IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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BERT VILLON and MARK APANA,
Plaintiffs-Appellants,

vs.

MARRIOTT HOTEL SERVICES, INC., dba WAILEA MARRIOTT RESORT,
Defendant-Appellee.

RENELDO RODRIGUEZ and JOHNSON BASLER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,
dba WESTIN MAUI RESORT & SPA,
Defendant-Appellee.

SCCQ-11-0000747

ORIGINAL PROCEEDING

July 15, 2013

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM CIRCUIT JUDGE CHAN, JOINS

I reaffirm that because a violation of Hawaiʻi Revised

Statutes (HRS) § 481B-14 (Supp. 2000)[1], which requires that a hotel or restaurant service charge be distributed to employees as tip income or that the contrary be disclosed to consumers, is "deemed" to be an unfair method of competition (also UMOC herein) under HRS § 481B-4 (Supp. 2008),[2] and thus "unlawful" under HRS § 480-2 (Supp. 2002),[3] employees as injured "persons" and consumers

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[1] HRS § 481B-14 provides as follows:

> **§ 481B-14 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.

(Emphasis added).

[2] HRS § 481B-4 provides as follows:

> **§ 481B-4 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.

(Emphases added).

[3] HRS § 480-2 provides in relevant part as follows:

> **§ 480-2 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.
> . . .
> (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 unfair methods of competition declared unlawful by this section.

(Emphasis added).

may sue for damages pursuant to HRS § 480-13 (Supp. 2005),[4] without alleging any anti-competitive effect of the violation.[5] Davis v. Four Seasons Hotel Ltd., 122 Hawaiʻi 423, 447-49, 228 P.3d 303, 327-29 (2010) (Acoba, J., dissenting).

Respectfully, the majority decision of this court in Davis contravened the legislature's intention to allow enforcement of HRS § 481B-14 through HRS § 480-2(e). See Davis, 122 Hawaiʻi at 449, 228 P.3d at 329 (Acoba, J.,dissenting) ("The majority's construction of HRS § 481B-4 deprives the statute of its force and undermines the legislature's manifest intent in enacting the law."). That holding resulted in the perceived "impossibility" of enforcing violations of HRS § 481B-14 through HRS § 480-2(e). Villon v. Marriot Hotel Servs., Inc., 2011 WL 4047373, at *10 (D. Haw. Sept. 8, 2011) (Kobayashi, J.).

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[4] HRS § 480-13 provides in relevant part as follows:

> **§ 480-13 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:
> (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 . . . .

(Emphases added).

[5] As discussed infra, I believe that the legislature intended that employees and other persons would vindicate their rights under HRS § 481B-14 through chapter 480. A suit under chapter 388 may be available because under Davis, employees would otherwise be precluded from enforcing HRS § 481B-14. I therefore concur that violations of HRS § 481B-14 can be asserted by employees in an action under HRS §§ 388-6, 388-10, and 388-11 if they choose to do so.

I.

The plain language of HRS § 481B-4 provides that "any person who violates [HRS § 481B-14] shall be deemed to have engaged in an unfair method of competition . . . within the meaning of [HRS §] 480-2." (Emphasis added.) Nevertheless, Davis held that a plaintiff must also allege "the nature of the competition" to successfully sue for violations of HRS § 481B-14 through HRS § 480-2. Davis, 122 Hawaiʻi at 437, 228 P.3d 317. As Plaintiff-Appellants Bert Villon and Mark Apana (Plaintiffs) and Amici Curiae Raymond Gurrobat, Loretta Chong, Marti Smith, Jonalen Kelekoma, and Darren Miyasato (Amici) demonstrate, this holding has precluded plaintiffs' utilization of HRS §§ 480-2 and 480-13 to enforce HRS § 481B-14.[6]

II.

A.

HRS § 481B-14 provides that a hotel or restaurant must either distribute service charges to employees or disclose to consumers that it is not doing so. Thus, when a hotel or restaurant (1) does not distribute service charges directly to employees, and (2) does not disclose to consumers that the

[6] According to Plaintiffs and Amici, the deviation from the plain language of HRS § 481B-14 has resulted in dismissal of claims seeking to enforce HRS § 481B-14 through HRS §§ 480-2 and 480-13 by Judges Gillmor, Kay, Ezra, and Kobayashi of the Federal District Court and Judge Sakamoto of the First Circuit Court. With the exception of Judge Kobayashi, however, those Judges have allowed plaintiffs to enforce violations of HRS § 481B-14 through HRS § 388-6. This case is here because Judge Kobayashi, who held otherwise, certified this question for review.

service charge is not used to pay the wages and tips of employees, it "violates" HRS § 481B-14. See Davis, 122 Hawaiʻi at 447, 228 P.3d at 327 (Acoba, J., dissenting).

