No. SCWC-13-0004290

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

Plaintiffs-Appellants/Petitioners,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity,

Defendants-Appellees/Respondents,

and

JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

On Petition for a Writ of Certiorari
To the Intermediate Court of Appeals of the State of Hawaii
Case No. CAAP-13-0004290
(Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

♦♦♦♦♦

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE INTERMEDIATE COURT OF APPEALS' MARCH 30, 2016 ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION AND ITS APRIL 21, 2016 ORDER DENYING RECONSIDERATION

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A. Questions Presented

This is a case of first impression in this State that only this Supreme Court has the power and the responsibility to resolve by reversing pursuant to HRS Section 602-59(b)(1) the following grave error of law committed by the ICA below and pursuant to HRS Section 602-59(b)(2) removing the inconsistencies between how the ICA is interpreting the following procedural rules adopted from the federal system and how those adopted rules have been interpreted by this Court and are being interpreted by federal courts today:

1. Did the ICA commit grave error of law by concluding that the filing of a notice of appeal was untimely, denying it appellate jurisdiction pursuant HRCP Rule 77(d), where the lower court admittedly failed to provide the parties with notice of the entry of an appealable order and judgment, resulting in a party who lacked such knowledge not filing a notice of appeal within 30 days pursuant to HRAP Rule 4(a)(1), notwithstanding the lower court within the additional 60 days provided by HRAP Rule 4(a)(4)(B) having made an express finding of excusable neglect and a notice of appeal was thereafter timely filed within said 60 days?

2. Did the ICA abuse its discretion, dismissing an appeal for lack of appellate jurisdiction, when it overruled the discretion of the lower court which found, pursuant to HRAP Rule 4(1)(4)(B), that a party who lacked knowledge of the entry of an appealable order and judgment who had not filed a notice of appeal within 30 days pursuant to HRAP Rule 4(a)(1) because the lower court had admittedly failed to provide the parties with such notice, had to the satisfaction of the lower court shown excusable neglect following a hearing and credibility assessments, whereas the ICA, the issue not even having been raised or briefed before it, *sua sponte* ignored the finding of the lower court, relying instead upon the strict liability language of HRCP Rule 77(d) that had been adopted in Hawaii *verbatim* from the federal system although subsequently changed by federal courts?

B. Prior Appellate Proceedings

The ICA rejected *sua sponte* Petitioner's appeal on March 3, 2016, upon a finding of a lack of appellate jurisdiction, by Order set forth in Exhibit "A", and subsequently denied Reconsideration on April 21, 2016, by Order set forth in Exhibit "B", even when for the first time being provided with the transcript of proceedings before the lower court where it found excusable neglect and signed a HRAP Rule 4(a)(4)(B) Order permitting a timely appeal.

This Petition is being filed within 30 days following the entry of the Order denying reconsideration, pursuant to HRAP Rule 4(a)(1).

C. Statement of the Case

Petitioners' counsel, upon discovering by routinely checking Ho'ohiki, that the final appealable order had been filed below almost 90 days earlier, immediately moved for a finding of excusable neglect from the lower court to preserve Petitioners' right to appeal pursuant to HRAP Rule 4(a)(4)(B).

Petitioners' motion papers are set forth in Exhibit "C", and at the hearing on shortened time that lower court admitted that there appeared to be some mix-up with its law clerk or the court clerk, failing to provide any of the parties with a copy of its final appealable order denying reconsideration of its dismissal of the case.

In initially dismissing the Appeal for lack of appellate jurisdiction, the ICA did not have the benefit of a complete record before it.

At the October 21, 2013 hearing, for instance, even opposing counsel had no record of ever receiving the lower court's final appealable order and judgment *until the hearing*, despite having had in her law firm substantial regular practices in place for tracking such matters:

> MS. LOVEJOY: Your Honor, I have to say I haven't had the time to look into the situation, but I will tell you this. When I received Mr. Dubin's letter, which was sent to me by my staff by email, and luckily I was able to check it, just for clarification, I was in a mediation, not in an arbitration. So it's just for clarification purposes. I did ask my staff whether we had any record of having received the entry of the order, and my office has no record of it either.
>
> . . . .

> THE COURT: All right. I'm going to ask my staff to do the best they – whether they can check if on August 21, 2013, it was the actual order itself or just minutes of the Court's disposition. And my staff will be checking.
>
> But if – all right. My staff has handed to me the original of a document that is file stamped. And this is the order denying the motion for rehearing and reconsideration. It's file-stamped August 21, 2013. So that's not minutes. It's an actual order. And our usual procedure is when the Court executes an order, we then contact the filing party, which in this case is Ms. Lovejoy's office. And the filing party – the party who filed and prepared the order then picks up the – the executed order from my chambers and then takes it to the clerk's office for filing. That's the normal procedure. We do not see anything out of the ordinary in this case. So I'm not sure, Ms. Lovejoy, why you wouldn't have a copy if your office actually filed the order.
>
> MS. LOVEJOY: Your Honor, I don't know either. I can tell you I asked our legal assistant who is handling this case, who's in my experience typically quite good. Could have been a mix-up. I didn't know. I asked specifically whether, as far as we know, did we ever receive information about it. Could have been a mistake. I don't know. I also asked did we have an appeal date calendared, which would have indicated that somebody in the office had accepted the signed order – I mean, had received information about it. The response was no.
>
> I found the Rule 23 letter, which was sent to the Court on July 11. She talked about as soon as orders come in, the usual practice is to scan, put it in a worksite, mail a copy to Mr. Dubin, as well as email a copy to myself as the lead counsel and to the client so we know it came in. I searched all around, found nothing showing this order. I don't have a copy in my pending box. I checked to see if I emailed anything to Mr. Dubin around August 21st, but I see no entry there either
>
> So for whatever purpose we don't appear to have anything that would acknowledge it in our office. Whether that was a mistake in our office, I couldn't say. I don't know the answer to that.

Transcript of Proceedings, 10/1/2013 at 6-9 (see Exhibit "D").

The newly obtained Transcript below further confirmed that Petitioners' counsel had made additional efforts to keep apprised of the status of the case by checking

Ho'ohiki, and that even the lower court was unsure what had happened to its final appealable order and judgment.

Because the basis of the lower court's exercise of its discretion in granting the subject extension was not earlier before the ICA when it dismissed the Appeal, Petitioners sought reconsideration by the ICA and that request was similarly denied based on HRCP Rule 77(d), even though the lower court had entered a HRCP Rule 4(a)(4)(B) Order, set forth in Exhibit "E", granting Petitioners an extension to file their notice of appeal upon their showing of excusable neglect.

Instead the ICA relied almost entirely upon this Court's decision in Enos v. Pacific Transfer & Warehouse, Inc., 80 Haw. 345, 910 P.2d 116 (1996). In Enos, however, this Court not only had a complete record before it, but the issue in Enos to the contrary was whether the Circuit Court abused its discretion in granting an extension to file a notice of appeal was objected to, preserved for appeal, and briefed and presented on appeal. Enos was not a case where an appellate court sua sponte considered an issue under its limited independent authority via the plain error doctrine.

Furthermore, the circumstances of the instant case are substantially different than the facts of Enos.

In Enos, the Appellant's attorney was in fact notified that the judgment had been filed. *Id.* at 353, 910 P.2d at 124. The attorney, however, was confused regarding the plain language of the procedural rules and did not realize that a judgment is "entered" when it is filed. In Enos, 80 Haw. at 355, 910 P.2d at 126, this Court explained:

> The circuit court's grant of a HRAP Rule 4(a)(5) motion will not be reversed absent an abuse of discretion, and, ordinarily, a finding of "excusable neglect" will not be disturbed. In this case, however, the circuit court's conclusion that there was "excusable neglect" is legally and factually insupportable. Nothing in the record indicates that the failure to file a timely notice of appeal was occasioned by anything other than Richards's purported confusion regarding the time that a judgment is deemed "entered," and the court expressed, in no uncertain terms, its disbelief of that reason. The court, instead, pointed to chaos engendered by moving chambers and the HGEA strike as constituting "excusable neglect," but there was no showing that these factors in any way delayed the filing of the notice of appeal. Further, the court placed excessive weight on the

> lack of prejudice to the Enoses. The character of the neglect, rather than the consequences, should be determinative of whether it is "excusable." In this case, the character of the neglect was ignorance of the rules of procedure, which no court has found to be excusable. As Judge Friendly, a member of the Advisory Committee that drafted the Federal Rules of Appellate Procedure, commented in O.P.M. Leasing Services, Inc. v. Far West Federal Savings and Loan Association, 769 F.2d 911, 917 (2d Cir. 1985), affirming the trial court's finding of "excusable neglect" in this case "would convert the 30-day period for appeal provided in [HRAP] Rule 4(a) into a 60-day one-a result clearly not intended by the Rule's framers."
>
> We therefore hold that the trial court abused its discretion by granting the motion to extend time for filing a notice of appeal because the failure to timely file the appeal was caused by counsel's failure to read and comply with the plain language of the applicable procedural rules, which cannot constitute "excusable neglect."

In Petitioners' situation, the newly obtained Transcript demonstrates an independent effort by Petitioners' counsel to check Ho'ohiki, the failure of opposing counsel's office procedures responsible for receiving and processing court orders, and the lower court's own lack of knowledge as to how his staff may have processed or misprocessed the final appealable order.

Here, unlike in Enos, Petitioners' counsel was well aware of the need to comply with the applicable appellate rules. It even is quite possible from a reading of the Transcript that the lower court itself may have filed and misplaced the order, which may not have been logged on Ho'ohiki for several weeks or more after its entry.

In any event, unlike in Enos, the record shows that Petitioners' counsel made independent efforts to stay informed as to the status of the order, and counsel's failure to learn of the entry of the order and file a timely notice of appeal therefrom was a result of matters well outside of his control.

Given the totality of the circumstances, and especially as this matter was not even briefed and argued on appeal before the ICA concluded otherwise, it could not have been determined as the ICA otherwise did solely on the appellate record that the lower court abused its discretion in finding excusable neglect and extending the time to file the notice of appeal.

In another completely flawed effort to re-support its initial position, the ICA in denying reconsideration misconstrued yet another decision of this Court, in Bacon v. Karlin, 68 Haw. 648, 652, 727 P.2d 1127, 1130-1131 (1986), claiming that it held that HRCP Rule 77(d) must be strictly construed even if producing an unfair result if counsel did not know the appealable order or judgment had been entered, which is not what happened in Bacon.

In Bacon, the Appellate Rule at that time allowed for an extension for excusable neglect for 30 days, yet the attorney in Bacon did not seek an extension until "some seventy-nine days later and nineteen days after the deadline," 68 Haw. at 652, 727 P.2d at 1130-1131.

D. Reasons Why Certiorari Should Be Granted

The facts in this case as a necessary backdrop in reviewing this Application should draw the special interest of this Court for several reasons in its supervisory and ethical functions and speak for themselves.

First, Petitioners filed their Jurisdictional Statement on December 23, 2013, set forth in Exhibit "F", clearly explaining what had occurred, yet it was more than two years later before this Appeal was *sua sponte* dismissed, yet all of the jurisdictional facts were fully known for years; and neither did any opposing party since the Appeal was filed in 2013 file a motion to dismiss for lack of appellate jurisdiction.

Second, the underlying facts and the errors appealed, shown in Petitioners' Opening Brief, set forth in Exhibit "G", revolve around a sitting circuit court judge refusing to disqualify himself while presiding over the largest foreclosure calendar in this State failing to disclose his ownership of stock in the initial foreclosing mortgagee, with the judge's self-described good friend, an attorney, one of the principal material Defendants and witnesses in the case.

Third, the ICA Panel was designated on November 25, 2014 (Fujise, Leonard, and Ginoza, JJ.), as set forth in Exhibit "H", yet only several weeks before the Order dismissing the Appeal was entered and after the notice of no oral argument was announced, thus suggesting that an opinion had been prepared, first Judge Leonard recused herself, set forth in Exhibit "I", then minutes later Chief Judge Nakamura took her place, set forth in Exhibit "J", then two weeks later he recused himself, set forth in

Exhibit "K", and Judge Reifurth took his place, set forth in Exhibit "L" – the judicial musical chairs ending two weeks later – giving the impression of a dismissal order searching for sponsors.

Fourth, when one compares our current applicable Hawaii Rules, set forth in Exhibit "M" adopted from the applicable Federal Rules with the Amended Federal Rules in effect today, set forth in Exhibit "N", it is apparent that the federal courts learned the unfairness of the ICA's otherwise draconian and unfair interpretation of its Rules and amended them to take care of this very situation if not by judicial interpretation beforehand, its present Appellate Rule 4(a)(6) allowing 14 days for the filing of a notice of appeal after a reopening order is entered.

Firth, the fact that withholding from parties knowledge of the filing of appealable orders and judgments takes place for whatever reason in other cases in Hawaii is seen in yet another Appeal before the ICA, as set forth in Exhibit "O" indicating that the practice of not informing counsel is no isolated event.

