FOR PUBLICATION IN WEST'S HAWAIʻI REPORTS AND PACIFIC REPORTER

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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DARYL DEAN DAVIS, MARK APANA, ELIZABETH VALDEZ KYNE, EARL TANAKA, THOMAS PERRYMAN, and DEBORAH SCARFONE, on behalf of themselves and all others similarly situated,
Plaintiffs/Appellants,

vs.

FOUR SEASONS HOTEL LIMITED, dba FOUR SEASONS RESORT, MAUI and FOUR SEASONS RESORT, HUALALAI, and MSD CAPITAL, INC.,
Defendants/Appellees.

NO. 29862

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI
(Case 1:08-cv-00525-HG-LEK)

MARCH 29, 2010

MOON, C.J., NAKAYAMA, DUFFY, AND RECKTENWALD, JJ.;
WITH ACOBA, J., DISSENTING

OPINION BY RECKTENWALD, J.

Plaintiffs-Appellants (collectively "Employees") have been or currently are employed as banquet servers at the Defendants-Appellees Four Seasons Resort, Maui or Four Seasons Resort, Hualalai on the island of Hawaiʻi. Employees filed a class action complaint against Defendants-Appellees[1] (hereinafter collectively referred to as "Four Seasons") in the United States District Court for the District of Hawaiʻi (district court), and

[1] Defendant-Appellee Four Seasons Resorts Limited operates the Four Seasons Resort, Maui and Four Seasons Resort, Hualalai, which are both owned by Defendant-Appellee MSD Capital.

subsequently filed an Amended Complaint. Employees claimed, inter alia, that Four Seasons violated Hawaiʻi Revised Statutes (HRS) § 481B-14[2] by retaining a portion of a mandatory "service charge" collected at banquets and other events and by failing to notify customers that it was doing so.

Four Seasons moved to dismiss the Amended Complaint, arguing, inter alia, that Employees do not have standing to assert their claims for monetary damages under HRS §§ 480-2(e) and 480-13, quoted infra, because they are not businesses, competitors, or consumers, and because they failed to adequately plead the effect of Four Seasons' alleged actions on competition and therefore did not sufficiently allege antitrust injury.

On June 2, 2009, the district court[3] certified the following question pursuant to Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 13[4]:

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[2] HRS § 481B-14 (2008) provides:

> **Hotel or restaurant service charge; disposition.** Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

[3] The Honorable Helen Gillmor, United States District Judge, presided.

[4] HRAP Rule 13(a) states in pertinent part as follows:

> When a federal district or appellate court certifies to the Hawaiʻi Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawaiʻi that is determinative of the cause and that there is no clear controlling precedent in the Hawaiʻi

> Where plaintiff banquet server employees allege that their employer violated the notice provision of H.R.S. § 481B-14 by not clearly disclosing to purchasers that a portion of a service charge was used to pay expenses other than wages and tips of employees, and where the plaintiff banquet server employees do not plead the existence of competition or an effect thereon, do the plaintiff banquet server employees have standing under H.R.S. § 480-2(e) to bring a claim for damages against their employer?

This court entered an order accepting this certified question on June 12, 2009.

For the reasons set forth herein, we answer the certified question as follows:

Employees are "any persons" within the meaning of HRS §§ 480-1 and 480-2(e), quoted infra, and are within the category of plaintiffs who have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14.

However, based on the allegations contained in Employees' Amended Complaint, Employees have not sufficiently alleged the "nature of the competition" to bring a claim for damages against Four Seasons under HRS §§ 480-2(e) and 480-13(a) for a violation of HRS § 481B-14.

I. BACKGROUND

This factual background is based primarily upon the information certified to this court by the district court, as well as the allegations contained within Employees' Amended

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> judicial decisions, the Hawaiʻi Supreme Court may answer the certified question by written opinion.

Complaint. See TMJ Hawaii, Inc., v. Nippon Trust Bank, 113 Hawaiʻi 373, 374, 153 P.3d 444, 445 (2007) (in answering a certified question, this court relied upon the information certified to the court by the district court and the facts set forth in the plaintiff's amended complaint).

Employees have all worked as food and beverage servers for Four Seasons. Daryl Dean Davis, Mark Apana, Elizabeth Valdez Kyne, Earl Tanaka, and Thomas Perryman have worked at the Four Seasons Resort, Maui, and Deborah Scarfone has worked at the Four Seasons Resort, Hualalai on the Big Island.

The Amended Complaint, which sought money damages, alleged in relevant part[5]:

> 4. For banquets, events, meetings and in other instances, the defendants add a preset service charge to customers' bills for food and beverage provided at the hotels.
> 5. However, the defendants do not remit the total proceeds of the service charge as tip income to the employees who serve the food and beverages.
> 6. Instead, the defendants have a policy and practice of retaining for themselves a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages).
> 7. The defendants do not disclose to the hotel's customers that the service charges are not remitted in full to the employees who serve the food and beverages.
> 8. For this reason, customers are misled into believing that the entire service charge imposed by the defendants is being distributed to the employees who served them food or beverage when, in fact, a smaller percentage is being remitted to the servers. As a result, customers who would otherwise be inclined

[5] Employees' Amended Complaint also included Counts II - V, in which Employees' alleged that Four Seasons' conduct constituted intentional interference with contractual relations and/or advantageous relations, breach of implied contract, unjust enrichment, and unpaid wages pursuant to HRS §§ 388-6, 10 and 11.

to leave an additional gratuity for such servers frequently do not do so because they erroneously believe that the servers are receiving the entire service charge imposed by the defendants.

. . .

COUNT I
(Hawaii Revised Statutes, Sections 481B-14, 481B-4, and 480-2[6])

The action of the defendants as set forth above are in violation of Hawaii Revised Statutes Section 481B-14. Pursuant to Section 481B-4, such violation constitutes an unfair method of competition or unfair and deceptive act or practice within the meaning of Section 480-2. Section 480-2(e) permits an action based on such unfair methods of competition to be brought in the appropriate court, and a class action for such violation is permitted and authorized by

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[6] HRS § 480-2 (2008) provides:

Unfair competition, practices, declared unlawful. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

(b) In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

(e) Any person may bring an action based on this section.

HRS § 481B-4 (2008) provides:

Remedies. Any person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2.

> Section 480-13[[7]] and Rule 23 of the Federal Rules of Civil Procedure.

On January 30, 2009, Four Seasons moved to dismiss the Amended Complaint, arguing, inter alia, that Employees lacked standing under HRS § 480-2(e) to bring a claim for unfair methods of competition because they are not businesses, competitors, or consumers. Four Seasons also asserted that Employees failed to properly plead the nature of the competition.

The district court held a hearing on the motion to dismiss on March 24, 2009. Following oral argument, Judge Gillmor denied Four Seasons' motion to dismiss with leave to renew the motion following receipt of a ruling by this court with respect to the issue of standing of the Employees to bring the action. An order certifying the question was entered on June 2,

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[7] HRS § 480-13 (2008) provides:

> **Suits by persons injured; amount of recovery, injunctions.** (a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:
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> (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and
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> (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.
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> . . .

2009, and transmitted to this court the next day.

In addition to the briefs of both parties, several amici curiae also filed amicus briefs in this case as follows: (1) Gustavo Rossetto (hereinafter "Amicus Curiae Rossetto"); (2) Fairmont Hotels and Resorts (U.S.), Inc., Oaktree Capital Management, LP, Kuilima Resort Company, Turtle Bay Resort Company, Turtle Bay Resort Hotel, LLC, TBR Property LLC, and Benchmark Hospitality, Inc.; (3) Starwood Hotels & Resorts Worldwide, Inc.; and (4) HTH Corporation, Pacific Beach Hotel, and Pagoda Hotel.

II. DISCUSSION

A. Introduction

1. Applicable Statutes

The Amended Complaint alleges that Four Seasons engaged in unfair methods of competition in violation of HRS § 481B-14 by withholding a portion of the service charge imposed on the sale of food and beverages at Four Seasons' resorts without advising customers that it was doing so. In their Opening Brief, Employees argue that this conduct "leads customers to believe that the waitstaff are receiving a tip of 18-22% of the food and beverage bill and deters customers from leaving any additional gratuity . . . ."

HRS § 481B-14 provides that:

> Any hotel or restaurant that applies a service charge

> for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

Pursuant to HRS § 481B-4, any person who violates chapter 481B, including § 481B-14, "shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2." HRS § 480-2(a), which is virtually identical to section 5(a)(1) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1),[8] declares that any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

Only consumers, the attorney general, or the director of the office of consumer protection are authorized to bring an action based on unfair or deceptive acts or practices. HRS § 480-2(d). Actions based on unfair methods of competition, on the other hand, are not so limited. Instead, HRS § 480-2(e) provides that "[a]ny person may bring an action based on unfair methods of

[8] Section 5(a)(1) of the FTCA provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). HRS § 480-2 "differs from section 5 of the FTCA in one essential aspect - enforcement." Hawaiʻi Med. Ass'n v. Hawaiʻi Med. Serv. Ass'n, 113 Hawaiʻi 77, 109, 148 P.3d 1179, 1211 (2006). HRS § 480-2(e) provides a private right of action with regard to unfair methods of competition claims, id., while the Federal Trade Commission (FTC) has sole authority to enforce the FTCA, see Robert's Hawaiʻi Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawaiʻi 224, 249, 982 P.2d 853, 878 (1999), superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in Hawaiʻi Med. Ass'n, 113 Hawaiʻi at 107, 148 P.3d at 1209; Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Hawaiʻi 1996).

competition declared unlawful by this section." (emphasis added).[9] Furthermore, HRS § 480-13(a), which is similar to section 4 of the Clayton Act, 15 U.S.C. § 15(a),[10] provides that "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by [chapter 480]: (1) [m]ay sue for damages . . . ; and (2) [m]ay bring proceedings to enjoin the unlawful practices[.]"