HRS § 481B-4 is clear and unambiguous. HRS § 481B-4 provides that "[a]ny person who violates this chapter [HRS chapter 481B] shall be deemed to have engaged in an [UMOC] and unfair or deceptive act or practice [also UDAP herein] in the conduct of any trade or commerce within the meaning of section 480-2." (Emphases added.) The word "deem" has been defined as, inter alia " to treat [something] as (1) if it were really something else," or (2) it has qualities that it does not have." Davis, 122 Hawaiʻi at 448, 228 P.2d at 328 (Acoba, J, dissenting) (quoting Black's Law Dictionary 477-78 (9th ed. 2008)).

Hence, "deem" "'has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by deeming something to be what it is not or negatively by deeming something not to be what it is." Id. (quoting Black's Law Dictionary 447-78) (emphasis in original). HRS § 481B-4 provides that it is "'deemed,' i.e., "established" that a violation of chapter HRS chapter 481B, and hence, of HRS § 481B-14, is an "'unfair method of competition and unfair or deceptive act or practice.'" Id. (emphasis added). Consequently, "HRS § 481B-4 renders a violation of HRS § 481B-14, in and of itself, both a UDAP and UMOC." Id.

In tandem with HRS § 481B-14, HRS § 480-2(a) provides that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." (Emphasis added.) The remedy for such unlawful competition is set forth in HRS §§ 480-2(d) and 480-2(e). Under HRS § 480-2(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." On the other hand, HRS § 480-2(e) provides that "any person may bring an action based on unfair methods of competition declared unlawful by this section." (Emphasis added.) As discussed supra, under HRS § 481B-4 it is established then that a violation of HRS § 481B-14 is a UMOC and a UDAP.

Under HRS § 480-2(d) then, a suit for a violation of HRS § 481B-14 may be brought by a consumer, the attorney general, or the director of the Office of Consumer Affairs as a UDAP. Davis, 122 Hawaiʻi at 449, 228 P.3d at 329 (Acoba, J., dissenting) In contrast, "any person" is entitled to bring a UMOC action. Id. As defined in HRS § 480-1, "person" includes "individuals." Id. Employees are not "consumers" and therefore cannot bring an UDAP action under HRS § 480-2(d). Id. However, an employee, as an individual, qualifies as "any person" under HRS § 480-2(e). Therefore, the explicit command of HRS § 480-2

provides that violations of HRS § 481B-14 are "unlawful" and that employees, as "person[s]," may bring an action to enforce HRS § 481B-14 on this basis. Hence, allowing employees to bring an action as "persons" under HRS § 480-2(e) would make resort to HRS chapter 388 unnecessary.

Finally, HRS § 480-13 provides that "any person who is injured in the person's business or property by reason of anything forbidden in the chapter [i.e., HRS § 480-2]" may sue for damages, and receive, inter alia, "threefold damages by the plaintiff sustained[.]" The language of HRS § 480-13 of "permitting a suit based on injuries to 'business or property' manifestly includes the economic loss of withheld tip income." Davis, 122 Hawaiʻi at 450, 228 P.3d at 330 (Acoba, J., dissenting). Based on the foregoing, a violation of HRS § 481B-14 is manifestly a UMOC, and therefore "unlawful" under HRS § 480-2. HRS § 480-13 consequently grants employees as persons, the right to sue for treble damages under HRS § 480-13 for violations of HRS § 481B-14 based on the improper withholding of tip income.

In sum, the statutory language of HRS § 481B-4 and HRS § 481B-14 plainly mandates that a violation of HRS § 481B-14 is "deemed" a UMOC, without requiring additional proof, and plaintiffs may therefore receive treble damages under HRS § 480-13 on evidence that HRS § 481B-14 was violated. "It is a

cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute." Davis, 122 Hawaiʻi at 449, 228 P.3d at 329. (Acoba, J., dissenting) (internal quotation marks omitted).

