No. _____

In the
Supreme Court of the United States

MICHAEL BORNEMANN,
Petitioner,
v.

BENJAMIN PAUL KEKONA AND TAMAE M. KEKONA,
Respondents.

On Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawai'i

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Hawaii Court gravely erred when it upheld a grossly excessive punitive damages award against Bornemann in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution where:

   a. The punitive damages award of $1,642,857.13, together with post-judgment statutory interest of $1,314,285.60, totaling $2,957,142 (i) was more than 10 times the underlying 1994 Judgment against Bornemann of $253,079.29; and (ii) was not reasonably predictable in its severity in that it grossly exceeded the punitive damages awarded against Bornemann by two prior juries, a trial court and a Hawaii appellate court on the same identical issues.

   b. The Hawaii Supreme Court, in upholding the grossly excessive punitive damages award, wrongfully cited to, and relied upon, "aggravating factors" that included, and arose out of, Bornemann's proper pursuit of his due process rights through multiple trials and appeals. Bornemann had prevailed on those appeals, requiring that his case be tried and retried over a period of many year. and

   c. The imposition of post judgment statutory interest of $1,314,285.60 on top of the underlying $1,642,857.13 punitive damages award almost doubled the award and also resulted in a *de facto* and unconstitutional double penalty on Bornemann.

B. Whether the Hawaii Court gravely erred when it interpreted Hawai`i Revised Statutes ("**HRS**") 657-5 (2001) and determined that the underlying judgment had not expired and prohibited continued collection efforts of the original September 2, 1994 Revised Final Judgment ("**1994 Judgment**").

Respectfully, these questions should be answered in the affirmative and certiorari granted.

LIST OF PARTIES

Respondents BENJAMIN PAUL KEKONA and TAMAE M. KEKONA were Plaintiffs-Appellees below.

Respondent PAZ FENG ABASTILLAS was Defendant *Pro Se*-Appellant below.

Respondent ROBERT A. SMITH was Defendant *Pro Se*-Appellant below.

STATEMENT OF RELATED PROCEEDINGS

- *Standard Mgmt., Inc. v. Kekona*, 99 Hawai'i 125, 53 P.3d 264, No. 22750 (Hawai'i App. Feb. 28, 2001) (vacated and remanded; reconsideration denied March 21, 2001).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

Petitioner Michael A. Bornemann ("**Bornemann**" or "**Petitioner**"), by and through his counsel, respectfully petitions for a writ of certiorari to review the opinion and judgment of the Intermediate Court of Appeals, as affirmed on denial of application for certiorari to the Hawaii Supreme Court (sometimes collectively referred to herein as the "**Hawaii Court**").

OPINIONS BELOW

The Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawaii, entered November 30, 2018 ("**ICA**") (App. A, *infra*) is not reported. The Order of the Supreme Court of Hawaii denying a Petition for Writ of Certiorari (App. C, *infra*) is not reported.

Other published and unpublished decisions in this case *sub judice* include: *Standard Mgmt., Inc. v. Kekona*, 99 Hawai'i 125, 53 P.3d 264 (2001); *Kekona v. Abastillas*, 111 Hawaii 203, 140 P.3d 436, 2006 WL 1562086, No. 24051, (Hawai'i App. Jun. 8, 2006) (Mem. Op.) ("***Kekona I***"), *vacated in part by* 113 Hawai'i 174, 150 P.3d 823 (2006) ***("Kekona II***"); *Kekona v. Bornemann*, 130 Hawai'i 58, 305 P.3d 474 (App. 2013) ("***Kekona III***"), *vacated in part by* 135 Hawai'i 254, 349 P.3d 361 (2015) ("***Kekona IV***") (collectively attached as App. D, *infra*).

JURISDICTION

The judgment of the Intermediate Court of Appeals of the State of Hawaii (App. B, *infra*) was entered on November 30, 2018. The Hawaii Supreme Court denied Petitioner's Petition for Certiorari on April 4, 2019 (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

Hawai`i Revised Statutes ("**HRS**") 657-5 (2001) provides in pertinent part:

> Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. . . . A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. . . .

HRS § 478–3 (1993) provides: "Interest at the rate of ten per cent a year, and no more, shall be allowed on any judgment recovered before any court in the State, in any civil suit.".

STATEMENT OF THE CASE

As the ICA correctly noted, the litigation between the parties has an extensive, multi-decade history. The underlying collection lawsuit was brought in 1993 by Respondents Plaintiffs-Appellees Benjamin Paul Kekona and Tamae M. Kekona ("**Kekonas**") against Defendants-Appellants Paz F. Abastillas ("**Abastillas**"), Robert A. Smith ("**Smith**") and Bornemann, among others. The Kekonas claimed the Defendants prevented them from recovering an award from a prior lawsuit. *See* App. A at 1. In the prior lawsuit, filed November 13, 1989, Standard Management, Inc. ("**SMI**"), a company run by Abastillas, filed suit against the Kekonas based on a business dispute related to operating a tram at Hanauma Bay ("**Hanauma Bay lawsuit**"). *See Standard Mgmt., Inc. v. Kekona*, 99 Hawai'i 125, 53 P.3d 264 (2001). Therein, the Kekonas counterclaimed and brought third-party claims against Abastillas and Smith, individually. In May of 1993, the Kekonas secured a jury verdict against SMI, Abastillas and Smith. Within days of the verdict, Abastillas transferred to Bornemann an apartment unit located on HPP Avenue ("**HPP property**"), and Abastillas and Smith transferred to Bornemann their primary residence, located in Kane'ohe ("**Kane`ohe property**").[1] *See id.*

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[1] Bornemann has always claimed and shown that he, too, had a pre-existing debt owed by Abastillas to him and a basis for said transfers. *See Kekona*, 130 Hawaii at 62-3, 305 P.3d at 478-9.

In October of 1993, the Kekonas initiated the underlying lawsuit for fraudulent conveyance, among other claims, based on the transfer of the HPP and Kaneohe properties on May 26, 1993 and June 1, 1993, respectively, to Bornemann.[2] This action generated three separate trials and two prior sets of appeals. *See Kekona I, Kekona II, Kekona III* and *Kekona IV, supra.*

A jury trial began on May 10, 1999, with the case being submitted to the jury on May 20, 1999. *See Kekona I*, 111 Hawai`i at *1-2, 140 P.3d at *1-2. On May 21, 1999, by a detailed special verdict form, the jury found by a preponderance of evidence that the Kaneohe property was fraudulently transferred to Bornemann and awarded the Kekonas $29,064 in special damages and $17,436 in general damages against Abastillas; $6,000 in special damages and $3,600 in general damages against RASCORP; and $156,564 in special damages and $93,936 in general damages against SMI. The jury also found by clear and convincing evidence that Abastillas, Smith, RASCORP, SMI and Bornemann conspired to fraudulently transfer the Kaneohe property and awarded $100,000 in resulting damages that the HPP property was fraudulently transferred to Bornemann and awarded the Kekonas $15,128 special damages and $9,076 general damages against Abastillas; and that Abastillas, Smith and Bornemann conspired to fraudulently transfer the HPP property and awarded $100,000. Finally, the jury found by clear and convincing evidence that the Kekonas should be

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[2] *See Kekona IV*, 135 Hawai`i at 258, 349 P.3d at 365.

awarded punitive damages and awarded them $250,000 against Abastillas, Smith, RASCORP, SMI and Bornemann each. *See Kekona I*, 111 Hawai`i at *5-6, 140 P.3d at *5-6.

