No. _____

In the

Supreme Court of the United States

JONNAVEN JO MONALIM and MISTY MARIE MONALIM,

Petitioners,

v.

HAWAIIUSA FEDERAL CREDIT UNION,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Hawaii

APPENDIX: EXHIBITS 6 THROUGH 9

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EXHIBIT 6

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HAWAIIUSA FEDERAL CREDIT UNION,
Respondent/Plaintiff-Appellee,

vs.

JONNAVEN JO MONALIM; MISTY MARIE MONALIM,
Petitioners/Defendants-Appellants,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA,
by its Board of Directors; KO OLINA COMMUNITY ASSOCIATION, INC.,
a Hawai'i nonprofit corporation;
Respondents/Defendants-Appellees.

SCWC-16-0000807

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000807; CIV. NO. 10-1-1388)

APRIL 30, 2020

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

This case involves a credit union enforcing the terms of two mortgages that the mortgagors granted as assurance that

they would repay the loans they received from the credit union to purchase an investment property. As a result of the mortgagors' failure to make their loan payments, the property was sold at a public foreclosure auction to a third party bidder who placed a bid that was more than the taxed assessed valuation of the property but less than the mortgagors' outstanding debt. Because the sale proceeds were not sufficient to fully satisfy the mortgagors' outstanding debt to the credit union, the credit union exercised its rights under the mortgages and obtained a deficiency judgment against the mortgagors. The deficiency amount was calculated, in accordance with Hawai'i's long-standing practice, based on the difference between the sale proceeds and the total outstanding debt. The Majority opines that the method the circuit court used to calculate the deficiency amount was unfair. I respectfully disagree.

The Majority adopts a new rule that will change Hawai'i's traditional method of calculating deficiency judgments. Under the new rule, mortgagors are entitled to a hearing to determine the "fair market value" of a property at the time of a foreclosure sale. The circuit court will be required to calculate the amount of the deficiency judgment based on a new formula in which the greater of the "fair market value" or the court-confirmed sale price will be deducted from the outstanding debt.

Claiming that "the traditional approach can result in unjust enrichment," Majority at 3, the Majority relies on a hypothetical unjust enrichment windfall to justify adopting the new rule. Parts III(C) and (D) of the Majority opinion are premised on preventing such an inequitable result that did not occur in this case and is not supported by the record. See Majority at 26-51. I therefore dissent from parts III(C) and (D) of the Majority opinion.

I agree with part III(B) of the Majority opinion, which holds that the circuit court failed to address the mortgagors' laches argument. See Majority at 18-26. However, I believe that a review of the record reveals that the mortgagors' laches argument fails on the merits because the mortgagors did not demonstrate that the delay was unreasonable under the circumstances or that they were prejudiced by the delay.

I therefore respectfully concur in part and dissent in part.

I. BACKGROUND

Respondent/Plaintiff-Appellee HawaiiUSA Federal Credit Union (the credit union) is a not-for-profit federal credit union. In 2008, Petitioners/Defendants-Appellants Jonnaven Jo Monalim and Misty Marie Monalim (the Monalims) applied for and received two loans from the credit union to purchase a portion of the Beach Villas at Ko Olina condominium project in Kapolei,

Hawai'i. The record indicates that this property was not the Monalims' residence and that it was one of five properties the Monalims owned on O'ahu.

The first loan (note #1) was for $911,200.00 and the second loan (note #2) was for $113,900.00. The loans were secured by mortgages, which were recorded as liens against the Ko Olina property. The mortgages required the Monalims to pay to the credit union any resulting deficiency in the event of foreclosure.

Two years after the loan was made, the Monalims stopped making the required payments on both note #1 and note #2 and the loans went into default.

A. The Foreclosure Proceedings

On June 24, 2010, the credit union commenced foreclosure proceedings against the Monalims to enforce its rights under the mortgages. The credit union alleged that the Monalims defaulted on their loan obligations and owed $1,024,428.04 on note #1 and $121,547.20 on note #2 and that it was entitled to foreclose the mortgage, sell the property, and obtain a deficiency judgment for any outstanding debt that was not satisfied by the proceeds from the foreclosure sale.

The credit union moved for summary judgment and an interlocutory decree of foreclosure. The Monalims failed to appear at the March 23, 2011 summary judgment hearing. The

circuit court granted the motion and, on April 13, 2011, entered a foreclosure decree and judgment. The circuit court later set aside the foreclosure decree and judgment upon the Monalims' assertion that they had not been served with the summary judgment motion or notified of the hearing date.

