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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
KONA DIVISION, STATE OF HAWAII

JASON HESTER, an individual, his successors and assigns, Plaintiff, v. LEONARD G. HOROWITZ, an individual; SHERRI KANE, an individual; MEDICAL VERITAS INTERNATIONAL, INC., a California nonprofit corporation; THE ROYAL BLOODLINE OF DAVID, a Washington Corporation Sole; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITITES 1-10 and DOE GOVERNMENTAL UNITS 1-10, Defendants.	))))))))))))))))	CIV. NO. 14-1-0304 (Quiet Title/Summary Possession) **DEFENDANTS' RULE 59(e) MOTION TO ALTER OR AMEND THE SUMMARY JUDGMENT AND ORDER DUE TO MISTAKE; DECLARATION OF LEONARD G. HOROWITZ; EXHIBITS A thru D; PROPOSED ORDER AMENDING/RELIEVING JUDGMENT; CERTIFICATE OF SERVICE** NON-HEARING MOTION Judge: Honorable Wendy DeWeese Trial Date: No trial date set

DEFENDANTS' RULE 59(e) MOTION TO ALTER OR AMEND THE SUMMARY JUDGMENT AND ORDER DUE TO MISTAKE

COMES NOW Defendants/Counterclaimants LEONARD G. HOROWITZ and SHERRI KANE, (hereafter, "Defendants") pro se, moving the Court by the Hawaii Rules of Civil Procedure ("HRCP"), Rules 59(e) to Alter or Amend the Judgment and Order entered November 13, 2020, as the Summary Disposition was based on manifest error of law and fact.

I. Standard of Review: Requirement for 59(e) Motion:

The Hawai'i Intermediate Court of Appeals ("ICA") stated it reviewed an HRCP Rule 59(e) (motion for reconsideration) under the abuse of discretion standard.

> "The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. *Beneficial Hawai'i*, 98 Hawai'i at 164, 45 P.3d at 364 (quoting *Molinar v. Schweizer*, 95 Hawai'i 331, 335, 22 P.3d 978, 982 (2001))." *ASSOCIATION OF APARTMENT OWNERS OF KAI MAKANI, v. MICHAEL J. OLEKSA and ERICA L. OLEKSA, and OPTION ONE MORTGAGE CORPORATION NKA SAND CANYON CORPORATION*, NO. CAAP-16-0000611

The ICA also held in Association of Apartment Owners of Kai Makani (Kai Makani) that with respect to Rules 59 (e) and 60 (b):

> "Each rule is governed by its own standards, requirements, and relevant case law (as detailed infra) and must be addressed separately. See, e.g., Omerod v. Heirs of Kaheananui, 116 Hawai#i 239, 273-77, 172 P.3d 983, 1017- 21 (2007) (reviewing a Rule 59(e) motion for reconsideration separately from a Rule 60(b) motion for relief); Sousaris v. Miller, 92 Hawai#i 505, 514 n.10, 993 P.2d 539, 548 n.10 (2000)"

Furthermore, per the ICA in Kai Makani:

> "[T]he standard for granting relief under Rule 59(e) and Rule 60(b) differs…Rule 59(e) motions are subject to a somewhat 'lower threshold of proof' than Rule 60(b) motions" (citing James WM. Moore, Moore's Federal Practice ¶ 60.03[4] (3d ed. 2009))). Thus, the circuit court abused its discretion when it erroneously combined the requirements of HRCP Rule 59(e) and HRCP Rule 60(b) to deny the Oleksas' motion for reconsideration."
>
> "Because the plaintiff filed his "Motion for Reconsideration" within the 10-day period set for Rule 59(e) motions, the court treats the motion as a Rule 59(e) motion to alter or amend judgment, as opposed to a Rule 60(b) motion seeking relief from a judgment or order. *United States v. Emmons*, 107 F.3d 762, 764 (10th Cir. 1997) (applying filing-date-determinative rule)"
>
> "In general, there are four basic grounds upon which a HRCP 59(e) Motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law. While a Rule 59 motion is not limited to those four grounds, alteration or amendment of a judgment is "an extraordinary remedy which should be used sparingly." Id. (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc)); *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

II. Timely Filing of 59 (e) Motion within the 10-day period

Plaintiff's Judgment and Order was entered on November 13, 2020. Therefore, this motion filed on November 22, 2020 is within the 10-day period, and therefore timely.