On July 22, 1999, Bornemann filed a Motion for a New Trial and/or to Eliminate Punitive Damages, which the circuit court granted in part. The Circuit Court found the award of $250,000 in punitive damages against Bornemann to be excessive and reduced the award to $75,000. The Circuit Court then ordered a new trial solely on the question of punitive damages, unless the Kekonas would consent to the reduction (which they did not). *Id.* at *7, 140 P.3d at *7. Because the Kekonas refused, a new trial on punitive damages against Bornemann was submitted to a jury. On November 2, 2000, the jury awarded the Kekonas $594,000 in punitive damages against Bornemann. *Id.* The Circuit Court entered a Revised Final Judgment on November 30, 2000, combining both jury verdicts with minor modifications that have no bearing here. After several motions, the circuit court entered an Amended Revised Final Judgment on February 26, 2001. Appeals and cross-appeals were filed May 20, 2002. *Id.*

In 2006, the ICA affirmed in part and reversed in part the final judgment of the Circuit Court and ruled, among other things, that the requisite burden of proof on a constructive fraud claim under HRS § 651C-4(a)(2) and 651C-5 was preponderance of the evidence; and HUFTA allowed compensatory and punitive damages, following the law of Ohio., These rulings were seminal rulings in Hawaii, where there was conflicting case law

from other jurisdictions, including California (allowing preferential transfers to other creditors under California's UFTA) and New York (allowing limited compensatory damages and no punitive damages under New York's UFTA).[3] *See Kekonas I*, 111 Hawaii at *11, *12-16, *20, and *24, 140 P.3d at *11, *12-16, *20 and *24. Bornemann, Abastillas and Smith filed applications for writs of certiorari to the Hawai`i Supreme Court, which were granted.

On September 26, 2006, in a reported decision, the Hawai`i Supreme Court held that the ICA gravely erred and reversed the portion of the ICA's above decision regarding the requisite standard of proof, vacating and remanding the matter to the Circuit Court for a new trial as to the Kekonas' claim of conspiracy and the $594,000 in punitive damages against Bornemann. *See Kekona II*, 113 Hawai`i at 180-82, 150 P.3d at 829-31.

On remand, the third trial began in late December 2007.[4] On January 3, 2008, the jury returned a special verdict finding among other things that Bornemann conspired with one or more persons to harm the Kekonas in the fraudulent transfer of the Kaneohe property, and that punitive damages should be awarded against Bornemann. *See Kekona III*, 130 Hawai`i 62-3, 305 P.3 at 478-79. With respect to the HPP Property, the jury determined that the Kekonas

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[3] *See* Section A.4 below, discussing case law from several jurisdictions.

[4] *See Kekona IV*, 135 Hawai`i at 259-60, 349 P.3d at 366-67.

did not prove that the HPP Property was transferred without reasonably equivalent value and determined that Bornemann proved that he took the HPP Property in good faith and for reasonably equivalent value – meaning that it was not fraudulently transferred. *See id.* The jury then awarded $253,075.29 in compensatory damages arising from the conspiracy count vis-à-vis the Kaneohe Property and $1,642,857.13 in punitive damages. *See id.* Bornemann filed a Motion to Amend Judgment challenging the compensatory and punitive damages, which was denied. Final judgment was entered, and Bornemann appealed.

On appeal, Bornemann argued *inter alia* that (1) the Kekonas received a double recovery of $253,000 in compensatory damages, and (2) the punitive damages award was excessive and unconstitutional. *Id.* at 63-4, 305 P.3d at 479-80.

> Bornemann's third argument concerns whether the Kekonas proved separate damages for conspiracy to fraudulently transfer the Kaneohe property. The undisputed evidence is that the accumulated interest from the 199[4] Judgment in the amount of $191,000 is $253,075.29. The jury awarded $253,075.29 against Bornemann for his participation in the conspiracy to fraudulently transfer the Kaneohe property. Thus, because of Bornemann conspiring to fraudulently transfer the Kaneohe property, the Kekonas were unable to collect on their original judgment, which resulted in the accumulation of $253,075.29 in interest on that

> judgment. However, as the ICA concluded in its 2006 Memorandum Opinion, the damages necessary to compensate for the "conspiracy" are the same damages as are necessary to compensate the Kekonas for the fraudulent transfer and, although the amount of interest on the original $191,000 increased, no other damages were proven. As discussed further below, setting aside for the moment the issue of punitive damages, the Kekonas are entitled to a remedy that fully compensates them for the harm they suffered as a result of Bornemann's wrongful conduct. **However, they are not entitled to collect that amount more than once.**
>
> Bornemann's fourth and fifth arguments are related. Bornemann argues that HRS § 651C–8(b) limits any fraudulent transfer judgment to the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less. Bornemann notes that the 199[4] Judgment was for approximately $191,000 and the accumulated interest on that judgment was roughly $253,000, making a total of approximately $444,000. Since the current equity in the Kaneohe property is purportedly at least $950,000, Bornemann argues, the Circuit Court's cancellation of the fraudulent transfer of the Kaneohe property provides "twice the equity necessary to fund the [May 199[4[5]]] judgment."

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[5] The ICA's 2013 Decision advertently refers to a 1993 Judgment. There was a judgment entered in 1993 that was later revised on September 2, 1994.

Thus, Bornemann argues that the compensatory damages award constituted "double recovery" because there was no evidence that the liquidation of the Kaneohe property would not satisfy the 199[4] Judgment plus the interest.

With respect to compensatory damages for a fraudulent transfer, and/or compensatory damages for a conspiracy to commit a fraudulent transfer (which in this case results in a unified amount of damages), although not entirely correct (with respect to the equity in the Kaneohe property), Bornemann's point is well taken. The Kekonas are entitled to a variety of means to secure a full recovery of their losses from Bornemann and/or the asset fraudulently transferred to him, but only once, not twice. *See generally* HRS §§ 651C–7 & 651C–8 and 37 Am.Jur.2d *Fraudulent Conveyances and Transfers* §§ 142–172 (2001) (discussing remedies for fraudulent conveyances and transfers).