Sixth, this problem will likely continue to trouble our courts and work grave injustice on parties as these Petitioners otherwise similarly denied an adjudication on the merits, as this Court, for instance, has only recently ordered the amendment of HRAP Rule 4, effective July 1, 2016, in another context, that of the timing of appeals regarding the entry of post-judgment motions, set forth in Exhibit "P", which once again will depend on self-enforcement, that is, upon notification of entry by the lower court. If such a draconian misinterpretation of HRCP Rule 77(d) is not corrected by this Court and immediately, in effect appellants and their appeals will continue involuntarily beyond their control to remain exposed to an unfair appellate death penalty

E. Conclusion

For all of the above reasons, this Court is respectfully urged *to accept* review of this Appeal, *to correct* the grave error of law by the ICA herein, *to remove* the misinterpretations given to your earlier Enos and Bacon decisions, *supra*, which misinterpretations were, moreover, entered before the federal courts later codified their more rational and long-standing interpretations of Civil Rule 77(d) and Appellate Rule 4(a)(1)(B), and *to adopt* the applicable Amendments to the Federal Rules.

Finally, your respected review of the merits of this Appeal, *as opposed to an artificial dismissal,* will -- one way or the other -- strength the belief that justice is possible in our Courts no matter whether or not the facts complained of occasionally and thankfully rarely involve allegations of documented unethical judicial misconduct, inadvertent or otherwise, by a sitting, *albeit* highly respected, circuit court judge or arbitrator, in the absence of which these Petitioners will clearly be denied due process of law under both the Hawaii State Constitution and the Constitution of the United States of America.

DATED: Honolulu, Hawaii; May 23, 2016.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Petitioners
Ke Kailani Development LLC
and Michael J. Fuchs

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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of the record on appeal in appellate court case number CAAP-13-0004290, it appears that we do not have jurisdiction over this appeal that Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs (the Appellants) have asserted from the Honorable Gary W.B. Chang's April 19, 2013

judgment, because the Appellants' October 21, 2013 notice of appeal is not timely under Rule 4(a) of the Hawai'i Rules of Appellate Procedure (HRAP).

The circuit court's April 19, 2013 judgment satisfies the requirements for an appealable final judgment under Hawaii Revised Statutes (HRS) 641-1(a) (1993 & Supp. 2015), Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). Although HRAP Rule 4(a) initially required the Appellants to file their notice of appeal within thirty days after entry of the April 19, 2013 judgment, pursuant to HRAP Rule 4(a)(3), the Appellants extended the initial thirty-day time period when the Appellants timely filed their premature March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment before the ten-day time period after entry of the April 19, 2013 judgment expired, as HRCP Rule 59 requires for the purpose of invoking the tolling provision in HRAP Rule 4(a)(3). See Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995) ("HRCP [Rule] 59 does not require that a motion be served after the entry of judgment; it imposes only an outer [ten-day] time limit on the service of a motion to alter or amend the judgment[.]"). HRAP Rule 4(a)(3) "provides that the court has 90 days to dispose of [the] post-judgment [tolling] motion . . . , regardless of when the notice of appeal is filed." Buscher v. Boning, 114 Hawai'i 202, 221, 159 P.3d 814, 833 (2007). "Although the rule does not address the situation in which a [post-judgment tolling] motion . . . is prematurely filed

prior to the entry of final judgment, [the Supreme Court of Hawai'i] will deem such motion filed immediately after the judgment becomes final for the purpose of calculating the 90-day period." Buscher v. Boning, 114 Hawai'i at 221, 159 P.3d at 833. When "the court fail[s] to issue an order on [the movant]'s [post-judgment tolling] motion by . . . ninety days after [the movant has] filed the [post-judgment tolling] motion, the [post-judgment tolling] motion [i]s deemed denied." County of Hawai'i v. C&J Coupe Family Limited Partnership, 119 Hawai'i 352, 367, 198 P.3d 615, 630 (2008). Nevertheless, "when a timely post-judgment tolling motion is deemed denied, it does not trigger the thirty-day deadline for filing a notice of appeal until entry of the judgment or appealable order pursuant to HRAP Rules 4(a)(1) and 4(a)(3)." Association of Condominium Homeowners of Tropics at Waikele v. Sakuma, 131 Hawai'i 254, 256, 318 P.3d 94, 96 (2013). Consequently, "the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion[.]" HRAP Rule 4(a)(3) (emphasis added). Based on the holding in Sakuma, the event that triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal from the April 19, 2013 judgment was the entry of the August 21, 2013 written order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment.

The Appellants did not file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order, as HRAP Rule 4(a)(3) requires for a timely appeal. Instead, on Monday, October 21, 2013, the Appellants filed a

motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), which authorized an extension under these circumstances if the Appellants could sufficiently show "excusable neglect":

> (4) Extensions of Time to File the Notice of Appeal.
> (A) . . . .
> (B) Requests for Extensions of Time After Expiration of the Prescribed Time. The court or agency appealed from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from.

(Emphasis added). The Supreme Court of Hawai'i has defined "excusable neglect" as "some mistake or inadvertence within the control of the movant[.]" Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 352, 910 P.2d 116 123 (1996). Furthermore, "as a matter of law, only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect." Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001) (citation and internal quotation marks omitted); Enos, 80 Hawai'i at 353, 910 P.2d at 124. For example, where an appellant's attorney mistakenly thought that the filing of the notice of entry of a judgment (rather than the entry of the actual judgment) triggered the time period for filing a notice of appeal, the Supreme Court of Hawai'i held that the "trial court abused its discretion by granting [a] motion to extend time for filing a notice of appeal [where] the failure to timely file the appeal was caused by counsel's failure to read and comply with

the plain language of the applicable procedural rules, which cannot constitute 'excusable neglect.'" Enos, 80 Hawai'i at 355, 910 P.2d at 126. In another example, the Supreme Court of Hawai'i held that a trial court abused its discretion by finding excusable neglect where

> the record reveals that the only cause that can be discerned . . . for Hall's failure to timely file the notice of appeal . . . was Hall's counsel's purported confusion or misunderstanding regarding the likely outcome of his ex parte motion for an extension of time. His leap of faith that the ex parte motion would be granted under the rule is analogous to a misinterpretation of a rule when the language is crystal clear, which we held in Enos, 80 Hawai'i at 354, 910 P.2d at 125 to be a failure to follow the plain language of the rule rather than plausible misconstruction. . . . . As the ICA's opinion observed, in light of the express provision in the rule that a court may extend the time for filing a notice of appeal, . . . counsel's belief that his motion for an extension of time would be granted was an unreasonable belief and not excusable. . . . . Accordingly, the family court abused its discretion in construing Hall's counsel's conduct as excusable neglect.

Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation, internal quotation marks, and original brackets omitted).

In the Appellants' October 21, 2013 motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), counsel for the Appellants argued that he had "excusable neglect" for not filing a timely notice of appeal because: "This morning I discovered, while routinely occasionally browsing Ho'ohiki, that this Court had entered on August 21, 2013 an order denying my clients' motion for reconsideration in the above-entitled action." "Unfortunately, no one informed my office, my office has never received a copy of the filed order nor any word from opposing counsel which otherwise has religiously emailed and hand delivered to me immediately every signed order and judgment in

this case, and no notice of entry of such an order was filed or served, suggesting that opposing counsel similarly never received word of the entry of the order either." Nevertheless, under the Hawai'i Rules of Civil Procedure, "[l]ack of notice of the entry by the clerk or failure to make such service [of an order or judgment], does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawaii Rules of Appellate Procedure.". HRCP Rule 77(d). The Supreme Court of Hawai'i interpreted this language in HRCP Rule 77(d) as follows:

> Although HRCP Rule 77(d) specifically refers to HRAP Rule 4(a) as providing the only relief for a party's failure to timely file a notice of appeal, nothing in Rule 77(d) suggests that the failure of the clerk to timely notify the parties of the entry of judgment could excuse a party's neglect. "A party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time." Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1412 (9th Cir.1986) (citations omitted). This is especially so where, as here, "[appellants] presented no reason for their failure, for example, to send a messenger to court to look up the relevant date, and we see no 'forces beyond their control,'-at least on this record-that prevented them from taking this eminently reasonable step." Virella-Nieves, 53 F.3d at 453.

Enos, 80 Hawai'i at 353, 910 P.2d at 124 (emphasis added); see also Ek v. Boggs, 102 Hawai'i 289, 300, 75 P.3d 1180, 1191 (2003). In Enos, the Supreme Court of Hawai'i dismissed an appeal as untimely, and, therefore, lacking appellate jurisdiction, because the circuit court abused its discretion in finding "excusable neglect" in granting a motion for an extension under HRAP Rule 4(a)(4)(B). Enos, 80 Hawai'i at 355, 910 P.2d at 126 (italics in original).

Despite that the Appellants' reason for failing to file a timely notice of appeal was because, according to their counsel, the other parties and the clerk did not provide notice of entry of the August 21, 2013 order denying reconsideration to counsel for the Appellants, Enos held that a party has an independent duty to keep informed and that failure by the clerk to notify the parties that judgment was entered does not provide grounds for excusable neglect. In this case, Appellants' counsel's declaration establishes that he discovered the August 21, 2013 order had been entered "while routinely occasionally browsing Ho'ohiki." There is nothing to suggest that the August 21, 2013 order could not have been discovered in a more timely manner.

The circuit court appears to have disregarded HRCP Rule 77(d) and the requirements for "excusable neglect" under HRAP Rule 4(a)(4)(B) and the holding in Enos, and, instead, the circuit court expressly found "excusable neglect" and entered the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B). Based on the holding in Enos, it appears that the circuit court abused its discretion in entering the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), and, thus, the October 21, 2013 order is invalid. Consequently, the Appellants' failure to file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration violates the thirty-day time limit under HRAP Rule 4(a)(3) for a timely appeal under these circumstances.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."); HRAP Rule 26(e) ("The reviewing court for good cause shown may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal."). Accordingly,

IT IS HEREBY ORDERED that appellate court case number CAAP-13-0004290 is dismissed for lack of appellate jurisdiction.

IT IS FURTHER ORDERED that the December 25, 2014 Motion to Consolidate Appeal is denied as moot.

DATED: Honolulu, Hawai'i, March 30, 2016.

Presiding Judge

Associate Judge

Associate Judge

B

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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnersip, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER DENYING APRIL 5, 2016 HRAP RULE 40 MOTION
FOR RECONSIDERATION OF MARCH 30, 2016 ORDER
DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of (1) the March 30, 2016 order dismissing appellate court case number CAAP-13-0004290 for lack of appellate jurisdiction, (2) Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs's (the Appellants) April 5, 2016 motion to reconsider that March 30, 2016 dismissal order pursuant to Rule 40 of the Hawai'i Rules of Appellate Procedure (HRAP), and (3) the record, it appears that the court did not overlook or misapprehend any points of fact or law when we entered the

March 30, 2016 dismissal order.

Appellants argue that the issue whether the circuit court abused its discretion by granting the HRAP Rule 4(a)(4)(B) extension of time was not properly before the Hawai'i Intermediate Court of Appeals because no party contested the issue of timeliness in any appellate brief. However, the Supreme Court of Hawai'i has consistently held that

> [i]n each appeal, the supreme court is required to determine whether it has jurisdiction. . . . Without jurisdiction, a court is not in a position to consider the case further. . . . An appellant's failure to file a timely notice of appeal is a jurisdictional defect that can neither be waived by the parties nor disregarded by the court in exercise of judicial discretion.

Poe v. Hawai'i Labor Relations Board, 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002) (citations and internal quotation marks omitted; emphasis added); Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986) ("When we perceive a jurisdictional defect in an appeal, we must, *sua sponte*, dismiss that appeal.") (citation omitted); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."); HRAP Rule 26(e) ("The reviewing court for good cause shown may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal."). Therefore, the fact that no party contested the issue of timeliness in any appellate brief is irrelevant. This court clearly had a duty to review the jurisdictional issue whether the Appellants' appeal was timely.

Appellants next argue that it was inappropriate for this court to hold that the circuit court abused its discretion by granting the Appellants' HRAP Rule 4(a)(4)(B) motion for an

extension of time because the transcript of the hearing for the Appellants' HRAP Rule 4(a)(4)(B) motion was not in the record on appeal. However, ensuring that the record on appeal contains all relevant documents is the duty of the appellant.

> It is the responsibility of each appellant to provide a record, as defined in Rule 10 and the Hawai'i Court Records Rules, that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency from which the appeal is taken to correct any omission.

HRAP Rule 11(a).

Although the Appellants attached a copy of the hearing transcript to their April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order, the hearing transcript would not have changed our conclusion that the circuit court abused its discretion by finding excusable neglect for the Appellants' untimely appeal. The Supreme Court of Hawai'i has long held that the failure of a circuit court to provide formal notice of entry of an appealable order or appealable judgment does not excuse any aggrieved party from filing a timely notice of appeal. For example, thirty years ago, the Supreme Court of Hawai'i held that, where the appellant had not received prompt notice that an appealable order had been filed, it did not toll the time for appeal and her untimely request to extend the time for appeal barred her appeal. Bacon v. Karlin, 68 Haw. at 652, 727 P.2d at 1130-31.

> Even though she did not receive prompt notice of entry of the order granting summary judgment, Ms. Bacon had advance knowledge that the order would be filed. Her attorney was present when the oral order awarding judgment was issued, and he approved the written order of September 23, 1985 before it was filed. Furthermore, delinquent service of such a notice does not toll the time

for appeal, for HRCP Rule 77(d) expressly provides that

> [l]ack of notice of the entry by the clerk, or failure to make such service, does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawaii Rules of Appellate Procedure.

We are without jurisdiction to hear and decide the appeal, and it is dismissed.

Id. (footnote omitted; emphasis added). Similar to the appellant in Bacon v. Karlin, the record in this case indicates that the Appellants' counsel was present at the relevant June 17, 2013 circuit court hearing when the circuit court announced that it would enter the written post-judgment order that eventually triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal in the instant case, and, furthermore, the lack of any formal notice of entry of that written post-judgment order does not affect the time to appeal under HRCP Rule 77(d). Therefore,

IT IS HEREBY ORDERED that the Appellants' April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order is denied.

