

No. _____

In The
Supreme Court of the United States

SANFORD A. MOHR and TINA A. MOHR,
Individually and as Co-Trustees of their
October 15, 1996 unrecorded Revocable Trust,

Petitioners,

vs.

MLB, SUB I, LLC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

R. STEVEN GESHELL, #3349
345 Queen Street, Suite 709
Honolulu, HI 96813
Tel. No. 808.396.7701
Fax No. 808.395.8556
E-Mail: geshlaw@lava.net

*Attorney for Petitioners
Sanford A. Mohr and
Tina A. Mohr, Individually
and as Co-Trustees of their
October 15, 1996 unrecorded
Revocable Trust*

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals and the United States District Court for the District of Hawaii denied Petitioners Mohrs' Constitutional rights to Due Process and Equal Protection of the Laws by refusing to follow Hawaii case and statutory law in a quiet title and foreclosure action on cross motions for summary judgment.

STATEMENT OF RELATED CASES

Mohr v. MLB, Sub I, LLC, No. 1:16-cv-00493-ACK-WRP, U.S. District Court for Hawaii. Judgment entered 13 April 2020. Mandate from 9th Circuit filed 20 August 2021.

Mohr v. MLB, Sub I, LLC, No. 20-15895, U.S. Court of Appeals for the Ninth Circuit. Panel decision filed 9 July 2021. Mohrs' petition for rehearing en banc denied and entered 12 August 2021. Mandate filed 20 August 2021.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF RELATED CASES.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PROCEEDINGS BELOW	1
STATEMENT OF JURISDICTION	5
CONSTITUTIONAL PROVISIONS AND APPLICABLE STATUTES.....	5
STATEMENT OF THE CASE.....	6
ARGUMENT	16
The trial court and the appellate court, by refusing to follow Hawaii case and statutory law, the U.S. Supreme Court and 9th Circuit cases in deciding the cross motions for summary judgment, denied Mohrs their Constitutional rights to due process and equal protection.	16
CONCLUSION.....	21

APPENDIX

United States Court of Appeals for the Ninth Circuit, Memorandum, July 9, 2021.....	App. 1
United States District Court for the District of Hawai'i, Order and Judgment, April 13, 2020	App. 7

TABLE OF CONTENTS – Continued

	Page
United States Court of Appeals for the Ninth Circuit, Order Denying Petition for Rehearing, August 12, 2021.....	App. 50
Relevant Statutes	App. 53
Plaintiffs-Appellants' Petition for Rehearing En Banc, filed in the Ninth Circuit Court of Appeals, July 15, 2021	App. 57

TABLE OF AUTHORITIES

	Page
CASES	
<i>Aloha Care v. D.H.S.</i> , 127 Haw. 76, 276 P.3d 645 (2012).....	17
<i>Amantiad v. Odum</i> , 90 Haw. 152, 977 P.2d 160 (1999).....	3
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S.Ct. 2505 (1986)	9, 19, 21
<i>Baehr v. Lewin</i> , 74 Haw. 530, 852 P.2d 44 (1993)	17
<i>Bank of America v. Reyes-Toledo</i> , 139 Haw. 361, 360 P.3d 1248 (2017)	3
<i>Bank of America v. Reyes-Toledo</i> , 143 Haw. 249, 428 P.3d 761 (2018)	3
<i>Beverly v. Bank of New York Mellon</i> , 751 Fed. Appx. 1011 (9th Cir. 2018)	18
<i>Brescia v. North Shore Ohana</i> , 115 Haw. 477, 168 P.3d 929 (2007)	17
<i>Florer v. Congregation Pidyon Shevuyim, NA</i> , 639 F.3d 916 (9th Cir. 2011).....	16
<i>His and Her Corp. v. Shake-N-Go Fashion, Inc.</i> , 572 Fed. Appx. 517 (9th Cir. 2014)	9, 19, 21
<i>In re Allen</i> , 472 B.R. 559 (9th Cir. BAP 2012)....	17, 18, 19
<i>In re Genesys Data Technologies, Inc.</i> , 95 Haw. 33, 18 P.3d 895 (2001)	16
<i>In re Weisband</i> , 427 B.R. 13 (Bankr. D. Ariz. 2010)	19