. . .

Taken as a whole, this statutory scheme provides the Kekonas with any number of ways to recover what is due to them, **but it does not allow them to be compensated more than once. Clearly** (and again setting aside the issue of punitive damages for the moment), **the Kekonas can set aside the transfer of the Kaneohe property to the extent necessary to satisfy the amount of the original judgment plus the statutory interest, which**

> **is an additional amount of damages due to them (whether construed as damages for the fraudulent transfer or the conspiracy to commit the fraudulent transfer).** The Kekonas can execute on the property without voiding the transfer. The Kekonas can attach and execute on other property of Bornemann in the amount due to them. The Kekonas can obtain a money judgment against Bornemann. Nothing in the Hawai‘i statute requires the Kekonas to elect one remedy over another. **The statute does not, however, allow them recovery of both the asset transferred (regardless of its value) and, in addition, a judgment in the full amount of their damages.**
>
> **Thus, although the Kekonas are entitled to relief against Bornemann for the amount of the original underlying judgment against Smith and Abastillas plus the statutory interest awarded by the jury as damages, further proceedings are necessary to fashion an appropriate form or forms of remedy, executed in a manner that their recovery does not exceed the sums due to them.**

Kekona III, 130 Hawai`i at 67-9, 305 P.3d at 483-85 (emphases and some brackets added).

The ICA also reversed and recommended a reduction of the punitive damages award from $1,642,857.13 to $250,000 based upon constitutional considerations. In doing so, the ICA looked at the

factors analyzed in *BMW of N. Am. Inc. v. Gore,* 517 U.S. 559, 574-77 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). *See id.* at 72-3, 305 P.3d at 488-89. The ICA concluded that the majority of the factors associated with the most important indicium of the reasonableness of a punitive damages award – the degree of reprehensible conduct – were not present. The harm inflicted was purely economic, not physical; there was no evidence that the Kekonas were particularly financially vulnerable; and Bornemann was held liable for his participation in a single transfer – the Kaneohe property. The ICA also noted that neither party had identified, nor had the Court located, any Hawaii state court cases in which punitive damages were awarded in a fraudulent transfer case. Likewise, the ICA noted that Abastillas and Smith, "who were most directly culpable for seeking to avoid their liability to the Kekonas, were assessed just $250,000 in punitive damages." *Id.* at 73, 305 P.3d at 489. Finally, in concluding its decision, the ICA pointed to the only Hawaii-related fraudulent transfer case it could find where punitive damages were awarded – an unpublished federal district court case involving an award of $250,000 in punitive damages on a previously-obtained judgment of $4,000,000. *See id.* (citing *Valvanis v. Milgroom,* No. 06–00144, 2009 WL 1561575, at *1 (D. Haw. June 1, 2009)). The Kekonas filed an application for writ of certiorari requesting review of the punitive damages award *only*, leaving the remainder of the ICA 2013 Decision intact.

On April 24, 2015, the Hawaii Supreme Court issued the 2015 Decision in this matter. (RA52:23:867-

894). In its procedural history of the case, the Court acknowledged that, in addition to vacating the punitive damages award as grossly excessive and unconstitutional, the ICA "vacated the $253,000 special damages award." *Kekona IV*, 135 Hawai`i at 262, 349 P.3d at 369. In essentially vacating the punitive damages portion of the ICA decision and reinstating the punitive damages award below, the Hawaii Supreme Court engaged in its own analysis of the factors under *Gore, supra*, as applied to the facts of the case, and came to the opposite conclusion as to the presence of aggravating factors. Importantly, however, although the Hawaii Supreme Court referenced the "compensatory award" of $253,000 as the basis for comparison in affirming the $1,642,857.13 in punitive damages in three different portions, that compensatory award was vacated by the ICA as duplicative of the underlying interest component on the underlying original 1994 judgment of $191,628.27. Therefore, there was no longer a compensatory damage award for purposes of the Court's punitive-versus-compensatory ratio analyses. *See Kekona IV*, 135 Hawai`i at 264-67 & n.14, 349 P.3d at 371-74 & n.14. Previously, in its 2006 Decision, the Court had analogized the "establishment of liability" in a fraudulent transfer claim without a corresponding compensatory award as the functional equivalent of "nominal damages" and sufficient for purposes of awarding punitive damages. *See Kekona II*, 113 Hawai`i at 179-80, 150 P.3d at 828-29. The Hawaii Supreme Court vacated "the ICA's September 16, 2013 Judgment on Appeal to the extent that it vacated the punitive damages award against Bornemann and remand[ed] to the circuit court for further proceedings consistent with" the opinion.

Kekona IV, 135 Hawai`i at 267, 349 P.3d at 374. Therefore, the Supreme Court did not modify the ICA's 2013 Decision regarding the compensatory award or the direction to the Circuit Court regarding the remedies permitted in terms of collection of the original 1994 Judgment plus interest or setting aside the transfer – whichever is less. *See Kekona III*, 130 Hawai`i at 67-9, 305 P.3d at 483-85.

Bornemann filed a motion for reconsideration on May 4, 2015, which was denied on May 22, 2015. The Supreme Court entered the Judgment on Appeal on June 19, 2015, remanding the matter back to the First Circuit Court for further proceedings. (RA52:23:866) The Kekonas then filed a motion for reconsideration of the judgment on appeal on June 25, 2015, which was granted on July 6, 2015. *See Kekona v. Bornemann*, 135 Hawai`i 405, 353 P.3d 408 (2015). The Amended Judgment on Appeal was filed on July 7, 2015, and the case was remanded to the Circuit Court. (RA52:23:1071-72)

On September 19, 2016, the Circuit Court entered the "Consolidated Third Amended Revised Final Judgment" filed on ("**9/19/16 Consolidated Judgment**"), (1) declining to apply HRS § 657-5 and determining that the underlying judgment had expired and prohibited continued collection efforts of the original 1994 Judgment; (2) transferring the Kaneohe property to Smith and Abastillas without considering its value in comparison to the value of the 1994 Judgment (plus interest accrued) and without providing Bornemann a credit for the approximate $315,400 in equity remaining in the property above the

remaining amount of the 1994 Judgment (plus interest accrued); and (3) awarding statutory interest of $1,314,285.60, in addition to the punitive damage award of $1,642,857.13, for a total of $2,957,142.73 in punitive damages and interest against Bornemann – which together totaled more than fifteen (15) times the amount of the underlying 1994 Judgment of $191,628.97. Bornemann in CAAP-16-0000679 and Abastillas and Smith in CAAP-16-0000782, respectively, contested the "Consolidated Third Amended Revised Final Judgment" filed on September 19, 2016 ("**9/19/16 Consolidated Judgment**"). In CAAP-16-0000679, Petitioner appealed an "Order Granting in Part Plaintiffs' Motion to Amend Three Orders to Pay Over, and for Other and Further Relief," filed February 1, 2016; and an "Order Denying [Bornemann]'s Motion to Vacate Judgment Entered on February 5, 2008 or Any Judgment Entered on Remand, and to Dismiss this Case in its Entirety," filed on October 8, 2015.