2. The Parties' Arguments

Employees allege that they have standing based on the plain meaning of the relevant statutes, the legislative history of HRS §§ 481B-14 and 480-2(e), and relevant Hawaiʻi and federal

[9] The availability of a private right of action for unfair methods of competition in Hawaiʻi has changed over the last several years. In Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 612, 607 P.2d 1304, 1308-09 (1980), overruled by Robert's Hawaiʻi Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawaiʻi 224, 982 P.2d 853 (1999), and Island Tobacco Co., Ltd. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 300-01, 627 P.2d 260, 268-69 (1981), overruled by Robert's Hawaiʻi, this court held that HRS § 480-2 afforded plaintiffs a private right of action for unfair methods of competition. In Robert's Hawaiʻi, this court overruled Ai and Island Tobacco to the extent that they held there existed such a private right and instead held that "there is no private claim for relief under HRS § 480-13 for unfair methods of competition in violation of HRS § 480-2." 91 Hawaiʻi at 252, 982 P.2d at 881. Thereafter, in 2002, the legislature amended HRS § 480-2 to add subsection (e) which makes clear there is such a private right. 2002 Haw. Sess. Laws Act 229, § 2 at 916-17. In Hawaiʻi Med. Ass'n v. Hawaiʻi Med. Services Ass'n, 113 Hawaiʻi 77, 107, 148 P.3d 1179, 1209 (2006), this court held that "[w]e do not believe the amendment 'overruled' Robert's Hawaiʻi . . . but instead simply provided a new right that did not previously exist."

[10] Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides:

> **(a) Amount of recovery; prejudgment interest**
> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

law. Specifically, Employees argue that the plain meaning of "any person" as found in HRS § 480-2(e), and as defined by HRS § 480-1, does not limit standing to businesses, competitors or consumers, and that even if this court determines that the phrase "any person" is ambiguous, the legislative history of HRS § 480-2(e) demonstrates that "[e]ach one of the plaintiffs here qualifies as 'any person' under the law."[11] Furthermore, Employees argue that the legislative history of HRS § 481B-14 "reflects a specific legislative intent to protect plaintiff food and beverage servers." Additionally, Employees argue that based on the plain meaning of HRS §§ 480B-14 and 481B-4, "a violation of § 481 B-14 is 'deemed' by the language of the statute to be an unfair method of competition . . . and no further proof that such a violation is an [unfair method of competition] is required." Finally, Employees argue that "[t]o the extent it is applicable, federal antitrust law supports the conferral of standing on plaintiffs."[12]

Four Seasons counters that Employees "lack standing to

[11] Employees also argue that a limited interpretation of "any person" so as to exclude Employees "risks violation the equal protection clause of the Hawaii Constitution (Article I, Section 5) because it requires the court to deny the protection of Chapter 480 to employees, who may be [unfair methods of competition] victims similarly situated to other 'persons' receiving protection under the statute, without a reasonable basis." Because we conclude that Employees fall within the definition of "any person," we do not

[12] Employees also contend that Employees can enforce HRS § 481B-14 through HRS §§§ 388-6, 10 and 11. However, this argument will not be addressed because it is beyond the scope of the certified question.

bring their damages claims under HRS § 481B-14 as that statute is currently written and based on the allegations (or lack thereof) in [their] Amended Complaint." Specifically, Four Seasons argues that the legislative history of HRS § 481B-14 shows that it is not a wage and hour law intended to protect employees or create a labor standard,[13] but is instead "a consumer protection law designed to prevent businesses from engaging in unfair and/or anticompetitive behavior." Furthermore, Four Seasons argues that the broad "any person" language of HRS § 480-2(e) "should not be interpreted literally" and should instead be limited to businesses, competitors, or consumers[14] based on the legislative history of HRS § 480-2(e) and this court's holding in Hawaiʻi Medical Association v. Hawaiʻi Medical Services Association, 113 Hawaiʻi 77, 105, 148 P.3d 1179, 1212 (2006) (hereinafter "HMA"), as well as federal courts' interpretations of section 4 of the

[13] Four Seasons also argues that if HRS § 481B-14 "was intended to create a wage claim for employees, it is strikingly - if not unconstitutionally - vague. Among other things, it does not specify which employees should be paid the service charge as tip income[,]" and "allows the employer to pick any employee to receive the monies in any amount."

This argument, however, does not relate to the issue of whether or not employees have standing under HRS § 480-2(e) to bring a claim for damages for a violation of HRS § 481B-14, but instead relates the merits of such a claim. Accordingly, we do not address it here.

[14] At some points in its Answering Brief, Four Seasons also includes 480-2(e) is limited to businesses, competitors, consumers or "other market participants." At oral argument, counsel for Four Seasons argued that "businesses" may be broadly interpreted under this court's holding in HMA to include groups such as trade associations which are market participants, but did not further explain what other entities may be considered to be "market participants," see MP3: Oral Argument, Hawaiʻi Supreme Court, at 39:37 - 40:01 (Jan. 21, 2010), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc29862.html, other than indicating that employees are not, id. at 57:15 - 57:23.

Clayton Act. Additionally, Four Seasons argues that both Hawaiʻi and federal case law require that Employees plead the nature of the competition, and that this requirement must be satisfied even if a plaintiff alleges a per se violation of Hawaiʻi antitrust law.

As discussed below, Employees clearly qualify as "any person" within the plain meaning of HRS §§ 480-1 and 480-2(e), and the legislative history of HRS § 480-2(e) is consistent with this interpretation. Contrary to Four Seasons' assertions, standing to sue under HRS §§ 480-2(e) and 480-13(a) is not limited so as to preclude Employees from bringing suit. Moreover, both the plain language and legislative history of HRS § 481B-14 support the conclusion that Employees can bring claims for violations of HRS § 481B-14, as long as all other requirements of §§ 480-2(e) and 480-13(a) are met.

Additionally, Employees have sufficiently alleged a direct injury in fact to their "business or property" within the meaning of HRS § 480-13(a). However, Employees have failed to allege the "nature of the competition" in their Amended Complaint, which is required in order to bring a claim for damages based on Four Seasons' alleged unfair methods of competition.

B. Employees are "persons" within the meaning of HRS §§ 480-1 and 480-2(e), and have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14

1. Employees are "persons" for purposes of HRS §§ 480-1 and 480-2(e)

HRS § 480-2(e) provides that "any person" can sue for unfair methods of competition, while HRS § 480-1 defines "person" to include "individuals, corporations, firms, trusts, partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and incorporated or unincorporated associations, ..." Therefore, under the plain language of HRS §§ 480-1 and 480-2(e), Employees constitute "any person" within the meaning of § 480-1 because they are "individuals." Since the language of §§ 480-1 and 480-2(e) is plain, clear, and unambiguous, the statute should be applied as written. See, e.g., State v. Yamada, 99 Haw. 542, 553, 57 P.3d 467, 478 (2002) ("[i]nasmuch as the statute's language is plain, clear, and unambiguous, our inquiry regarding its interpretation should be at an end"); Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 67, 905 P.2d 29, 42 (1995) ("[w]here the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning") (citation omitted).

However, even if the language of HRS §§ 480-2(e) and 480-1 is considered to be unclear or ambiguous and the legislative history of HRS § 480-2(e) is therefore examined, it confirms that "any person" is not limited to consumers, businesses, or competitors, and can in fact extend to Employees.

HRS § 480-2(e) was enacted in 2002 in response to Roberts Hawaiʻi School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawaiʻi 224, 252, 982 P.2d 853, 881 (1999), superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in HMA, 113 Hawaiʻi at 107, 148 P.3d at 1209, in which this court held that "there is no private claim for relief under HRS § 480-13 for unfair methods of competition in violation of HRS § 480-2." See H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 (noting that HRS § 480-2 was amended in response to a "1999 Supreme Court interpretation of section 480-2").

The "any person" language initially proposed for HRS § 480-2(e) never changed from the time the bill was first introduced as S.B. 1320 until it was signed into law as Act 229. Compare S.B. 1320, 21st Leg., Reg. Sess. (2002) with 2002 Haw. Sess. Laws Act 229, § 2 at 916-17. Most of the committee reports suggest that the "any person" language is to be construed broadly so as to encompass plaintiffs like Employees who are neither consumers, businesses nor competitors. See S. Stand. Comm. Rep. No. 448, in 2001 Senate Journal, at 1116-17 ("The purpose of [S.B. 1320] is to allow a private citizen to bring an action based on unfair methods of competition.") (emphasis added); S. Stand. Comm. Rep. No. 931, in 2001 Senate Journal, at 1295 ("The purpose of [S.B. 1320] is to amend the antitrust and unfair competition law to allow any person to bring a lawsuit for

enforcement . . .") (emphasis added); H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 ("The purpose of this bill is to permit private actions for unfair methods of competition.") (emphasis added). This interpretation is also consistent with the Senate floor discussion of S.B. No. 1320.[15]

Four Seasons argues that standing under HRS § 480-2(e) is limited to businesses, competitors or consumers, so as not to include Employees, based on this court's statement in HMA that "[b]y its plain terms, HRS § 480-2(e) authorizes any person, i.e., businesses and individual consumers, to bring an action grounded upon unfair methods of competition[,]" 113 Hawaiʻi at 110, 148 P.3d at 1212 (emphasis in original), which is a reference to a report of the House Consumer Protection & Commerce and Judiciary & Hawaiian Affairs committees, indicating that "[t]his bill amends the law to clearly give businesses and consumers the right to enforce the law . . . [,]" H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 (emphasis added). This argument must be rejected, however, because when viewed in context, the reference to "businesses and individual consumers" in the committee report does not appear to have been an exclusive

[15] In support of the bill, Senator Matsunaga stated that the bill "amends the antitrust and unfair competition law to allow any person to bring a lawsuit for enforcement." 2002 Senate Journal, at 626 (statement of Sen. Matsunaga) (emphasis added). Senator Hogue, who opposed the bill, expressed similar views about its scope in a subsequent debate: "This bill, if enacted, would open the floodgates and allow anybody to file such a suit, no matter how frivolous." 2002 Senate Journal, at 724 (statement of Sen. Hogue) (emphasis added).

definition of who may bring suit.[16] Similarly, when viewed in context, the foregoing passage in HMA appears to have been intended to explain that persons or entities in addition to competitors may bring an action under HRS § 480-2(e) as long as they meet the additional standing requirements discussed below, in part II.C. See HMA, 113 Hawaiʻi at 110, 148 P.3d at 1212 ("To require that the plaintiffs in this case be competitors of HMSA would contravene the plain language of subsection (e) and the intent of the legislature in amending the subject statute."). Additionally, a broad interpretation of "any person" is consistent with the principle that, as a remedial statute, chapter 480 must be construed liberally. Cieri v. Leticia Query Realty, Inc., 80 Hawaiʻi 54, 68, 905 P.2d 29, 43 (1995) (HRS chapter 480 is a remedial statute, which is 'to be construed liberally in order to accomplish the purpose for which [it was]

[16] The committee report states that:

> Your Committees find that only the Attorney General may bring an action to enforce the antitrust, or unfair methods of competition law. This restriction was the result of a 1999 Supreme Court interpretation of section 480-2, Hawaii Revised Statutes. However, the Attorney General does not have the resources to investigate and litigate all price-fixing claims. This bill amends the law to clearly give businesses and consumers the right to enforce the law if the Attorney General declines to commence an action based on the claim.