TABLE OF AUTHORITIES – Continued

	Page
<i>KNG Corp. v. Kim</i> , 107 Haw. 73, 110 P.3d 397 (2005).....	17
<i>Motschenbacher v. R.J. Reynolds Tobacco Co.</i> , 498 F.2d 821 (9th Cir. 1974).....	17
<i>Nakano v. Matayoshi</i> , 68 Haw. 140, 706 P.2d 814 (1985).....	17
<i>Oswalt v. Resolute Industries, Inc.</i> , 642 F.3d 856 (9th Cir. 2011).....	16
<i>Palau v. Helemano Land Co.</i> , 22 Haw. 357 (Haw. Terr. 1914)	3, 9
<i>Portland Feminist Women’s Health Center v. Advocates for Life, Inc.</i> , 859 F.2d 681 (9th Cir. 1988)	16
<i>Romero v. Star Markets, Ltd.</i> , 82 Haw. 405, 922 P.2d 1018 (1996)	16
<i>Rosenbaum v. City and County of San Francisco</i> , 484 F.3d 1142 (9th Cir. 2007).....	16
<i>U.S. Bank v. Mattos</i> , 140 Haw. 26, 398 P.3d 615 (2017).....	3
<i>Wells Fargo Bank v. Behrendt</i> , 142 Haw. 37, 414 P.3d 89 (2018).....	19, 21

CONSTITUTIONAL PROVISIONS

Haw. Const., Art. I, Sec. 5	16, 17
U.S. Const., amend. V	5
U.S. Const., amend. XIV	6, 16, 17

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
28 U.S.C. §1254(1).....	5
28 U.S.C. §1291	5
28 U.S.C. §1332	17
28 U.S.C. §1332(a)(1)	5
28 U.S.C. §1441	5, 17
H.R.S. §13.....	20
H.R.S. §428-1003	6
H.R.S. §428-1008	6, 20
H.R.S. §480-2	20
H.R.S. §480-13	20
H.R.S. §490:3-309(a)	6, 18
H.R.S. §490:3-309(b)	6, 18
Hawaii Unfair Deceptive Trade Practice Act	20

PROCEEDINGS BELOW

The trial court proceedings concerned Mohrs' removed action for quiet title and Respondent's mortgage foreclosure action involving homeowner's claims for quiet title, wrongful foreclosure, unfair and deceptive trade practices under Hawaii law, as listed herein below.

On 13 April 2020, the trial court granted Respondent's motion for summary judgment on its counter-claim for a decree of foreclosure and also granted summary judgment in favor of Respondent and against Petitioners (hereafter Mohrs) on Mohrs' claims as homeowners for quiet title, wrongful foreclosure, unfair and deceptive trade practices under Hawaii law. (Appendix at page 7-47). On 13 April 2020 the trial court filed its judgment on said summary judgment order. (Appendix 48-49). Mohrs timely appealed to the Ninth Circuit Court of Appeals. On 9 July 2021, the Ninth Circuit Panel filed its memorandum decision. (Appendix 1-6). On 15 July 2021, Mohrs filed their Petition for rehearing en banc before the Ninth Circuit, which was denied on 12 August 2021. (Appendix 50-52). Mohrs have argued below the following and bring this petition for correction of the following errors:

1. The Courts' decisions deprive Mohrs of due process and equal protection of the laws in violation of U.S. Constitution.
2. BNC did not merge with Finance America, it was just the reverse in 2005 and then later, Finance America ceased to

exist in 2007 per Paatalo's Declaration in ECF 86-1. Therefore, MERS agency died in 2007 making its purported mortgage assignments void. This makes the further purported mortgage assignments to and by Lehman Brothers void too.