Both parties appeared at a subsequent hearing on July 6, 2011. On August 29, 2011, the circuit court issued a new foreclosure decree and judgment.[1] The foreclosure decree ordered foreclosure of the mortgage liens that secured notes #1 and #2, ordered the property to be sold at a public auction, appointed a commissioner to sell the property, and ordered a hearing to confirm the foreclosure sale. The foreclosure decree also provided for a deficiency judgment in favor of the credit union in the event the sale proceeds did not sufficiently satisfy the Monalims' outstanding debt:

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

The Monalims appealed the foreclosure decree and judgment on September 28, 2011. After more than one year passed

1 The new foreclosure decree and judgment were substantially the same as the April 13, 2011 foreclosure decree and judgment.

without the Monalims filing their opening brief, the ICA dismissed the appeal.

While the appeal was pending, the court-appointed commissioner conducted the public auction. At the time of the auction, the City and County of Honolulu valued the property at $703,600.00. The Commissioner mailed a "Fact Sheet" with information about the property to "a number of different persons and parties, which [the] Commissioner felt might be interested in bidding for the subject premises, or who [he] felt might be in a position to refer the information to other interested parties or to their clients." The Commissioner arranged two, three-hour open house dates for viewing by the general public. Finally, the Commissioner published a classified advertisement describing the property and stating the dates and times for the open houses and the public auction in the Sunday Honolulu Star Advertiser.

The Commissioner received sixteen bids at the public auction. The highest bid was $760,000.00, which exceeded the City and County's valuation of the property by $56,400.00. Notably, the highest bidder was a third party who is unaffiliated with the credit union.

On December 1, 2011, the circuit court held a hearing on the credit union's motion to confirm the foreclosure sale. No interested bidders appeared at the hearing and there was no

request to re-open the bidding process. The Monalims orally moved for a further hearing on any deficiency judgment, which the court granted.[2]

On December 22, 2011, the circuit court entered an order confirming the sale in the amount of $760,000.00 (confirmation order) and judgment. The court concluded that the $760,000.00 purchase price was "fair and reasonable." The confirmation order expressly provided that "since the proceeds from the sale of the Mortgaged Property are insufficient to fully satisfy the amounts due to [the credit union], that a motion for deficiency judgment may subsequently be filed by [the credit union] against [the Monalims], jointly and severally." The Monalims did not appeal the confirmation order and judgment.

B. The Motion for Deficiency Judgment

On January 12, 2016, four years after the court entered the confirmation order, the credit union moved for a deficiency judgment against the Monalims as provided under the foreclosure decree and confirmation order. The credit union set forth a calculation of the deficiency amounts for notes #1 and #2.

The Monalims opposed the motion for deficiency judgment on grounds that the deficiency judgment was barred by

2 The record indicates that no other hearing took place until the 2016 hearing on the credit union's motion for a deficiency judgment.

laches and that the method of calculating the amount of the deficiency violated their constitutional right to due process.

In reply, the credit union argued that the dismissal of the Monalims' appeal of the foreclosure decree and judgment precluded them from challenging the credit union's right to a deficiency judgment. Regarding the amount of the deficiency judgment, the credit union argued that both the foreclosure sale and the confirmed bid price were fair and reasonable and, thus, the confirmed sale price was the proper basis from which to calculate the deficiency amount. The credit union also noted that "Hawaii law does not require that a motion for deficiency judgment be filed within a certain time from the date of confirmation."

On October 13, 2016, following a hearing on the motion at which both parties appeared, the circuit court issued an order granting in part and denying in part the credit union's motion for deficiency judgment and entered a deficiency judgment against the Monalims in the amount of $493,282.04. The circuit court denied the credit union's request to include interest that accrued from the date of entry of the confirmation order and judgment to the date the credit union filed its motion for deficiency judgment. Any interest that accrued during this four-year time period is not included in the deficiency amount.

II. DISCUSSION

I dissent from the Majority's holding in parts III(C) and (D) because it is clear to me that the facts of this case do not support the adoption of the Majority's new rule.

I concur with the Majority's holding in part III(B), but I believe that the laches argument that the Monalims presented below and on application for writ of certiorari fails on its merits.

A. The facts of this case do not support the adoption of the Majority's new rule.

Hawai'i has historically calculated deficiency judgments by deducting the foreclosure sale proceeds from the outstanding mortgage debt. We have instructed that, if the highest bid at a foreclosure sale is "so grossly inadequate as to shock the conscience[,]" the court may refuse to confirm the sale. Wodehouse v. Hawaiian Trust Co., 32 Haw. 835, 852 (Haw. Terr. 1933).