DATED: Honolulu, Hawai'i, April 21, 2016.

Presiding Judge

Associate Judge

Associate Judge

C

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Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiffs,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CIVIL NO. 11-1- 1577- 07 GWBC
(Foreclosure)

KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' EX PARTE MOTION TO SHORTEN TIME FOR THE HEARING OF THEIR MOTION FOR HRCP RULE 4(a)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL, OR IN THE ALTERNATIVE TO DECIDE THE MOTION FORTHWITH WITHOUT ORAL ARGUMENT PURSUANT TO HRCC RULE 8; DECLARATION OF GARY VICTOR DUBIN; ORDER; CERTIFICATE OF SERVICE

(The Honorable Gary W.B. Chang)

No Trial Date Set.

KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' EX PARTE MOTION TO SHORTEN TIME FOR THE HEARING OF THEIR MOTION FOR HRCP RULE 4(A)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL, OR IN THE ALTERNATIVE TO DECIDE THE MOTION FORTHWITH WITHOUT ORAL ARGUMENT PURSUANT TO HRCC RULE 8

COME NOW Ke Kailani Development and Michael J. Fuchs, parties herein, by and through their undersigned counsel, and hereby move this Honorable Court *ex parte* for the above-referenced alternative relief, based upon the accompanying Declaration of Gary Victor Dubin, and pursuant to Rule 8 of the Rules of the Circuit Courts of the State of Hawaii and Rule 4(a)(4)(B) of the Hawaii Rules of Appellate Procedure and in the interests of justice.

DATED: Honolulu, Hawaii; October 21, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

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

Plaintiffs,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CIVIL NO. 11-1-1577-07 GWBC

DECLARATION OF GARY VICTOR DUBIN

DECLARATION OF GARY VICTOR DUBIN

I, GARY VICTOR DUBIN, HEREBY DECLARE:

1. I am an attorney licensed to practice law in the Courts of the State of Hawaii, and I represent the Plaintiffs in this action.

2. This morning I discovered, while routinely occasionally browsing Ho'ohiki, that this Court had entered on August 21, 2013 an order denying my clients' motion for reconsideration in the above-entitled action.

3. Unfortunately, no one informed my office, my office has never received a copy of the filed order nor any word from opposing counsel which otherwise has religiously emailed

and hand delivered to me immediately every signed order and judgment in this case, and no notice of entry of such an order was filed or served, suggesting that opposing counsel similarly never received word of the entry of the order either.

4. The immediate problem is that pursuant to HRAP Rule 4(a)(4)(B) today coincidentally is the final day in which this Court can remedy this situation, which unfortunately is *jurisdictional*, by entering an order before the close of business today, based upon a showing of excusable neglect, extending the time to file a notice of appeal, which then based upon your filing of such an extension order the notice of appeal must also be filed today.

5. Such a proposed order must be filed before the close of business today to enable my office to electronically file a notice of appeal before the JEFS appellate filing system closes tonight at 11:30 p.m.

6. Depending upon how this Court proposes to proceed, I am submitting this motion for a Rule 4(a)(4)(B) extension, together with an *ex parte* motion to shorten time for hearing this afternoon, and a proposed order granting the required extension, with notice to opposing counsel, as otherwise my clients will be severely prejudiced through no fault of their own and no fault of their counsel.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on October 21, 2013.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs, vs. KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants.	CIVIL NO. 11-1- 1577- 07 GWBC ORDER

ORDER

Based upon a reading of these *ex parte* Motion papers, and for good cause appearing therefor:

IT IS HEREBY ORDERED that this *ex parte* motion is GRANTED, and that:

GWBC/ai [X] the date for the hearing of this matter is shortened to today at 3:45 p.m. before the Honorable Gary W.B. Chang; or

[ ] this matter shall be decided without an oral argument pursuant to Rule 8 of the Rules of the Circuit Courts of the State of Hawaii.

DATED: Honolulu, Hawaii; OCT 21 2013

Gary Won Bae Chang

JUDGE OF THE ABOVE-ENTITLED COURT

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs, vs. KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants.	CIVIL NO. 11-1-1577-07 GWBC CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served on the date first written below by hand delivery to the following persons before noon today:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
Richard J. Wallsgrove, Esq.
733 Bishop Street, Suite 1900
Honolulu, Hawaii 96813

Attorneys for Defendants
Ke Kailani Partners, LLC and
Hawaii Renaissance Builders,
and for Original Plaintiffs
Bank of Hawaii, Central
Pacific Bank, and
Finance Factors, Limited

DATED: Honolulu, Hawaii; October 21, 2013.

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FREDERICK J. ARENSMEYER
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Attorneys for Plaintiffs
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and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiffs,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CIVIL NO. 11-1- 1577- 07 GWBC
(Foreclosure)

KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR HRCP RULE 4(a)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL; DECLARATION OF GARY VICTOR DUBIN; NOTICE OF HEARING OF MOTION; CERTIFICATE OF SERVICE

DATE: October 21, 2013
TIME: 3:45p.m
JUDGE: Gary W.B. Chang

No Trial Date Set.

KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR HRCP RULE 4(a)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

COME NOW Ke Kailani Development and Michael J. Fuchs, parties herein, by and through their undersigned counsel, and hereby move this Honorable Court for the above-referenced relief, based upon the accompanying Declaration of Gary Victor Dubin, and pursuant to Rule 4(a)(4)(B) of the Hawaii Rules of Appellate Procedure and in the interests of justice.

DATED: Honolulu, Hawaii; October 21, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs, vs. KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants.	CIVIL NO. 11-1-1577-07 GWBC DECLARATION OF GARY VICTOR DUBIN

DECLARATION OF GARY VICTOR DUBIN

I, GARY VICTOR DUBIN, HEREBY DECLARE:

1. I am an attorney licensed to practice law in the Courts of the State of Hawaii, and I represent the Plaintiffs in this action.

2. This morning I discovered, while routinely occasionally browsing Ho'ohiki, that this Court had entered on August 21, 2013 an order denying my clients' motion for reconsideration in the above-entitled action.

3. Unfortunately, no one informed my office, my office has never received a copy of the filed order nor any word from opposing counsel which otherwise has religiously emailed

and hand delivered to me immediately every signed order and judgment in this case, and no notice of entry of such an order was filed or served, suggesting that opposing counsel similarly never received word of the entry of the order either.

4. The immediate problem is that pursuant to HRAP Rule 4(a)(4)(B) today coincidentally is the final day in which this Court can remedy this situation, which unfortunately is *jurisdictional*, by entering an order before the close of business today, based upon a showing of excusable neglect, extending the time to file a notice of appeal, which then based upon your filing of such an extension order the notice of appeal must also be filed today.

5. Such a proposed order must be filed before the close of business today to enable my office to electronically file a notice of appeal before the JEFS appellate filing system closes tonight at 11:30 p.m.

6. Depending upon how this Court proposes to proceed, I am submitting this motion for a Rule 4(a)(4)(B) extension, together with an *ex parte* motion to shorten time for hearing this afternoon, and a proposed order granting the required extension, with notice to opposing counsel, as otherwise my clients will be severely prejudiced through no fault of their own and no fault of their counsel.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on October 21, 2013.

GARY VICTOR DUBIN

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs, vs. KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants.	CIVIL NO. 11-1-1577-07 GWBC NOTICE OF HEARING OF MOTION

NOTICE OF HEARING OF MOTION

To:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
Richard J. Wallsgrove, Esq.
733 Bishop Street, Suite 1900
Honolulu, Hawaii 96813

Attorneys for Defendants Ke Kailani Partners, LLC and Hawaii Renaissance Builders, and for Original Plaintiffs Bank of Hawaii, Central Pacific Bank, and Finance Factors, Limited

PLEASE TAKE NOTICE that the above-referenced motion will come on for hearing before the Honorable Gary W.B. Chang, Judge of the Above-Entitled Court, in his courtroom at 777 Punchbowl Street, Honolulu, Hawaii, at 3:45 pm., on October 21, 2013, or as soon thereafter as counsel may be heard.

You are invited to attend and to file memorandum in support or in opposition thereto in accordance with the Rules of Court.

DATED: Honolulu, Hawaii; October 21, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs, vs. KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants.	CIVIL NO. 11-1-1577-07 GWBC CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served on the date first written below by hand delivery to the following persons before noon today:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
Richard J. Wallsgrove, Esq.
733 Bishop Street, Suite 1900
Honolulu, Hawaii 96813

Attorneys for Defendants
Ke Kailani Partners, LLC and
Hawaii Renaissance Builders,
and for Original Plaintiffs
Bank of Hawaii, Central
Pacific Bank, and
Finance Factors, Limited

DATED: Honolulu, Hawaii; October 21, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

D

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KE KAILANI DEVELOPMENT, et al., Plaintiffs, vs. KE KAILANI PARTNERS, et al., Defendants.	Cv. No. 11-1-1577

TRANSCRIPT OF PROCEEDINGS

Had before the HONORABLE GARY WON BAE CHANG, Judge presiding, on OCTOBER 21, 2013, regarding the above-entitled matter; to wit, KE KAILANI DEVELOPMENT, LLC, AND MICHAEL J. FUCHS' MOTION FOR 4(A)4(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL.

APPEARANCES:

SHARON V. LOVEJOY, ESQ. For the Plaintiffs

GARY V. DUBIN, ESQ. For the Defendants

REPORTED BY:
Jamie S. Miyasato
Official Court Reporter
First Circuit Court
State of Hawaii

OCTOBER 21, 2013

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THE BAILIFF: On the civil motions calendar, calling Case No. 1; Civil No. 11-1-1577; Ke Kailani Development, LLC, versus Ke Kailani Partners, LLC; for Ke Kailani Development, LLC, and Michael J. Fuchs' motion for HRCP Rule 4(a) 4(b) extension of time in which to file notice of appeal. Counsel, please state your appearances.

MR. DUBIN: Good afternoon, Your Honor. Gary Dubin representing Ke Kailani Development and Mr. Fuchs.

MS. LOVEJOY: Good afternoon, Your Honor. Sharon Lovejoy for Ke Kailani Partners, LLC, and Hawaii Renaissance Builders, LLC.

THE COURT: Okay. Good afternoon, counsel. Thank you very much for mobilizing so quickly. Let me just make a short introduction about what we are doing here. I was out of the office until about, oh, maybe 10 minutes after 3:00 or 3:15. When I got back to the office, it was brought to my attention that some documents were dropped off at our court during the lunch hour, and these documents consisted of a cover letter from Mr. Dubin's office. It is undated. There is a motion to shorten time for this hearing, an ex parte motion, and then there is a document entitled Ke Kailani

Development, LLC, and Michael J. Fuchs' motion for HRCP Rule 4(a) 4(b) extension of time in which to file notice of appeal.

When I reviewed the letter and the documents, it dawned upon me that the Ke Kailani Development and Mr. Fuchs are taking the position that today is the deadline for filing the notice of appeal, so this is an emergency matter. So as quickly as we could, we contacted everyone because I really wanted to have this matter addressed by counsel rather than by ex parte proceedings. And so we made some telephone calls at about 3:25 or so.

We are -- I understand that Ms. Lovejoy was actually in an arbitration hearing and that her staff had to pass a note to her in order to procure her participation in this matter and that the record should reflect that Ms. Lovejoy is participating by telephone. Mr. Dubin is here in the courtroom with us.

So that is the history of the proceedings that brought us here today, and I apologize for the urgent nature of this hearing. But I thank counsel very much for interrupting your afternoon to participate in this hearing.

Mr. Dubin, I'm not real clear on some of the time table, so let me ask a few questions. The judgment

that is being appealed from, what is the date that judgment was filed?

MR. DUBIN: It says on Ho`ohiki it's August the 21st, 2013.

THE COURT: No. That's the order denying the motion for reconsideration.

MR. DUBIN: Exactly. The judgment.

THE COURT: Yes.

MR. DUBIN: It looks like it's 12 -- I don't really have that information with me. All I know is that we filed -- we filed the -- I can tell the Court what happened. We filed the motion for reconsideration.

THE COURT: When?

MR. DUBIN: Before the judgment was entered.

THE COURT: What was the date that the motion for reconsideration was filed?

MR. DUBIN: I don't have that with me. What I remember was that the motion for reconsideration was filed within -- was actually -- it was a -- it was a request for rehearing or reconsideration. It was -- the judgment had not been entered yet. The history of this was an original judgment had been entered and we appealed. And the Intermediate Court of Appeals dismissed the appeal as premature because the judgment did not have the proper Rule 56(b) certification

language. So then it came back to this. By that time Your Honor had -- was replace -- was a replacement judge.

Ms. Lovejoy filed a new judgment with the proper language in it. And when she did that, I filed an objection and I filed a motion for rehearing or reconsideration. Approximately three days before the hearing, the judgment was entered by Your Honor. We then had the hearing. The judgment that was entered on August 21st, 2013, was the result of that hearing before Your Honor. I did the research on what happens when you file a motion for reconsideration or rehearing before the judgment is entered.

THE COURT: Well, let me -- I really want the record to be clear with respect to some of the deadlines. And I was asking you because some of the dates in our notes are a little odd. But what my notes indicate is that the judgment in this matter was filed on April 19, 2013. And I take it that is the judgment from which appeals would have been taken except about a month before the final judgment was filed on April 19, 2013, on March 19, 2013, the motion for rehearing and reconsideration was filed.