3. The Courts' discussion on pages 4-6 of ECF 150 and in Dkt. Entry 33-1 at pages 2-5 about the lost promissory note missed the point that if the note was at some point possessed or owned by American Home Mortgage or Servicing, that entity and series of related entities filed for Chapter 11 protection on 6 August 2007 in Delaware Bankruptcy Court. Thus, there is no evidence by MLB Sub I, LLC (hereafter as MLB) that the court-appointed Plan Trustee assigned or endorsed the lost note thereby creating more genuine issues of material fact requiring MLB's motion for summary judgment to be denied.
4. The same reasoning applies to the purported mortgage assignments by or thru Lehman Brothers Holdings, Inc., etc. as it was in Chapter 11 Bankruptcy too since 2008 and continuing in 2014. Thus, there is no proper evidence that April Smith was authorized to sign for the bankrupt Lehman Holdings in 2014 nor was it approved by the bankruptcy court trustee, if one existed.
5. The decisions disregarded Mohrs' evidence of forgery making the disputed

documents void per *Palau v. Helemano Land Co.*, 22 Haw. 357 (Haw. Terr. 1914).

6. The decisions disregarded Mohrs' proof that the mortgage documents claimed by MLB were altered.
7. The decision disregarded Mohrs' proof that MLB's claims are based on fraud so therefore the Court should not reward that but punish it.
8. The decision that Mohrs are precluded by *res judicata* from raising these issues here because of the Lehman Brothers bankruptcy is wrong because the bankruptcy court lacked subject matter jurisdiction to decide a quiet title claim on land in Hawaii. When a court lacks subject matter jurisdiction, any decision by that court is void. *Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160, 167 (1999).
9. The 13 April 2020 order, decree and judgment violate *Bank of America v. Reyes-Toledo*, 139 Haw. 361, 360 P.3d 1248 (2017) ("Toledo I") and *Bank of America v. Reyes-Toledo*, 143 Haw. 249, 428 P.3d 761 (2018) ("Toledo II") as Mohrs proved they have valid claims against MLB.
10. MLB's proof failed to comply with *U.S. Bank v. Mattos*, 140 Haw. 26, 398 P.3d 615 (2017). MLB failed to prove that it is the current trustee of the REMIC Trust identified ECF # 135 & 136 by Mohrs and in MLB's motion for summary judgment

where MLB's counterclaim does not allege nor did MLB prove that it is suing in a representative capacity as the current trustee of an existing REMIC trust Mohrs identified as being the FAMLT 2004-2. Therefore, MLB lacks standing to counterclaim for mortgage foreclosure.

11. The decisions dismissing Mohrs' argument that the MERS agency died when Finance America, LLC ceased to exist when it merged into BNC Mortgage, Inc. and was dissolved in 2007 are contrary to the law and the evidence because any purported mortgage assignments by MERS after its dissolution are void.
12. Mohrs' supplemental memorandum filed 16 March 2020 in ECF # 143 proved that MLB **ceased to exist** on 30 December 2019 so **lacks standing** proving the judges' decisions violated *Toledo I* and *II*, failing to apply and follow Hawaii law.
13. The judges erroneously held MLB had standing to counterclaim seeking foreclosure when it failed to prove it was the owner of Mohrs' note and mortgage that Mohrs proved were paid in 2006 and transferred into the FAMLT 2004-2 on 6 August 2004 and the MLB is not the current trustee of said trust.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. §1291 and the United States District Court for the District of Hawaii had jurisdiction under 28 U.S.C. §1332(a)(1) and 28 U.S.C. §1441 on removal from the Circuit Court of the State of Hawaii. On 13 April 2020, the trial court granted summary judgment. (Appendix at page 7-47). On 13 April 2020 the trial court filed its judgment on said summary judgment order. (Appendix 48-49). Mohrs timely appealed to the Ninth Circuit Court of Appeals. On 9 July 2021, the Ninth Circuit Panel filed its memorandum decision. (Appendix 1-6). On 15 July 2021, Mohrs filed their Petition for rehearing en banc before the Ninth Circuit, which was denied on 12 August 2021. (Appendix 50-52).

CONSTITUTIONAL PROVISIONS AND APPLICABLE STATUTES

The Fifth Amendment to the United States Constitution provides in pertinent part:

“No person . . . shall . . . be deprived of life, liberty or property, without due process of law, . . .”