H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665.

Thus, the report was focusing on the question of whether persons other than the Attorney General should be able to bring suit, rather than providing an exclusive list of which persons would be able to bring suit if the statute was amended.

enacted . . . .'") (citation omitted).

Four Seasons also argues that federal judicial interpretations of the phrase "any person" in similar federal antitrust statutes also limit standing to businesses, consumers, or competitors. For example, Four Seasons relies on Vinci v. Waste Management, Inc., 80 F.3d 1372 (1996), for the proposition that the Ninth Circuit has limited standing to "only certain plaintiffs[.]" Four Seasons further notes that HRS § 480-3 states that "[t]his chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, ..."

A review of federal case law interpreting the phrase "any person" in section 4 of the Clayton Act, 15 U.S.C. § 15(a), which is analogous to HRS § 480-13(a), demonstrates that "any person" is not so limited. Instead, the Supreme Court has observed that "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-485 (1982) (citation omitted) (plaintiff, who was an individual receiving health care coverage under a health plan purchased by her employer from the defendant (Blue Shield), had antitrust standing to sue under

section 4 of the Clayton Act for Blue Shield's alleged failure to reimburse her for costs of treatment); see also Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 311-15 (4th Cir. 2007) (plaintiff was a software developer and had antitrust standing to sue a defendant manufacturer of computer operating system software even though the plaintiff was not a consumer or competitor and did not operate in the same market as the defendant); American Ad Mgmt., Inc., v. General Telephone Co. of California, 190 F.3d 1051, 1057 (9th Cir. 1999) (holding that authorized sellers of advertising space, who purchased advertising space in the defendant's Yellow Pages telephone directory and then sold the space to customers, had antitrust standing even though not consumers or competitors); Eichorn v. AT&T Corp., 248 F.3d 131, 141-42 (3d Cir. 2001) (former employees of a subsidiary corporation who challenged a no-hire agreement of the parent corporation, alleging that the agreement was a conspiracy to restrain competition in the relevant labor market, had federal antitrust standing because the agreement precluded them from seeking re-employment from at least three divisions of the parent corporation within the competitive market).

The Ninth Circuit's holding in Vinci is not inconsistent with this analysis. In Vinci, the plaintiff was a former employee of a waste removal corporation who brought an action against his former employer, alleging that he was

discharged for refusing to cooperate in the employer's anti-competitive scheme to drive a joint venturer out of business and engage in predatory price-fixing. 80 F.3d at 1373-74. Four Seasons relies on a passage from the Ninth Circuit's opinion which stated that "[a] plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer 'antitrust injury.'" Id. at 1376 (citation omitted). However, the court's subsequent discussion indicates that although "antitrust standing is generally limited to customers and competitors," employees can be afforded standing in certain circumstances. Id. (emphasis added).

The court in Vinci focused on the narrow issue of when a terminated employee has antitrust standing to challenge the loss of his or her job as an antitrust violation. For example, the court recognized that former employees who were "essential participants" in an anti-competitive scheme and whose termination is a "necessary means" to accomplish the scheme can obtain antitrust standing. Id. The court held that the plaintiff in Vinci did not fall within this category of former employees because he did not "allege any facts which suggest that he was essential to the alleged antitrust scheme or that his termination was necessary to accomplish the scheme." Id. at 1376-77; cf. Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 745-46 (9th Cir. 1984) (former employee who had alleged that he had been

discharged after refusing to engage in the employer's scheme to fix prices in violation of federal antitrust law had antitrust standing because he was "an essential participant in the scheme to eliminate competition" in the industry and "his discharge was a necessary means to achieve the [employer's] illegal end"); Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 843 F. Supp. 759, 765-72 (D. Me. 1994) (former employees had federal antitrust standing to sue for alleged price discrimination by their employer since they were integral to the employer's anti-competitive scheme in that they either had to take an active role in implementing the scheme or face discharge).

Vinci, therefore, does not stand for the proposition that the Ninth Circuit has limited antitrust standing to only businesses, competitors, or consumers, to the exclusion of employees or other individuals. 80 F.3d at 1376-77; see also American Ad Mgmt., 190 F.3d at 1057 (rejecting the defendant's claim that standing is limited to consumers and competitors, and recognizing that "[t]he Supreme Court has never imposed a 'consumer or competitor' test but has instead held the antitrust laws are not so limited"). Instead, Vinci indicates that antitrust standing may extend beyond businesses, competitors, or consumers and provides a specific framework for analyzing the distinct issue of antitrust standing for a terminated employee.

In sum, based upon the plain language of the statute,

Employees are "individuals" within the meaning of HRS § 480-1 and therefore qualify as "persons" under HRS §§ 480-2(e) and 480-13(a). Additionally, the legislative history of HRS § 480-2(e) does not evince a clear intent by the legislature to preclude employees from filing an unfair methods of competition claim, but rather indicates that the language is intended to be interpreted broadly. Finally, the federal case law would not require a contrary result. Therefore, Employees have standing to sue under HRS §§ 480-2(e) and 480-13(a) if they meet the additional requirements discussed below.

2. The plain language and the legislative history of HRS § 481B-14 establish that Employees have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14

Four Seasons argues that Employees lack standing to bring an unfair methods of competition claim for violation of HRS § 481B-14 because it "is a consumer protection law designed to prevent businesses from engaging in unfair and/or anticompetitive behavior." In making this argument, Four Seasons relies on the legislative history of HRS § 481B-14. Employees respond that the legislative history demonstrates that "one of the problems the statute is intended to remedy is that 'employees may not be receiving tips or gratuities' that customers intend to be distributed to the employees." Employees further contend that "nothing in the committee reports demonstrates a legislative intent to deny employees the ability to seek redress for

violation of § 481B-14."

As a threshold matter, we observe that the plain language of HRS § 481B-14 is inconsistent with Four Seasons' argument that Employees cannot obtain standing to sue for a violation of HRS § 481B-14. HRS § 481B-14 provides that any hotel or restaurant that applies a service charge "shall distribute the service charge directly to its employees" or "clearly disclose to the purchaser" that it is withholding some of the service charge. HRS § 481B-4 provides that "[a]ny person who violates [chapter 481B] shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice . . . ." Nothing in either provision purports to preclude employees from seeking to enforce those provisions pursuant to HRS § 480-2(e). Since we have concluded that employees are "persons" who may bring an action under HRS § 480-2(e), see section II.B.1, supra, the plain language of these provisions is inconsistent with Four Seasons' position. See Cieri, 80 Haw. at 67, 905 P.2d at 42 ("[w]here the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning") (citation omitted). In any event, as we discuss below, the legislative history of HRS § 481B-14 does not reflect an intent to preclude enforcement by employees.

In April of 2000, the legislature passed House Bill No.

2123 (H.B. No. 2123, H.D. 2), which was signed into law as Act 16, and codified within chapter 481B entitled "Unfair and Deceptive Practices" as HRS § 481B-14. Section 1 of Act 16 states that "[t]he legislature finds that Hawaii's hotel and restaurant employees may not be receiving tips or gratuities during the course of their employment from patrons because patrons believe their tips or gratuities are being included in the service charge and being passed on to the employees." 2000 Haw. Sess. Laws Act 16, § 1 at 21-22. It also states that:

> The purpose of this Act is to require hotels and restaurants that apply a service charge for food or beverage services, not distributed to employees as tip income, to advise customers that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

2000 Haw. Sess. Laws Act 16, § 1 at 22.

The legislative history of HRS § 481B-14 includes three forms of the bill (original, House Draft 1 (H.D.1) and House Draft 2 (H.D.2)), three committee reports, and Act 16 as signed into law by the Governor. H.B. 2123, H.D.1, H.D.2, 20th Leg., Reg. Sess. (2000); 2000 Haw. Sess. Laws Act 16, § 1 at 21-22. At all times, including when signed into law as Act 16, the bill was entitled "Relating to Wages and Tips of Employees."[17] Id.

[17] Employees argue that "[t]he title to the Act is pivotal in dismantling Defendants' claim that the law was not meant to benefit employees because the Hawaii Constitution provides at Article III, Section 14 that: 'No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title.'" However, although we believe the title is instructive in that it appears to reflect the legislature's concern that employees may not always be receiving the service charges imposed by their employers, we do not believe it is dispositive of the issue of whether

Initially introduced as HB 2123, the bill would have, inter alia, added a definition for "tips" in HRS § 387-1 that would include any service charges imposed by the employer, and amended HRS § 388-6 to prohibit employers from withholding tips from employees. See H.B. 2123, 20th Leg., Reg. Sess. (2000). According to the report of the House Committee on Labor & Public Employment, which was the first committee to consider the bill, it was originally intended to "strengthen Hawaii's wage and hour law to protect employees who receive or may receive tips or gratuities from having these amounts withheld or credited to their employers." H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155.