MR. DUBIN: That's consistent with my recollection.

THE COURT: All right. And then that hearing

was continued several times. I think the case may have been reassigned from Judge Ayabe to this Court. And the hearing was held on about June 17, 2013, and then the order was issued on August 21, 2013.

MR. DUBIN: I think that's -- that's consistent with my recollection.

THE COURT: All right. So today is the -- by the Court's calculation, the 61st day after the order denying the motion for rehearing and reconsideration was filed. And maybe we can short-circuit this and find out.

Ms. Lovejoy, are you -- is your client going to object to an extension of time to file the notice of appeal?

MS. LOVEJOY: Your Honor, I have to say I haven't had the time to look into the situation, but I will tell you this. When I received Mr. Dubin's letter, which was sent to me by my staff by email, and luckily I was able to check it, just for clarification, I was in a mediation, not in an arbitration. So it's just for clarification purposes. I did ask my staff whether we had any record of having received the entry of the order, and my office has no record of it either.

So I will say that I haven't had an opportunity to look. If failure to receive the order is an automatic grounds for an extension, then we wouldn't

be objecting. But I don't know if that's the case or not.

MR. DUBIN: Can I make one correction? I think you said, Your Honor, this was the 50-something day?

THE COURT: 61st day.

MR. DUBIN: It's actually the 60th day. 6-0. Which would have been actually due on Sunday.

THE COURT: Sunday is the 60th day. Today is the 61st day.

MR. DUBIN: Yes. That's my understanding.

THE COURT: All right. I'm going to ask my staff to do the best they -- whether they can check if on August 21, 2013, it was the actual order itself or just minutes of the Court's disposition. And my staff will be checking.

But if -- all right. My staff has handed to me the original of a document that is file stamped. And this is the order denying the motion for rehearing and reconsideration. It's file-stamped August 21, 2013. So that's not minutes. It's an actual order. And our usual procedure is when the Court executes an order, we then contact the filing party, which in this case is Ms. Lovejoy's office. And the filing party -- the party who filed and prepared the order then picks up the -- the

executed order from my chambers and then takes it to the clerk's office for filing. That's the normal procedure. We do not see anything out of the ordinary in this case. So I'm not sure, Ms. Lovejoy, why you wouldn't have a copy if your office actually filed the order.

MS. LOVEJOY: Your Honor, I don't know either. I can tell you I asked our legal assistant who is handling this case, who's in my experience typically quite good. Could have been a mix-up. I don't know. I asked specifically whether, as far as we know, did we ever receive information about it. Could have been a mistake. I don't know. I also asked did we have an appeal date calendared, which would have indicated that somebody in the office had accepted the signed order -- I mean, had received information about it. The response was no.

I found the Rule 23 letter, which was sent to the Court on July 11. She talked about as soon as orders come in, the usual practice is to scan, put it in a worksite, mail a copy to Mr. Dubin, as well as email a copy to myself as the lead counsel and to the client so we know it came in. I searched all around, found nothing showing this order. I don't have a copy in my pending box. I checked to see if I emailed anything to Mr. Dubin around August 21st, but I see no entry there either.

So for whatever purpose we don't appear to have anything that would acknowledge it in our office. Whether that was a mistake in our office, I couldn't say. I don't know the answer to that.

THE COURT: Okay. Mr. Dubin, did you have any other comment on this August 21, 2013 order denying the motion for rehearing?

MR. DUBIN: Only that Ms. Lovejoy's office has always provided me immediately with whatever documents they actually received.

THE COURT: Okay. Now -- okay. This is a little mysterious what went on with this case. But even if the order were not communicated to everyone, I am concerned because of the way that I read Rule 4 of the Hawaii Rules of Appellate Procedure. It appears to suggest to the Court that when a tolling motion such as -- I'm assuming the motion is a tolling motion. I'm not making that determination, but that's the representation, so let's operate on that basis. When a tolling motion is filed, then the notice of appeal instead of being filed within 30 days of the judgment must be filed within 30 days of the order disposing of the motion for rehearing and reconsideration.

If there is -- the Court then has the power to extend the deadline for filing the notice of appeal a

maximum of 30 days. So if in fact the order disposing of the motion for rehearing and reconsideration was filed on August 21, 2013, the 30 days for the notice of appeal have elapsed and today is the 61st day.

So I guess my question is, does this Court even have the power to extend the first 30 days after the August 21, 2013 date for another 30 days, which would have made it expire yesterday, Sunday? Does the Court have that authority?

And I will ask Mr. Dubin to respond first.

MR. DUBIN: Yes, the Court does. Subdivision A(4)(a) provides that within the prescribed period, and the prescribed period is the 30 days after the order is entered, the Court can extend it for 30 days past the prescribed time. So if an order is filed and within the next 30 days -- or judgment in this case is filed within 30 days, then the Court has the power to extend the appeal date for another 30 days.

Subdivision capital B says -- and that's ex parte. Subdivision capital B says that if the request is made after the prescribed time, which in other words, after that first 30 days, then the Court may extend the time to file for another 30 days. And the key language is that the Court may extend the time for filing notice of appeal upon motion filed not later than 30 days after

the expiration of the time. And of course, Sunday is not included in the calculation of time, so today would be the expiration of the second 30 days.

Then it says, However, no such extension, which means the extension for the second 30 days, shall exceed 30 days past the prescribed period. The prescribed period is the first 30 days. So therefore, 30 plus 30 equals 60. And Sunday is a -- is a holiday not counted in calculations.

And interestingly, we had a -- we had an issue develop for filing a cert. petition in the ICA where someone in our office made a mistake and filed it what we thought was one day late. But the Court held that -- it's the same thing. 30 days and 30 days. The Intermediate Court of Appeals actually to my surprise held that if the first 30 days fell on a Sunday, the first period ended on a Monday. And they accepted our petition for certiorari.

THE COURT: What's the cite to that case?

MR. DUBIN: That case could have been the B-i-h-n. Ms. B-i-h-n. It was several weeks ago. I think that could have been the case. We had another one pending cert. at that time. Actually I think it was another one that they accepted cert. When I get back to the office, I could give you. But that one they actually

accepted cert., and I think they interpreted the rule so they could handle the case. And it's -- it was accepted cert. just about a week ago. It wasn't my case in the office. That's why I don't recall the name. It was kind of an odd name. I think it began with a K, but when I get back to the office I can provide that. And actually one could probably look it up on Ho`ohiki because they don't accept too many cert. petitions. It would have been within about a week or two.

THE COURT: So --

MR. DUBIN: So they actually -- they actually ruled that a Sunday didn't count for the first 30 days. And actually that's different than one -- than the instruction that the clerk of the Intermediate Court of Appeals gives you if you extend it.

But here I think it's clear we don't have that problem. This is the second 30 days. The period fell on a Sunday and the appellate rules say that if -- if you're on a weekend or a holiday, the deadline's extended to the next day.

THE COURT: So is your second 30 days by which you must file the notice of appeal expired today?

MR. DUBIN: Today. And it's -- it's amazing luck. I just happened to look through Ho`ohiki and saw it today.

THE COURT: Okay. Ms. Lovejoy, do you have any comment on this discussion?

MS. LOVEJOY: Your Honor, I don't. I haven't looked at it, so I don't have a position on it.

THE COURT: Okay. Is your client taking any position overall or generally on the motion to extend the first 30 day?

MS. LOVEJOY: Your Honor, the -- we take no position except to ask that the extension, if it's going to be granted, be short so things can move along.

THE COURT: Well --

MR. DUBIN: Well, the extension has to be today, Sharon.

MS. LOVEJOY: I see what you're saying. Yeah.

THE COURT: All right. Then in light of all that has transpired, the Court will grant the motion then.

And Mr. Dubin, you need to stay here while the Court processes the order, and you need to get downstairs to file that notice of appeal.

MR. DUBIN: Well, they're closed downstairs. As far as the notice of appeal, I can file that on the internet on the JEFS system by 11:30.

THE COURT: 11:30 p.m.?

MR. DUBIN: P.m.

So as long as I have the process papers, I won't have any difficulty. But I would like to get a copy of the -- the order. The original, the one in August too, if I could.

THE COURT: Well, I don't think we just get to make copies. I think you or Ms. Lovejoy must go downstairs and make arrangements through the Circuit Court. I don't want to be cavalier about how that is handled.

MR. DUBIN: Okay.

THE COURT: Because --

MR. DUBIN: At least I need the orders that I -- I submitted to the Court today, the motion. I need --

THE COURT: Yeah. I have no idea what happened and I don't want to go out of the ordinary course to create more confusion. So you and Ms. Lovejoy must make arrangements with the Circuit Court clerks to obtain copies of those documents.

MR. DUBIN: That's fine.

THE COURT: All right. So Ms. Lovejoy, I thank you very much for making yourself available and interrupting your mediation. The Court will execute the order granting the motion to extend.

And Mr. Dubin, it's incumbent upon you to make

sure Ms. Lovejoy gets a copy of everything that is done here today.

MR. DUBIN: Yes. She'll get it today.

MS. LOVEJOY: No problem.

MR. DUBIN: In addition to the signed order, I need the clerk of the court that has the ability to stamp it today.

THE COURT: We will take care of that.

MR. DUBIN: All right. I'll be here. Thank you.

THE COURT: All right. So yes.

MS. LOVEJOY: Thank you, Your Honor.

THE COURT: Okay. Ms. Lovejoy, we're going to adjourn the session now, so I thank you very much. Court stands in recess.

(End of proceedings.)

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STATE OF HAWAII)
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CITY AND COUNTY OF HONOLULU)
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I, JAMIE S. MIYASATO, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing comprises a full, true, and correct transcription of my stenographic notes taken in the above-entitled matter, so transcribed by me to the best of my ability.

Dated this 3rd day of April 2016.

JAMIE S. MIYASATO, CSR #394

kekailani

E

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Attorneys for Plaintiffs
Ke Kailani Development LLC
and Michael J. Fuchs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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

Plaintiffs,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

CIVIL NO. 11-1- 1577- 07 GWBC
(Foreclosure)

ORDER GRANTING KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR HRCP RULE 4(a)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

No Trial Date Set.

ORDER GRANTING KE KAILANI DEVELOPMENT LLC AND MICHAEL J. FUCHS' MOTION FOR HRCP RULE 4(a)(4)(B) EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

Ke Kailani Development LLC and Michael J. Fuchs' Motion for HRCP Rule 4(A)(4)(B) Extension of Time in Which To File Notice of Appeal having been considered by the Court for good cause without oral argument, and good cause also having been shown therefor, upon a satisfactory showing of excusable neglect found by the Court pursuant to Rule 4(a)(4)(B) of the Hawaii Rules of Appellate Procedure:

THE COURT HEREBY ORDERS THAT the time in which Ke Kailani Development LLC and Michael J. Fuchs shall have to file a notice of appeal from this Court's August 21, 2013 Order denying their Motion for Rehearing and Reconsideration is hereby extended through today.

DATED: Honolulu, Hawaii; October 21, 2013.

Gary Won Bae Chang

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

TERRENCE J. O'TOOLE
SHARON V. LOVEJOY
Attorneys for Defendants
Ke Kailani Partners LLC and
Hawaii Renaissance Builders LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served on the date first written below by the JEFS Electronic filing system to the following persons:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
733 Bishop Street, Suite 1900
Honolulu, Hawaii 96813
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Attorneys for Appellees
Ke Kailani Partners, LLC and
Hawaii Renaissance Builders

DATED: Honolulu, Hawaii; October 21, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Appellants
Ke Kailani Development LLC
and Michael J. Fuchs

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No. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity,

Defendants-Appellees,

and

JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

On Appeal from the Circuit Court of the First Circuit
(Civil No. 09-1-0717)

♦♦♦♦♦

APPELLANTS' JURISDICTIONAL STATEMENT

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No. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

Plaintiffs-Appellants,

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KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity,

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Defendants.

On Appeal from the Circuit Court of the First Circuit
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♦♦♦♦♦

APPELLANTS' JURISDICTIONAL STATEMENT

COME NOW Appellants, by and through their undersigned attorneys, and pursuant to Rule 12.1 of the Hawaii Rules of Appellate Procedure, hereby submit their Jurisdictional Statement.

This Appeal is based upon Section 641-1 of the Hawaii Revised Statutes and Rule 58 of the Hawaii Rules of Civil Procedure.

The Orders and Judgment being appealed from are set forth in Exhibits "A" through "J" in accordance with the requirements of Rule 12.1 of the Hawaii Rules of Appellate Procedure. Only those relevant to the timing of this appeal, however, are referenced in footnotes below.

A Judgment dismissing some of the Defendants was filed on December 19, 2011 (Exhibit "A"), but was therefore not only not appealable, but also moot as a First Amended Complaint was filed before the Judgment was filed.

An Order dismissing Appellants' First Amended Complaint below as to those same Defendants, not all Defendants was thereafter filed on April 23, 2012 (Exhibit "E").

A Judgment was thereupon entered that same day purporting to be a Rule 54(b) final judgment (Exhibit "F").

Appellants' timely motion for reconsideration of that Judgment was subsequently denied below on August 21, 2012 (Exhibit "H").

A Notice of Appeal was then timely filed by Appellants; however this Court concluded that Appellees had drafted their Final Judgment incorrectly, and in CAAP-12-0000758 that first appeal was dismissed as premature.