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

“. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

H.R.S. §490:3-309 is reproduced in the Appendix.

H.R.S. §428-1003 and §428-1008 are reproduced in the Appendix.

STATEMENT OF THE CASE

The following lists what Mohrs contend were the pertinent and relevant facts opposing MLB’s Motion for Summary Judgment in **2 ER @135**:

No.	Petitioners Mohrs’ Facts	Evidence Source
1	Mohrs as co-trustees of their revocable trust own the subject land in Kailua-Kona, Hawaii	Mohrs’ Decl. ¶ 1-5
2	Mohrs are consumers with respect to the mortgage and note involved in this case.	Mohrs’ Decl. ¶ 5
3	The mortgage document Mohrs signed before recording is shown in Exhibit A to their declarations.	Ex. A to Mohrs’ Decl. and ¶ 8
4	The mortgage document Mohrs signed was altered before it was recorded.	Mohrs’ Decl. ¶ 8-9 & Exh. A to their Decl.

No.	Petitioners Mohrs' Facts	Evidence Source
5	The contested Mohr mortgage and note were securitized into the FAMLT 2004-2 Trust in 2004 and paid by 31 May 2006.	Paatalo's Decl. pgs. 4-15 & attached his exhibits 8 & 9 to Decl.
6	MERS' agency for Finance America, LLC expired in February 2007, when it was dissolved in California.	Ex. 8 to Paatalo's Decl. & pages 7-15 of his Decl.; Mohrs' Decl. ¶ 12-13.
7	Mohrs' promissory note was paid in May 2006.	Mohrs' Decl. ¶ 21 & Paatalo's Decl. Pg 4 & his Exh. 8 & 9.
8	MLB's conduct amounts to an unfair trade practice so it is liable to Mohrs for over \$633,000 plus attorney fees and costs.	Mohrs' Decl. ¶ 18-22
9	MLB never paid any money to Mohrs so not entitled to any equitable lien nor remedy.	Mohrs' Decl. ¶ 23
10	MLB's claimed ownership of Mohrs' mortgage and note is based on fraudulent and void mortgage assignments.	Mohrs' Decl. ¶ 27-41

Mohrs' arguments in the trial court and on appeal are summarized below:

- a. The purported assignment by Lehman Brothers, Inc. by MLB Sub I, LLC as attorney-in-fact to MLB recorded March 25, 2014 is void.

- b. The purported assignment by MERS to Lehman Brothers Holdings, Inc., recorded April 22, 2014 is likewise void because MERS was just a recording system in an electronic database and was nothing more than a fraud and a strawman as a fraud on the public. MERS was not the mortgagee when the mortgage was sold and transferred to FAMLT 2004-2 in 2004.
- c. The purported assignment by Lehman Brothers Holdings, Inc. by MLB Sub I LLC as attorney in fact, recorded April 25, 2014, is likewise void, because MERS agency died when Finance America, LLC ceased to exist when it merged into BNC Mortgage, Inc. and further when it was dissolved in 2007.
- d. Lehman Brothers Holdings, Inc. filed for bankruptcy thereby ending the purported agency for Finance America, LLC on or about September 15, 2008, thereby rendering any purported transfers by Lehman Brothers Holdings, Inc. thereafter void.
- e. On or about December 2, 2008 BNC Mortgage Inc., purported successor by merger with Finance America, LLC released the mortgage involved in this case and therefore it has been released of record and paid. Upon merger of Finance America LLC into BNC Mortgage, Inc. as successor automatically as a matter of law

caused Finance America, LLC to cease to exist and it disappeared thereafter upon the merger per California Corporation Code §1107, and Finance America, LLC was dissolved in 2007.

Mohrs proved the affirmative defense that MLB cannot prove compliance with Hawaii cases, in particular *Toledo I* and is therefore subject to liability to Mohrs' amended complaint under *Toledo II*.