III. The Court erred under 59(e)(1) and 59(e)(3):

Under 59(e)(1), the "(1)" referencing the enumerations as set forth above in *McDowell v. Calderon*), the Court's ruling was a "wholesale disregard, misapplication, and failure to recognize controlling precedent (see *Rupert v. Bond*, No. 12-CV-05292, 2015 WL 78739, at *2 (N.D. Cal. Jan. 6, 2015) (quoting *Oto v. Metro. Life Ins. Co*.).

Specifically, the Court's errors include: failure to recognize controlling precedent as set forth in *Kondaur Capital Corp. v. Matsuyoshi*, 361 P. 3d 454 - Haw: Supreme Court 2015 and *Ulrich 35 Haw at 168;* misapplication of the statutory language in HRS § 667-5; and wholesale disregard for explicit instructions provided by the ICA in its Memorandum Opinion ("MO") of July 20, 2020 (pgs. 12-14, **Exhibit A**).

Under 59(e)(3), this Court's decision denies Defendants their substantive and procedural due process rights to defend their property from a manifestly unjust, unlawful, and legally-defective foreclosure per 667-5, *Kondaur*, *inter alia.* This Court's ruling also aides and abets Plaintiff's wrongful attempt to steal an adjacent property, with respect to which, he has no lawful claim. Had the Court taken its time to review Plaintiff's deed, it would have become aware of the fact that Plaintiff has no claim whatsoever to one of two parcels which are the subject of this foreclosure action.

Therefore, due to these mistakes, the Court abused its discretion and the entry of summary judgment against Defendants should be set aside. Nevertheless, if this Court remains unwilling to render justice and deny Plaintiff's Summary Judgment, as the law and facts demand, a new hearing should be ordered without further delay. Defendants (who have been driven from their home, bankrupted, and health destroyed, a.k.a., *substantial detriment*) are entitled after 10-years of *hell* to be heard.

IV. Manifest Error of Law

The Court adopted Plaintiff's pleadings that stated the only remaining issue for the Court to decide was whether the Non-Judicial Foreclosure (NJF) had been conducted in a manner that

was “fair, reasonably diligent, in good faith, and Plaintiff had obtained an adequate price for the Property.” Based on the Court’s erroneous adoption of this misdirection by Plaintiff, Defendants were proscribed from raising issues they were legally entitled to raise per *Kondaur* and *Ulrich,* 35 Haw. at 168)(ICA’s MO, pp. 12-14); and Hawaii Revised Statute (“HRS”) § 667-5 (“667-5”); and the MO directing remand of these proceedings. This “manifest error” is “plain and indisputable,” and “amounts to a complete disregard of the controlling law or the credible evidence in the record.”) (*Black’s Law Dictionary*, 8th Edition, 2004, p. 582).

V. **Procedural History:**

“[O]n August 21, 2014, Horowitz and Kane filed an answer and twenty counterclaims in their ‘Defendants/Counterclaimants Answer, Affirmative Defense, and Counterclaims to Paul J. Sulla, Jr. and Jason Hester’s Conspiracy to Commit Theft Under Color of Law’” (See **Exhibit A**, the “MO” in 16-0000163, p. 10.). Subsequently, Defendants responded to Plaintiff’s three summary judgment motions addressing HRS § 667-5 deficiencies in the NJF proceedings. These defenses were referenced in the ICA’s opinion (p. 10), and the ICA vacated the NJF by reason that this Court never permitted Defendants to raise its defenses; nor did it ever consider those defenses, as it *defaulted* Defendants for their failure to timely secure counsel for Defendant/Mortgagor, The Royal Bloodline of David (“RBOD”).