The Majority rejects Hawai'i's traditional approach to calculating deficiency judgments and instead adopts a new rule based on the possibility that the deficiency amount could be inequitable to the mortgagor, a result that plainly did not occur in this case. In vacating the ICA's Judgment on Appeal, the Majority adopts a new method of calculating a deficiency judgment based on the greater of the property's "fair market

value" at the time of the foreclosure sale, as determined at an evidentiary hearing, or the court-confirmed sale price. Majority at 3.

First, I believe that by rationalizing the adoption of this new method based on the possibility that the deficiency amount in other foreclosure cases could be inequitable, the Majority oversteps the authority entrusted to this court to determine, in each case, if the law was applied correctly to a specific set of facts. The Majority should exercise judicial self-restraint in this case and leave the decision of whether or not to enact this new rule to the Legislature. Second, the new rule will require the court to select from the fair market value estimations of competing experts. The additional time and expense of this process will unnecessarily burden both the parties to foreclosure actions and the courts. Finally, the new rule will not, as the Majority avers, protect both parties to the mortgage.

First, the facts of this case do not support this court's usurpation of the Legislature's role and the judicial adoption of a new deficiency judgment rule. The Majority cautions that the conditions surrounding a foreclosure sale may allow a mortgagee to recover more than the original mortgage debt, "granting mortgagees a windfall they are not due." Majority at 29. The Majority sets forth the following

hypothetical:

> This situation occurs, for example, when a mortgagee purchases the property during a foreclosure sale at a price below its fair market value, obtains a deficiency judgment for the difference between the foreclosure price and the outstanding mortgage debt, and then resells the property at or above its fair market value.

Majority at 28. Respectfully, this "situation" is far removed from what occurred in this case.

The record shows that the deficiency judgment will not unjustly enrich the credit union. In a 2011 tax assessment, the year the property was sold at public auction, the City and County of Honolulu valued the property at $703,600.00. The Commissioner received sixteen bids at the public auction, the highest of which, at $760,000.00, exceeded the City and County's valuation of the property by $56,400.00. The credit union was not the highest bidder; the highest bidder was a third party who is unaffiliated with the credit union.[3]

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3 Though the record lacks any evidence that the tax assessed value of the property was greater or less than its fair market value, the Majority speculates that the tax assessed value was less than the fair market value and that therefore the property was purchased at below fair market value. The Majority insists that the tax assessed value "is not competent direct evidence of value for purposes other than taxation" and, citing a Tennessee case from 1904, asserts that "[t]ax assessments of real estate are not always aimed at estimating market value[.]" Majority at 47. Immediately thereafter, the Majority concedes that "[a]ssessed values may also exceed market values." Majority at 48 n.29 (emphasis added).

The Majority implies that the fair market value at the time of purchase was equivalent to the amount of the original mortgage, noting that when the Monalims purchased the property, its tax assessed value was $322,600.00 while the mortgage the Monalims executed on the property was $1,025,100.00. Majority at 48. Just as the tax assessed value does not necessarily equal the fair market value, however, neither does the amount of the mortgage. The amount of the mortgage can, in some situations, greatly exceed the fair market value of the property.

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No interested bidders appeared at the confirmation of sale hearing. The circuit court confirmed the sale to the third party in the amount of $760,000.00, which the court determined was "fair and reasonable."

The sale proceeds did not adequately satisfy the outstanding debt and the circuit court subsequently awarded the credit union a deficiency judgment in the amount of $493,282.04. This total represents the remaining amounts the Monalims owed on their mortgages when they stopped making payments less the $760,000.000 confirmed sale price. The total does not include any accrued interest from the date of the confirmation order to the date of the motion for deficiency judgment. Despite the Majority's implication, if the Monalims pay the deficiency judgment, the credit union will recover no more than what the credit union is owed on the loans. The record clearly indicates that the credit union will not be unjustly enriched by the Monalims repaying the money that they owe.