Contrary to the judges' decisions, Mohrs proved the following facts by competent evidence at least creating genuine issues of material fact involving credibility determination thus requiring MLB's summary judgment to be denied per *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); and *His and Her Corp. v. Shake-N-Go Fashion, Inc.*, 572 Fed. Appx. 517 (9th Cir. 2014):

1. The defense that the notary public on the mortgage claimed by MLB is a fraud and void as the notary public goes by 2 different names and did not personally take Mohrs' acknowledgment.
2. MLB's Exhibit 3 purported mortgage assignment is void because Finance America, LLC ceased to exist and was dissolved in California in 2007, therefore the purported mortgage assignment contained in Exhibit 3 is void, phony, and may be a forgery making it void per *Palau v. Helemano Land Co.*, 22 Haw. 357 (Haw. Terr. 1914).

3. MLB's Exhibit 4 purported mortgage assignment is void as Lehman Brothers was not the assignee of the mortgage in 2014 and no documents are attached to the counterclaim proving how Lehman Brothers Holding, Inc. owned the mortgage in 2014 when it was still in Chapter 11 bankruptcy proceedings. In addition, there is no showing that April Smith was authorized to sign Exhibit 4 on behalf of Lehman Brothers Holdings, Inc. in April of 2014, almost 6 years after Lehman Brothers Holdings, Inc. filed for Bankruptcy protection.
4. The defense that MLB did not invest in the mortgage loan so is not entitled to any equitable lien nor constructive mortgage nor declaratory relief.
5. The defense of MLB's assumption of risk and contributory negligence based on the facts opposing MLB's motion for summary judgment.
6. The defense of fraud, in that Mohrs proved that MLB is not the real party-in-interest per FRCP Rule 17 and owner of both the note and mortgage through any claimed valid assignments to and/or through MERS and Lehman Brothers Holding, Inc., so not entitled to a foreclosure decree.
7. The defense of illegality, in that MLB is trying to foreclose a mortgage and note which it does not own.

8. The defenses that there are no valid interim assignments of the mortgage to MLB nor any valid negotiation for value to MLB of the Mohrs' promissory note that was lost before MLB got the lost note affidavit.
9. The defense that MLB is not a holder in due course of Mohrs' promissory note.

The **Declaration** of private investigator William J. Paatalo appears in **2 ER 135-3 @ pages 1-32** (Volume 2 of the excerpt of record @ pages cited) which is not simply his report per the Panel's opinion but **his testimony per his declaration** supported by documents summarized as follows:

1. He is an Oregon licensed private investigator with 17 years of combined law enforcement and mortgage industry experience, having worked for eight years investigating foreclosure fraud, titles and issues related to securitization of such mortgage loans. He has performed such analyses in all of the Western states and including the states of Florida, Ohio, Montana, New Jersey and Illinois. He testified at trial as an expert witness on August 6, 2018 in the California Superior Court in San Diego.
2. He has been deemed qualified by courts concerning his knowledge of the Pooling and Servicing Agreements and various Securities and Exchange Commission

filings, and all chain of title analysis concerning publicly recorded documents.

3. He was retained by Mohrs to learn what defects, if any, and discrepancies or fraud existed regarding the mortgage involved in their case. He looked into the Pooling and Servicing Agreement for Finance America Mortgage Loan Trust 2004-2, and in doing so he found that the original lender, Finance America, LLC, sold the Mohrs loan/debt to undisclosed securitization participants on or about August 6, 2004 concerning the Finance American Loan Trust 2004-2 Trust.
4. He determined that the subject loan of about \$457,732 was paid off within that Trust (FAMLT 2004-2 Trust) on May 31, 2006. He further learned that fraudulent assignments of the subject mortgage were recorded after the mortgage lien was released in an effort to hide and conceal the sale and pay off of the mortgage loan/debt to the FAMLT 2004-2 Trust.
5. In determining the foregoing, he ran a securitization check of the subject loan and determined that it was paid off within the Trust because the data showing in the securitization research showed that the current balance owed the investors was \$0.00 in the FAMLT 2004-2 Trust.
6. The cut off date for transferring loans into that Trust was August 1, 2004 and the closing date was August 6, 2004. His