Petitioner argued the 9/19/16 Consolidated Judgment should be vacated: (1) because the 1994 judgment in the Hanauma Bay lawsuit expired on September 2, 2014, pursuant to HRS § 657-5, and thus can no longer support the judgments in the instant case; (2) the Circuit Court erred by canceling deeds and returning the Kane`ohe property to Abastillas and Smith without affording Bornemann credit for equity; and (3) the Circuit Court erred by awarding both post-judgment statutory interest and punitive damages against Bornemann, where the punitive damages award already reflected punishment for delayed payment to the Kekonas. *See* App. A at 3-4. In its

November 30, 2018 unpublished memorandum opinion, the ICA agreed with Bornemann on one of the above three issues – reversing the portion of the 9/19/16 Judgment only with regard to the portion that canceled and voided the deeds related to the Kaneohe property without affording Bornemann a credit for the difference in the value of the real property and amount of the actual judgment owed, pursuant to HRS Chapter 651C (1985) (Hawaii's Uniform Fraudulent Transfer Act ("**HUFTA**"). *See* App. A at 4-5, and 18-21. The ICA affirmed the remaining two issues (*see id.* at 4-5, 14-17, and 21-25), and issued the Judgment on Appeal, on January 4, 2019. Bornemann filed an application for writ of certiorari the Hawaii Supreme Court, which was denied on April 4, 2019. This Application timely followed.

Questions regarding the viability of a preferential transfer defense, the requisite burden of proof and permissible remedies in a HUFTA claim, as well as the constitutionality of significant punitive damages against a transferee absent clear and convincing evidence of actual intent or malice, together, generated 3 separate jury trials and 4 separate appeals. After the 2015 remand in *Kekona IV, supra*, on June 23, 2015, Bornemann filed a motion to vacate the judgment entered on February 5, 2008 ("**Motion to Vacate**"). (RA52:23:926-1008) In short, Bornemann argued that the 1994 Judgment expired on September 3, 2014, pursuant to the plain language of HRS § 657-5 (limiting a judgment to a maximum of 20 years), and, without a presently enforceable debt or other claim for relief, the Kekonas could no longer recover compensatory damages (whether nominal or actual) or

punitive damages from Bornemann. (RA52:23:926-1008) Kekonas essentially argued that the Circuit Court could not ignore the mandate of the Court's 2015 Decision, that Defendants waited too long to argue that the 1994 Judgment had expired, and that the Hawaii Supreme Court held that liability for a conspiracy to defraud leading to an award of punitive damages needs no underlying compensatory or special damages. (RA54:24:27-42) The Circuit Court denied Bornemann's Motion to Vacate. (RA54:24:432-434)

Based on the Circuit Court's February 1, 2016 Orders and Judgment, Bornemann paid a total of $2,957,142.73, *in addition to* the transfer of the Kaneohe property valued at approximately $910,000. (RA58:26:187-95) A satisfaction of judgment as to Bornemann has been recorded, expressly reserving Bornemann's rights in the underlying appeal. (RA58:26:390-98) On October 14, 2016, Bornemann timely filed a Notice of Appeal to the Hawaii Supreme Court (RA58:26:944-955). After full briefing in the consolidated appeals, the ICA issued Memorandum Opinions on November 30, 2018 and the Judgment on Appeal on January 4, 2019. Bornemann filed an application for writ of certiorari to the Hawaii Supreme Court, which was denied on April 4, 2019. This timely Petition followed.

REASONS FOR GRANTING THE WRIT

A. The Hawaii Supreme Court Gravely Erred When it Upheld a Grossly Excessive Punitive Damages Award Against Bornemann in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution

The punitive damages award suffers from multiple constitutional flaws. Moreover, this case provides the Court with the much needed opportunity to again speak out loudly and clearly against outlier punitive damage awards that are grossly excessive, disproportionate and totally unpredictable in their severity. The Hawaii Court's outlier decision below flatly ignores this Court's heightened concern with the "stark unpredictability of punitive damage awards" and the Court's strong admonition that such awards must be reasonably predictable in their severity. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495, 496 (2008).

Here, the absence of predictability is both shocking and patent: based upon the same identical set of facts, involving the same parties, three juries awarded punitive damages that differed by as much as 650%; one trial court concluded that due process required an award no higher than $75,000 (4.5% of the ultimate punitive damages award); and, the Hawaii Intermediate Court of Appeal's due process standard would have reduced the final shocking $1,642,857.13 award by 85%. In truth, and sadly, more predictability and certainty can be found by buying a ticket in a state lottery!

1. The punitive damages award is constitutionally flawed because it is patently excessive.

The original underlying compensatory damages award against Bornemann of $253,079.29 arose out of a highly contested fraudulent transfer claim involving Bornemann as transferee. The juries in the first two trials awarded punitive damages against Bornemann of $250,000 and $594,000 respectively. In the first jury trial, the trial court found the $250,000 punitive damages award to be excessive and reduced it to $75,000. The Kekonas refused to accept the lower amount and opted for a new trial. . In the second jury trial, the jury increased the punitive damages award to $594,000. But, that award and judgment was entirely vacated by the Hawaii Supreme Court based on an error of law at the trial court level concerning the proper standard of proof for a fraudulent transfer. When the third jury awarded $1,642,857.13 in punitive damages against Bornemann, the Hawaii Intermediate Court of Appeals deemed this award to be so grossly excessive that it reduced the award by 85% to $250,000. In sum, over the course of several decades, and based upon the same set of facts, two juries, a trial court and the Hawaii Intermediate Court of Appeals all bracketed a reasonable punitive damages award between a low of $75,000 and a high of $594,000. The only outlier was the Hawaii Supreme Court who, as discussed below, went out of its way to find "aggravating factors" to punish Bornemann and to conclude, in essence, that Bornemann's exercise of his due process rights through three trial and multiple

appeals over several decades merited special punishment.

The differences in punitive damages between the three jury awards, between the one trial court remittitur and the jury awards and between the two Hawaii appellate courts are so vast that, on their face, they belie the notion that the ultimate $1,642,857.13 punitive damages award is "reasonably predictable" and consistent with due process.

2. The Punitive Damages Award is Constitutionally Flawed Because it was Intended to Punish Bornemann for Exercising His Due Process Rights to Appeal.