A [corrected] Final Judgment was filed in this action on April 19, 2013 (Exhibit "I"),[1] however preceded by the filing of a combined timely Rule 59(e) and Rule 60(b)

[1] Record on Appeal, Part 25, at 956-958 (Appellants' counsel has no record of having ever received this Judgment, and actually secured a filed copy only in preparation of this Jurisdictional Statement from the Record on Appeal).

motion on March 19, 2013,[2] anticipating the entry of a written order after the oral ruling, which Motion was subsequently denied by Order filed on August 21, 2013 (Exhibit "J").[3]

However, the parties were provide with no notice that that Order had been filed until discovered by Appellants' counsel checking Ho'ohiki the morning of October 21, 2013 (Exhibit "L").[4]

A timely Notice of Appeal was thereafter filed on October 21, 2013 (Exhibit "K"),[5] following the lower court's granting that day a timely Order extending the time in which to file a notice of appeal (Exhibit "L"),[6] within 60 days of the filing of the August 21, 2013 Final Judgment, the final weekend excluded in the calculations.

DATED: Honolulu, Hawaii; December 23, 2013.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Appellants
Ke Kailani Development LLC
and Michael J. Fuchs

[2] Record on Appeal, Part 24, at pages 9, et seq.
[3] Record on Appeal, Part 26, at pages 446-449 (neither Appellants' counsel nor Appellee Ke Kailani Partners. LLC's counsel had any notice of or a copy of that Order earlier than October 21, 2013 as each so testified at that hearing before the Honorable Gary W.B. Chang).
[4] CAAP-13-0004290 (Doc. Nos. 3 and 4); Record on Appeal, Part 26, at 450-464.
[5] CAAP-13-0004290 (Doc. No. 1); Record On Appeal, Part 26, at 450-464.
[6] CAAP-13-0004290 (Doc. Nos. 3 and 4); Record on Appeal, Part 26, at 450-464.

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No. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity,

Defendants-Appellees,

and

JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

On Appeal from the Circuit Court of the First Circuit
(Civil No. 11-1577-07)

♦♦♦♦♦

OPENING BRIEF

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A. CASE SUMMARY

This appeal arises out of a dispute over a $100,000,000 development project in Kona that collapsed as a result of the 2008 mortgage meltdown in the United States, the developer Appellant, Ke Kailani Development LLC (KKD) being unable to refinance.

At first three local banks initially funding the project sought to accommodate KKD with a loan modification, but when that failed they filed a judicial foreclosure in the First Circuit Court. Eventually, a foreclosure was ordered, after which KKD and its Guarantor and sole owner, Michael J. Fuchs (Fuchs) entered into a series of settlement agreements with a third party, formed as KKP, and the three banks to take over the project, in consideration of releasing Fuchs from his guaranties and waiving any deficiency judgment.

KKD, Fuchs, and KKP disagreed concerning the terms of the settlement agreements, which resulted in KKP as high bidder foreclosing on KKD, confirming the sale to itself, and securing a deficiency judgment against KKD and Fuchs, after KKD's unsuccessful intervening Chapter 11 bankruptcy attempted relief. KKD and Fuchs then sued KKP in a separate lawsuit in the First Circuit Court assigned to the same foreclosure Judge, who refused to consolidate the two cases and who eventually ordered the dismissal of KKP.

KKD and Fuchs appealed the confirmation of sale and the deficiency judgment, which consolidated appeal has been fully briefed in CAAP-12-0000758 and awaits decision in this Court. KKD and Fuchs also appealed the dismissal of KKP in the other related case in CAAP 12-0000153 and sought its consolidation with the first appeal which was unsuccessful, this Court dismissing, finding that that appeal was premature due to a drafting error by KKP's counsel.

A final judgment has know been entered in the other related case, from which KKD and Fuchs have now appealed.

The underlying dispute cannot be intelligently understood and resolved fairly on appeal without a full understanding of both cases and without wasting litigant and appellate resources, the issues being identical. As a result, in briefing the first appeal the Opening Brief addressed both cases below. That being the situation, the goal of this appeal is to formally add to the appellate record that which previously this Court was requested to take of and a motion will therefore now be filed to consolidate both appeals.

To aid in keeping both appellate records separate, the references herein in black are to the record in the first appeal and briefing exhibits of which this Court may take judicial notice, and the references and exhibits in red refer to the record in this, the second appeal.

B. STATEMENT OF THE CASE

While vacationing in Hawaii more than a decade ago, Fuchs, the Founder of Home Box Office, understandably fell in love with the Big Island, decided to build a home there, eventually causing his company, renamed KKD, to invest nearly $100,000,000 in a more than 65-acre South Kohala spectacular luxury residential subdivision called Ke Kailani (Exh. 1, Record, Part ("RP") (2) 26 & filling in related Case Civil No. 11-1-1577 ("1577") as described) within the Mauna Lani Resort development, wanting to make a major contribution to the beauty of the State as his legacy.

KKD in 2005 and in 2006 accordingly proceeded to borrow a total of more than $70,000,000 in acquisition and construction funds for the development of the subdivision in the form of two short-term loans from three local banks, the Bank of Hawaii (BOH), Central Pacific Bank (CPB), and Finance Factors, Ltd. (FF).

Fuchs, residing in New York, as a passive investor personally guaranteed both company loans (Exh. 2, RP (1) 89-96 & 187-194), which appeared very safe investments, based on appraisals prepared for BOH in 2005 and 2006 (Exh. 3, 1577), projecting market value well in excess of $100,000,000.

However, just as the subdivision was about completed and sales underway, a growing worldwide recession prevented further subdivision sales, while at the same time both loans after brief maturity date modifications had become due in mid-2009. Upon maturity, the remaining aggregate principal balance owed on both loans was approximately $26,000,000, whereas the market value of the unsold lots and condominium interests by mid-2009 had been reduced to slightly less than $24,000,000 owed to the Consortium, according to a professional appraisal prepared for BOH (Exh. 4, 1577).

The prospect of immediately repaying the Consortium brightened due to an offer received from Quintess, a non-equity membership destination club composed of extremely wealthy members, seeking to acquire most of KKD's remaining interest in Ke Kailani, which would have enabled KKD to have paid off the Consortium, but one owner, Mary Morrison, objected, reading the Association Declaration to prohibit membership club use.

On March 11, 2009 Morrison filed suit in Third Circuit Court in Kona, Civil No. 09-1-078K, seeking injunctive relief, which was referred to AOAO arbitration by the Honorable Elizabeth A. Strance pursuant to Hawaii condominium procedures, with the Honorable

Thomas K. Kaulukukui, Jr. (Ret.) serving as Arbitrator, KKD represented by the Bays law firm who had represented KKD in loan extension negotiations earlier with the Consortium.

On July 13, 2009 the Arbitrator found in favor of Morrison, who then moved to confirm the arbitration award, S.P. No. 09-01-039K, the hearing in which was held before Judge Strance on September 9, 2009, who confirmed the arbitration award on October 12, 2009 (Exh. 5, RP (2) 420-439), ending KKD's chance of repaying the Consortium and heading off foreclosure and cancelling Fuchs' liability under his Consortium's guaranties.

KKD's attorneys, the Bays Law Firm, without Fuchs' knowledge, had filed a notice of "no opposition" and a notice of "non-appearance" in the special proceeding, resulting in the confirmation order and final judgment being granted without objection and recorded at the State Bureau of Conveyances on October 16, 2009, as Document No. 2009-159577.

KKD, meanwhile, was never informed by the Bays Law Firm that KKD had a right to timely appeal to the Circuit Court the arbitration award before it became final and non-appealable pursuant to HRS Section 514B-163, including Morrison's nearly six-figure attorneys' fee award, at which time KKD could have ignored the arbitration and fee award altogether and merely proceeded with a trial *de novo* on the merits before Judge Stance in Civil No. 09-1-078K, keeping alive its intended membership club sale to Quintess.

Consequently, the Consortium declared an "event of default" and without any prior notice to Fuchs, withdrew all funds in a Fuchs' $3,000,000 standby letter of credit pledged to secure an earlier payment extension, and the Consortium proceeded to file a foreclosure action in First Circuit Court, Civil No. 09-1-2523-10, on October 27, 2009, although the property is located in Kona, the case nonrandomly assigned by the Clerk's Office upon filing to the Honorable Bert I. Ayabe who by assignment hears all foreclosure cases in Honolulu.

KKD and Fuchs, retaining new counsel, opposed foreclosure, filing an Answer and Counterclaim alleging breach of contract, breach of fiduciary duty, interference with advantageous economic relations, unfair and deceptive banking practices, fraud and deceit, rescission, dissolution of partnership, discharge of guaranties, declaratory and injunctive relief, abuse of process, wrongful foreclosure, and punitive damages, and filed a Third-Party Complaint seeking to set aside the arbitration award as a result of inadequate notice to all condominium owners and a Fourth-Party Complaint to sell the condominium interests, removing it from HRS Chapters 514A and 514B to salvage the Quintess transaction.

Meanwhile, the foreclosure case being stalled for almost a year as a result of KKD's opposing claims and very extensive BOH settlement negotiations, the Bays Law Firm approached the CEO of KKD, William L. Beaton, and Fuchs, informing them it had had "for several years" the Hunt Companies, as a client, now interested in purchasing Ke Kailani, seeking permission to waive any confidentiality with respect to the Bays Law Firm, to allow it to negotiate an acquisition by Hunt notwithstanding having KKD's confidential proprietary information, and they all agreed on June 1, 2010 (Exh. 6, RP 1577).

The very next day Judge Ayabe orally granted summary judgment in favor of the Consortium, decreeing foreclosure (Exh. 7, RP (7) 446-536), entering a foreclosure judgment (Exh. 8, RP (7) 435-441), granting summary judgment against KKD/Fuchs' Counterclaim (Exh. 9(7), RP 427-434), and judgment against the Counterclaim (Exh. 10, RP (7) 537-543, amend. 919-931), dismissing the Fourth-Party Complaint and related Joinder.

KKD had complained BOH interfered with the sale and/or refinancing of Ke Kailani, and requested time to complete pending discovery to prove it, but Judge Ayabe refused to allow time for needed discovery, delayed by agreement due to settlement discussions.

Instead, the BOH's attorneys argued to Judge Ayabe in their "Reply Memorandum," pages 6-7, filed May 27, 2010, the issue of interference should be reserved for later, the issue of damages they argued had nothing to do with their motion, claiming the issue of "tortious interference and similar causes of action" was *not* part of their summary judgment motion and should be decided *after* any auction sale as a separate issue of "damages".

Judge Ayabe refused to allow KKD three weeks for its pending discovery, yet Inconsistently waited three full months, doing nothing, until ordering foreclosure, *supra*, on September 1, 2010, also inconsistently granting summary judgment on KKD's interference Counterclaim, despite the BOH's attorneys' judicial admission that that was not a part of BOH's motion for summary judgment, but for later determination of any provable damages.

Meanwhile, with a foreclosure gun pointed at their heads, KKD and Fuchs, effective July 9, 2010, entered into an Acquisition Agreement (Exh. 11, RP (9) 509-549) negotiated with the Bays Law Firm representing a wholly-owned subsidiary of Hunt, Hawaii Renaissance Builders (HRB), agreeing in Paragraph 2.1 to sell Ke Kailani to HRB for no monetary consideration if HRB could purchase from the Consortium and retire KKD's two

promissory notes at whatever price to be paid by HRB that could be agreed to and HRB in turn agreed to cancel Fuchs' two guaranties, the purpose of the Acquisition Agreement.

All parties understood that the two-part transaction – HRB purchasing the promissory notes and cancelling the guaranties, and KKD transferring title from KKD to HRB – was one inseparable transaction, divided into two simultaneous stages so that HRB would have in effect a firm option to purchase Ke Kailani should its negotiations with BOH be successful.

Those listed in the initial Paragraph of the Acquisition Agreement as agreeing to terms, and those also signing on the concluding signature page of the Acquisition Agreement as agreeing to terms, were KKD, HRB, *and Fuchs*, and with respect to Fuchs it is recited before his signature that he has "AGREED with respect to the provisions of Section 8.7 applicable to Guarantor," making him as a party liable as well as having bargained for and entitled to consideration from HRB under Section 8.8, as follows:

> 8.7 EXISTING LOAN DOCUMENTS. . . . Owner and Guarantor undertake and agree that if, as a result of discussions with Existing Lender, the Parties and Existing Lender agree that, if at Closing, the Existing Loan Documents shall be amended and/or assigned to and assumed by HRB or a related entity, such that all further liability of Owner and Guarantor thereunder is terminated and the condition set forth in Section 8.8 is satisfied, then Owner and Guarantor shall be obligated to accept such resolution and shall not be entitled to object to Closing on such basis.
>
> 8.8 RELEASE AND INDEMNITY. It shall be a condition to HRB's delivery of a Notice to Proceed and right and obligation to proceed with Closing that HRB undertake and agree, from and after Closing, to release and indemnify Guarantor as guarantor of the Existing Loan under the Existing Loan Documents in the event HRB elects to assume or purchase the Existing Loan.

It was agreed for HRB to offer $14,000,000 to buy out the Consortium's loan position, an initial proposal made by Hunt's senior representative in Hawaii, Steven W. Colon, to KKD by letter dated July 27, 2010 (Exh. 12, 1577). BOH agreed in writing on August 13, 2010 to entertain loan buyout proposals from HRB, but only if KKD and Fuchs would agree in writing to waive any claim of breach of confidentiality or tortious interference "relating to such communications between BoH and HRB;" and KKD, Fuchs, and HRB signed evidencing their individually needed approval (Exh. 13, 1577).