research also proved that the Trustee of that Trust is Deutsche Bank National Trust Co. His research further shows that the assignor of the assignment recorded April 25, 2014 to MLB Sub I, LLC, a Delaware limited liability company, was dated September 9, 2013. He further proved that the first assignment of the mortgage of record was on March 25, 2014 in which the assignor was Lehman Brothers Holdings by MLB Sub I, LLC, a Delaware limited liability company, by its attorney in fact, assigning the mortgage to MLB Sub I, LLC. His research proves that the second assignment was recorded April 22, 2014 in which Mortgage Electronic Registration Systems, Inc. was the assignor and Lehman Brothers Holdings, Inc. was the assignee. The third mortgage assignment was recorded April 25, 2014 in which Lehman Brothers Holdings, Inc. was the assignor, executed by MLB Sub I, LLC, a Delaware Limited Liability Company, by virtue of a power of attorney, and the assignee was to itself, MLB Sub I, LLC. In his opinion all such assignments are fraudulent because of the following.

7. From his experience and knowledge in reviewing thousands of security instruments with MERS ID numbers, MERS is deactivated in the chain of ownership after the mortgages are sold into Trusts. In this case, Lehman Brothers Holdings, Inc. filed for bankruptcy on September 15,

2008, and therefore its relationship with MERS ended and in particular did so also upon the sale and transfer of the Mohr loan into FAMLT 2004-2 Trust on or about August 6, 2004. Therefore, the purported listed mortgage assignments are fraudulent.

On 16 March 2020, Mohrs' supplemental memorandum opposing the declarations of Mr. Kikawa and Ms. Lisby has Tina Mohr's **declaration [2 ER @ 143]**, proves the following undisputed facts:

- A. She had never seen the document that MLB claimed it sent to Mohrs on 9 January 2020, being Exhibit 17, but that document proves that Mohrs were told to make the checks payable to **MCH** Sub I LLC and to remit the payments to **MCH** Sub I. **[not MLB]**
- B. She ran an internet Google search on **MCH** Sub I LLC, and learned that it was a Delaware corporation in which April Smith was listed as a manager, and that it was incorporated about 3 months before March of 2020, on or about January of 2020.
- C. She bought a certified copy of the authority in Hawaii for **MCH** Sub I LLC as a foreign limited liability company to do business in the state of Hawaii, in which April Smith was listed as a manager.
- D. She found in the Hawaii Bureau of Conveyances a document proving that the

Mohr purported mortgage was purportedly assigned from MLB Sub I LLC to **MCH** Sub I LLC, notarized on 15 December 2019 and recorded in the Bureau of Conveyances on 16 January 2020 per Exhibit C to her declaration.

- E. She discovered from the Department of Commerce and Consumer Affairs in Hawaii that on 25 November 2019, MLB's last annual filing for registration to transact business in Hawaii was filed per Exhibit D to her declaration. On 6 September 2019, MLB applied to cancel its Hawaii registration effective on 9 December 2019, which certificate of cancellation was signed by the Vice President of MLB, being April Smith, all of which is further shown in Exhibit E attached to her declaration.
- F. She proved that based upon her research from the Delaware Secretary of State that **MLB ceased to exist** as a Delaware corporation on 30 December 2019, which was 21 days before MLB filed its motion for summary judgment, all as proved by Exhibit F to her Declaration.
- G. She also proved that April Smith was purportedly the Vice President of Lehman Brothers Holding, Inc. in April of 2014. [2 ER @ 143].



ARGUMENT

The trial court and the appellate court, by refusing to follow Hawaii case and statutory law, the U.S. Supreme Court and 9th Circuit cases in deciding the cross motions for summary judgment, denied Mohrs their Constitutional rights to due process and equal protection.

Constitutional issues are reviewed on appeal *de novo*. *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 684 (9th Cir. 1988). Accord *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007).

District Court's decisions in granting summary judgment are reviewed on appeal *de novo*. *Florer v. Congregation Pidyon Shevuyim, NA*, 639 F.3d 916, 921 (9th Cir. 2011). Accord *Oswalt v. Resolute Industries, Inc.*, 642 F.3d 856, 859 (9th Cir. 2011).