The Hawaii Supreme Court specifically found that the extraordinarily large punitive damages award here was proper and justified in large part due to "aggravating factors". Those "aggravating factors" however, all arose out of, or related to, Bornemann's exercise of his due process rights to appeal; and, Bornemann had, in fact, prevailed on those appeals.

It is particularly instructive to review the Hawaii Supreme Court's description of what it considered to be "aggravating factors". In each instance, the aggravating factor ties directly to delays and costs experienced by the Kekonas as a result of the multiple trials and appeals over a period of several decades while Bornemann pursued his due process rights. For example, in its decision, the Court cites to the following: "the Kekonas could not collect on their judgment"; "Mr. Kekona died during the pendency of

the litigation" without collecting anything on the original judgment and with his retirement plans greatly disrupted"; "the Kekonas were forced to consign years of their retirement to full-scale litigation in order to recover amounts that they were legitimately owed". In truth, both sides chose to litigate to the end but it was Bornemann's conduct that was selected out as an "aggravating factor" to justify a huge punitive damages award.

In short, despite that fact that Bornemann pursued three successful appeals, obtaining reversals of significant issues at trial (*see id.* at 61-62, 305 P.3d at 477-78 (detailing the three trials, appeals and reversals on various legal issues), the Hawai`i Supreme Court relied upon the amount of attorneys' fees incurred, and the corresponding delay caused during these appeals (notwithstanding their validity and Bornemann's success in obtaining reversals of various errors committed by the trial court – without considering the instances where the Kekonas appealed), as a basis for the Court to affirm a punitive damage award equal to more than fifteen (15) times underlying compensatory award. *See Kekona v. Bornemann*, 135 Hawai`i 254, 264, 349 P.3d 361, 371 (2015). As discussed below, awarding the Kekonas post-judgment interest to compensate them for the delay pending the appeal would have more than compensated them for the same delay component that the Hawaii Supreme Court included in the punitive damage award itself.

The Hawaii Supreme Court's 2015 Decision not only punished Bornemann for not accepting improper standards of proof imposed at trial or other errors of

law committed by the Circuit Court but it also clearly signaled to future litigants that those who exercise legitimate appeal rights may be punished for doing so and may exponentially increase their risk of a large punitive damages award for the delay caused thereby. *Cf. Perry v. Perez-Wendt*, 129 Hawai`i 95, 102, 294 P.3d 1081, 1088 (2013) (acknowledging that "public participation" in the form of actual legislative or judicial petitioning activity is protected under HRS Chapter 634F and the First Amendment of the U.S. Constitution, the Petition Clause in article I, section 4 of the Hawai'i Constitution); *see also E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523 (1961); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657, 85 S.Ct. 158 (1965).

3. The Punitive Damages Award is Also an Unconstitutional Double Penalty on Bornemann.

The Hawaii Court's imposition of post judgment statutory interest of $1,314,285.60 on top of the underlying $1,642,857.13 punitive damages award not only almost doubled the award but it also resulted in a *de facto* unconstitutional double penalty on Bornemann. That is, the Hawaii Court had already upheld the excessively high punitive damages award to compensate the Kekonas for what the Court deemed to be delays and costs caused by Bornemann's appeals; and, thereafter the Hawaii Court sustained the trial court's award of post-judgment statutory interest on that award of 10 % per year. The very purpose of post-

judgment statutory interest[6] is to compensate the prevailing party for delayed payment.

While Hawaii courts have addressed whether awarding post-judgment interest constitutes an illegal or excessive penalty in and of itself, and have addressed the general framework for evaluating a request for pre-judgment interest on an award of punitive damages, Hawaii courts have not addressed the propriety of an award of post-judgment interest ***in addition to*** a significant award of punitive damages. *See e.g., Metcalf v. Voluntary Employees' Ben. Ass'n of Hawaii*, 99 Hawai`i 53-61, 6, 52 P.3d 823, 830-31 (2002). In *Metcalf,* the Hawai`i Supreme Court explained:

> Pre-judgment interest is designed "to allow the court to designate the commencement date of interest in order to correct injustice when a judgment is delayed for a long period of time for any reason, including litigation delays." *Schmidt v. Board of Directors of Ass'n of Apartment Owners of Marco Polo Apartments,* 73 Haw. 526, 534, 836 P.2d 479, 483 (1992) (quoting *Leibert v. Finance Factors, Ltd.,* 71 Haw. 285, 293, 788 P.2d 833–838 (1990)) (internal quotation marks omitted). "[T]he purpose of prejudgment interest is to discourage 'recalcitrance and unwarranted delays in cases which should be more speedily resolved.' " *Calleon v. Miyagi,* 76 Hawai'i 310,

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[6] *See* HRS § 478–3 (1993) ("Interest at the rate of ten per cent a year, and no more, shall be allowed on any judgment recovered before any court in the State, in any civil suit.").

322, 876 P.2d 1278, 1290 (1994) (citation omitted). However,

> it is clearly within the discretion of the circuit court to deny prejudgment interest where appropriate, for example, where: (1) the defendant's conduct did not cause any delay in the proceedings, *see Amfac, Inc. [v. Waikiki Beachcomber Investment Co.*], 74 Haw. [85], 137, 839 P.2d [10,] 36 [(1992)]; (2) **the plaintiff himself has caused or contributed to the delay in bringing the action to trial**, see *Schmidt v. Board of Directors of the Ass'n of Apartment Owners of the Marco Polo Apartments,* 73 Haw. 526, 534–35, 836 P.2d 479, 484 (1992); or (3) **an extraordinary damage award has already adequately compensated the plaintiff**, *see Leibert v. Finance Factors, Ltd.,* 71 Haw. 285, 293, 788 P.2d 833, 838 (holding that it was an abuse of discretion for the circuit court to award prejudgment interest to a treble damages award), *reconsideration denied,* 71 Haw. 664, 833 P.2d 899 (1990).
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> *Roxas v. Marcos,* 89 Hawai'i 91, 153, 969 P.2d 1209, 1271 (1998), *reconsideration denied,* 89 Hawai'i 91, 969 P.2d 1209 (1999).

Id. at 61, 52 P.3d at 831) (emphases added). The Kekonas were appellants or petitioners in several of the appeals in this case.

Similarly, courts have recognized that the "purpose of post-judgment interest is to compensate the plaintiff for loss of the use of the money awarded in the judgment 'without regard to the elements of which that judgment is composed.'" *Air Separation v. Lloyd's of London,* 45 F.3d 288, 290 (9th Cir. 1995) (citation and internal quotation marks omitted) (awarding post-judgment interest on punitive damages). In *Air Separation,* the Ninth Circuit noted that awarding post-judgment interest is designed to prevent a defendant from exploiting the time value of money by ***frivolously*** appealing or otherwise delaying timely payment. *See id.* Therein, the appellant failed to post a bond to secure a stay pending appeal, and the Air Separation Court concluded that an award of post-judgment interest of approximately 15,000 on $271,000 of punitive damages was mandatory under the applicable statute. *See id.* at 290-91.