In its opinion, the ICA stated that Defendants’ failure to secure counsel was moot:

> “We deem this issue as moot, as both the parties and the record indicate that RBOD was dissolved prior to the initiation of the Quiet Title Action, and remains dissolved. Thus, any further adjudication as to its interests in the subject property is immaterial. See *McCabe Hamilton & Renny Co., Ltd. v. Chung*, 98 Hawai'i 107, 116, 43 P.3d 244, 253 (App. 2002) (noting that "[t]his court may not decide moot questions or abstract propositions of law.” (Citations omitted). (MO, p. 12)

Additionally, the ICA stated:

> “Based on our *de novo* review of the record, we conclude that the underlying non-judicial foreclosure on the subject property was deficient under *Kondaur*, and as such the circuit court erred in granting Hester's Quiet Title MSJ.” (MO, p. 13)

According to the ICA (MO, p. 13), in a “self-dealing transaction” (as was the case at bar), Plaintiff would be required to meet an “initial burden” prior to the burden shifting to Defendants to raise any genuine issue of material fact. The ICA stated:

> "In a self-dealing transaction, where the mortgagee is the purchaser in a non-judicial foreclosure sale, the mortgagee has the "burden to prove in the summary judgment proceeding that the foreclosure 'sale was regularly and fairly conducted in every particular.…
>
> Here, Revitalize, with Hester as Overseer, was both the foreclosing mortgagee and the highest bidder at the non-judicial foreclosure sale on April 20, 2010… Hester had the initial burden to establish that the non-judicial foreclosure was conducted in a manner that was fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property. See id. at 241-43, 361 P.3d at 468-70; *JPMorgan Chase Bank, Nat. Ass'n v. Benner*, 137 Hawai'i 326, 327-29, 372 P.3d358, 359-61 (App. 2016)….
>
> Hester thus failed to satisfy his initial burden of showing that the non-judicial foreclosure sale was conducted in a manner that was fair, reasonably diligent, and in good faith, and that Revitalize had obtained an adequate price for the Property. In turn, the burden never shifted to the defendants to raise any genuine issue of material fact. Thus, the circuit court erred in its "Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment. . . ."

In this case, the Court's error of law was that it misinterpreted the ICA opinion as stating that once Plaintiff (as a self-dealer) met his burden of showing that the sale was fair in every particular, Defendants' genuine issues of material fact unrelated to the sale process itself were no longer subject to the Court's review on remand.

This mistake of law by the Court is clearly contraindicated by the ICA opinion, *Kondaur*, as well as the 667-5 statute. The Court's refusal to consider all of Defendants' genuine material issues of fact in dispute, constitutes a wholesale disregard, misapplication, and failure to recognize controlling law and precedent.

The ICA spells out clearly that to sustain an ejectment more than a limited focus upon the fairness of the sale's process itself is required. The MO states that the Plaintiff, to maintain an ejectment action, in a self-dealing transaction, must prove *he or she owns the parcel in issue,* and that the sale was fairly conducted <u>in every particular</u>.

In order to maintain an ejectment action, the plaintiff must: (1) prove that he or she owns the parcel in issue, meaning that he or she must have valid title to and right of possession of such parcel; and (2) establish that possession is unlawfully held by another. *Kondaur* at 468. In a self-dealing transaction, where the mortgagee is the purchaser in a non-judicial foreclosure sale, the mortgagee has the "burden to prove in the summary judgment proceeding that the foreclosure 'sale was regularly and fairly conducted in every particular.'"

This is not an "or" test, but an "and" test. In other words, showing that the sale was fair in every particular only evidences that Plaintiff has met his initial burden. It does not constitute fulfillment of the foundational requirements necessary to maintain a Summary Judgment for ejectment under 667-5 and *Kondaur.* This seems self-evident, and for this Court to hold otherwise is a wholesale disregard of the law.

In fact, *Kondaur* makes it clear *Ulrich* is viable law and the requirements under *Ulrich* are not in lieu of 667-5, but in addition to.

> The Hawai'i Supreme Court held that "the duties set forth in *Ulrich* [*v. Sec. Inv. Co.*, 35 Haw. 158 (Haw. Terr. 1939)] remain viable law and are applicable to non-judicial foreclosure of real property mortgages." *Kondaur*, 136 Hawai'i at 229, 361 P.3d at 456.

The Supreme Court also determined that "the *Ulrich* requirements are not statutorily or contractually based," but instead are "separate and distinct from the requirements of the foreclosure statute and operative mortgage." *Kondaur*, 136 Hawai'i at 243, 361 P.3d at 470.