The Hotel Employees and Restaurant Employees, Local 5, union testified in support of the proposed bill. Id. The Department of Labor and Industrial Relations [DLIR] and the ILWU Local 142, however, expressed concerns.[18] Based on those

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the legislature intended to afford Employees standing to sue for HRS § 481B-14 violations.

[18] Specifically, the Committee Report notes that:

> The [DLIR] expressed concerns that the bill, as drafted, would delete the tip credit in its entirety thereby disallowing employers from taking any offset from the employees' wages. DLIR testified that since the current rules concerning tips and gratuities are in line with federal regulations, changing the definitions would cause a lot of confusion for both employers and employees.

H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155. The ILWU Local 142 also expressed concerns that "changing the definition of tips would cause much confusion[.]" Id.

concerns, the House Committee on Labor and Public Employment "amended the bill by deleting its contents and inserting a new section regarding unfair and deceptive business practices." Id. Thus, H.D.1 reflects the Committee's decision to amend Chapter 481B (Unfair and Deceptive Trade Practices) rather than Chapter 387 (Wage and Hour Law). The new section, which eventually became § 481B-14, would "require[] that any hotel or restaurant applying a service charge to distribute it to the employees or clearly state that the service charge is being used to pay for costs or expenses other than wages for employees." Id.

H.D.1 was then considered by the House Committee on Finance, which made only "technical, nonsubstantive amendments" to the bill, which, as amended, became H.D.2. See H. Stand. Comm. Rep. No. 854-00, in 2000 House Journal, at 1298. The Committee's report, dated March 3, 2000, indicated that the bill's purpose "is to prevent unfair and deceptive business practices." Id.

The bill was subsequently considered by the Senate Committee on Commerce and Consumer Protection, which recommended adoption of the bill without further amendment. The Committee's April 3, 2000 report indicates that "[t]he purpose of this measure is to enhance consumer protection," and further noted that:

> Your Committee finds that it is generally understood that service charges applied to the sale of food and beverages by hotels and restaurants are levied in lieu

> of a voluntary gratuity, and are distributed to the employees providing the service. Therefore, most consumers do not tip for services over and above the amounts they pay as a service charge.
>
> Your Committee further finds that, contrary to the above understanding, moneys collected as service charges are not always distributed to the employees as gratuities and are sometimes used to pay the employer's administrative costs. Therefore, the employee does not receive the money intended as a gratuity by the customer, and the customer is misled into believing that the employee has been rewarded for providing good service.

S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1286-87 (emphasis added).

The report went on to state that "[t]his measure is intended to prevent consumers from being misled about the application of moneys they pay as service charges . . . ." Id.

In sum, the legislative history of H.B. No. 2123 indicates that the legislature was concerned that when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted. The legislature chose to address that concern by requiring disclosure and by authorizing enforcement of that requirement under HRS chapter 480. There is no clear indication in the legislative history that the legislature intended to limit enforcement to consumers, businesses, or competitors and to preclude enforcement by employees. Therefore, the legislative history of HRS § 481B-14 is consistent with the conclusion that Employees have standing to sue as "persons" under HRS § 480-2(e) for a violation of HRS § 481B-14 if they meet the

additional requirements discussed below.

C. Employees have not sufficiently alleged the "nature of the competition," which is required to bring a claim for unfair methods of competition under HRS §§ 480-2(e) and 480-13(a)

In order to state a cause of action pursuant to HRS § 480-2(e) and recover money damages, Employees must first satisfy the requirements of HRS § 480-13. Flores v. Rawlings Co., LLC, 117 Hawaiʻi 153, 162, 177 P.3d 341, 350 (2008) ("In order for [the defendant's] failure to register [as a collection agency as required by HRS § 443B-3] to be actionable by private litigants [pursuant to HRS § 480-2], the threshold requirements of HRS § 480-13 must be satisfied."). HRS § 480-13(a) provides that, with limited exceptions, "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by [chapter 480]: (1) [m]ay sue for damages . . . ; and (2) [m]ay bring proceedings to enjoin the unlawful practices[.]"

When analyzing whether or not Employees have sufficiently alleged an injury to their "business or property," this court views Employees' Amended Complaint "in a light most favorable to [Employees] in order to determine whether the allegations contained therein could warrant relief . . . ." In re Estate of Rogers, 103 Hawaiʻi 275, 280, 81 P.3d 1190, 1195 (2003); see Hawaiʻi Rules of Civil Procedure Rule 12(b)(6).

In HMA, this court considered what a plaintiff must

allege in order to bring an action for unfair methods of competition under HRS § 480-2(e). Specifically, this court addressed, inter alia, whether the Hawaiʻi Medical Association (HMA) sufficiently alleged injury to itself under HRS § 480-13(a) as a result of the Hawaiʻi Medical Services Association's (HMSA) alleged unfair methods of competition. HMA, 113 Hawaiʻi at 107-115, 148 P.3d at 1209-1217. HMA alleged that HMSA deprived over 1,600 HMA physicians of reimbursement for services provided by HMA physicians to HMSA plan members. Id. at 83-84, 148 P.3d at 1185-86. These HMA physicians had become "participating physician[s]" in HMSA's network by entering into a "Participating Physician Agreement" (called a "PAR agreement") with HMSA "to provide medically necessary healthcare services to HMSA's plan members in exchange for HMSA's payments at specified rates." Id. at 81, 148 P.3d at 1183.

HMA, on its own behalf and on behalf of participating physicians in HMSA's network, brought suit against HMSA for violation of HRS § 480-2, and tortious interference with prospective economic advantage.[19] Id. at 81, 148 P.3d at 1183. HMA alleged that HMSA engaged in "an unfair and deceptive scheme to avoid making timely and complete payments owed to its

[19] Individual physicians also sued HMSA on similar grounds and the cases were consolidated on appeal. HMA, 113 Hawaiʻi at 81, 148 P.3d at 1183. However, because this court's discussion regarding the requirements to sue under HRS §§ 480-2 and 480-13 arose in the context of the HMA suit, we focus here solely on the issues pertaining to that suit.

physician members" after the HMA physicians had rendered medical care to HMSA members pursuant to their PAR agreements. Id. at 84, 148 P.3d at 1186. HMA alleged that this "wrongful conduct (1) constituted unfair methods of competition and (2) delayed, impeded, denied or reduced reimbursement owed to HMA's physician members. HMA further alleged that HMSA's wrongful conduct . . . resulted in direct and substantial harm to HMA and its members." Id. at 81, 148 P.3d at 1183.

HMSA filed a motion for judgment on the pleadings, arguing that HMA's claims should be dismissed because HMA, inter alia, lacked standing to bring suit on its own behalf. Id. at 85, 148 P.3d at 1187. Moreover, in its reply to HMA's opposition to the motion, HMSA argued that HMA's claim under HRS chapter 480 failed because HMA had not pled any direct injury to its "business or property." Id. at 86, 148 P.3d at 1188. The circuit court granted HMSA's motion for judgment on the pleadings and HMA appealed. Id. at 87, 148 P.3d at 1189.

On appeal, this court considered whether HMA sufficiently alleged injury to itself with respect to its post-June 28, 2002[20] unfair methods of competition claims under HRS § 480-2. Id. at 107-15, 148 P.3d at 1209-17. This court

[20] HRS § 480-2(e) became effective on June 28, 2002. In HMA, this court held that § 2(e) cannot be applied retroactively because "[n]either the language of the statute itself nor the legislative history of the amendment give any expressed indication that the amendment should be applied retroactively." HMA, 113 Hawaiʻi at 107, 148 P.3d at 1209.

acknowledged the three elements essential to recovery under HRS § 480-13: (1) a violation of HRS chapter 480; (2) which causes an injury to the plaintiff's business or property; and (3) proof of the amount of damages.[21] Id. at 114, 148 P.3d at 1216 (citing Ai, 61 Haw. at 617, 607 P.2d at 1311); see also Roberts Hawaiʻi School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawaiʻi 224, 254 n.30, 982 P.2d 853, 883 n.30 (1999), superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in HMA, 113 Hawaiʻi at 107, 148 P.3d at 1209 ("[W]hile proof of a violation of chapter 480 is an essential element of an action under HRS § 480-13, the mere existence of a violation is not sufficient ipso facto to support the action; forbidden acts cannot be relevant unless they cause [some] private damage.") (citation omitted).

This court, according to the majority opinion, first determined that HMA need not be a "competitor[]" of or "in competition" with HMSA in order to have standing under HRS § 480-13(a).[22] Id. at 110, 148 P.3d at 1212. This court also

[21] A fourth element--"a showing that the action is in the public interest or that the defendant is a merchant"--used to be required, but was eliminated by the 1987 amendment to HRS §§ 480-2 and -13. See HMA, 113 Hawaiʻi at 114 n.31, 148 P.3d at 1216 n.31 (citing S. Conf. Comm. Rep. No. 105, in 1987 Senate Journal, at 872).