However, this Honorable Court has stated and the Hawaii appellate court agreed that:

> the "Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor." *BMW of N. Am. Inc. v. Gore,* 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (citations and internal quotation marks omitted). A grossly excessive punitive damages award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 417, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (citation omitted).

Kekona, 130 Hawai`i at 72, 305 P.3d at 488.

It is important to further note that the Hawaii Supreme Court used the $253,079.29 as the basis for comparison in determining whether the different portions of the award of $1,642,857.13 were excessive. However, the reality is that there was no existing compensatory award.[7] The ICA had vacated that award as duplicative of the interest amount to be awarded against Abastillas and Smith. *See Kekona*, 130 Hawai`i at 67, 305 P.3d at 483. Furthermore, upon remand, the Kekonas conceded that they had abandoned their claim for compensatory damages against Bornemann and were purely pursuing punitive damages. (RA TR 2015-12-2 at 5, 7, 10).

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[7] While Bornemann recognizes that the Hawai`i Supreme Court ruled in 2006 that a determination of liability amounts to a determination of nominal damages (*see Kekona*, 113 Hawai`i at 179-80, 150 P.3d at 828-29 (albeit relying upon three cases involving sexual assault by a woman's own father, a dog attack allowed by police, and a car dealership selling used cars as new, and two cases involving a consumer protection statute awarding treble damages and a fraud case holding because there were no actual damages punitive damages could not be awarded)), the instant situation presents the terribly slippery slope of allowing juries to punish litigants for pursuing legitimate appeals – even when the parties are already protected through an award of 10% statutory interest – greater than any investment vehicle available. The ICA determined the only evidence supporting a compensatory award was the statutory interest caused by the delay resulting from the litigation – ironically, damages which could not be awarded twice and had to be vacated – and resulted from legitimate appeals resulting in reversals of the underlying rulings versus merely frivolous appeals.

4. The Punitive Damages Award was Excessive and Constitutionally Improper in the Context of this Fraudulent Transfer Case.

Bornemann was made to pay more than 6 times the amount that Abastillas and Smith were assessed in punitive damages (*i.e.*, $250,000) – when evidence presented at the third trial showed that Bornemann was in fact a creditor regarding the HPP property, and he took the HPP property in good faith and for reasonably equivalent value. *See Kekona*, 130 Hawaii at 62-3, 305 P.3d at 478-9. A review of the 2006 ICA and Supreme Court Decisions should also make clear that the jury instructions, coupled with the incorrect standard of proof at the prior trials, made a ruling against Bornemann inevitable. In 2000, the jury was instructed to apply a preponderance of evidence burden and instructed that "[k]nowledge that a transaction will operate to the detriment of creditors is sufficient for actual intent. If the conveyance is made under such circumstances that the result must necessarily be to hinder and delay creditors, it will be presumed that this was the intent of the transferor in making it. Fraudulent intent can be found on the basis of circumstantial evidence, direct proof will rarely be available." *See Kekona*, 111 Hawaii 203 at *11-12, 140 P.3d 436 at *11-12 (affirming the preponderance standard applied below, which was later reversed and vacated in *Kekona*, 113 Hawai`i at 181-2, 150 P.3d at 830-1).[8] Bornemann directly admitted and argued

[8] The ICA noted that these instructions were not challenged on appeal.

below that he was a creditor and took preferential transfers as to the HPP and Kaneohe properties. Although the Supreme Court ruled that HUFTA did not expressly abrogate the preferential transfer rule (*see id.* at 182-3, 140 P.3d at 831-2), when coupled with instructions like the ones above, it would be impossible for anyone with knowledge of any other creditors to ever take a "preferential transfer" and withstand a HUFTA claim. Now, **unlike the majority of other jurisdictions**, Hawaii allows significant punitive damages against grantees, even if they were owed money and were acting in good faith, particularly if they were unfortunately incorrect on whether they took the property for reasonably equivalent value.

Through Bornemann's February 25, 2008 Motion for Stay, something the Circuit Court admitted reviewing in deciding the Motion to Enter and Motion to Amend just prior to entering the February 1, 2016 Judgment,[9] Bornemann presented significant case law from other jurisdictions showing that punitive damage awards were either not permitted or that large awards above the value of the asset transferred did not exist. (RA50:22:1375-81) *See also C & A Investments v. Kelly*, 330 792 N.W.2d 644, 646-47 (Wis. App. 2010) (holding punitive damages are not available under UFTA and particularly where no compensatory damages were awarded); *Northern Tankers, Ltd. v. Backstrom*, 968 F. Supp. 66, 67 (D. Conn. 1997) (holding no punitive damages under Connecticut's UFTA and damages limited to the property transferred); *Cadle Company v. Organes Enterprises, Inc.*, 29 A.D.3d 927 (S.Ct. App.

[9] (TR113-2016-01-11 at 12, 28-29).

Div. 2d. Dept. N.Y. 2006) (holding claim under New York law fraudulent conveyance does not give rise to punitive damages even if it was effected with intent to avoid creditors); *Miller v. Kaiser*, 433 P.2d 772, 777 (Colo. 1967) (holding equitable remedy of setting aside conveyance is not compatible with an award of exemplary damages); *Summer v. Hagen*, 852 P.2d 1165 (Alaska 1993) (holding punitive damages against grantee of fraudulently conveyed property are not authorized where underlying judgment was on contract); *Damazo v. Wahby*, 269 Md. 252, 305 A.2d 138 (1973) (recognizing that Maryland fraudulent conveyance statute does not preclude a judgment for damages against the transferee when the property can no longer be recovered from the transferee); *In re Shore,* 305 B.R. 559 (Bankr. D. Kan. 2004) (noting court judgment awarded punitive damages award against transferee of $20,000 where underlying fraudulent transfer totaled $124,000); *Mussetter v. Lyke*, 10 F. Supp.2d 944 (N.D. Ill. 1998) (assessing exemplary damages of $50,000 against transferee for fraudulent transfer of assets found to be worth between $1.62 and $1.716 million in return for forgiveness of $750,000 debt where underlying judgment was in the sum of $311,577.56 in principal amount, and fraudulently transfer of assets could not be "avoided" because assets were unavailable or consumed); *Regency Centre Development Co., Ltd. v. Construction Dimensions, Inc.,* 2003 WL 22215483 (Ohio App. 8 Dist. 2003) (recognizing that additional indicia of "actual malice" is required for punitive damages); *Volk Construction Co. v. Wilmescherr Drusch Roofing Co.*, 58 S.W.3d 897 (Mo. App. E.D. 2001) (holding punitive damages available in fraudulent transfer case with an

underlying judgment of $11,771.17, and confirming $5,000 in punitive damages was appropriate, even where security interests were intentionally created to strip corporation).