Consequently, "a mortgagee's minimal adherence to the statutory requirements and the terms of the mortgage . . . does not establish that the foreclosure sale similarly satisfied the *Ulrich* requirements." *Id.*

Accordingly, it is apparent that a Motion for Summary judgment (MSJ) cannot be sustained simply by a "self-dealer" showing that the sale process was fair, but requires a self-dealer, as well all mortgagees, to <u>prove ownership</u> of the subject property, adherence to *Ulrich,* as well as strict compliance with HRS § 667-5. This Court's error, that its review stops with the fairness of the sale, is explicitly countermanded by the ICA's opinion which states the moving party <u>must</u> show *there are no genuine issues as to <u>any</u> material fact.*

> "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citations and brackets omitted). "The moving party has the initial burden of 'demonstrating the absence of a genuine issue of material fact.' 11 Id. (citation omitted). "Only with the satisfaction of this initial showing does the burden shift to the nonmoving party to respond 'by affidavits or as otherwise provided in HRCP Rule 56, ... setting forth specific facts showing that there is a genuine issue for trial. 111 Id. at 240-41, 361 P.3d at 467-68 (citation, emphasis, and brackets omitted, ellipses in original)(ICA MO, pp.12-13)

The ICA makes it clear it did not preclude consideration of Defendants' 667-5 issues (as set forth in CAAP- 16-0000163) or even that Plaintiff had satisfied all of his initial burden. In

fact, because Plaintiff didn't even get out of the gate, and failed to meet his heightened initial burden as a self-dealer, the ICA saw little purpose in addressing Defendants' substantive defenses under 667-5.

When a moving party clearly fails to meet his initial burden, stopping the review process is not atypical in appellate decisions. This Court is well aware of that fact. Nevertheless, the ICA spelled it out for the Court:

> "In turn, the burden never shifted to the defendants to raise any genuine issue of material fact. Thus, the circuit court erred in its "Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment". Given this ruling, we need not address the appellants' other points of error asserted in CAAP-16-0000163. (MO, p 14.)

Defendants' proffer of these CAAP- 16-0000163 points of error raise genuine issues of material fact, and Defendants placement of these points of error before this Court was explicitly acknowledged by the ICA, even though the ICA found it unnecessary to address them, because Plaintiff failed to meet his initial burden.

> "In this appeal, Horowitz, Kane, and RBOD contend that the circuit court erred in . . . granting Hester's motion for summary judgment where there existed substantial questions of material facts. (MO, p. 9.)

Furthermore, Defendants' CAAP-16-0000163 points of error have never been addressed by Plaintiff , this Court, nor in any substantive way in any Third Circuit Court, given its improper default of the Defendants.

VI. <u>Plaintiff does not own nor does Plaintiff have any legal interest in a material portion of the subject property ("Property")</u>

Under both HRS § 667-5 and *Kondaur*, Plaintiff must prove he owns the subject property. Plaintiff cannot do this because Plaintiff has neither title to Parcel II nor the right to its possession. Parcel II is one of two parcels listed by Plaintiff in Exhibit 11 (attached hereto as **Exhibit B**) which evidences the properties which are the subjects of this MSJ. Parcel II is a valuable property with a lava-heated water pool, and Plaintiff has stated he needs Parcel II to access other portions of the Property. Because Plaintiff, through this MSJ, is seeking to quiet title to Parcel II in the name of his LLC, per *Kondaur* and HRS § 667-5, Plaintiff must establish that possession of Parcel II (.83 acres) is unlawfully held by another. This is a legal impossibility,

because Defendants have the Warranty deed to Parcel II, which was granted to Defendants by the County of Hawaii (COH).

According to the ICA's decision, the higher court determined:

> The subject property consists of two parcels of land designated on the tax maps for the State of Hawai'i as TMK: (3)1-3-001:049 and (3)1-3-001:43 and are situated in the County of Hawai'i. The record reflects that the parcels are 1.32 acres and 16.55 acres respectively [ICA p 2].

Per Plaintiff's "WARRANTY DEED" Exhibit 11 (attached hereto as **Exhibit B**), filed July 20, 2020 in this case, the two parcels identified by the ICA as the subject parcels in this action (1.32 acres and 16.55 acres) are no longer in fact an accurate representation of the NJF subject Property, since the 1.32 acre parcel is no longer included as part of the present action. [Note the 1.32 acre parcel is a sink hole worth less than 1% of the total subject Property Value and is titled in the name of strawman Hester. Successor in Interest Sulla (as the real party in interest) holds title through his LLC to 99% of the Subject Property's value via the 16.55 acre parcel (Parcel I). Parcel II is an adjacent .83 acre property owned by Defendants (via Warranty Deed from COH) which Sulla claims to have "mistakenly" appended to Plaintiff's 16.55 acre deed as Parcel II.]

