would be calculated, the 10/13/16 Deficiency Judgment in this appeal did not adjudicate the method, but rather was incident to the enforcement of the earlier 8/29/11 Foreclosure Judgment. See Wise, 130 Hawai'i at 16, 304 P.3d at 1197. Accordingly, the Monalims are precluded from challenging the method of calculating their deficiency judgment and their remaining arguments on appeal are without merit.

Therefore,

IT IS HEREBY ORDERED that the "Deficiency Judgment Against Defendants Jonnaven Jo Monalim and Misty Marie Monalim in Favor of Plaintiff HawaiiUSA Federal Credit Union," entered on October 13, 2016, in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 17, 2018.

On the briefs:

Gary Victor Dubin,
Frederick J. Arensmeyer,
for Defendants-Appellants.

Jonathan W.Y. Lai,
Thomas J. Berger,
Tracey L. Ohta,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

EXHIBIT "B"

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CAAP-16-0000807
16-AUG-2018
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NO. CAAP-16-0000807

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HAWAIIUSA FEDERAL CREDIT UNION,
Plaintiff-Appellee,
v.
JONNAVEN JO MONALIM; MISTY MARIE MONALIM,
Defendants-Appellants

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA, by its Board of Directors; KO OLINA COMMUNITY ASSOCIATION, INC., a Hawaii nonprofit corporation; Defendant-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; DOE GOVERNMENTAL UNITS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 10-1-1388)

JUDGMENT ON APPEAL
(By: Ginoza, Chief Judge, for the court[1])

Pursuant to the Summary Disposition Order of this court entered on May 17, 2018, the "Deficiency Judgment Against Defendants Jonnaven Jo Monalim and Misty Marie Monalim and in

[1] Ginoza, Chief Judge, Fujise and Chan, JJ.

Favor of Plaintiff HawaiiUSA Federal Credit Union," entered by the Circuit Court of the First Circuit on October 13, 2016, is affirmed.

Further, pursuant to this court's "Order Approving Request For Attorney's Fees and Costs," filed on July 16, 2018, judgment is entered in favor of Plaintiff-Appellee HawaiiUSA Federal Credit Union and against Defendants-Appellants Jonnaven Jo Monalim and Misty Marie Monalim in the amount of $6,213.61 for attorney's fees and $14.04 for costs.

DATED: Honolulu, Hawai'i, August 16, 2018.

FOR THE COURT:

Chief Judge

No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

HAWAIIUSA FEDERAL CREDIT UNION,

Plaintiff-Appellee/Respondent,

v.

JONNAVEN JO MONALIM and MISTY MARIE MONALIM,

Defendants-Appellants/Petitioners,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA, by its Board of Directors, KO OLINA COMMUNITY ASSOCIATION, INC., a Hawaii nonprofit corporation, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 1-10, DOE GOVERNMENTAL UNITS 1-10,

Defendants.

On Appeal from the Circuit Court of the First Circuit
(Civil No. 10-1-1388-06 BIA -- The Honorable Bert I. Ayabe, Presiding)

♦♦♦♦♦

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served upon the following persons by the Court's JEFS System unless otherwise noted, on the date first written below:

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Defendant

DATED: Honolulu, Hawaii; September 17, 2018.

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