Mohrs' rights to due process are guaranteed to them by the Fourteenth Amendment to the United States Constitution, and Article I, Section 5 of the Hawaii Constitution. Those constitutional provisions prohibit courts from depriving persons of their life, liberty, or property without due process of law. *Romero v. Star Markets, Ltd.*, 82 Haw. 405, 412, 922 P.2d 1018, 1025 (1996). Where a court acts in a manner inconsistent with due process, the judgment that follows is void. *In re Genesys Data Technologies, Inc.*, 95 Haw. 33, 38, 18 P.3d 895, 900 (2001).

Also of constitutional import are the equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 5 of the Hawaii Constitution prohibiting courts from depriving litigants of their equal protection of the laws. *Brescia v. North Shore Ohana*, 115 Haw. 477, 501-503, 168 P.3d 929, 953-955 (2007); *Aloha Care v. D.H.S.*, 127 Haw. 76, 88-90, 276 P.3d 645, 657-659 (2012). By granting summary judgment to MLB, the District Court violated Mohrs' constitutional rights to due process and equal protection by denying their property, possession, and ownership interests. *KNG Corp. v. Kim*, 107 Haw. 73, 80-83, 110 P.3d 397, 404-407 (2005). The strict-scrutiny test applies here under the equal protection clause argument. *Nakano v. Matayoshi*, 68 Haw. 140, 151-152, 706 P.2d 814, 821 (1985); *Baehr v. Lewin*, 74 Haw. 530, 570-575, 852 P.2d 44, 63-65 (1993).

With all due respect to the judges, they relied upon cases from other jurisdictions rather than Hawaii in reaching the conclusion that MLB was entitled to foreclose on a mortgage that it in fact did not own and a lost promissory note that MLB never possessed. In doing so, Judge Kay and the Ninth Circuit violated the case of *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 823 (9th Cir., 1974) for the simple reason that the trial court and the Ninth Circuit Court are obligated to apply Hawaii law in this case, not federal law, in this removed foreclosure case per 28 U.S.C. §1332 and 1441. Here, the judges relied upon *In re Allen*, 472 B.R. 559 (9th Cir. BAP 2012) on the lost note issue when Mohrs proved that the note had been paid

because it was in a REMIC trust and not owned by nor possessed by MLB. Also, **MLB proved it did not possess the note when it was lost**. Therefore, H.R.S. §490:3-309(a) and (b) **did not apply** to assist MLB in its claimed proof of complying with *Toledo I*, but proved Mohrs' complaint per *Toledo II*. A REMIC is defined as a Real Estate Mortgage Investment Conduit per *Beverly v. Bank of New York Mellon*, 751 Fed. Appx. 1011, 1012 (9th Cir. 2018). Therefore, according to the *Beverly* case, the standard of review in this case is *de novo* where the trial judge decides that *res judicata* bars Mohrs' claims. *Id.* @1013. Here, Mohrs proved that the mortgage was in a REMIC Trust and clearly MLB failed to prove that it was the current trustee of that REMIC Trust and whether it and the REMIC Trust **still existed**. Instead, Mohrs proved that the promissory note and the mortgage had been paid in that Trust when it was securitized into the REMIC Trust in 2006. Therefore, MLB could not be a holder of Mohrs' paid promissory note per H.R.S. §490:3-309(a) and (b) **because MLB was not ever in possession of Mohrs' promissory note** since it was lost before it had the lost note affidavit per its own evidence. MLB claimed it acquired the lost note affidavit on 17 April 2014 per **Doc. # 128-15 and 128-23 & 24; also per Doc. # 129 @ pages 3-4, all in 2 ER**. The *Allen* case is not based on Hawaii law because the statute is no help to MLB. The record proves that MLB supposedly bought the note and mortgage from Lehman Bros. in September of 2013. [1 ER 150 @ 22]. So **MLB never possessed the original note, only a copy and the affidavit of the lost note**. Also, it is clear that MERS claimed to sell