This appendment was admitted by attorney Paul J. Sulla, Jr. *and* was the subject of his grand jury indictment. Whether this appendment was a mistake or intentional makes no difference in a MSJ, since Sulla's *mens rea* is irrelevant under HRS 667-5. In any case, the ICA was clearly unaware of this "mistaken" appendment as evidenced by the ICA's description of the subject Property. Because the correct legal description of TMK (3)1-3-001:049 has been obliterated by successor-in-interest Sulla, this Court now faces the stark prospect of quieting title to Parcel II in the name of Sulla's LLC. If so, this Court will knowingly and intentionally quiet title to a parcel that Plaintiff has no claim of ownership in, as required by HRS 667-5.

Furthermore, Plaintiff cannot establish (as is required by *Kondaur*) that ownership of Parcel II is unlawfully held by another. This is a genuine and material fact which is indisputable, since the Court could take judicial notice of it, by review of Defendant's **Exhibit C** which is a true and accurate copy of the Bureau of Conveyances Doc. No. 2005-009276. This admitted *slander-of-title* by Plaintiff (without any other averment) defeats this MSJ. For this court to remain willfully blind to this fact constitutes gross *manifest error*.

Plaintiff's intentional submission by Exhibit 11 of an improperly modified deed, material to this MSJ, for the purpose of engendering this Court's reliance, constitutes *blatant fraud* and fully justifies an extraordinary remedy per HRCP 59(e).

VII. <u>Ownership of Parcel II – A Genuine Material Issue of Fact this Court Ignored.</u>

1) Parcel II is not owned by Plaintiff and Plaintiff has no lawful claim to Parcel II.

2) The original seller Lee did not have title to Parcel II, and Parcel II was not referenced in the Mortgage instrument.

3) Parcel II was not the subject of the Judicial Foreclosure nor was it the subject of the NJF.

4) Parcel II is owned by Defendants and title to Parcel II was conveyed to Defendants' predecessor-in-interest, RBOD, by the County of Hawaii by Warranty Deed. (**Exhibit C**) The COH has sent a writing to Plaintiff telling him he does not own this land.

5) The ICA in its MO on page 2 identified the subject parcels in this action, and Parcel II, as legally described by Plaintiff in his Exhibit 11, is *not* in it. Defendant has admitted his inclusion of Parcel II in this deed was a "mistake;" yet he did not correct his "mistake" because he (in his own words) intends to convert title by adverse possession. In other words, Plaintiff intends to steal it.

6) By appending Parcel II onto the subject deed of this MSJ, Plaintiff is hereby asking this Court to quiet title to Parcel II (a property he does not own) in the name of his LLC, Halai Heights.

Plaintiff in his testimony to COH Prosecutors defended his actions with respect to the deed in question, as an unintentional "mistake," and, therefore, he did not have the requisite *mens rea* for criminal prosecution. Regardless, Plaintiff's ongoing failure to correct that mistake in his Exhibit 11, has inescapably created a genuine material issue of fact regarding the ownership of the subject Property per *Kondaur*. Additionally, since he has no Mortgage instrument evidencing his right to foreclose against Parcel II, he is not compliant with the requirement as set forth in HRS § 667-5.

Thus, this Court's refusal to address the issue of Parcel II's ownership is an abuse of discretion and manifests "wholesale disregard" for the facts – including the facts set forth in Defendants' **Exhibit C**, evidencing Defendants' Warranty Deed to Parcel II.

A manifest error of fact might include, for example, a court's decision that materially relied on an exhibit that was never offered or admitted into evidence. See *In re Wahlin*, No. 10-

20479, 2011 WL 1063196, at *3 (Bankr. D. Idaho Mar. 21, 2011). Also see *Norman v. Arkansas*, 79 F.3d 748, 750 (8th Cir. 1996) (finding abuse of discretion where court refused to reconsider clear factual error).