"In order to give full effect to HRS § 481B-4, the phrase 'shall be deemed'" must be construed as establishing a UMOC violation. Id. The drafters of HRS § 481B-4 did not insert conditional language or provide any additional limitations on access to the remedies in HRS § 480-13 after a "deemed" UMOC violation is proved. Id. Rather, the statutory text evinces an intent to allow those who have suffered a violation under HRS § 481B-14 a cause of action to enforce their rights under HRS § 480-13. Id.

B.

The legislative history of HRS § 481B-14 further supports allowing employees to recover for damages once an employer's conduct is "deemed" a UMOC under HRS § 480-2. In considering the legislative history of HRS § 481B-14, this court has concluded that the statute was enacted because "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." Davis, 122 Hawaiʻi at 434, 228 P.3d at 314 (emphasis added); see also Davis, 122 Hawaiʻi at 459, 228 P.3d at 339 (Acoba, J., dissenting) ("[T]he legislative history of [HRS §] 481B-14 demonstrates that the legislature was not simply concerned with the anti-competitive effect of the conduct on consumers and businesses, but, rather, took into account the direct effect of such conduct on employees.") (emphasis in original); majority opinion at 19-20 (noting that the legislative history of HRS § 481B-14 reflected "truly a dual purpose," i.e., "employee wage protection and consumer protection"). Thus, regardless of the effect of those practices on competition, HRS § 481B-14 was intended to protect employees and consumers from practices the legislature had already "deemed" to be unfair. Allowing actions under HRS § 480-13 for injuries suffered as a result of HRS § 481B-14 violations promotes this purpose by allowing employees and consumers to sue for damages.

III.

Despite the apparent clarity of the statutory scheme, Davis imposed an additional requirement not found in the statute or suggested in the legislative history on plaintiffs seeking to enforce HRS § 481B-14 though HRS § 480-13. First, according to Davis, this court in Hawaiʻi Medical Ass'n v. Hawaiʻi Medical Services Ass'n, 113 Hawaiʻi 77, 148 P.3d 1179 (2006) (HMA) held

that the "nature of the competition" must be alleged in UMOC cases. Davis further asserted that the requirement that the "nature of the competition" be alleged was derived from language in HRS § 480-13 that states, "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter," i.e., "the causation requirement." Id. at 438-39, 228 P.3d at 318-19.

However, reliance on HMA was misplaced for two reasons. First, the requirement in HMA that the "nature of the competition be alleged" is limited to circumstances where a plaintiff brings a UMOC action for claims that would also constitute a UDAP. See Davis, 122 Hawaiʻi at 453, 228 P.3d at 333 (Acoba, J., dissenting). Second, assuming arguendo that the "nature of the competition" requirement applies when a plaintiff does not rely on UDAP claims, it nevertheless would not apply to conduct that is already "deemed" a UMOC. Therefore, HMA is inapplicable to claims brought under HRS § 481B-14.

A.

In HMA, the plaintiffs were physicians who alleged that the defendant HMSA, had engaged in unfair or deceptive acts or practices by refusing to reimburse physicians for necessary medical services. 131 Hawaiʻi at 111, 148 P.3d at 1213. The plaintiffs argued, inter alia, that these allegations could be used to support their UMOC claim. Id. The circuit court

concluded, however, that although the plaintiffs were asserting UMOC claims, the claims were actually UDAP claims, and consequently dismissed the action. Id.; see also Davis, 122 Hawaiʻi at 454, 228 P.3d at 334 (Acoba, J., dissenting).

This court vacated the dismissal. HMA explained that "plaintiffs may bring claims of UMOC based on conduct that would also support claims of UDAP." However, it held that "the nature of the competition must be sufficiently alleged." HMA, 113 Hawaiʻi at 111, 148 P.3d at 1213. This was because without such allegations, "the distinction between claims of unfair and 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 deceptive acts and practices." Id. at 435, 228 P.3d at 333. (emphasis added).