With due respect, the ICA's 2006 opinion relating to punitive damages under HUFTA, *Kekona*, 111 Hawai`i 203 at *20-25 203, 140 P.3d 436 at *20-25,[10] failed to analyze the critical distinction between a transferee who disposes of the transferred property, and a transferee who retains possession of the transferred property. Without discussing this distinction, the ICA relied primarily on *Lochafrance United States Corp. v. Interstate Distribution Services, Inc.*, 451 N.E.2d 1222, 1225 (Ohio 1983) (requiring sufficient evidence of malice for purposes of awarding punitive damages on fraudulent conveyance claim). *Lochafrance* is an unusual case in that the transferees were successor corporations of the transferor with the same business, employees, and facilities. In any event, the *Lochafrance* case should not have been relied upon, because the case appears to rely heavily on at least two fundamentally flawed premises: (1) that the UFTA supplemental provision (found at HRS § 651C-10) which provides for the application the provisions of the fraudulent transfer statute, or the UFTA's "catch-all" provision (found at HRS § 651C-7(a)(3)(C)) allows for

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[10] Hawai`i appellate courts have never addressed in depth the issue whether punitive damages are truly appropriate when the grantee retains the transferred property. *Cf. Kekona*, 135 Hawai`i at 265 n.16, 349 P.3d at 372 n.16. This may be the opportunity for the Court to clarify and limit the remedy to the appropriate circumstances.

application of punitives, and (2) that the common law of fraudulent conveyances allowed punitive damages against a transferee of a fraudulent transfer.

With respect to *Lochafrance's* first flawed premise, HRS § 651C-10 specifically prohibits the application of supplemental "principles of law and equity" where doing so would displace the provisions of HUFTA. Under HRS §7(a)(l), and §8(b), a creditor has the express remedies of either avoidance of the property, or a money judgment against the transferee limited to the value of the property transferred or the underlying judgment, whichever is less. Allowing punitive damages against a transferee would displace §8(b), and is thus prohibited. Additionally, the "catch-all" provision at HRS § 651 C-7(a)(3)(C) which allows for "[a]ny other relief the circumstances may require" is qualified by the phrase "[s]ubject to applicable principles of equity" contained in §7(a)(3). Accordingly, the additional "avoidance" remedies in §7(a)(3), including the "catch-all" remedy of §7(a)(3)(C), are limited by principles of equity. In the context of §7(a)(3), the phrase "principles of equity" is most likely a reference to the fact that the "avoidance" remedy set out in § 7 was historically an "equitable" action, and historically, "equity" did not recognize punitive damage awards against a transferee of a fraudulent conveyance. Accordingly, there is no basis for claiming the "catch-all" provision of §7(a)(3)(C) justifies an award of punitive damages against a transferee.

With respect to *Lochafrance's* second flawed premise, even if "principles of law or equity" were to be applied, that would not justify the imposition of

punitive damages against a transferee. As discussed above, historically "equity" principles did not allow punitive damages against transferees of fraudulent conveyances as the equitable remedy was limited to setting aside the transfer. *See Miller*, 433 P.2d at 777 (equitable remedy of setting aside conveyance is not compatible with an award of exemplary damages). Moreover, common "law" principles do not authorize a general creditor to pursue the transferee in a fraudulent conveyance action for anything other than the specific property transferred or the proceeds thereof this was the rule at common law, *Dime Savings Bank of New York, FSB v. Butler*, 1997 WL 112776, *4 (Conn. Super. 1997) (citing *Austin v. Barrows,* 41 Conn. 287, 299 (1874) (other citations omitted)), and the general common law rule is that as long as the subject property remains in the possession of the fraudulent transferee *in toto* and its value is not depreciated by any action of the fraudulent transferee, a personal judgment against such transferee will not be sustained. *See Miller*, 433 P.2d at 775. Nothing in "principles of law or equity" authorize a punitive damage award against a transferee who retains possession of the transferred property, particularly absent clear and convincing evidence of malice.

B. The ICA Gravely Erred in Refusing to Hold the Underlying Judgment Expired on September 2, 2014, Terminating the Fraudulent Transfer Claim.

The ICA gravely erred in declining to hold that Circuit Court incorrectly denied Bornemann's June 23, 2015 Motion to Vacate the February 5, 2008 Judgment

insofar as the original 1994 Judgment had expired as a matter of law on September 2, 2014, pursuant to HRS § 657-5.[11] Without a presently enforceable debt or claim, the Kekonas could no longer recover compensatory (whether nominal or actual) or punitive damages from Bornemann. The Circuit Court nevertheless denied the Motion to Vacate and entered the February 1, 2016 Judgment against Bornemann – all premised on the underlying September 2, 1994 Revised Final Judgment.

Addressing whether garnishment proceedings could proceed after a judgment expired under HRS § 657-5, the Hawaii Supreme Court explained: "HRS § 657–5 is a statute of repose that compels the exercise of a right within the statutorily defined period of time. . . . If the judgment creditor fails to secure the extension within the ten years, **the judgment and all the rights and remedies appurtenant to that judgment terminate**." *Int'l Sav. And Loan Ass'n Ltd. v. Wiig*, 82 Hawai`i 197, 199-200, 921 P.2d 117, 119-20 (1996) (emphases added). Recognizing that HRS § 657–5 creates a presumption that the judgment is "fully paid" after ten years from the judgment, the *Wiig* Court held that "**the judgment, together with all the rights**

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[11] HRS § 657-5 provides:

> Unless an extension is granted, **every judgment** and decree of any court of the State **shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered.** . . . **A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree.** . . . (Emphases added.)

and remedies appurtenant to it, are conclusively presumed paid and discharged after ten years unless timely renewed." *Id.* at 201, 921 P.2d at 121. In other words, because garnishment is a collection procedure premised on a valid judgment, it cannot survive independently of the judgment. Thus, the *Wiig* Court concluded that, if the judgment expires under HRS § 657-5, the judgment is presumed paid and discharged as a matter of law and all of the rights and remedies appurtenant to that judgment terminate. *Id.* The Ninth Circuit Court of Appeals recognized the same *in In the case of In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 536 F.3d 980, 987 & 990 (9th Cir 2008):

> On its face, HRS § 657–5 plainly states that all judgments are extinguished after ten years unless timely renewed. The Hawai'i Supreme Court has authoritatively declared that the burden is on the judgment creditor to seek judicial extension of the judgment prior to expiration of the ten-year period, and that if she fails to secure an extension within the ten years, "the judgment and all the rights and remedies appurtenant to that judgment terminate." *Wiig,* 921 P.2d at 119. . . . .
>
> Alternatively, Hilao submits that the running of the Hawai'i period of limitations was tolled by her collection efforts . . . . Whether or not this is so, the extension was not sought before the MDL 840 Judgment expired. HRS § 657–5 contains no provision for revival, and

> the Hawai‘i Supreme Court has held that its time limits are absolute. . . .