Also, by its refusal to consider Defendants' defenses and counterclaims against Plaintiff's ownership claim to the subject Property, this Court made a mistake of law by its failure to adhere to controlling precedent as stated in *Kondaur,* as ruled by the ICA. (**Exhibit A**)

VIII. The Court's conclusory statement that she would not undo what previous courts have done is a manifest error of fact.

The Court averred she had reviewed all the filings and procedural history of this case and would not undo what her predecessors in the Third Circuit had ruled regardless of the ICA's remand expressly directing the Court to do just that—adjudicate to vindicate the Court's previous errors.

Had the Court reviewed the procedural history as averred, she would have noticed that Plaintiff's creation of the false deed occurred subsequent to the prior actions in the Third Circuit Court. These actions include this 0304 case Complaint filed in 2014, as well as the underlying foreclosure case, Civ. No. 05-1-0196/CAAP 16-0000162. Therefore, it would have been an impossibility for those courts to have addressed and disposed of this "mistake" which constitutes error and mistake of fact by this Court which precludes valid summary judgment.

Furthermore, the Court's reference to, and reliance upon, dispositions in prior actions constitutes an error of fact since, per the ICA, the Defendants were improperly defaulted and had no opportunity to be heard on any issue, let alone one that had not yet occurred.

IX. The Court erred by disregarding the Defendants' objections to Plaintiff's failure to advertise the foreclosed Property consistent with *Ulrich*.

On the issue of Plaintiff's defective advertising (which goes to the adequacy of the sale price as well as the good faith, diligence, and fairness of the sale), the Court made a mistake of law by barring Defendants from raising their *Ulrich* defenses—that Plaintiff's advertising was defective per *Kondaur*.

> "Moreover, the description of the property intended to be sold upon foreclosure as contained in the notice of sale was defective. . . . A description of property intended to be foreclosed should be sufficient to inform the public of the nature of the property to be offered for sale. The description of the property to be sold was not calculated to interest purchasers." *Ulrich V Security Investment Co*. 35 Haw158, 173 (Haw 1939)

The $225,000.00 sales price of the Property at foreclosure was grossly deficient because Plaintiff neglected to advertise the NJF sale in keeping with *Ulrich*. The subsequent Property listing for $975,000.00 contradicts Plaintiff's claim that the NJF sale price was reasonable.

The Plaintiff claimed that his $975,000.00 listing was not its true value since he later reduced the sale price to $775,000.00 because of the volcano. The volcanic activity after the NJF is completely irrelevant for the determination of value at the time of the NJF. This Court corroborated this higher value when it set the bond amount on May 19, 2016 at $588,374.91, and fixed the daily commercial value of the Property at "$500/day". (**Exhibit D**)

Plaintiff's admissions do, however, show that even after the volcano opened-up cracks adjacent to the Property, the listed value was still more than $500,000 above Plaintiff's NJF purchase price at the self-dealing auction.

Plaintiff also stated that he reduced the area of real property 'comps' to a 3-mile radius because he did not want to include Pahoa town. By doing so he excluded every and all property of comparable value. Plaintiff did produce a valuation from his business partner which based on this clear conflict has little to no probative value. It should also be noted that the public record of assessor value (which historically is below the fair market value) was $575,000. That is $350,000 above Plaintiff's purchase price.

Given the Court is required to review these facts in the light most favorable to Defendants, the Court must take notice that the Plaintiff failed to comply with the requirements of *Ulrich*. In fact, Plaintiff took no steps reasonably anticipated to create interest in the sale, and as a result no one but Plaintiff was at the auction to bid. This clearly raises an issue of genuine material fact, that self-dealing Plaintiff did not advertise the sale in compliance with *Ulrich*, and therefore the adequacy of the purchase price as well as the fairness, diligence, and good faith of the sale are at issue.

Plaintiff has never offered any fact, made any claim or attempted to rebut Defendants in any way, regarding Plaintiff's *failure* to comply with *Ulrich*'s advertising requirement. Plaintiff admittedly only did the absolute minimum required by placing a tombstone ad in a newspaper three times, which the *Ulrich* court explicitly held was insufficient. "A description of property intended to be foreclosed should be sufficient to inform the public of the nature of the property to be offered for sale. . . . defendant . . . , who conducted the foreclosure, kept the sale as quiet as possible." *Ulrich*, op. cit.