Hence, in HMA this court required the plaintiffs to allege the "nature of the competition" to preserve the distinction between UMOC claims and UDAP claims. See Davis, 122 Hawaiʻi at 454, 228 P.3d at 334 (Acoba, J., dissenting) (explaining that the "pleading requirement interposed [by HMA] between UDAP and UMOC" was "necessitated in situations where they share a commonality"). In suits for violations of HRS § 481B-14, however, plaintiffs are not attempting to bring a UMOC claim on the basis of conduct that would ordinarily constitute a UDAP. Instead, HRS § 481B-4 establishes that any violation of HRS §

481B-14 is both a UMOC and a UDAP. Hence, in suits for violations of HRS § 481B-14, "there is no requirement or need to distinguish between unfair methods of competition and unfair and deceptive acts that may also constitute unfair methods of competition." Davis, 122 Hawaiʻi at 453, 228 P.3d at 333 (Acoba, J., dissenting). Therefore, HMA is inapposite.

B.

Assuming, arguendo, that "nature of the competition" is ordinarily an element that must be pled and proved to recover under a UMOC claim, that requirement is inapplicable to violations of HRS § 481B-14, which are "deemed" to be a UMOC. In HMA, the issue before this court was what must be alleged to "bring a claim of unfair methods of competition." 113 Hawaiʻi at 113, 148 P.3d at 1215 (emphasis added). HMA explained that plaintiffs "may rely upon [] alleged unfair or deceptive acts or practices to support their claims of unfair methods of competition," id. at 111, 148 P.3d at 1213, provided that "the nature of the competition" was also "alleged." Id. In other words, under the circumstances of HMA, pleading "the nature of the competition" was necessary to the existence of a UMOC.

HMA was significantly different from Davis and the instant case, in which HRS § 481B-4 provides that a violation of HRS § 481B-14 shall be deemed a UMOC. Thus, the failure of a hotel or restaurant to disclose whether employees receive the

service charge itself substantiated the existence of a UMOC. Giving the statutory language its plain meaning as we must, it would be violative of HRS § 481B-14 to conclude a plaintiff must allege and prove an element foreign to the statutory language. See Davis, 122 Hawaiʻi at 448-49, 228 P.3d at 328-29. In other words, under HRS § 481B-4, it is unnecessary to allege anything further -- including the "nature of the competition" -- to show that a breach of HRS § 481B-14 is a UMOC. As a result, the reasoning in HMA, which did not address the "deemed" language in HRS § 481B-4, is inapposite to this case.

IV.

No authority from this jurisdiction[7] supports the proposition that the "nature of the competition" allegation is

[7] This court in HMA did hold that the "nature of the competition" must be alleged to establish a UMOC claim under the limited circumstances discussed supra. However, HMA did not hold that the requirement that the "nature of the competition" be pled stemmed from the injury requirement in HRS § 480-13. To the contrary, this court in HMA discussed those requirements as two distinct propositions:

> 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. Accordingly, we hold that the circuit court erred in concluding that the plaintiffs' post-June 28, 2002 claims are barred.
>
> However, inasmuch as the circuit court's May 23, 2003 orders differed in one respect -- that is, in the HMA Appeal case, the circuit court additionally concluded that HMA had failed to show injury for its claim of unfair methods of competition -- we turn now to address the sufficiency of HMA's allegations of injury.

HMA, 113 Hawaiʻi at 113, 148 P.3d at 1215 (emphases added).

derived from HRS § 480-13. See Davis, 122 Hawaiʻi at 438-39, 228 P.3d at 318-19. Davis relied solely on federal cases[8] that stated a plaintiff must allege that his or her injury "'reflect[s either] the anti-competitive effect either of the violation or of [the] anti-competitive acts made possible by the violation'" in order to obtain standing under the federal equivalent of HRS § 480-13. Davis, 122 Hawaiʻi at 445, 228 P.3d at 325 (quoting Brunswick, 429 U.S. at 489); see also Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990). According to Davis, this requirement was "consistent" with "the Hawaiʻi requirement that a plaintiff allege the nature of the competition." Davis, 122 Hawaiʻi at 445, 228 P.3d at 325. However, the reasoning of the federal cases suggests that the language cited by Davis was not intended to apply when, as in this case, the purposes of the statute violated by the defendant are broader than the protection of competition.

A.