Other courts have reached similar holdings. *See e.g., Kroop & Karland, P.A. v. Lambros*, 118 Md. App. 651, 655-66, 703 A.2d 1287, 1293-1294 (1998) (holding failure to renew means the judgment "no longer exists" and creditor lost right to sell property in satisfaction thereof); *Ayer v. Hemingway*, 73 A.3d 673, 676 (VT 2013) (holding expired judgment stopped a post-judgment lien foreclosure). While the result may seem harsh, this makes sense.

> While a statute of limitations bars a cause of action if not brought within a certain time period, a statute of repose prevents a cause of action from arising after a certain period. ***The bar of a statute of repose is absolute***, whereas the bar of a statute of limitations is conditional.
>
> ***A statute of repose creates a substantive right in those protected to be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.***

4 C.J.S., *Limitations of Actions* § 7 *Distinctions Between Statutes of Limitations and Statutes of Repose* (2016) (footnotes omitted and emphases added). Thus, Hawai`i law is clear that once the judgment expires, it is extinguished and the judgment holder cannot collect on that judgment debt.

Fraudulent transfer, just like garnishment, is a mechanism to collect an existing debt and requires a presently enforceable claim. In fact, a valid, presently enforceable debt against the original transferor is an essential element of an action against the transferee to set aside a fraudulent transfer, the absence of which is fatal.[12] The rationale for this long-recognized rule was explained in *Jorden v. Ball*, 258 N.E.2d 736, 737 (Mass. 1970):

> The uniform fraudulent conveyance act confers jurisdiction to set aside conveyances made with actual intent 'to hinder, delay, or defraud either present or future creditors, * * *' G.L. c. 109A, Sec. 7. The act is remedial. It provides a method by which the frustration of claims by a conveyance may be avoided, but it ***does not create new claims***. To benefit from the rights it creates, a person must qualify as a 'creditor,' defined in the act as 'a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.' As we stated in *Blumenthal v. Blumenthal*, 303 Mass. 275, 278, 21 N.E.2d 244, 246 (1939), 'The remedy i[s] incidental to the claim. If the claim

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[12] *See* 37 C.J.S. *Fraudulent Conveyances* Sec. 70 (1943); *Oregon Recovery, LLC v. Lake Forest Equities, Inc.*, 211 P.3d 937, 940-50 (Or. App. 2009); *Laidley v. Heigho*, 326 F.2d 592, 593-594 (9th Cir. (Cal.) 1963); *Clark v. Rosson*, 657 P.2d 903, 904 (Ariz. App. 1982); *Strom v. Felton*, 302 P.2d 917, 923 (Wyo. 1956); *State of Rio De Janeiro v. E.H. Rollins & Sons, Inc.*, 87 N.E.2d 299, 300 (N.Y. 1949); *Remington-Rand, Inc. v. Emory Universit*y, 196 S.E. 58, 59 (Ga. 1938).

> is not established, then the whole proceedings fail, and the bill must be dismissed.'

(Emphasis added; quotation marks in original.)[13] Here, the Kekonas pursued a claim of fraudulent transfer against Bornemann based solely upon the 1994 Judgment, which expired on September 2, 2014. Insofar as the Kekonas no longer have a presently enforceable debt or claim, their corresponding claim against Bornemann for fraudulent transfer likewise expired.

In declining to recognize the application of the above well-settled law, the ICA first attempted to note that the Kekonas initiated the underlying action based upon the 1993 jury award ***before*** it was reduced to the 1994 Judgment, incorrectly "noting" somehow that therefore the 1994 Judgment is not the ***only*** basis for their fraudulent transfer claim, without any support or authority that a jury award before judgment is somehow independent of the resulting judgment. *See* App. A at 15. The 1993 jury award was reduced to the 1994 Judgment and is the only claim and/or judgment that the Kekonas pursued at trial and during the several retrials of their claim. The ICA then attempted to distinguish the above case law, discussing *Int'l Sav.*

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[13] Indeed, "numerous decisions declare that the action to set aside a fraudulent conveyance is merely 'incidental,' 'adjective,' and 'ancillary' to the creditor's right to collect the underlying debt[,]" and cannot be maintained if the underlying debt does not exist, has expired or is otherwise void. *Jahner v. Jacob*, 515 N.W. 2d 183, 185-6 (N.D. 1994); *Central-Penn Nat'l Bank of Phila. v. Culp*, 182 A. 239, 240-241 (Pa. 1936); *State of Rio De*, *supra*, at 300; *Clark*, *supra*, at 904.

and Loan Ass'n, Ltd. v. Wiig, *supra* and referring to *Oregon Recovery, LLC, supra*, and *Carr v. Guerard*, 616 S.E.2d 429 (S.C. 2009), by noting that the underlying judgments in those cases had expired before the plaintiff had ***secured*** independent judgments in those cases. The ICA then stated "independent and separate judgments were entered in this case against Bornemann." App. A at 16. This analysis is flawed for two basic reasons. First, Hawaii statutory law, unlike some of these jurisdictions, does not stay the effect of HRS § 657–5 when a collection action is pursued. *Cf. RRR, Inc. v. Toggas*, 98 F.Supp.3d 12 (2015) (holding that second "garnishment" judgment was rendered void and recognizing the "narrow exception" to expiration if the judgment creditor has completed all execution efforts prior to the ten-year expiration date and is only awaiting the issuance of an execution order (citing D.C. Code §15-39-30 (1976))). Second, the "independent and separate judgments" the ICA referenced were reversed and/or modified through appeal and were not enforceable ***before*** the 1994 Judgment expired.

The ICA then essentially concluded that the Circuit Court "did not err in denying the motion to vacate" because it was required to "strictly comply with the mandate of the appellate court" and Bornemann could have raised this issue in a motion for reconsideration before the Hawaii Supreme Court in 2015. However, HRS 657-5 is mandatory – a "court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree" and "every judgment . . . shall be presumed to be paid and discharged at the expiration[.]" There is no discretion in this language. There is no exception for actions

already instituted in this language. Accordingly, the ICA should have reversed the Circuit Court and vacated the February 5, 2008 Judgment, entering judgment in favor of Bornemann, and returning the payments and assets made and/or conveyed to the Kekonas for the punitive damages award (totaling $2,957,142.73).

CONCLUSION

For the above-stated reasons, Bornemann respectfully requests that this Court grant this Petition and issue a writ of certiorari, review and reverse certain portions of the ICA Memorandum Opinion and enter judgment in favor of Bornemann.

Respectfully submitted,

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