Section 8.4 of the Restatement (Third) of Property: Mortgages, which the Majority expressly adopts, "is aimed primarily at preventing the unjust enrichment of the mortgagee." § 8.4 cmt. a. (Am. Law Inst. 1997). Here, because there is no possible scenario in which the credit union will be unjustly

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Notwithstanding the Majority's conjecture, the record does not indicate if the property sold at above or below fair market value.

enriched, it is incomprehensible that the Majority chooses this case to usurp the Legislature's role and enact a new deficiency judgment rule.[4]

In light of the facts of this case, I believe that this court oversteps its role by adopting the new rule. Quoting Justice Stone's dissenting opinion in U.S. v. Butler, 297 U.S. 1, 79, (1936) (Stone, J., dissenting), Chief Justice Moon noted that "the only check upon [the judicial branch's] exercise of power is [its] own sense of self-restraint. For that reason, alone, judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review." Hac v. Univ. of Hawaii, 102 Hawai'i 92, 108, 73 P.3d

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4 The Majority asserts that it would be "imprudent" to "wait[] for a case in which the mortgagee is unjustly enriched" before adopting the new rule that the Majority justifies primarily by claiming that the current method allows mortgagees to become unjustly enriched. Majority at 46-47 n.28.

Respectfully, it is a bedrock principal of the American judicial system that courts wait to remedy injustice until injustice occurs rather than attempt to prospectively resolve issues. While I acknowledge that this court has entered certain holdings prospectively, I believe that doing so is not appropriate here, where the facts plainly do not support the adoption of the new rule, the complicated effects of which render it better enacted by the Legislature, if at all.

As Justice Blackmun observed in his concurrence in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 547 (1991),

> [u]nlike a legislature, we do not promulgate new rules to be applied prospectively only . . . The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a Government of limited powers.

(internal citations omitted).

46, 62 (2003) (Moon, C.J., concurring and dissenting, in which Nakayama, J. joins) (internal citations omitted).

The Majority's use of HRS § 667-1.5 to justify the judicial enactment of the new rule is unavailing. Our construction of statutes is guided by the following rules:

> First, the fundamental starting point for statutory-interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. . . .

First Ins. Co. of Hawaii v. A&B Props., 126 Hawai'i 406, 414, 271 P.3d 1165, 1173 (2012) (internal citations omitted).

The Majority asserts that, by enacting HRS § 667-1.5, the Legislature vested the courts with discretion to calculate deficiency judgments by whatever method the courts choose. Majority at 34-35. Respectfully, the Majority's interpretation of HRS § 667-1.5 adds meaning to the statute that is not expressed by its language and was not intended by the Legislature.

HRS § 667-1.5 (Supp. 2015) provides,

> The circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury, and shall render judgment for the amount awarded, and the foreclosure of the mortgage. Execution may be issued on the judgment, as ordered by the court.

Nevertheless, the Majority insists that "the

legislature, through HRS § 667-1.5, has expressly provided that the determination of the amount due in a deficiency judgment, and thereby the method for its calculation, is entrusted to the discretion of the courts." Majority at 38-39 (emphasis added). The Majority clings to the Legislature's use of the word "may" in HRS § 667-1.5. While the word "may" does confer discretion to the court to perform the fact finding function of assessing the amount due upon the mortgage, it does not vest the court with the authority to dispense with the longstanding traditional method and to calculate deficiency judgments by whatever new method the court deems appropriate.

First, HRS § 667-1.5 enables the court to assess "the amount due upon a mortgage" but makes no reference to deficiency judgments or the method for their calculation. By stating "[t]he circuit court may assess the amount due upon a mortgage . . . and shall render judgment for . . . the foreclosure of the mortgage[,]" HRS § 667-1.5 refers to the determination of the amount due on the mortgage before a foreclosure sale takes place, before it is determined whether or not a deficiency remains.[5] Indeed, even in the context of

5 The Majority asserts that this interpretation of HRS § 667-1.5 is "directly contrary to longstanding precedent." Majority at 40. The "longstanding precedent" to which the Majority refers is an interpretation of HRS § 667-1.5 expressed by the ICA in Bank of Honolulu, N.A., v. Anderson, 3 Haw. App. 545, 549-50, 654 P.2d 1370, 1374 (1982), which this court has never referenced or adopted.

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deficiency judgments, it makes sense that under the traditional method of calculating deficiency judgments, whereby the deficiency amount is the amount due on the mortgage less the foreclosure sale proceeds, the circuit court should be able to compute this simple calculation "without the intervention of a jury[.]" HRS § 667-1.5.

Moreover, while the statute permits the circuit court to assess the amount due on a mortgage, it in no way "expressly provid[es]" for the circuit court to create a new method of calculating deficiency judgments that departs from the traditional formula, nor does it expressly permit the court to consider fair market value. HRS § 667-1.5 does not, on its face, express what the Majority asserts that it expresses.