and assign the mortgage and the note to Lehman Brothers **after the date of the lost note affidavit**. Therefore, clearly *Allen* does not apply to support Judge Kay's and the Panel's decision. Instead, Judge Kay erroneously decided that the Mohrs were not disputing the Lost Note Affidavit but reasoned that the Mohrs' evidence of the Note being paid in 2006 was not persuasive. In doing so, that violated the standard of review on summary judgment motions. *Anderson, supra* & *His and Her Corp. supra*. That was clearly erroneous and generated at least genuine issues of material fact created by Paatalo's Declaration per footnotes 16 & 17 at 1 **ER 150 @ p. 25**. *In re Weisband*, 427 B.R. 13 (Bankr. D. Ariz. 2010) held GMAC lacked standing as it was not a holder of the note. Judge Kay cited *Weisband*, but misapplied it. What's even worse is Judge Kay forgot or intentionally omitted to discuss *Wells Fargo Bank v. Behrendt*, 142 Haw. 37, 414 P.3d 89 (2018) which held that a purchaser of the property subject to a mortgage to which the buyer was not a party had **standing** to challenge the foreclosing bank's entitlement to enforce the promissory note. If a buyer of the subject property has standing to challenge the validity of the note and the entitlement to enforce it, clearly Mohrs had such standing because they were seeking to quiet title as against the claimed mortgagee, MLB, when Mohrs proved that MLB **didn't even exist anymore**. The Ninth Circuit failed to apply *Toledo I, supra*, holding that the claimed mortgage and note holder had the burden of proving that it had **standing** at the start of the case to sue for foreclosure, and *Toledo II, supra*, holding that homeowners in foreclosure

actions have four counterclaims that can be asserted concurrently against foreclosure plaintiffs, to wit: wrongful foreclosure, quiet title, declaratory judgment and a treble damage claim under the Hawaii Unfair Deceptive Trade Practice Act (UDAP) in H.R.S. §480-2 and -13. Mohrs' Amended Complaint pled the *Toledo II* claims, but the judges erroneously and reversibly decided Mohrs didn't even have standing to assert such claims. Clearly that is reversible error and of constitutional dimension.

Judge Kay's reliance upon H.R.S. §428-1003 and 1008 for the reasoning that MLB still had standing because it didn't matter to him that it had been **disolved** in Delaware effective 30 December 2019, **six days before** the purported mortgage assignment by MLB to **MCH** Sub I, LLC, all as proven in Mohrs' 16 March 2020 supplemental memorandum opposing the declarations of attorney Kikawa and Lisby per **2 ER Doc No. 143**. In fact, Mohrs proved that April Smith was acting as Vice President of MLB Sub I LLC in 2019 when it applied to **cancel** the existence of MLB Sub I LLC, and she was also supposedly the manager of **MCH** LLC on the purported assignment of the mortgage involved to **MCH** Sub I LLC by the **defunct** MLB Sub I, LLC. Clearly, at least those documents and proof by Mohrs in **2 ER @ 143** generated at least genuine issues of material fact requiring denial MLB's summary judgment motion. Judge Kay reversibly erred granting it and then dismissed the Mohrs' Amended Complaint in violation of *Toledo II* and failed to follow

Behrendt, supra. Affirming those decisions was reversible error.

On summary judgment motions, trial and appellate courts are not to decide credibility issues. *Anderson, supra & His and Her Corp., supra.* That is exactly what happened here by the judges rejecting Mohrs' competent proof of their complaint and that MLB lacked standing per the *Toledo* cases and *Behrendt, supra*. The Panel's cases cited on pages 3 & 5 do not apply here for all of the foregoing reasons.

CONCLUSION

The Ninth Circuit and District Court clearly erred therefore this Petition should be granted for justice to Mohrs to correct the cited many errors. No court should grant a decree of mortgage foreclosure where the homeowners' evidence proved the foreclosing entity lacked standing and the promissory note in the REMIC was paid.

DATED: Honolulu, Hawaii, this 8th day of September, 2021.

Respectfully submitted,

R. STEVEN GESHELL
Attorney for Petitioners
Sanford A. Mohr and
Tina A. Mohr, Individually
and as Co-Trustees of their
October 15, 1996 unrecorded
Revocable Trust