[22] The majority opinion further stated that "notwithstanding . . . our holding that the plaintiffs need not be 'competitors' of, or 'in competition' with, HMSA, the question remains whether the nature of the competition must be sufficiently alleged. Contrary to the dissent, we conclude that it does . . . ." Id. at 111, 148 P.3d at 1213. Justice Acoba and Justice Nakayama, who concurred in the result, nevertheless characterized the majority's holding as requiring that plaintiffs be in competition with

determined that a plaintiff "may bring claims of unfair methods of competition based on conduct that would also support claims of unfair or deceptive acts or practices." Id. at 111, 148 P.3d at 1213. In doing so, however, "the nature of the competition [must be] sufficiently alleged in the complaint." Id. at 113, 148 P.3d at 1215 (emphasis added). This court recognized that otherwise, "the distinction between claims of unfair or deceptive acts or practices and claims of unfair methods of competition that are based upon such acts or practices would be lost where both claims are based on unfair and deceptive acts or practices." Id. at 111-12, 148 P.3d at 1213-14 (emphasis in original). This court held that HMA sufficiently alleged an unfair methods of competition claim based on conduct that would also support a claim of unfair or deceptive acts or practices[23] because it

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defendants and dissented on those grounds. Id. at 119, 148 P.3d at 1221 (Acoba, J. and Nakayama, J., dissenting) ("it is unnecessary to allege, as the majority indicates, that HMSA and all the plaintiffs are in competition with each other for the same 'customers.'"). However, the dissent agreed that something more than an unfair or deceptive act or practice must be alleged in order to bring a claim for unfair methods of competition. Id. ("In my view it is sufficient that 'unfair methods of competition' adversely impact the plaintiffs and allegations in that respect are made, beyond any allegations of unfair and deceptive acts or practices.").

[23] This court specifically stated that

> HMSA facilitates access to the dispensing of medical services, and the plaintiffs provide medical services directly. Thus, in our view, HMSA and the plaintiffs share the same goal or mission, i.e., ensuring that medical services are accessible to their "customers." Their success in meeting the common goal-and, in turn, ensuring the profitability of their respective businesses-is dependent upon their ability to effectively provide medical services to their customers, i.e., the patients. However, if HMSA engages in acts or practices that impede or interfere

sufficiently alleged the nature of the competition in its complaint.[24] Id. at 112-13, 148 P.3d at 1214-15.

As to the injury in fact requirement, this court

> with physicians' ability to provide effective healthcare services to their patients and/or create incentives for patients to look elsewhere for medical services-that is, to other participating physicians who may be reluctant to challenge HMSA or to non-participating physicians-such acts or practices can, if proven, constitute unfair methods of competition, notwithstanding the fact that the same conduct could also support a claim of unfair or deceptive acts or practices.

HMA, 113 Hawaiʻi at 112-13, 148 P.3d at 1214-15.

[24] This court held that HMA sufficiently alleged the "nature of the competition" by, for example, alleging in its complaint that:

> 11. . . . [HMSA's] conduct has adversely impacted, and continues to adversely impact, members of [HMSA's] plans by, among other things: (a) imposing financial hardships on, and in some cases threatening the continued viability of, the medical practices run by [the plaintiffs]; (b) threatening the continuity of care provided to patients by [the plaintiffs], as required by sound medical judgment; (c) requiring [the plaintiffs] to expend considerable resources seeking reimbursement that could otherwise be available to provide enhanced healthcare services to [HMSA's] plan members; (d) making it more costly and difficult for [the plaintiffs] to maintain and enhance the availability and quality of care that all patients receive; and (e) increasing the costs of rendering healthcare services in Hawaii as a result of the additional costs incurred and considerable effort expended by HMA members in seeking reimbursement from HMSA for services rendered. . . .
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> . . .
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> 26. HMSA dominates the enrollee market in Hawaii with over 65% of Hawaii's population enrolled in one of HMSA's plans. In this regard, HMSA is the largest provider of fee-for-service insurance in the State with more than 90% of the market and is the second largest HMO provider in the State. Similarly, HMSA dominates the physician market, with approximately 90% of Hawaii's physicians participating in HMSA's networks.
> 27. It is through such market dominance that HMSA is able to dictate the terms and amount of reimbursement HMA physicians will receive.

HMA, 113 Hawaiʻi at 112, 148 P.3d at 1214 (emphasis and brackets in original).

concluded that HMA established that it had been injured in its "business or property" by alleging a "diminishment of financial resources" as a result of HMSA's actions. Id. at 114, 148 P.3d at 1216. This court quoted Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980), for the proposition that "it is unnecessary for plaintiffs to allege commercial or competitive injury[;] it is sufficient that plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced."[25] Id. at 114, 148 P.3d at 1216 (quoting Ai, 61 Haw. at 614, 607 P.2d at 1310) (internal quotation and bracketed text omitted; brackets in original). Therefore, this court held that "HMA need only allege that, by reason of an antitrust violation, it has been injured in its 'business or property.'" Id. HMA clearly alleged a direct injury to its business where "HMA was required to divert substantial resources and time to deal with its members' problems created by HMSA's conduct - resources that otherwise would go to support its principal mission in service of its members." Id. (internal

[25] Ai's suggestion that allegations of "competitive injury" are the requirement in HMA that a plaintiff allege the "nature of the competition" in order to plead an unfair methods of competition claim under HRS § 480-2(e). However, when this passage from Ai is viewed in the context of the facts the case, it is apparent that this court was explaining that injury to "business or property" means that a private plaintiff does not need to allege that he or she suffered an injury to his or her business property or in a business activity, but rather can allege that he or she suffered an injury to personal property. Ai, 61 Haw. at 614, 607 P.2d at 1310. Moreover, Ai involved alleged unfair or deceptive acts or practices, not unfair methods of competition, id. at 611, 607 P.2d at 1308, and therefore this court did not address the requirements to properly plead an unfair methods of competition claim.

quotation marks omitted).

As discussed below, although Employees have sufficiently alleged a direct injury in fact to their "business or property," Employees did not sufficiently allege the "nature of the competition" as required by HMA.

1. Employees have alleged an injury in fact to their "business or property"

Employees sufficiently alleged an injury to their "business or property" within the meaning of HRS § 480-13(a). HRS § 480-13(a)'s requirement of alleging an injury to business or property incorporates the fundamental standing requirement that a plaintiff must allege an injury in fact, but narrows it so that a plaintiff must specifically allege an injury in fact to his or her "business or property." Employees argue that Four Seasons' alleged violation of § 481B-14 directly injures them in both their "business," which is working as banquet servers, and their "property," in the form of "loss of tip income."

The phrase "injury to business or property" found in HRS § 480-13(a) is not defined in that section or elsewhere in the chapter. However, as discussed above, this court has established that the requirement is satisfied, for example, if "plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced," HMA, 113 Hawaiʻi at 114, 148 P.3d at 1216 (quoting Ai, 61 Haw. at 614, 607 P.2d at 1310), or through the diminishment of financial resources as a

result of a defendant's unfair methods of competition or unfair or deceptive acts or practices, id. Therefore, because Employees have alleged that their tip income has been reduced due to Four Seasons' allegedly unlawful conduct, they have alleged an injury to their "business or property."

2. Employees failed to allege the "nature of the competition"

As noted above, Employees allege in their Amended Complaint that Four Seasons failed to distribute the entirety of its service charge to its employees and to clearly disclose to the purchaser of the services that employees were not receiving the entire service charge as tip income, and further allege that such conduct constitutes a violation of HRS § 481B-14. Pursuant to HRS § 481B-4, such a violation would constitute both an unfair method of competition and an unfair or deceptive act or practice under HRS § 480-2(a). However, Employees cannot pursue a claim for unfair or deceptive acts or practices because such a claim can only be brought by consumers, the attorney general or the director of the office of consumer protection. See HRS § 480-2(d). Therefore, as was the case in HMA, in order to pursue a claim under § 480-2(e) for the unfair methods of competition of Four Seasons, Employees must allege the "nature of the competition."[26] HMA, 113 Hawaiʻi at 111, 148 P.3d at 1213.

[26] The dissent suggests that the present case is distinguishable from HMA because HMA involved an unfair methods of competition claim based on

Employees allege that they have been directly injured by not receiving a portion of the service charge retained by Four Seasons, or by not receiving the tips hotel patrons might have otherwise left if they had known how the service charge was allocated. Even when viewed in a light most favorable to Employees, the Amended Complaint clearly does not contain any allegations concerning the nature of the competition. However, Employees are required to allege how Four Seasons' conduct will negatively affect competition in order to recover on an unfair methods of competition claim.[27]

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claim, and that the requirement in HMA that the plaintiffs allege the nature of the competition was "to preserve the distinction" between the two claims. Dissenting Opinion at 15. The dissent therefore argues that because HRS § 481B-4 deems a violation of chapter 481 to be both an unfair method of competition and an unfair or deceptive act or practice under HRS § 480-2, the need for distinction between the two claims as articulated in HMA is not present in the instant case. Dissenting Opinion at 16-18.

However, this court in HMA did not indicate that a plaintiff alleging an unfair method of competition under HRS § 480-2(e) must plead the nature of the competition merely so there is a distinction between claims of unfair or deceptive acts or practices and claims of unfair methods of competition. While recognizing that such distinction is necessary, this court further indicated that "the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition." HMA, 113 Hawaiʻi at 112, 148 P.3d at 1214. In other words, this court indicated that the pleading requirement is based on the differences in the nature of the underlying causes of action. Therefore, HMA's holding is equally applicable to the instant case.

[27] Thus, we respectfully disagree with the dissent's suggestion that the Amended Complaint sufficiently alleged the nature of the competition. Dissenting Opinion at 36-38. In HMA, after recognizing that the standard of review for a motion to dismiss or motion for judgment on the pleadings requires this court to accept the allegations in the complaint as true and construe the allegations in the light most favorable to the plaintiff, we held that this standard does not relieve plaintiffs from the requirement of pleading the nature of the competition in the complaint itself. See HMA, 113 Hawaiʻi at 113, 148 P.3d at 1215 ("In sum, we hold that any person may bring a claim of unfair methods of competition based upon conduct that could also support a claim of unfair or deceptive acts or practices as long as the nature of the competition is sufficiently alleged in the complaint") (emphasis added). In , we concluded that HMA sufficiently alleged the nature of the

Amicus Curiae Rossetto suggests that this court's opinion in Island Tobacco Co., Ltd., v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 627 P.2d 260 (1981), "recognized that there need be no 'injury to competition' in order for [an unfair method of competition] claim to lie under HRS § 480-2." For support, Amicus Curiae Rossetto cites to the following passage from that case:

> [W]e view § 480-2 as being designed to aid "competitors," as much as to protect "competition." And unlike the Federal Trade Commission Act, the policy of the Hawaii law, as expressed in HRS § 480-13, is to foster private suits grounded on unfair or deceptive trade practices, even where the unlawful acts to [sic] not culminate in injury to "competition."