Plaintiff's only "defense" for his failure to advertise the valuable features of the Property is that even though no one other than the self-dealer Plaintiff Hester showed-up to bid, Defendants knew about the NJF, and if they thought the price too low should have bid on it themselves. Indeed! This nonsense ignores the fact that Plaintiff's actions were in process of causing Royal's insolvency and dissolution. Having shut down Defendants Court-assessed "$500/day" income, the Defendants' financial inability to secure timely counsel, and ultimately Horowitz's personal bankruptcy, resulted.

X. The Court erred in granting Plaintiff standing and a right to foreclose against the Property per 667-5; therefore, the NJF is void as is the summary disposition ruling.

The Plaintiff had no legal right to foreclose in 2010, nor now. The summary disposition ruling evaded Defendants' affirmative defenses, counterclaims, and exhibited evidence showing that the Plaintiff (and/or his predecessor and successors-in-interest) had no legal right to foreclosure under the *void* Mortgage's power of sale because original Seller Lee was in breach of the Mortgage's covenants.

The Court erroneously neglected Defendants' material evidence that both successors-in-interest Sulla and Halai Heights, LLC, and original Seller Cecil Loren Lee, jointly and severally engaged in a consistent pattern of bad acts, evidenced by defective transfers, forgeries, fraud, and false filings with the State, the courts, and the title companies.

The Court neglected to review the evidence that Plaintiff's mortgage interest, underlying this NJF, arises out from a *void* mortgage instrument, due to seller's fraud *ab initio.* This material fact is incontrovertible because this matter was conclusively decided in the case of *Maise v. Lee* and *Lee v. Maise* (Civ. Nos. 01-01-0444 and 05-1-0235). In that case, the Court held that at the same time Lee sold the subject Property to Defendants, Lee had promised to sell the subject property to Maise. As a result, Defendants were issued three orders from the Third Circuit Court to make their mortgage payments directly to Maise and not to Lee. Regardless of these incontrovertible facts, Plaintiff claims at the time of the NJF, Lee and not Maise was owed the money that this Court ordered Defendants to pay to Maise. Plaintiff, however, is on record as stating he was confused about the actual amount Defendants owed to Lee, due to these underlying Third Circuit court Orders. It is for this reason, *inter alia,* that at the time of the NJF the Plaintiff had absolutely no idea what amount was necessary for Defendants to cure. Thus, the amount he did provide was both untimely under HRS § 667-5, and materially and factually incorrect.

Nevertheless, this Court consideration of only those prior Third Circuit rulings, it believes beneficial to Plaintiff under *Kondaur*, is plain error and a violation of Defendants' right to Equal Protection under the Law.

Next, in order to maintain the fictional transfer of the void mortgage, Plaintiff falsely claims Seller Lee transferred his rights in the Mortgage instrument to Plaintiff's foreclosing predecessor, "Revitalize." However, at the time of this "Assignment of Mortgage" "Revitalize" had not been legally formed under Hawaii law and thus vitiates the conveyance and Plaintiff's alleged interest. "As a general rule, when a corporation has been legally formed, it has an existence as a separate and distinct entity." *Evanston Ins. Co. v. Luko* 7 Haw. App. 520, 783, P.2d 293 (1989).

XI. The Plaintiff failed to provide Defendants with the amount to cure as required per HRS § 667-5, even after timely request by Defendant Horowitz.

> HRS § 667-5 (3)(2) (c) states in relevant part: "Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information: (1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and . . ."

The Court overlooked Plaintiff's failure to comply with 667-5 by never providing the Defendant with an accurate amount to cure Defendants' alleged default; the estimated amount of mortgagee's attorneys fees and costs; and other costs incurred by the foreclosing mortgagee, after the Plaintiff responded to the Defendants written requests for a final accounting beyond the five-day deadline required by HRS § 667-5.