Nor does the legislative history of HRS § 667-1.5 indicate that the Legislature intended to provide the Hawai'i courts with discretion to unilaterally implement a new method of calculating deficiency judgments. Contra Majority at 41. The only reference to deficiency judgments in the legislative history of the statute, the language of which has remained largely unchanged since its enactment in 1859, is the following

Moreover, the Anderson interpretation, which, I note, is not "directly contrary" to this opinion's interpretation, is based exclusively on legislative history from 1971. Id. As the Majority contends that the language of HRS § 667-1.5 is so clear and unambiguous that to look to legislative history for explanation is not "appropriate[,]" Majority at 41, it is unclear how the Majority can simultaneously claim that the ICA's interpretation of the statute, based exclusively on legislative history, is controlling authority.

paragraph in the Senate Standing Committee Report for the 2012 amendment:

> Your Committee further notes that owner-occupants who lose their primary residences to foreclosure suffer harsh personal losses that leave them particularly susceptible in cases where the lender may pursue a deficiency judgment to collect on any insufficiency of the foreclosure sale proceeds to satisfy the debt. As such, owner-occupants should be provided with greater relief from deficiency judgments. However, your Committee notes there are concerns about prohibiting deficiency judgments in the case of refinanced mortgages, as many borrowers refinance their mortgages for more than they currently owe, then use the difference to pay for cars, trips, or other consumer items that are unrelated to the purchase of the home. Although not addressed by the amendments proposed by your Committee to this measure, these concerns merit further discussion.

S. Stand. Comm. Rep. No. 3325, in 2012 Senate Journal, at 1075 (emphasis added).

This description reveals how the Legislature understood deficiency judgments to be calculated - "any insufficiency of the foreclosure sale proceeds to satisfy the debt." S. Stand. Comm. Rep. No. 3325, in 2012 Senate Journal, at 1075. The description does not reference the fair market value of the property, but instead reflects the traditional formula of outstanding debt less the foreclosure sale proceeds.

In addition, the Legislature expressed concern about limiting lenders' ability to pursue deficiency judgments, even in the case of a displaced owner-occupant,[6] due to the prevalence of borrowers refinancing their mortgages for more than the value

6 The Monalims were not owner-occupants of the property.

of their home. See S. Stand. Comm. Rep. No. 3325, in 2012 Senate Journal, at 1075. The position of the Legislature which most recently amended HRS § 667-1.5, reflected by this Committee Report, is at odds with the Majority's characterization that HRS § 667-1.5 grants the courts specific discretion to determine how to calculate deficiency judgments. The Majority's interpretation of HRS § 667-1.5 is misguided, as the statute does not grant this court express permission to enact a new method for calculating deficiency judgments.

If the state of Hawai'i adopts the new rule, the rule should be enacted by the Legislature, not adopted by this court. The Majority notes that twenty-three other states "statutorily define a deficiency using the 'fair value' of the foreclosed property." Majority at 29 n.18. By contrast, in Sostaric v. Marshall, 234 W. Va. 449, 453-54 (2014), the Supreme Court of Appeals of West Virginia listed only four jurisdictions that have adopted the new rule by judicial decision. Though the Sostaric list does not claim to be exhaustive, it appears that the vast majority of jurisdictions which have chosen to adopt the new rule have done so by legislative action. In declining to amend, by judicial decision, the longstanding rule that a mortgagor's deficiency is measured by the difference between the amount of unpaid debt and the foreclosure sale proceeds, the Supreme Court of Missouri opined that "[t]he policy debate

presented by the parties may explain why so many states have chosen to deal with this issue by statute, rather than by common law[.]" First Bank v. Fischer & Frichtel, Inc., 364 S.W.3d 216, 222 (2012) (en banc) (noting that the balancing of competing policies is best left to the Legislature). Clearly, this new rule carries broad policy implications with respect to the mortgage industry. Given courts' relative lack of expertise on these policy considerations, the new rule should not be adopted through judicial activism. It should be left to the Legislature to determine whether enacting the new rule will truly serve the State's best interests.

In cases where a bank forecloses on a property, the bank is the highest bidder with its credit bid below market value, the bank collects a deficiency judgment that is based on the difference between the outstanding loan debt and the credit bid, and the bank later sells the property at market value, the bank may be unjustly enriched. However, that situation is so far removed from the facts of this case that it defies reason to understand why the Majority chose to adopt the new rule in this case. I believe that this court should exercise judicial self-restraint and decline to change Hawai'i's method for calculating deficiency judgments to remedy a result that did not occur in

this case.[7]

Second, the Majority's rule will unnecessarily burden parties to a foreclosure action and Hawai'i courts. The Majority's rule entitles any party whose property has been foreclosed upon to an evidentiary hearing to determine the "fair market value" of the property so that the deficiency judgment will be calculated based on the greater of the "fair market value" or the amount of the confirmed sale price - in essence, whichever number results in a lower deficiency amount. Majority at 32.