Island Tobacco, 63 Haw. at 301, 627 P.2d at 269 (emphasis added).

This passage, however, does not support Amicus Curiae Rossetto's argument. Rather, this language was limited to claims of unfair or deceptive trade practices, rather than unfair methods of competition, and was used to explain that an act can constitute an unfair or deceptive practice if it injures a competitor, even if it does not injure competition itself. Id. This analysis does not extend to claims involving unfair methods of competition.

Employees argue that "since § 481B-4 'deems' a violation of [§ 481B-14] to be an 'unfair method of competition'

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anti-competitive effect HMSA's alleged actions would have on the marketplace for healthcare services in Hawaiʻi and that HMA's injury directly resulted from these unfair methods of competition. See supra, section II-C and notes 23

under § 480-2, this Court should not require further proof that such a violation is in fact an [unfair method of competition]." Citing to this court's previous holding in Ai, Amicus Curiae Rossetto similarly contends that the legislature, "by 'deeming' a violation of Section 481B-14, through the operation of Section 481B-4, to be a per se [unfair method of competition] has found the necessary element of 'competition' by its legislative action." For the following reasons, these arguments confuse the requirements necessary to bring an unfair methods of competition claim under HRS § 480-2(e).

The requirement that the plaintiff allege the "nature of the competition" in an unfair methods of competition claim is distinct from the requirement that a defendant's conduct constitute an unfair method of competition. The latter requirement stems from HRS § 480-2(a), which provides that unfair methods of competition are declared to be unlawful. See Robert's Hawaiʻi, 91 Hawaiʻi at 255, 982 P.2d at 884 ("Generally speaking, competitive conduct is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.") (internal quotations omitted; citation omitted); Cieri, 80 Hawaiʻi at 61, 905 P.2d at 36 ("It is impossible to frame definitions which embrace all unfair practices. . . . Whether competition is unfair or not generally depends upon the surrounding

circumstances of the particular case.") (citation omitted).

In contrast, the requirement that a plaintiff allege that he or she was harmed as a result of actions of the defendant that negatively affect competition is derived from HRS § 480-13(a)'s language that "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter . . . [m]ay sue for damages . . . ;" (emphasis added).

In Robert's Hawaiʻi, this court discussed the elements that must be established to bring a claim under HRS § 480-13(a). 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31. We held that "the elements of (1) resulting injury to business or property and (2) damages" are "two distinct elements" of HRS § 480-13(a), and went on to note that:

> Indeed, federal case law has interpreted the "injury to business or property" language of section 4 of the Clayton Act as a causation requirement, requiring a showing of "antitrust injury." "Plaintiffs must prove . . . [an] injury of the type the antitrust laws were intended to prevent[, one] . . . that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the 'type of loss' that the claimed violations . . . would be likely to cause."
>
> Also known as the "fact of damage" requirement, the antitrust plaintiff need not prove with particularity the full scope of profits that might have been earned. Instead, it requires a showing, with some particularity, of actual damage caused by anticompetitive conduct that the antitrust laws were intended to prevent.

Id. (internal citations omitted; ellipses and brackets in original); see also HMA, 113 Hawaiʻi at 114 n.30, 148 P.3d at

1216 n.30 (citing Robert's Hawaiʻi, 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31).

HRS § 481B-4 declares that "[a]ny person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2." Amicus Curiae Rossetto contends that Employees do not need to allege the "nature of the competition" because Employees' claim is based upon a statutory violation deemed by HRS § 481B-4 to be "per se" an unfair method of competition, rather than a claim based on an unfair or deceptive act or practice that is also being alleged to be an unfair method of competition, as was the case in HMA. However, although the deeming language of HRS § 481B-4 eliminates the requirement that a plaintiff prove that a defendant's conduct that violates chapter 481B (including HRS § 481B-14) constitutes an unfair method of competition, it does not purport to modify the causation requirement of HRS § 480-13.

Moreover, even if this court were to determine that the language of HRS § 481B-4 is ambiguous, the legislative history of HRS § 481B-4 does not reflect an intent to eliminate the causation requirement of HRS § 480-13(a). The current deeming language of HRS § 481B-4 ("deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of

section 480-2") was added in 1996 pursuant to Act 59. 1996 Haw. Sess. Laws Act 59, § 4 at 83. Prior to the enactment of Act 59, HRS chapter 481B contained a variety of different enforcement provisions which were replaced by HRS § 481B-4. See, e.g., id. (replacing the provision in HRS § 481B-4 which provided that violators could be "fined not more than $500 for each violation or imprisoned not more than one year or both" with the present deeming language).

The Senate Judiciary Committee report indicates that:

> The purpose of the bill is to provide a consistent penalty for certain specific unfair and deceptive acts or practices of regulated industries under chapter 480, . . . governing monopolies and restraint of trade.
>
> Your Committee finds that this bill is intended to delete duplicative or unnecessary penalty provisions and by deeming the violations to constitute unfair and deceptive business practices under section 480-2[.]

S. Stand. Comm. Rep. No. 2103, in 1996 Senate Journal, at 1016-17.

The report of the House Consumer Protection & Commerce and Judiciary committees similarly provides that "[t]he purpose of this bill is to provide consistency in the consumer protection statutes by amending certain provisions so that they uniformly relate to the unfair or deceptive acts or practices statute" and that the "bill is designed to remove duplicative or unnecessary recitation of penalty provisions in favor of a simple reference to the unfair or deceptive acts or practices statute." H. Stand. Comm. Rep. No. 1459-96, in 1996 House Journal, at 1610.

While the committee reports reflect a desire for consistency in enforcement, they do not indicate that the legislature intended to modify the causation requirements which are generally applicable to unfair methods of competition claims under HRS § 480-13(a).

The dissent argues that because the legislative history indicates that HRS § 481B-14 was intended to prevent harm to employees, it can therefore be inferred that the legislature did not intend to require that a plaintiff plead the nature of the competition in order to bring an unfair methods of competition claim under HRS § 480-2(e). Dissenting Opinion at 30-32. However, as we discuss above in section II-B-2, the legislative history of HRS § 481B-14 indicates that both employees and consumers may be negatively impacted when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so. Moreover, the legislature chose to place HRS § 481B-14 within Hawaii's consumer protection statutes and provided that it be enforced through HRS § 480-13. Therefore, while the legislative history of HRS § 481B-14 recognizes that employees are negatively impacted when a hotel or restaurant does not properly distribute the service charge, neither this recognition nor anything else in the legislative history of HRS §§§ 481B-14, 481B-4, or 480-2(e) indicate that the legislature intended to eliminate the causation requirements of HRS § 480-13 for unfair

methods of competition claims brought under HRS § 480-2(e).

This analysis is consistent with Ai, which involved debt collection practices alleged to be unfair or deceptive acts or practices in violation of Chapter 443 and a "deeming" provision similar to HRS § 480B-4. 61 Haw. at 608-10, 607 P.2d at 1307-08. That provision provided that: "[a] violation of this part by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of section 480-2." Ai, 61 Haw. at 610 n.5, 607 P.2d at 1308 n.5 (citing HRS § 443-47). This court discussed the relationship between that provision and HRS § 480-2, recognizing that:

> the legislature . . . did not leave to the judiciary the unfettered discretion to independently determine in every case brought under [§] 480-2 whether a defendant's conduct had been "unfair or deceptive" within the comprehension of the statute. The legislature instead found it desirable to predetermine that violations of HRS Chapter 443 would constitute per se "unfair or deceptive acts or practices" for the purposes of § 480-2

Id. at 616, 607 P.2d at 1311 (emphasis added).

Applying Ai's reasoning here, by "deeming" a violation of § 481B-14 to be an unfair method of competition, the legislature "predetermine[d]" that violations of HRS Chapter 481B would constitute per se unfair methods of competition for the purposes of § 480-2, and therefore a plaintiff with standing need not prove that conduct which violates HRS § 481B constitutes an unfair method of competition. See id. However, by so doing, the

legislature did not determine that an injury suffered by "any person" as a result of a violation of chapter 481B necessarily stems from the negative effect on competition caused by the violation. In other words, the legislature was not making a determination that any person injured as a result of a violation of Chapter 481B automatically has standing to sue pursuant to HRS § 480-2 and 480-13. Instead, a private person must separately allege the nature of the competition in accordance with this court's holding in HMA.

At the time Ai was decided, HRS § 480-13 required the plaintiff to show that the suit would be in the public interest or that the defendant is a merchant. This requirement was eliminated by the 1987 amendment to HRS §§ 480-2 and -13. See HMA, 113 Hawaiʻi at 114 n.31, 148 P.3d at 1216 n.31 (citing S. Conf. Comm. Rep. No. 105, in 1987 Senate Journal, at 872). In Ai, this court held that "[s]ince plaintiffs herein have supplied allegations adequate to show that such a per se violation of [§] 480-2 has occurred, we accordingly find that the public interest has been sufficiently made out to confer standing to plaintiffs under § 480-13." Id. at 617, 607 P.2d at 1311. The dissent argues that this public interest requirement "is directly analogous to the . . . requirement that [Employees] plead the 'nature of [the] competition' inasmuch as both are aimed at addressing the anti-competitive effects of such conduct[,]" and

therefore this court's holding in Ai indicates that in cases of per se violations of HRS § 480-2, a plaintiff need not allege the nature of the competition in order to assert an unfair methods of competition claim. Dissenting Opinion at 23. Amicus Curiae Rossetto similarly asserts that Ai indicates that when there is a per se violation of Hawaiʻi's antitrust or consumer protection laws, the plaintiff does not need to allege the nature of the competition in order to bring an unfair methods of competition claim under HRS § 480-2(e).