Consequentially, on August 13, 2010 HRB transmitted its next buyout offer to BOH (Exh. 14, 1577), this time increasing its buyout price from $14,000,000 to $16,000,000, and again setting forth a summary of the terms of its Acquisition Agreement.

However, this time HRB added to its initial offer the misrepresentation that "KKD/Fuchs are making significant additional payments at closing toward outstanding project claims and closing costs," deliberately intending to deceive BOH into believing that Fuchs was paying part of the buyout price, apparently HRB believing that that would make it easier to get BOH to agree due to what it believed were somewhat bad feelings that had developed between BOH and Fuchs over his opposition to summary judgment.

KKD and Fuchs finally lost confidence in HRB and Colon and hired on their own and at their own expense a retired highly respected former Hawaii banking executive, Howard Hamamoto, to contact the representatives of BOH, CPB, and FF to negotiate a reduced acquisition price to be paid by HRB, which included a full release of KKD and Fuchs as to all loan obligations, including Fuchs' guaranties which as HRB knew and agreed was the only reason the Acquisition Agreement was entered into in the first place, who successfully negotiated a $17,500,000 buyout price with BOH with a full release of Fuchs' guaranties.

As a direct result of Hamamoto's efforts, on October 22, 2010 Ralph Mesick, then Executive Vice President of BOH, with whom KKD, Fuchs, HRB, the Bays Law Firm, Colon, and Hamamoto had principally been dealing, now more recently having left BOH for a similar position at First Hawaiian Bank, delivered to HRB and Colon a buyout counteroffer of $17,500,000, with a letter of transmittal, conditioned on an attached Mortgage Loan Purchase and Sale Agreement (Loan PSA) being signed by everyone ("HRB, KKD and Fuchs on or before 5:00 p.m. H.S.T. on October 25, 2010" (Exh. 15, RP (9) 477-507).

KKD and Fuchs had entered into the Acquisition Agreement induced by the promises of HRB set forth therein to buy out the Consortium's position with its own monies in exchange for HRB cancelling KKD's promissory notes and releasing Fuchs' guaranties, but after receiving from BOH the $17,500,000 buyout price, HRB refused, demanding that KKD and Fuchs' come up with the extra $1,500,000 plus "new added expenses."

Under obvious duress, KKD and Fuchs agreed, both required by HRB to sign a First Amendment to Acquisition Agreement, effective November 1, 2010 (Exh. 16, RP (9) 819-824), agreeing to add $1,500,000 to HRB's $16,000,000 at closing. Once again, the

required signatures on the First Amendment to Acquisition Agreement were KKD, HRB, *and Fuchs*, reaffirming therein what no one disputed that all three were principal parties to the Acquisition Agreement as well as the First Amendment thereto ("A. Owner, HRB and Guarantor entered into that certain Acquisition Agreement effective July 9, 2010" based upon "their mutual promises"), all three again signing the First Amendment, reaffirming what no one disputed, that all three were also parties to the Loan PSA (its Paragraph 13):

> 13. Agreement/Loan PSA Intention. HRB, Owner and Guarantor acknowledge and agree that their mutual intent, *in executing this amendment and the Loan PSA*, is that "Closing" as defined under both agreements encompasses both the acquisition by HRB of the Existing Lender's Interests and the immediate conveyance thereafter of the Property by Owner to HRB in a transaction akin to a conveyance in lieu of foreclosure, all as set forth in these agreements and subject to all conditions precedent thereto. (Emphasis added.)

The First Amendment to Acquisition Agreement recognized that both closings, separated only for HRB's strategic reasons to deceive BOH, had to close together or neither would close – about as joined together as two parts of the same transaction could possibly ever be. The joint closings were then extended to November 30, 2010. The First Amendment to Acquisition Agreement contained the following new term:

> 10. Owner/Guarantor Deposit. On or before 5:00 p.m., Hawaii Standard Time, on the third (3rd) day after the Amendment Effective Date, and as a condition of payment by HRB to Escrow Agent of the Loan PSA "Deposit", Owner shall deposit with Escrow Agent ("Owner/Guarantor Deposit"), by letter of credit, wire transfer or certified check **or other form of immediately available funds**, the amount of ONE MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS AND NO/100 DOLLARS ($1,650,000.00). (Emphasis added.)

Immediately after the signing of the First Amendment to Acquisition Agreement, the Loan PSA was signed on or about November 9, 2010 by BOH, CPB, FF, HRB, KKD, and Fuchs (Exh. 17, 1577), the document itself clearly recognizing KKD and Fuchs to be indispensable participants exchanging consideration in the Loan PSA:

> SECTION 22. Consent of Borrower and Guarantor. As evidenced by their signatures below, the Borrower and the Guarantor hereby assent to the execution, delivery and performance of this Agreement by Seller and Purchaser and to the closing of the transactions contemplated hereby. * * * *

Moreover, "Exhibit C" to the executed Loan PSA, entitled "Mutual Release Agreement," was a required document that specifically had to be signed before the Loan PSA would be effective, wherein KKD and Fuchs were listed as the "Borrower Parties" from start to finish ("This Mutual Agreement . . . entered into by and among: BANK OF HAWAII . . . , CENTRAL PACIFIC BANK . . . , FINANCE FACTORS . . . , KE KAILANI DEVELOPMENT . . . , MICHAEL J. FUCHS . . . AND HAWAII RENAISSANCE BUILDERS"), setting forth their promises and required performances throughout, with their signatures required within signature blocks specifically provided on the "signature page."

In furtherance of that part of the deal pertaining to the Fuchs' guaranties, it was specifically acknowledged by all parties to the Loan PSA that as a part of the bargained for contractual performance, the Fuchs guaranties were to be "released and cancelled":

> SECTION 2 (c) Guaranties Excluded. The Loans and the Loan Documents shall not include any right, title or interest of Seller under those certain guaranties (the "Guaranties") executed in favor of Seller in connection with the Loans by Michael J. Fuchs (the "Guarantor"), dated July 6, 2005, and July 31, 2006, respectively, which Guaranties shall be released and cancelled upon the Closing by way of the Mutual Release Agreement in the form of Exhibit C attached hereto and made a part hereof.

Escrows for both the Acquisition Agreement escrow and the Loan PSA escrow accordingly were opened at the same time for a joint closing at Title Guaranty (TG).

And while Fuchs was making his promised cash deposit into a New York escrow company with irrevocable instructions to transfer funds to TG upon closing, the Bays Law Firm representing HRB refused the tender, instead insisting on a cash deposit in Honolulu.

The result was an exchange of emails and faxes from November 11, 2010 to November 18, 2010 between Fuchs' counsel, Gary Dubin, who was mostly traveling in Japan at the time, and HRB's counsel from the Bays Law Firm, Ed Case, who could not be convinced to allow Fuchs to perform by making an irrevocable cash deposit with a licensed New York escrow as "another form of immediately available funds," which understandably caused Fuchs to believe that HRB was looking for a way to back out of the agreed joint transaction and joint closing (Exhs. 18-24, RP (9) 1198, *et seq.*, 1262-1297).

Fuchs had another reason for concern. Fuchs knew that BOH was receiving other inquiries from third parties also been contacting him, proposing to buy the two loans from

BOH for more than $17,000,000, and BOH could have easily backed out of the Fuchs, deal, having placed in its Loan PSA (Exh. 17, 1577) an inexpensive exit clause:

> SECTION 8 (b): Purchaser's Remedies. If Seller fails or refuses to consummate the purchase of the Loans . . . on the Closing Date . . . then Purchaser shall have the right, as its sole and exclusive remedy . . . for liquidated damages in the amount of $100,000 . . . for the harm . . . caused by Seller's breach.

Vividly remembering how BOH without notice to him had already earlier seized his $3,000,000 letter of credit, *supra*, upon originally merely abruptly and gingerly declaring an "event of default" while he was in the middle of workout discussions with its representatives, Fuchs was understandably not about precipitously to place $1,650,000 in cash exposed in a Honolulu escrow, especially since BOH already had a recorded $26,114,861 foreclosure summary judgment against KKD as borrower and Fuchs as guarantor (Exhs. 7-8).

However, while Fuchs and Colon were discussing a resolution of the deposit impasse, Case on behalf of HRB on November 24, 2010, six days before the scheduled joint closings, suddenly without prior notice or any demand for assurance of performance notified Dubin on behalf of KKD and Fuchs that HRB was unilaterally terminating the Acquisition Agreement and Loan PSA, seeking to cancel the Acquisition Agreement and to have escrow release its escrow deposit (Exh. 25, RP (9) 1346-1350).

In Case's cancellation letter, second paragraph, page 2, once again he recognized the obvious, that the Acquisition Agreement and the First Amendment thereto and the Loan PSA were all inseparably interconnected, by their interlocking terms and intentions:

> The First Amendment was also executed in connection with HRB's execution of the Loan PSA, under which HRB undertook to purchase the referenced Loans for $17.5 million in reliance on KKD/Fuchs' commitment, set forth in the First Amendment, to pay $1.5 million of that amount.

Six days later, Case abruptly notified KKD and Fuchs through Dubin by letter dated November 30, 2010 that "effective today" the Consortium had assigned the KKD promissory notes and mortgages and the Fuchs' Guaranties to HRB by way of an "Omnibus Assignment and Assumption of Loan Documents" (Exh. 26, RP (9) 1401-1411), the exact date that instead the two earlier opened escrows, *supra*, were supposed to have closed.

HRB had therefore managed behind KKD's and Fuchs' backs to buy out the Consortium, which it had promised to do, yet negotiated for and secured a transfer of the

two Fuchs guaranties for itself which it promised to release, and simultaneously recorded implementing assignments (Exh. 27-28, RP (9) 1413-1415).

Thereafter, Case on December 1, 2010 requested escrow cancel the Acquisition Agreement escrow and return HRB's $150,000 deposit (Exh. 29, 1577); TG responded, requesting the principals of KKD (Beaton) and HRB (Colon) sign its standard escrow cancellation form (Exh. 30, 1577), which Colon signed for HRB on December 7, 2010 and Fuchs for KKD on December 10, 2010 (Exh. 31, RP (9) 561).

Fuchs had signed the escrow cancellation form for KKD, because HRB, anticipating a lawsuit, following further negotiations between Colon and Fuchs, Case and Dubin, initiated by Colon and Case almost immediately, had decided to offer to reinstate the original deal if Fuchs would cancel the prior escrow and deposit $1,550,000 into a new TG escrow.

HRB presented KKD and Fuchs on December 3, 2010 with a new Acquisition Agreement (Exh. 32, 1577), for instance, already dated December 1, 2010, whereby on December 10, 2010, Fuchs believing HRB was attempting to mitigate its liability and he and KKD would have the same deal that had been promised them originally by HRB and the Consortium, and in reliance thereon, Fuchs wired $1,550,000 to Dubin's client's trust account and sent KKD's signed escrow cancellation form to TG as partial consideration for the new Acquisition Agreement so that a new escrow at TG could be opened.

However, negotiations conducted thereafter through December 17, 2010 terminated when KKD and Fuchs concluded the new Acquisition Agreement was merely a bad faith effort on the part of HRB to deflect its obvious breach of contract and would never close.

KKD and Fuchs came to that conclusion because (1) Van Buren, the Foreclosure Commissioner, suddenly announced on December 2, 2010 he was holding a foreclosure auction sale on January 6, 2011, and began advertising (Exh. 33, 1577), (2) the Consortium on December 6, 2010 meanwhile filed a nonhearing motion (Exh. 34, RP (7) 942-1077) to substitute as the foreclosing Plaintiff Ke Kailani Partners (KKP), a Hunt wholly owned company of HRB formed as early as October 27, 2010, and (3) the new Acquisition Agreement contained performance terms that likely could not be timely met.

It further seemed too coincidental just as the December 30, 2010 closing date approached for executing the new Acquisition Agreement, Judge Ayabe both denied

reconsideration of his foreclosure decree (Exh. 35, RP (8) 270-277), and granted the Consortium's nonhearing motion to substitute KKP as Plaintiff (Exh. 36, RP (8) 266-269).

KKD and Fuchs immediately appealed (Exh. 37, RP (8) 13-138, CADS 139-144), and KKD filed Chapter 11 on January 5, 2011 (Exh. 38, RP (8) 310-321) to seek to protect its property and to forestall the January 6, 2011 auction sale (Exh. 39, RP (8) 433-469).

In order to remain in Chapter 11 while hunting for purchasers, KKD was forced to stipulate to pay KKP several hundred thousand dollars (Exh. 40, RP (8) 327-373) and to dismiss its foreclosure appeal (Exhs. 41-42, RP (8) 382-392, 325-326), but unable to prepare a viable Chapter 11 Plan, KKD voluntarily stipulated to dismissing its Chapter 11 on May 12, 2011 (Exh. 43, RP (8) 402-404, 406-408), and KKP and Fuchs found themselves back in Judge Ayabe's Foreclosure Court, this time with KKP as foreclosing mortgagee.

The auction was held on June 21, 2011 (Exh. 44, RP (8) 433-469), with no bidders other than KKP, whose maximum credit bid was advertised as exceeding $26,000,000.

KKP's $10,000,000 bid was declared the winning bid by Van Buren, to await confirmation at an August 4, 2011 hearing, whose corporate twin, HRB, had purchased the loans from the Consortium less than 10 months earlier for nearly twice that amount.