The Majority defines "fair market value" as "the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate." Majority at 27 n.17. Since these conditions do not reflect the conditions that exist during a foreclosure sale, the market will not determine the subjective "fair market value" -

7 I acknowledge that under different circumstances, the determination of a property's fair market value might be necessary to ensure fairness to the borrower. Wodehouse's holding that the court may refuse to confirm a sale if the highest bid "is so grossly inadequate as to shock the conscience" could be extended to indicate that, where there are suggestions that the amount for which the property is sold is objectively unfair, courts have a duty to inquire further. See Wodehouse, 32 Haw. at 852. For example, the court could be required to calculate the fair market value in instances where (1) the lender is the purchaser, (2) the borrower alleges that the sale terms were unconscionable, or (3) the borrower alleges that the sale was conducted fraudulently.

the court will be forced to do so.[8] As the "fair market value" is contestable, we must assume that both parties' experts will testify that different values represent the "fair market value" and that the circuit court will be tasked with reconciling the experts' valuations to determine the most accurate "fair market value." This method requires additional time and forces all parties to incur additional costs while the property, subject to foreclosure because the mortgagor failed to make loan payments, remains in the mortgagor's possession.[9]

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8 For example, Nevada law requires that "[b]efore awarding a deficiency judgment . . . the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale." Nevada Revised Statutes (NRS) § 40.457(1). In addition, Idaho courts appear to determine fair market value by selecting the "more credible" of competing appraisals. Wilhelm v. Johnston, 136 Idaho 145, 149 (2001) ("With respect to the Johnstons' deficiency action, the district court found [the lender's] appraisal of the property to be more credible than [the borrowers'] appraisal, and thus determined the fair market value of the property to be $63,400 at the time of the trustee's sale.").

9 In support of its assertion that parties in jurisdictions that follow the new rule have not been unnecessarily burdened by the new rule's additional requirements, the Majority cites to a West Virginia case which notes that the West Virginia courts have not found that states following the new rule "suffer from unsettled foreclosure laws" and have not found that those states' banking institutions "have been negatively affected" by the new rule. Majority at 44, citing Sostaric, 234 W. Va. at 457. The West Virginia court's findings, or lack thereof, have no bearing on the reality that parties in Hawai'i foreclosure proceedings will now be burdened with the additional cost and time required to hire competing experts to testify about the fair market value of foreclosed-upon properties.

The Majority further contends that "parties may adduce evidence of the fair market value of the foreclosed-upon property in a variety of ways that do not entail significant additional expenditure." Majority at 45 n.26. The Majority proposes that, for example, the owner of the property can simply state his or her opinion of the property's fair market value. Majority at 45 n.26, citing City and Cty. of Honolulu v. Int'l Air. Serv. Co., 63 Haw. 322, 332, 628 P.2d 192, 200 (1981). Neither the mortgagee nor the mortgagor would be a disinterested party who could proffer an impartial opinion of the fair market value of a property in the context of a highly adversarial deficiency judgment proceeding. Moreover, the methods the Majority proposes for

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Finally, the Majority insists that the new rule "protects" mortgagees:

> Logically, the majority rule protects a mortgagee against any loss that would occur from a sale of the property at less than its fair market value because the mortgagee retains the option of tendering a credit bid for the amount of the outstanding mortgage debt and obtaining the property without additional monetary payment if there are no greater bids.

Majority at 32. This argument fails because even if the mortgagee tenders a credit bid for the amount of the outstanding mortgage debt and obtains the property, the mortgagee will still not be made whole if the outstanding mortgage debt exceeds the fair market value of the property. In addition, if, as here, a third-party purchaser buys the property, if the new rule is prospectively applied and the third-party sale price is determined to be less than the fair market value, the lender will not recover the money it lent to the borrower or be made whole. Thus, the new rule will not "protect[] all parties to the mortgage" in either scenario. Contra, Majority at 3.