XII. The Court erred by disregarding case law pursuant to the Plaintiff's non-compliance with HRS § 667-5.

The Court also disregarded case law to overrule Defendants' pleadings that Plaintiff never complied with the strict requirements of HRS § 667-5. The Court in *Carey*, 36 Haw. at 125, stated: "A mortgagee violation of the nonjudicial foreclosure requirements of HRS § 667-5, whether those violations are grievously prejudicial or merely technical, voids a subsequent foreclosure sale." The Ninth Circuit reiterated that "Hawaii law requires strict compliance with statutory foreclosure procedures… Without such compliance, the mortgagee has no legal

authority to exercise its power of sale in a nonjudicial foreclosure sale. . . .” *Id*.(Also see In *Lee v. HSBC BANK USA*, 218 P. 3d 775).

XIII. <u>The NJF did not comply with 667-5 because Defendants, at the time the NJF was initiated, were not in default on the Mortgage.</u>

The NJF did not comply with HRS § 667-5 because Defendants, at the time the NJF was initiated, were not in default on the Mortgage, because up until the time the Fifth Amended Final Judgment was issued in Civ. No. 05-1-0196, Defendants’ jury award of $200,000 was still valid, and offset any monies due to Plaintiff.

Even assuming Plaintiff was clairvoyant and knew for certain the $200,000 jury award would be vacated, it was false and incorrect under 667-5 for Plaintiff to claim $350,000 “due and owing” as this was nowhere near the $200,000 Plaintiff later claimed was the actual amount due.

Thus, even by Plaintiff’s own admittedly confused accounting, at the time of the NJF, Plaintiff failed to provide Defendant with the amount to cure as required by HRS § 667-5 (3)(2)(c). The Court’s refusal to consider this fact was a mistake of law.

V. Conclusion

It is incumbent upon this Court to administer justice by permitting Defendants to exercise their due process right to be heard under 667-5, *Kondaur*, and the ICA’s MO instructions. (**Exhibit A**)

It is clear from this Court's mistaken administration of MSJ process under *Kondaur* and 667-5 that the Defendants’ were deprived of their due process rights because the Court precluded the Defendants from raising material facts in dispute pursuant to the Plaintiff’s: (1) non-ownership of the subject Property; (2) failure to comply with the requirements of HRS § 667-5; (3) improper advertising of the Property per *Kondaur* quoting *Ulrich*; and (4) falsely modifying the Subject Property Deed submitted by the Plaintiff to this Court pursuant to this MSJ.

The Court, in effect, constructively defaulted Defendants again, repeating the ‘mistake’ requiring correction according to the ICA’s MO. The Court denied the Defendants their rights to raise any and all of the aforementioned defenses since the Court deemed their opposition pleadings *irrelevant* under *Kondaur,* HRS 667-5 and/or precluded by previous judgments, in which Defendants were improperly defaulted.

The Court's 'mistake' evidences an error of fact that the prior decision in this Third Circuit was on the merits of Defendants' 667-5 defenses. To the contrary, these merits were never tried, and now, again, this Court denies Defendants their right to raise genuine issues of material fact per 667-5, in direct discord with the ICA's express MO, **Exhibit A**, p. 14.

A review of the ICA's MO clearly avers that justice was initially denied to the Defendants by wrongful default, enabling the Plaintiff to prevail despite Plaintiff never having met his initial burden. To now rule Plaintiff has met his strict burden and that there are no genuine material issues in dispute, is an abuse of discretion that clearly exceeds the bounds of reason and disregards rules and principles of law and practice to the substantial detriment of Defendants.

The litany of mistakes by this Court include the erroneous holding that Defendants' substantive arguments had previously been considered, that Defendants were barred by *Kondaur* from using their 667-5 objections, that *Kondaur's* ownership defenses were not available, and that *Ulrich*'s advertising requirements were immaterial. The Court also disregarded the ICA's MO citing the express reason for this remand, which was to provide Defendants with the opportunity to raise all genuine material issues in dispute, if and only if Plaintiff met his initial burden and shifted the burden to Defendants.

Defendants were never given that opportunity. Not even close. Thus, this Court's Final Judgment constitutes a wholesale disregard, misapplication, and failure by this Court to recognize controlling precedent; thus it must be corrected.

We ask this Court to reconsider its decision and put an end to this injustice by allowing the overwhelming and incontrovertible evidence to speak for itself. Justice demands no less.

Respectfully submitted,

Dated: Cape Coral, Florida, November 22, 2020

/s/ Leonard G. Horowitz	/s/ Sherri Kane
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LEONARD G. HOROWITZ, pro se	SHERRI KANE, pro se