KKD and Fuchs found out only on September 20, 2011, however, what a year earlier had actually happened, when KKP's attorney, Sharon Lovejoy, accidentally emailed Dubin, who had been requesting more information, a PDF copy of a November 22, 2010 "Termination and Indemnity Agreement" ("Indemnity") between the Consortium and HRB and a copy of a companion November 23, 2010 "Mortgage Loan Purchase Agreement" ("new Loan PSA") executed by the Consortium and HRB (Exh. 45, RP (9) 1352-1399).

It was only then that the truth was revealed that on November 22, 2010, HRB secretly had terminated its Loan PSA with the Consortium, which had included a release of KKD and Fuchs, by misrepresenting to the Consortium that KKD and Fuchs had refused to close:

> RECITALS:
>
> B. Purchaser has stated that it is unable to fulfill the terms of the Original MLPSA due to certain actions and conduct of Ke Kailani Development LLC and Michael J. Fuchs (collectively, the "Borrowers") and is thus apparently unable to perform thereunder, as a consequence of which Seller has terminated the Original MLPSA.

> C. Purchaser has acknowledged such termination and requested that Seller and Purchaser enter into a new Mortgage Loan Purchase and Sale Agreement (the "New MLPSA").
> 3. Effective as of the termination date [November 22, 2011], Purchaser hereby stipulates and agrees . . . to indemnify . . . against all loss or liability from any and all claims . . . by Borrowers . . . .

On November 23, 2010 HRB proceeded to sign a new PSA with the Consortium which provided no release of KKD and Fuchs, thereby aborting HRB's performance of its promised contractual obligations to KKD and to Fuchs under their Acquisition Agreement which at the time was still active, no notice of anticipatory breach having been delivered to KKD and Fuchs, requesting assurances of their performance as required by contract law.

HRB meanwhile waited until the next day, November 24, 2010, *supra*, to announce after the fact its unilateral cancellation of its Acquisition Agreement with KKD and Fuchs, even though KKD and Fuchs still had until November 30, 2010 to close.

Without knowing what had really occurred on November 22, 2010, or more accurately what had really occurred before November 22, 2010 as presumably it must have taken considerable time for HRB and the Consortium to come to agreement aborting the joint closing and papering their new deal, KKD and Fuchs, with the hearing confirming sale set for August 4, 2011 and with pleadings closed in the foreclosure action, on July 27, 2011 filed a new, related Complaint in Civil No. 11-1-1577-07 (Exh. 46, RP (9) 1057-1091) against KKP, HRB, the Consortium, and the Commissioner, seeking specific performance, injunctive relief and damages, which new lawsuit was similarly assigned to Judge Ayabe.

KKD and Fuchs sought to consolidate the two actions, take discovery, deny KKP the right to continue the foreclosure action, and delay confirmation. Instead, Judge Ayabe granted confirmation over their objection, reserving the determination of the amount of the deficiency judgment (Exhs. 47-48, RP (10) 579-600, 31-160), entered judgment confirming sale and issued a writ of possession (Exhs. 49-50, RP (10) 161-168, 169-295), and denied consolidation (Exhs. 52-53, RP (9) 727-741, (14) 325-329), ignoring the new case entirely.

Judge Ayabe then denied discovery in the new action, and after an October 5, 2011 hearing (Exh. 51, RP (13) 516-569,(14) 106, *et seq.*), dismissed that Complaint, finding despite the above (1) that the escrow cancellation form signed by KKD released all claims against the Defendants and (2) that Fuchs was not a party to the Acquisition Agreement

with HRB, and (3) that KKD and Fuchs were not even parties to the first Loan PSA with the Consortium, lacking standing to claim breach of contract (Exh. 58, 1577).

Before a dismissal order was entered by Judge Ayabe on December 19, 2011, however, KKD and Fuchs had filed a First Amended Complaint in Civil No. 11-1-1577-07 on November 4, 2011 (see Exh. 61, RP (10) 681-809) based upon their learning of HRB's cover-up of its early misrepresentations to the Consortium that allowed HRB to run away with the loan without releasing the Fuchs' guaranties, although they had an uncontested right to amend their pleading (Exh. 54, Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969)).

Yet Judge Ayabe went ahead nevertheless on December 19, 2011 (Exh. 58, 1577) and dismissed the new lawsuit (Exh. 59, 1577), denying reconsideration on January 5, 2012 (Exh. 60, 1577), and when his many substantive and procedural errors were called to his attention, he nevertheless ignored even clearly established Hawaii Supreme Court binding precedent to the contrary allowing amendments to complaints prior to the entry of a written dismissal order (*ibid.*).

Filing a Verified First Amended Complaint (Exhs. 61-62, RP (12) 37-161), nevertheless, KKP and Fuchs eliminated the Consortium as Defendants based upon learning the banks had been tricked by HRB, and instead sued KKP, HRB, and Bays variously for Breach of Contract, Business Compulsion, Tortious Interference, Wrongful Contract Repudiation, Breach of Services Contract, Fraud, Deceit, Misrepresentation, Legal Malpractice, Indemnification, Specific Performance, Reformation of Contacts, Rescission of Escrow Cancellation, and Rescission of Sale Agreements.

KKD and Fuchs on November 25, 2011 then proceeded to file timely motions to disqualify Judge Ayabe in both cases (Exhs. 55-56, RP (12) 11, et seq., 1577) before he had ruled on their motion for reconsideration of confirmation of sale in Civil No. 09-1-2523-10, before he had entered his written Order dismissing their First Amended Complaint in Civil No. 11-1-1577-97 (Exh. 58, 1577), and before he had determined the amount of any deficiency, based on the following facts that they learned:

1. Gail Ayabe, Judge Ayabe's Wife, had been affiliated with the Mauna Lani Resort Development as its attorney, although three of the Mauna Lani Associations were named Defendants below, opposing KKD and Fuchs in virtually every motion, yet that family affiliation had not been disclosed at any time during of the foreclosure case or that his Wife

gave legal advice to some of those Defendants, a relationship freely admitted by the Mauna Lani Resort Association (Exh. 57, RP (14) 334-338).

2. Two partners in the Defendant Bays Law Firm alleged in said First Amended Complaint to have ethically defrauded KKD and Fuchs were Case and Crystal Rose, both of whom undisclosed were good friends of Judge Ayabe, contemporaries of his at the Hastings Law School, including Harvey Lung and particularly Crystal Rose, who were believed to have been in the same study group with Judge Ayabe as law students together.

3. When Case, running for political office, ran into well-publicized difficulties with the Hawaii Democratic Party, it was discovered that Judge Ayabe was asked by Crystal Rose to intercede on Case's behalf and that Judge Ayabe did make that attempt to personally assist Case in his political campaign, and also gave campaign contributions to Case, undisclosed.

Were Judge Ayabe, for instance, to continue to preside in both cases, he would be making decisions that not only would have potentially inflicted a $21,000,000 or more deficiency judgment by indemnification/contribution on his good friends in the Bays Law Firm, but he would be tasked with making credibility assessments concerning his good friends also as material witnesses in both cases – thus creating an unavoidable personal conflict of interest and an enormous objective appearance of impropriety.

A joint hearing in both cases was held before Judge Ayabe on December 20, 2011 to consider both disqualification motions and also KKP's and HRB's motion to dismiss the First Amended Complaint in Civil No. 11-1-1577-1-07 (Exh. 63, RP (16) 205-258).

Judge Ayabe denied he was ever in a study group with Bay's members or that he ever tried to assist Case personally with a political matter, but did acknowledge that he had "supported Ed Case in the past and we went to a fund-raiser once" (Exh. 63, RP (16) 205-258, p. 10) making a political contribution to Case's campaign which is a matter of government campaign contribution public records ("Regarding Ed Case, he is a classmate and I have supported him in the past in his political campaign" – *id.* at p. 23), and did not comment on his Wife's role, while proceeding to dismiss the First Amended Complaint.

Judge Ayabe entered identical Orders in both cases denying disqualification (Exh. 64 for the Order in Civil No. 11-1-1577-07; RP (14) 362-365), denying post-judgment relief in Civil No. 09-1-2523-10 (Exh. 60, RP (14) 344-350), denying reconsideration of the dismissal of the Complaint in Civil No. 11-1-1577-07 (Exh. 65, 1577), as a result of which KKD and

Fuchs appealed on February 3, 2012 (Exh. 66, RP (14) 366, *et seq.*) filing a Civil Appeal Docketing Statement on March 2, 2012 (Exh. 67, Appellate Docket), also in Civil No. 11-1-1577-07 (Exhs. 68-69, Appellate Docket CAAP-12-0000153).

On April 23, 2012, again without allowing KKD and Fuchs to conduct discovery, Judge Ayabe had dismissed the First Amended Complaint as to KKP and HRB on the same grounds as he had dismissed the original complaint (Exh. 70, 1577) and entered judgment (Exh. 71, 1577), notwithstanding numerous additional Counts alleged therein, for instance, for rescission and for fraud that were fact-intensive.

Also on April 23, 2012 Judge Ayabe granted KKP's motion for a deficiency judgment against KKP and Fuchs jointly and severally in the amount of $21,594,668.55 (Exh. 72, RP (15) 275-280) and entered judgment the same day (Exh. 73, RP (15) 281-286).

Bays had also filed a motion to dismiss the claims against it on December 12, 2011 in Civil No. 11-1-1577-07, which had been denied by Minute Order on January 24, 2012, Judge Ayabe seemingly apologetically suggesting therein it might instead file a motion for summary judgment (Exh. 82), which it then proceeded to do on March 9, 2012, giving KKD and Fuchs their first chance to take discovery in either case, and Ed Case's deposition was taken on March 7, 2012 (Exh. 74, RP (15) 451 & (16) 386, *et seq.*), in which he contradicted virtually all of Judge Ayabe's prior rulings in both cases, admitting:

1. BOH required KKD and Fuchs sign the Loan PSA or it would not have closed the buyout transaction and HRB would not have been able without their agreement to purchase the notes and mortgages. In that way the two agreements were clearly directly linked (*id.*, Deposition transcript pages 30-32), a pivotal material fact tying the agreements together;

2. the date for the joint closings was extended to November 30, 2010 (*id.*, p. 34);

3. a cashier's check, Case admitted, would take a day or two to clear and thus a money wire from a back-to-back New York-to-Honolulu escrow would actually have been a faster means of payment than a cashier's check that was stated in the First Amendment to the Acquisition Agreement to be a permitted alternative method of payment (*id.*, pp. 40-42);

4. at least eight days before the closing scheduled for November 30, 2010 and before KKD and Fuchs could perform, Case behind their back intentionally participated with his clients going to BOH and telling BOH that HRB could not close with the Consortium and instead negotiated and had HRB enter into a new buyout agreement with the Consortium,

but this time the new Loan PSA that Case negotiated provided not for the cancellation of the Fuchs' guaranties, but for their assignment to HRB (*id.*, pp. 50-53);

5. Case did all of this according to his own sworn testimony, supposedly assuming that KKD and Mr. Fuchs would not close on November 30, 2010, based solely upon the alleged, disputed content of a single conversation that Colon, the principal of HRB, purported to have had with Fuchs, yet Case never sent KKD or Fuchs a notice of anticipatory repudiation, giving them the requisite opportunity to acknowledge that they would perform as required by the law of anticipatory breach (*id.*, pp. 53-54);

6. Case further acknowledged he had planned back-to-back Honolulu escrows for the buyout and purchase transactions, but was unable to explain how a back-to-back escrow was acceptable for those transactions and not a back-to-back escrow for the $1,500,000 payment between the purchase escrow and an irrevocable New York escrow proposed by Fuchs intending to wire money to Honolulu that would have beaten any cashier's check clearance by at least one day even though payment by cashier's check was deemed acceptable in the written agreement between KKD and Fuchs and HRB (*id.*, p. 57);

7. Case never told KKD or Fuchs of the agreements that were signed by HRB and the Consortium at least eight days before the scheduled November 30, 2010 joint closing date; they only learned many months later those interfering documents had been signed at least eight days before the scheduled November 30, 2010 joint closing date (*id.*, pp. 58-60);

8. Case, who had earlier represented KKD and Fuchs, interpreted the "conflict waiver" he drafted, *supra*, to allow his law firm to do whatever his law firm wanted to do for HRB, which Hunt company his law firm had introduced to Fuchs to ironically help him avoid the guaranties, Case admitting nowhere in the "conflict waiver" did it say that (*id.*, pp. 63);

9. Case further admitted that the Acquisition Agreement he drafted was inextricably linked to the original Loan PSA between HRB and the Consortium, which KKD and Fuchs were also required by HRB and the Consortium to sign; one could not close without the other, each being conditioned on the simultaneous closing of the other (*id.*, pp. 67-69);

10. BOH required an indemnification agreement so it would not be sued for closing with HRB in violation of the promises the Consortium expressly made in writing to KKD and Fuchs and for its assigning Fuchs' guaranties to HRB, again contrary to the Consortium's written agreement to release and not assign the two guaranties upon closing (*id.*, p. 75);

11. Case admitted that had he and HRB instead accepted Fuchs' offer of a back-to-back irrevocable New York-to-Honolulu escrow for the $1,500,000 payment, the transactions scheduled for joint closing on November 30, 2010 would have been concluded and there would not now be an escalating $21,600,000 deficiency judgment (*id.*, pp. 80, 82);

12. HRB had completed its due diligence and was contractually required to close on November 30, 2010, but for the contrary agreements it signed with BOH, derailing the prior agreements between the parties without knowledge by KKD or Fuchs (*id.*, pp. 87-88, 90).