Because of my concerns about the Majority's new rule, that it is not supported by the facts of this case, that it will burden all parties and Hawai'i courts, and that it will plainly not protect all parties to a mortgage, I would not adopt the new rule. I believe that, instead of usurping the Legislature's

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determining fair market value, none of which have been used in the deficiency judgment context, are too complicated for a lay person to engage with in forming his or her opinion of the fair market value. It is clear that an expert opinion will be required to fairly establish fair market value.

role as lawmaker, this court should exercise judicial self-restraint and limit its holding to the facts of this case.

B. The circuit court erred when it did not address the Monalims' laches argument, but that argument fails on its merits.

I agree with the Majority's holding in part III(B) that "the ICA erred in affirming the circuit court's Deficiency Judgment without the circuit court having demonstrably addressed the Monalims' laches defense." Majority at 25. However, I believe that the Monalims' laches defense fails on its merits.

The doctrine of laches will apply only if two conditions are met, "[f]irst, there must have been a delay by the plaintiff in bringing his claim, and that delay must have been unreasonable under the circumstances . . . . Second that delay must have resulted in prejudice to [the] defendant." Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc., 139 Hawai'i 229, 234, 386 P.3d 866, 871 (2016) (internal citations omitted).

First, I do not believe that the four-year delay was unreasonable under the circumstances. The Monalims argued, without support, that the delay was unprecedented and that the credit union provided no explanation for the delay. The Majority cites only one case in which an appellate court held that the trial court should have refused to enter a deficiency judgment on account of laches. Majority at 18 citing E. Banking

Co. v. Robbins, 149 N.W. 779, 780 (Neb. 1914). E. Banking Co., however, is a 1914 case from the Supreme Court of Nevada in which the petitioner waited more than 14 years to seek the deficiency judgment. Majority at 18, id. Moreover, the Monalims argue that the credit union failed to explain why the credit union did not seek the deficiency judgment until four years after the confirmation order. Though an explanation as to why the credit union waited to seek the deficiency judgment could have bolstered the credit union's argument that the delay was reasonable, the credit union is not required to explain why it waited to collect on the debt. Clearly, the Monalims were on notice that the credit union was entitled to a deficiency judgment against them. The credit union's four-year delay in seeking such a judgment was not unreasonable, particularly when the court disallowed any interest accrued during those four years to be included in the deficiency amount.

Furthermore, the Monalims' arguments that the delay caused them prejudice are specious. The Monalims argue that they would have filed for Chapter 7 Bankruptcy had the credit union sought a deficiency judgment sooner, and that if they are now required to pay the deficiency judgment, it will "wipe out" all of their financial gains since 2011. In so arguing, the Monalims mistake the consequences of owing a debt with prejudice caused by delay in collecting that debt.

The credit union did not advise the Monalims not to file for bankruptcy, nor did the credit union's delay in seeking the deficiency judgment prevent the Monalims from doing so.[10] The Monalims chose not to file for bankruptcy in hopes that the credit union would not pursue the deficiency judgment. Indeed, the Monalims were well aware that a deficiency judgment was available to the credit union should they default.

The Monalims' original mortgage contract contained a clause requiring them to pay a deficiency if one remained in the event of a foreclosure. The credit union's original complaint asked the court to "direct entry of a deficiency judgment in favor of Plaintiff and against Defendants MONALIM. . . ." The court's April 13, 2011 foreclosure decree further ordered, at the credit union's request, that the credit union be granted a deficiency judgment. And, the court's December 13, 2011 confirmation of sale order authorized a deficiency judgment and directed that "since the proceeds from the sale of the Mortgaged Property are insufficient to fully satisfy the amounts due to Plaintiff . . . a motion for deficiency judgment may subsequently be filed by Plaintiff against Defendants [MONALIM]. . . ."

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10 As the Monalims owned five investment properties on O'ahu at the time of the foreclosure sale, it seems unlikely that the Monalims would have filed for Chapter 7 Bankruptcy at that time.

Nothing prevents the Monalims from filing for bankruptcy now, assuming they have a valid basis to file for bankruptcy. In the context of this protracted foreclosure proceeding, where the credit union repeatedly indicated that it would seek a deficiency judgment, the passage of four years is not enough to reasonably indicate that the credit union no longer sought to collect the nearly $500,000.00 that the Monalims owed.

The Monalims' argument that the deficiency judgment will "wipe out" their financial gains is similarly unavailing. Presumably, the Monalims would not have been able to make such financial gains if they had paid the credit union the balance of their outstanding debt after the foreclosure sale in 2011. Therefore, any prejudice that the Monalims might suffer by paying the deficiency is not caused by the credit union's delay, because the Monalims would be similarly situated had they paid the deficiency judgment now or in 2011. In addition, I agree with the ICA that the circuit court's denial of the credit union's requested interest on the deficiency amount sufficiently addresses any prejudice the Monalims might have suffered due to the delay.