However, this argument misconstrues Ai. As discussed above, Ai merely emphasized that when the legislature "deems" a practice to be a per se unfair method of competition or unfair or deceptive act or practice within the meaning of HRS § 480-2, a plaintiff with standing to sue does not need to prove that the defendant's action actually constituted either an unfair method of competition or unfair or deceptive act or practice, and does not need to make any additional showing that the suit was in the public interest. Id. at 616, 607 P.2d at 1311. Moreover, the now-repealed public interest requirement was not "directly analogous" to the nature of the competition, as the dissent suggests. Although this court in Ai indicated the public interest requirement can be satisfied when "the unfair method employed threatens the existence of present or potential competition[,]" we also indicated that the requirement can be

satisfied in circumstances where there is no such threat, including when "the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong." Ai, 61 Haw. at 614-15, 607 P.2d at 1310 (citing FTC v. Klesner, 280 U.S. 19, 28 (1929) (explaining that the purpose of the public interest requirement is to ensure that a suit brought by the FTC under the FTCA is truly in the interest of the public as a whole, not merely private individuals); see Ailetcher v. Beneficial Finance Co., 2 Haw. App. 301, 306, 632 P.2d 1071, 1076 (1981) (finding the public interest requirement was satisfied in an unfair or deceptive practices case because, even though "the action of the [defendant finance company was not] such as to constitute an unfair method of competition, a restraint of trade or a monopolization of an area of commerce[,]" there was "flagrant oppression of the weak by the strong"), abrogated on other grounds by Hac v. Univ. of Hawaii, 102 Hawaiʻi 92, 105-06, 73 P.3d 46, 59-60 (2003); T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 636 (9th Cir. 1987) ("Under Hawaiʻi law, an unfair act is committed, and the public interest requirement is met, whenever the unfair method is being employed under circumstances which involved flagrant oppression of the weak by the strong."). Therefore, contrary to the dissent's and Amicus Curiae Rossetto's assertions, this court's holding in Ai does not stand for the

proposition that where a statute deems an action to be a per se violation of Hawaiʻi's antitrust or consumer protection laws, the plaintiff is relieved of alleging the nature of the competition in order to have standing to sue under HRS § 480-2(e).

Amicus Curiae Rossetto also cites to Flores v. Rawlings Co., LLC, 117 Hawaiʻi 153, 177 P.3d 341 (2008), for the proposition that Employees do not need to allege the nature of competition because HRS § 481B-4 "deems" a violation of HRS § 481B-14 to be an unfair method of competition. However, Flores does not support this argument.

The plaintiffs in Flores were members of HMSA's benefit plans and brought an action against a company (Rawlings) that had contracted with HMSA to provide subrogation and "claims recovery services." Id. at 155-57, 177 P.3d at 343-45. The plaintiffs alleged that they were injured by Rawlings' failure to register as a debt collection agency as required by HRS § 443B-3(a) (1993), which, pursuant to HRS § 443B-20, would constitute an unfair or deceptive act or practice within the meaning of HRS § 480-2.[28] Id. Similar to HRS § 481B-4, HRS § 443B-20 (1993) provides that "[a] violation of this chapter by a collection

[28] HRS § 443B-3(a) (1993) provides:

> No collection agency shall collect or attempt to collect any money or any other forms of indebtedness alleged to be due and owing from any person who
>
> registering under this chapter.

agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of section 480-2." Id. at 162, 177 P.3d at 350. Because the plaintiffs alleged that Rawlings' actions constituted unfair or deceptive acts or practices rather than unfair methods of competition, HRS § 480-13(b) was applicable, requiring plaintiffs to show that they were "consumers" who were "injured" within the meaning of § 480-13(b) and HRS § 480-1.[29] Id. This court held that the plaintiffs were "consumers" without having to prove that they "purchased" something from the defendant. Id. at 162-66, 177 P.3d at 350-54.

This court recognized that "[b]y deeming violations of HRS chapter 443B an unfair or deceptive act or practice for the purposes of HRS § 480-2, it is evident that the legislature wished to have chapter 443B be enforceable in the same manner as other unfair trade practices under chapter 480[,]" i.e., enforceable by individual consumers under HRS § 480-2(d). Id. at 164, 177 P.3d at 352. If private enforcement was limited to those who purchased from a collection agency, then as a practical matter consumers would not be able to enforce the statute and enforcement "would be left entirely in the hands of the state[,]"

[29] HRS § 480-1 (1993) defines "consumer" as: "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." Flores, 117 Hawaiʻi at 162-63, 177 P.3d at 350-51.

because consumers do not typically purchase goods or services from collection agencies. Id. This would be "an inconsistent, if not absurd, result that the legislature would not have intended." Id. Therefore, this court held that:

> Rather, in the context of consumer debt, the determination of whether the individual seeking suit is a "consumer" should rest on whether the underlying transaction which gave rise to the obligation was for a good or service that is "primarily for personal, family, or household purposes," HRS § 480-1. This reading is supported by the definition of "debt" in HRS § 443B-1, as well as the fact that the statutory structure of HRS chapter 480 does not require that one be a "consumer" of the defendant's but merely a "consumer."

Id. at 164, 177 P.3d at 352 (emphasis in original).

Although this court held that the plaintiffs had established standing as consumers, we further concluded that the plaintiffs failed to demonstrate that they were injured as a result of Rawlings' conduct because, although Rawlings had failed to register as required by HRS § 443B-3, the underlying debt was nevertheless valid. Id. at 169, 177 P.3d at 357. We observed that "Rawlings's conduct in violation of HRS § 443B-3, while injurious to the state's interest in regulation of collection agencies, did not directly harm Plaintiffs." Id. at 171, 177 P.3d at 359.

This court's analysis in Flores addressed alleged unfair or deceptive acts or practices in the area of consumer debt collection and did not extend to cases involving alleged unfair methods of competition. Unlike the present case, this

court in Flores was construing HRS § 480-13(b), which provides the cause of action for unfair or deceptive acts or practices. Thus, Flores cannot be construed to mean that unfair methods of competition claims may be brought under HRS § 480-2(e) and § 480-13(a) without any reference to the effect on competition simply because HRS § 481B-4 "deems" a violation of § 481B-14 to be an unfair method of competition.[30] In any event, even though Flores involved a deeming provision similar to that here, this court acknowledged that the requirements imposed by HRS § 480-13 were nonetheless applicable. See Flores, 117 Hawaiʻi at 162, 177 P.3d at 350 ("In order for Rawlings's failure to register to be actionable by private litigants, the threshold requirements of HRS § 480-13 must be satisfied.").

Therefore, although Employees allege that they have suffered an injury resulting from Four Seasons' violation of § 481B-14, which is deemed to be an unfair method of competition by § 481B-4, Employees are additionally required to allege the "nature of the competition." HMA, 113 Hawaiʻi at 113, 148 P.3d

[30] Amicus Curiae Rossetto additionally cites to Fuller v. Pacific Medical Collections, Inc., 78 Hawaiʻi 213, 891 P.2d 300 (App. 1995), in which the Intermediate Court of Appeals held that although the Director of the Department of Commerce and Consumer Affairs was designated to enforce HRS chapter 443, a consumer could maintain an action under HRS § 480-2(d) for an unfair or deceptive act or practice claim because HRS § 443B-20 provided that violations of chapter 443 constitute unfair or deceptive acts or practices. Id. at 218, 891 P.2d at 305. However, because Fuller involved only claims of unfair or deceptive acts or practices pursuant to HRS § 480-2(d), it does not address the distinct issue of whether Employees must allege the nature of the competition in order to maintain an unfair methods of competition claim under HRS § 480-2(e).

at 1215. Employees have made no such allegation, and therefore have not satisfied the requirements to pursue a claim under HRS § 480-2(e).[31]

We note that this result is consistent with the principles of causation that have been developed in the federal antitrust context. In both Robert's Hawaiʻi and HMA, this court recognized that "federal case law has interpreted the 'injury to business or property' language of section 4 of the Clayton Act as a causation requirement, requiring a showing of 'antitrust injury.'" Robert's Hawaiʻi, 91 Hawaiʻi at 254 n.31, 982 P.2d at

[31] Without expressing an opinion regarding its sufficiency, we note that in their Reply Brief, Employees described how they would characterize the "nature of the competition" if they were required to allege it:

> [E]ven if there were some requirement that the unfair method of competition be asserted, the remedy would not be dismissal, but at worst, to allow the plaintiffs to allege such "unfair method". Indeed, it is obvious that if one hotel obeys the laws and remits the entire service charge to the employees serving at the banquet and another hotel/competitor skims the service charge and keeps 4-5% for itself without disclosure, the hotel acting unlawfully can undercut its stated price for the banquet knowing that it will be receiving improper gains from the misleading description of its service charge. This is clearly a

Amicus Curiae Rossetto similarly states that:

> In this case, hotels and restaurants that do not inform customers that they are keeping the imposed service charge and not paying it to employees gain a clear competitive advantage because they have deceived their patrons. They are able to "reduce" the published cost of their food and beverages in order to entice patronage away from their honest competitors who either pay out the service charge to employees or frankly inform patrons that management is keeping all or a part of the service charge (thereby telling patrons that they will still have to tip employees).

883 n.31; HMA, 113 Hawaiʻi at 114 n.30, 148 P.3d at 1216 n.30 (quoting Robert's Hawaiʻi, 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31). In Robert's Hawaiʻi, this court further noted that the antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977)).