It is not the practice of Hawaii lawyers to investigate the stock holdings of our Judges. Dubin preferred to resolve the matter informally after receiving additional information from Internet media monitoring the cases, that Judge Ayabe during both cases had held and continued to hold stock in BOH, the lead bank in the Consortium, causing Dubin on May 11, 2012 immediately to write Judge Ayabe, *inter alia*, as follows (Exh. 75, RP (16) 94-103):

> Late yesterday afternoon I was more than surprised for the first time to learn, upon receiving a copy of your April 25, 2011 Supreme Court of Hawaii Certified Financial Disclosure Statement, a copy of which is enclosed with this letter, that Your Honor has presided over the above two lawsuits at the same time that you have owned between $25,000 and $50,000 worth of stock in the Bank of Hawaii, which has not only been a principal party to both actions, but its officers material witnesses to this day in both cases. * * * *
>
> As a result of the above new circumstances, and given the prior disqualification history of these two cases questioning unsuccessfully your campaign contribution to Mr. Ed Case and your familiarity with Members of the Bays Law Firm, I am requesting on behalf of my clients that Your Honor immediately *sua sponte* set aside all of your prior orders and judgments in both cases, that you recuse yourself, and that these two cases be referred to the Chief Judge of this Circuit, the Honorable Derrick H. M Chan, for his reassignment to another First Circuit Court Judge. (Bracketed material added)

Judge Ayabe responded on May 14, 2012, asking counsel to attend a conference on May 17, 2012 (Exh. 77, RP (16) 105); meanwhile, Dubin consulted with a banking expert, who concluded the outcome of the foreclosure case could have had a significant impact on BOH stock, impacting the value of its shares (Exh. 78, RP (16) 122-187).

At the May 17, 2012 conference (Exh. 79, RP (16) 107-112), Judge Ayabe said he considered the allegations "serious" (*id.*, Transcript of Proceedings, page 3), but explained

the stock had been in a custodial account since 1995, purchased for $10,102.67, believed now to be 600 shares worth $29,334, with his Wife now the account fiduciary (*ibid.*).

Nevertheless, Judge Ayabe refused to answer any questions (*id.*, p. 5) or to disqualify himself (*id.*, p. 5), making the following statements, then abruptly departing:

1. Judge Ayabe acknowledged that in the federal judicial system "if a judge owns just one share of stock" a judge would be disqualified, but said that the ethical rule in Hawaii is different: (a) "the federal statute does not apply to a situation where the stock belongs to a judge's adult child," and (b) Hawaii instead has "adopted a *de minimis* standard" (*id.*, p. 4);

2. Judge Ayabe appeared to be relying upon the ethical advice of and clearance by the Hawaii Commission on Judicial Conduct, explaining that he "had already reported this matter to the Commission on Judicial Conduct" (*id.*, p. 4);

3. Judge Ayabe concluded that 600 shares of BOH stock "is a *de minimis* amount and does not unreasonably impair this Court's ability to remain impartial," and "believes it has been fair and impartial throughout this case and feels that it can remain to do so throughout the remainder of this case (*id.*, pp. 4-5);

4. Judge Ayabe applied a self-serving subjective test for appearances of impropriety, concluding he could decide fairly despite family ownership of BOH stock (*id.*, pp. 4-5).

Judge Ayabe's statements above gave the appearance that he had been misinformed by the wrong advice given to him by the Hawaii Commission on Judicial Conduct: (1) since federal law does not exempt the stock holdings of a judge's immediate family members or their fiduciary holdings, (2) since States that have adopted the same Model Code of Judicial Conduct as Hawaii have nevertheless held that the *de minimis* language found in Rule 2.11 is trumped by the appearance of impropriety standard under which it is subsumed as but one example, and (3) since the test is not subjective, whether a judge himself or herself believes that he can be impartial, but is controlled instead by the objective state of mind of a reasonable person appearing before him.

As a result, Dubin wrote the Commission on May 18, 2012 (Exh. 80, RP (16) 114-120), questioning its apparent erroneous advice to Judge Ayabe as not only unfair to his clients, but to Judge Ayabe, opposing parties, and the BOH as well.

By letter dated May 25, 2012, the Commission responded, backing away, stating only that the "function of the Commission is to assist judges with advisory opinions and to afford

judges an opportunity to discuss issues related to judicial conduct for guidance," pursuant to Supreme Court Rule 8.15 ("Advisory Opinions") (Exh. 81, RP (16) 189-190).

In effect, such *ex parte* communications with the Commission forming the basis of Judge Ayabe's decision, on the other hand, squarely would violate Rule 2.9(a) of the Hawaii Revised Code of Judicial Conduct, further aggravating the ethical problems in both cases, Rule 2.9(a) requiring to the contrary that "a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter" (no listed exceptions applicable here as there was no disclosure of the content of the communications from the Commission whatsoever by Judge Ayabe or the Commission).

Fuchs is a resident New York, who was already arguably double-crossed by his own former Hawaii law firm. Fuchs then learned that Judge Ayabe admitted that he went to law school with members of that law firm who he considers his good friends. Fuchs meanwhile was suing those good friends of Judge Ayabe for upwards of $21,600,000 for fraud and for indemnification and who are material witnesses in the cases before Judge Ayabe. Fuchs then learned that Judge Ayabe's Wife has been doing legal work for three of this adversary parties in the foreclosure case. Fuchs then learned that Judge Ayabe's family, while he was presiding over the foreclosure action against him and his action against BOH, had an *undisclosed* 600-share stock ownership in BOH despite the fact that he is *the* First Circuit Court Foreclosure Judge presiding over foreclosure cases, including others brought by BOH against other borrowers continuing to this day.

As a result, based upon a plethora of appearances of improprieties (Exh. 83), on June 12, 2012 KKD and Fuchs timely filed formal motions again in both cases to disqualify Judge Ayabe (Exhs. 85, 86, RP (16) 15, *et seq.*, 1577); both motions were perfunctorily heard on July 3, 2012; both motions were summarily denied at the hearing; and written orders were entered denying both motions on July 30, 2012 without further explanation (Exh. 87, 88, RP (16) 747-750, 1577).

Thereafter, Judge Ayabe on August 9, 2012 abruptly entered a Minute Order (Exh. 84) in Civil No. 09-1-2523-10 reducing the amount of the deficiency judgment a pitiful $16,601.60, and very uncustomarily filed the Minute Order, contrary to State v. English, 68 Haw. 46, 705 P.2d 12 (1985), without waiting for a written order (Exh. 89, RP (16) 751-756).

On August 21, 2012 Judge Ayabe entered an Order in Civil No. 11-1-1577-07 denying KKD and Fuchs' motion for reconsideration of his dismissal of HRB and KKP from that case (Exh. 90, 1577), notwithstanding the admissions contained in the deposition of Case, and simultaneously transferred that case only for reassignment to another judge (Exh. 94, 1577), which on August 23, 2012 was transferred by the Chief Judge of the First Circuit Court to the Honorable Gary W.B. Chang.

On August 31, 2012 KKD and Fuchs simultaneously filed Notices of Appeal in both cases (Exhs. 91, 92, RP (16) 757, *et seq.*, 1577), the Hawaii Intermediate Court of Appeals later on October 5, 2012, consolidating the two appeals arising from Civil No. 09-1-2523-10, but dismissing the two appeals in Civil No. 11-1-1577-07 as premature due to KKP's attorneys having failed to draft the appealed judgments properly with required finality language (Exh. 93, CAAP-12-0000153).

Judge Chang held a status conference on September 13, 2012 and heard arguments on the one remaining motion in Civil No. 11-1-1577-07 from the one remaining adverse party, the Bays Law Firm, its motion for summary judgment pending since March 9, 2012, and became the only Judge other than Judge Ayabe to view the above facts, and continued the summary judgment hearing, giving KKD and Fuchs their first opportunity after more than three years of protracted litigation before Judge Ayabe to finally be able to take the depositions of Colon and Mesick, HRB's and BOH's principal representatives respectively, they had noticed for years only to be blocked by motions to dismiss and protective orders.

Four oral depositions were taken, the official transcripts of which have been filed in Civil No. 11-1-1577-10 of which this Court may take judicial notice in the interests of justice: the deposition of TG's escrow officer Barbara Paulo, the deposition of TG's custodian of records, Leta H. Price, the deposition of Colon, and the deposition of Mesick -- the latter two a treasure trove of admissions against interest, despite constant improper interruptions and leading speeches by opposing counsel ( ).

Collectively they affirm the obvious based on the documents already adduced alone, *supra*, what KKD and Fuchs had been arguing for years before Judge Ayabe and what Case testified to in his deposition, (1) that the two transactions between KKD/Fuchs and HRB *and* between HRB and the Consortium were one inseparable transaction, (2) that KKD and Fuchs were parties to both contracts, (3) that a cash deposit with an irrevocable

instruction to a licensed New York escrow was full performance by KKD and Fuchs pursuant to the First Amendment to the Acquisition Agreement, (4) that HRB wrongfully aborted the joint closings by secretly misrepresenting to the Consortium the true intentions of KKD and Fuchs, (5) that the two actions should have been consolidated involving common issues of law and fact, (6) that the escrow release form signed by KKD and HRB was merely a TG boilerplate form and not negotiated by the parties, sign only in anticipation of settlement, (7) and that the deficiency judgment awarded KKP was not only entirely contrary to the contractual agreements aforesaid, but HRB had valued the property to be worth at least $16,000,000, yet KKP, its corporate twin, rigged the auction sale with a very low credit bid.

First, KKD and Fuchs secured additional evidence from Paulo (Exh. 95, 1577) (1) that a cashiers' check, a form of "immediately available funds" that was approved for KKD and Fuchs' payment into escrow, takes longer to accept as clear funds, sometimes as long as ten days especially from a Mainland bank ("Q: Is there any way to speed it up. A: No."), than a wire from a Mainland back-to-back escrow holding cash in hand with irrevocable wiring instructions customarily done through escrows (*id.*, pp. 9-10), and (2) that the escrow cancellation form KKD and HRB signed was a standard TG boilerplate form initiated by Paulo containing release language not requested by the parties (*id.*, pp. 14-17).

Second, KKD and Fuchs secured additional evidence from Price (Exh. 96, 1577) (1) that in an email to Paulo from Case sent on November 10, 2010, Case affirms in admissions against interest that the joint closing date was "November 30, 2012," that "the intent" of the parties "is a back-to-back under which HRB acquires the loan and property and releases the mortgage and security interests (and foreclosure-related liens if possible) all together," and that HRB considers "the value of the property conveyed is the $16M" (*id.*, first attachment), (2) that in an email from Case to Fuchs/Dubin sent on November 9, 2012, Case affirms in admissions against interest that the "property purchase escrow" was between "HRB, KKD and Fuchs" who together "will close the property escrow," and that the Acquisition Agreement was between "HRB, KKD and Fuchs" (*id.*, second attachment), and (3) that the balance of the Case-Paulo emails similarly refer throughout to Fuchs being acknowledged by Case as a party to the Acquisition Agreement, to its First Amendment, and to the property escrow as far as HRB was concerned (*id, et seq.*).

Third, KKD and Fuchs secured additional evidence in admissions against interest from Colon despite his being highly evasive with an incredulous constant bobbing and weaving "I don't recall" non-memory (Exh. 97, 1577) (1) that HRB's boss Chris Hunt ("one of the Hunt family members – nephew of the chairman") set the value of the property at no more than $16,000,000 as "that was as far as my boss was willing to go" (*id.*, pp. 18-20), (2) that Case drafted the deposit instructions in the First Amendment to the Acquisition Agreement and that HRB's boss Chris Hunt probably was the one who decided not to accept an irrevocable commitment from a licensed New York escrow holding cash and not to go through with the deal, Colon unable to explain, hemming and hawing, the difference between doing so, admitting that such a wire could take as little as 15 minutes, and a letter of credit which was also a permitted means of deposit much slower (*id.*, pp. 53, 72, 25-26, 55, generally 39-75), (3) that Fuchs was not a party to the purchase escrow and therefore not a party to the escrow cancellation form (*id.*, pp. 75-76), (4) Chris Hunt was the one who gave Colon instructions to "include the guarantees" (*id.*, pp. 84-85), and (5) Fuchs told Colon that "he was going to come back with proposed new terms and conditions under which he might proceed," but Chris Hunt made the decision not to wait (*id.*, pp. 88-92, 96).

Fourth, KKD and Fuchs secured additional evidence in admissions against HRB's interest from Mesick (Exh. 98, 1577) (1) BOH viewed $17,500,000 as an acceptable price for HRB buying out the notes and mortgages based not only on the market value of the property *but also* upon being able to terminate KKD and Fuchs' claims against BOH, which is why as necessary consideration BOH wanted, required and secured their consent and their agreement to the original Loan PSA, including their promise to sign a mutual release ("otherwise less attractive to the bank"), which consideration HRB replaced with an indemnity (*id.*, pp. 26, 15-25 generally), (2) Mesick made no effort to contact Fuchs to verify the truth of Colon's call to him that Fuchs was refusing to close, although "everyone was disappointed" (*id.*, pp. 29, 38, 40), (3) Mesick was led to believe that HRB had not deposited its $1,000,000 in escrow within three days because Fuchs defaulted in payment to HRB, another misrepresentation by HRB (*id.*, p. 51), and (4) Mesick admitted that indemnification was required because the guaranties were to be transferred (*id.*, p. 60).

Nevertheless, Judge Chang entered final judgment, denying reconsideration,