III. CONCLUSION

I dissent from parts III(C) and (D) of the Majority's opinion. The record does not support adoption of the new method

to calculate a deficiency judgment. By adopting the new rule, the Majority oversteps this court's limited role to apply the law to the facts of the case.

I concur with part III(B) of the Majority's opinion that the circuit court erred in failing to address the Monalims' laches argument, but I believe that the laches argument fails on its merits.

I respectfully concur in part and dissent in part.

Mark E. Recktenwald

Paula A. Nakayama

EXHIBIT 7

SCWC-16-0000807

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HAWAIIUSA FEDERAL CREDIT UNION,
Respondent/Plaintiff-Appellee,

vs.

JONNAVEN JO MONALIM; MISTY MARIE MONALIM,
Petitioners/Defendants-Appellants,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA,
by its Board of Directors; KO OLINA COMMUNITY ASSOCIATION, INC.,
a Hawai'i nonprofit corporation;
Respondents/Defendants-Appellees.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000807; CIV. NO. 10-1-1388)

ORDER DENYING MOTION FOR PARTIAL RECONSIDERATION
(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Upon consideration of Petitioners/Defendants-Appellants' Motion for Partial Reconsideration filed on May 11, 2020 (Motion), the documents submitted in support thereof, and the record herein,

IT IS HEREBY ORDERED that the Motion is denied.

DATED: Honolulu, Hawai'i, May 15, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

EXHIBIT 8

SCWC-16-0000807

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HAWAIIUSA FEDERAL CREDIT UNION,
Respondent/Plaintiff-Appellee,

vs.

JONNAVEN JO MONALIM; MISTY MARIE MONALIM,
Petitioners/Defendants-Appellants,

and

ASSOCIATION OF APARTMENT OWNERS OF BEACH VILLAS AT KO OLINA,
by its Board of Directors; KO OLINA COMMUNITY ASSOCIATION, INC.,
a Hawai'i nonprofit corporation;
Respondents/Defendants-Appellees.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000807; CIV. NO. 10-1-1388)

JUDGMENT ON APPEAL
(By: Pollack, J., for the court[1])

Pursuant to the opinion of the Supreme Court of the State of Hawai'i entered on April 30, 2020, we vacate the ICA's August 16, 2018 Judgment on Appeal, the circuit court's October 13, 2016 "Order Granting in Part and Denying in Part Plaintiff HawaiiUSA Federal Credit Union's Motion for Deficiency Judgment against Defendants Jonnaven Jo Monalim and Misty Marie Monalim

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[1] Court: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.

Filed January 12, 2016," and the October 13, 2016 "Deficiency Judgment against Defendants Jonnaven Jo Monalim and Misty Marie Monalim and in Favor of Plaintiff HawaiiUSA Federal Credit Union." This case is remanded to the circuit court for further proceedings consistent with the opinion.

DATED: Honolulu, Hawai'i, June 30, 2020.

FOR THE COURT:

/s/ Richard W. Pollack

Associate Justice

EXHIBIT 9

RULE 14 (g)(i) COMPLIANCE

WHEN	WHERE	HOW FEDERAL ISSUE RAISED	OUTCOME
2/16/15	Opposition to Deficiency	Objected on federal due process grounds, citing, quoting Gelfert, BFP, true value, federal due process cases	Denied
4/24/17	Opening Brief to ICA	Objected on federal due process grounds, citing, quoting Gelfert, BFP, true value, federal due process cases	Federal Question Denied
9/17/18	Certiorari Petition to HI Sup. Ct.	Review sought on federal due process grounds, citing, quoting Gelfert, BFP, true value, federal due process cases	Federal Question Denied
10/22/18	Reply in Support of Petition	Continued to argue "Violations of Due Process of Law" in reply to Credit Union's opposition to certiorari	Awaiting Decision To Grant Writ
1/11/19	Oral Argument HI Sup, Ct.	Argued Due Process Case; archived at Hawaii Judiciary Website: No. SCWC-16-0000807, Friday, January 11, 2019	Taken Under Advisement
4/30/20	HI Sup. Ct. Majority Opinion	Reference to due process arguments made by Monalims found in the Majority Opinion	Due Process Arguments Rejected
5/11/20	HI Sup. Ct. Recon Motion	Sought modified due process relief with retroactive application where property owners raised federal issues in defense	Federal Question Denied