When examining HRS § 480-2, this court has recognized that "[t]he genesis of Hawaiʻi's consumer protection statute is in federal antitrust law," with a shared "concern for the preservation of unrestrained economic competition and free trade." Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 59, 905 P.2d 29, 34 (1995). HRS § 480-2(a), which declares that unfair methods of competition and unfair or deceptive acts or practices are unlawful, is "a virtual counterpart of [§] 5(a)(1) of the Federal Trade Commission Act [FTCA]." Island Tobacco, 63 Haw. at 300, 627 P.2d at 268. HRS § 480-2(b) declares that "[i]n construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission [FTC] and the federal courts interpreting section 5(a)(1) of the [FTCA] . . . ." However, section 480-2 "differs from section 5 of the FTCA in one essential aspect - enforcement. Section 5 of the

FTCA contains no private remedy, rather enforcement of its provisions is vested in the [FTC]." HMA, 113 Hawaiʻi at 109, 148 P.3d at 1211 (quoting Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Haw. 1996) and citing Robert's Hawaiʻi, 91 Hawaiʻi at 249, 982 P.2d at 878) (internal parenthetical and quotation marks omitted). Therefore, federal interpretations of the FTCA, although helpful in determining whether a defendant's actions constitute an unfair or deceptive act or practice or an unfair method of competition, are of limited relevance in interpreting the standing requirements applicable to the private right of action provided by HRS § 480-2(e).[32]

HRS § 480-13(a) tracks the language of section 4 of the Clayton Act, which provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor...., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (emphasis added).

Additionally, HRS § 480-3 provides that "[chapter 480] shall be construed in accordance with judicial interpretations of

[32] When interpreting HRS § 480-2(e), Amicus Curiae Rossetto urges this court to only consider federal interpretations of section 5(a)(1) of the FTCA pursuant to HRS § 480-2(b), and not interpretations of section 4 of the Clayton Act. Specifically, Amicus Curie Rossetto argues that section 5(a)(1) of the FTCA has been interpreted in FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), to empower the FTC to define unfair practices to include practices without anti-competitive effects. However, this argument is misplaced, because as discussed above, interpretations of section 5(a)(1) of the FTCA are of limited relevance in analyzing standing requirements for HRS § 480-2(e) since the FTCA does not have a comparable private right of action. See supra, note 8.

similar federal antitrust statutes." Pursuant to this instruction, this court has indicated that it is appropriate to look to "the guidance of similar federal antitrust statutes as permitted in HRS § 480-3." Robert's Hawaiʻi, 91 Hawaiʻi at 251, 982 P.2d at 880.[33]

The Supreme Court first articulated the concept of "antitrust injury" in Brunswick. 429 U.S. at 489. Several bowling centers brought suit, challenging the acquisition of several of their competitors by Brunswick Corporation as creating

[33] Four Seasons argues that because § 480-13(a) is similar to section 4 of the Clayton Act, this court should examine relevant federal judicial interpretations of that statute pursuant to HRS § 480-3, citing, for example, to Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983) (hereinafter "AGC"). In AGC, the Supreme Court discussed the concept of standing under section 4 of the Clayton Act to sue for violations of federal antitrust law, and noted that standing in the antitrust context is more limited than the broad "any person" language of the statute would suggest. Id. at 534-35.

The Supreme Court identified a number of factors to assist courts in determining whether a plaintiff has established federal antitrust standing. The first factor, which was described by the Court in AGC as the "nature of the plaintiff's alleged injury[,]" and which considered whether the injury is the "type that Congress sought to redress," AGC, 459 U.S. at 538 (citation omitted), has since been referred to as "antitrust injury," meaning an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful[,]" see, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001). The other factors identified by the Court in AGC are: the "directness or indirectness of the asserted injury," the "speculative measure of harm," the "risk of duplicate recoveries" or "danger of complex apportionment of damages" and "the existence of more direct victims of the alleged [violation]." AGC, 459 U.S. at 538-545; see also Atlantic Richfield, 495 U.S. at 334; American Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054 (9th Cir. 1999).

Other than recognizing that federal courts have consistently applied the concept of antitrust injury when determining if a plaintiff has federal antitrust standing, this court has not expressly applied the AGC analysis to unfair methods of competition claims arising under HRS chapter 480. Robert's Hawaiʻi, 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31; HMA, 113 Hawaiʻi at 114 n.30, 148 P.3d at 1216 n.30. Since we have decided, based on our analysis of HRS § 480-13(a) and Hawaiʻi caselaw, that Employees must allege the nature of the competition, we do not need to consider the applicability of the AGC approach in order to answer the certified question.

a monopoly in violation of section 7 of the Clayton Act, 15 U.S.C. § 18,[34] and seeking treble damages under section 4 of the Clayton Act for profits they would have received had the acquired centers gone out of business. 429 U.S. at 480-81. The plaintiffs "attempted to show that had [the defendant] allowed the defaulting centers to close, [the plaintiffs'] profits would have increased." Id. at 481. The Court noted that plaintiffs were not complaining that Brunswick's actions had reduced competition, but rather preserved it and therefore deprived plaintiffs of increased concentration. Id. at 488. Accordingly, the Court found that the plaintiffs' injury was not of "'the type that the statute was intended to forestall.'" Id. at 487-88 (citation omitted).

The Court examined the underlying purpose of section 7, noting that although "[e]very merger . . . has the potential for producing economic readjustments that adversely affect some persons . . . Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." Id. at 487 (emphasis added). Therefore, the Court held that in order to recover treble damages under section 4 of the Clayton Act based on section 7 violations, "[p]laintiffs must prove antitrust injury, which . . . should reflect the

[34] Section 7 of the Clayton Act proscribes mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly." Brunswick, 429 U.S. at 485.

anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Id. at 489.

Additionally, the Supreme Court has clearly established that even where a plaintiff alleges a per se violation of the antitrust laws, the plaintiff must still allege and prove antitrust injury by alleging the nature of the competition in order to ensure that the injury results from a competition-reducing aspect of the defendant's behavior. For example, in Atlantic Richfield Co. v. USA Petroleum Co.,[35] 495 U.S. 328, 341 (1990), the Court "reject[ed] respondent's suggestion that no antitrust injury need be shown where a per se violation is involved." "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule . . . ." Id. at 344 (emphasis in original); see also Glen Holly Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1008 (9th

[35] It is important to note that Atlantic Richfield involved a judicially recognized per se antitrust violation, whereas the per se violation of Hawaiʻi antitrust law in this case is established by HRS § 481B-4. However, this distinction has no bearing on the underlying analysis for the antitrust injury requirement in the circumstances here, where we have concluded that the legislature did not intend to modify the causation requirements imposed by HRS § 480-13. Thus, it makes no difference whether the courts or the legislature have "deemed" certain action to be anti-competitive, because the purpose of the antitrust injury requirement is to ensure that the plaintiff's alleged injury stems from this anti-competitive aspect, rather than some pro-competitive or neutral effect of the defendant's antitrust violation.

Cir. 2003) ("If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se.") (citation omitted); Pace Elec., Inc. v. Canon Computer Sys., 213 F.3d 118, 123-24 (3d. Cir. 2000) (in order to show standing for a per se antitrust violation, the plaintiff need not allege that its injury actually "produced an anticompetitive result," but instead must allege that its injury "resulted from the anticompetitive aspect of the challenged conduct").

The Ninth Circuit reviewed the purpose of requiring plaintiffs to allege loss stemming from an anticompetitive effect of the defendant's actions in Glen Holly. Two manufacturers of film editing equipment entered into an agreement to jointly market certain products, with the agreement also prohibiting one of the manufacturers from selling the products to certain customers, such as the plaintiff. Id. at 1005-06. The plaintiff alleged that this joint venture caused the plaintiff to lose its customers and was "purposefully anti-competitive" in violation of sections 1 and 2 of the Sherman Act and California antitrust law because it created a monopoly and destroyed competition in the relevant market. Id. at 1006-07. The court recognized that "[t]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition . . . that these statutes recognize as vital to the public interest." Id. at 1010

(quoting Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000)) (emphasis added). The court then held that the plaintiff sufficiently alleged that the defendants' agreement to "unlawful[ly] remove[] a competitive product from the market" was the type of conduct the antitrust laws were designed to prevent and that plaintiff's "allegation of 'loss stems from a competition-reducing aspect or effect of [defendants'] behavior,'" thus satisfying the antitrust injury requirement. Id. at 1014 (citation omitted; emphasis added).

This court has similarly recognized that Hawaii's consumer protection laws are also intended to preserve competition. For instance, in Cieri, which involved claims that the vendors and broker involved in the sale of a residence engaged in unfair or deceptive practices in violation of HRS § 480-2 when they failed to disclose a plumbing problem, this court discussed the underlying purpose of Hawaiʻi antitrust and consumer protection laws:

> The genesis of Hawaiʻi's consumer protection statute is in federal antitrust law. Although the federal arsenal of antitrust laws is comprised of several differently worded statutes of varying scope that have generated volumes of case law, all of the acts have a common focus on trade, commerce, and business, and all share a concern for the preservation of unrestrained economic competition and free trade.

80 Hawaiʻi at 59, 905 P.2d at 34 (emphasis added).

"Embodied in Hawaiʻi's virtually word-for-word adoption of the prohibitions contained in the Sherman, Clayton, and FTC

acts is the federal antitrust laws' focus on commerce, the economy, and competition." Id. at 60, 905 P.2d at 35. This court also recognized that HRS § 480-13 similarly reflects this focus on preserving competition. Id. at 61, 905 P.2d at 36.

Thus, Hawaii's requirement that a plaintiff allege the "nature of the competition" in his or her complaint in order to maintain an action for unfair methods of competition pursuant to HRS § 480-2(e), HMA, 113 Hawaiʻi at 113, 148 P.3d at 1215, is consistent with the federal requirement that a plaintiff allege that his or her injury "reflect[s] the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation," in order to have standing pursuant to section 4 of the Clayton Act. Brunswick, 429 U.S. at 489. Furthermore, this requirement reflects the underlying purpose of both the federal and Hawaiʻi antitrust laws, which is to preserve unrestrained competition.

III. CONCLUSION

For the foregoing reasons, this court answers the certified question as follows:

Employees are "any persons" within the meaning of HRS §§ 480-1 and 480-2(e) and are within the category of plaintiffs who have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14.

However, based on the allegations contained in

Employees' Amended Complaint, Employees have not sufficiently alleged the "nature of the competition" to bring a claim for damages against Four Seasons under HRS §§ 480-2(e) and 480-13(a) for a violation of HRS § 481B-14.

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