In Brunswick, the defendant was "by far the largest

[8] Davis also cited footnotes in HMA and Robert's Hawaiʻi School Bus, Inc. v. Laupahoehoe Transportation Co., 91 Hawaiʻi 224, 982 P.2d 853 (1999). However, those footnotes merely note that "federal case law has interpreted the 'injury to business or property' language of section 4 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 . . . .'" Robert's Hawaiʻi, 91 Hawaiʻi at 254 n.31, 982 P.2d at 863 n. 31 (quoting Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1997)); accord HMA, 113 Hawaiʻi at 114 n.30, 148 P.3d at 1216 n.30. Neither HMA nor Robert's Hawaiʻi construed the injury requirement in HRS § 480-13 as requiring a plaintiff to prove the "nature of the competition." See HMA, 113 Hawaiʻi at 114, 148 P.3d at 1179 ("HMA need only allege that, by reason of an antitrust violation, it has been injured in its 'business or property.'").

operator of bowling centers" in the United States, and had acquired several bowling centers that would have otherwise gone out of business. 429 U.S. at 480. The plaintiffs alleged defendant had violated section 7 of the Clayton Act because its acquisition of failing bowling centers might "substantially lessen competition or tend to create a monopoly." Id. The plaintiffs filed suit under section 4 of the Clayton Act, on which HRS § 480-13 is modeled.[9] In relevant part, section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15.

The Supreme Court characterized the plaintiffs' claims as "complain[ing] that by acquiring the failing centers [the defendant] preserved competition, thereby depriving [the plaintiffs] of the benefits of increased concentration." Brunswick, 429 U.S. at 488 (emphasis added). Brunswick rejected the plaintiffs' claims that they were injured because they were compelled to compete with the defendant. Id. It was "quite clear" that the plaintiffs "were not injured by reason of anything forbidden in the antitrust laws." Id.

The Supreme Court held that to recover for a section 4 violation, the plaintiffs "must prove antitrust injury, which is

[9] See, e.g., Davis, 122 Hawaiʻi at 444, 228 P.3d at 324 ("HRS § 480-13 tracks the language of section 4 of the Clayton Act.").

to say the type of injury the antitrust laws were intended to prevent and that flows from that which makes defendant's actions unlawful." Id. at 489 (emphasis added). This reasoning was reaffirmed in Atlantic Richfield, which held the same proposition applied in order to obtain damages under section 4 of the Clayton Act. Atlantic Richfield, 495 U.S. at 334 (citing Brunswick, 429 U.S. at 488) (emphasis added).

Based on the foregoing, some federal courts interpreting Brunswick and Atlantic Richfield have concluded that the "fundamental rule" from those cases is simply "that the court must 'ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.'" In Town Hotels Ltd. v. Marriot Int'l Inc., 246 F. Supp. 2d 469, 476 (S.D. W. Va. 2003) (quoting Atlantic Richfield, 495 U.S. at 342) (internal brackets removed). Hence, when an action under section 4 of the Clayton Act is based on a statute whose purpose transcends the protection of competition, a plaintiff is only required to confirm that the injury corresponds to the purpose or rationale of the statute involved. Cf. id. For example, in Town Hotels, the district court determined that the "rationale behind the particular antitrust provision at issue" was, inter alia, the prevention of harms to individuals arising from commercial bribery. Id. at 476, 480. Town Hotels held that the plaintiffs could establish "antitrust injury" by

showing that the harm they suffered was caused by commercial bribery. Id. Because the rationale underlying the statute at issue was not the protection of competition, see id. at 476, the plaintiffs were not required to substantiate the anticompetitive effect of the violation. Id. at 481.[10]

B.

The proposition in Davis that a plaintiff in a HRS § 481B-14 action must prove the anticompetitive effect of an antitrust violation was premised on the Supreme Court's conclusion that the purpose of the federal antitrust laws was the protection of competition. Davis, 122 Hawaiʻi at 439, 228 P.3d at 319. However, the purposes of HRS § 481B-14 are broader. To reiterate, the legislature's purpose in enacting HRS § 481B-14 was to protect both consumers and employees from the injury suffered when a business retains the service charge for itself but does not inform consumers of this practice. The legislature manifested concerns that the result of this retention is to deny employees the tip income that they would have otherwise received from consumers. See Davis, 122 Hawaiʻi at 459, 228 P.3d at 339 (Acoba, J, dissenting) (noting that according to the legislature,

[10] See also Edison Elec. Institute v. Henwood, 832 F. Supp. 413, 418-19 (D.D.C. 1993); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 640 (D. Alaska 1982); cf. Blue Tree Hotels Inv. (Can.) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc. 369 F.3d 212 (2d Cir. 2004) (abrogating a district court decision holding that a plaintiff must allege an anticompetitive effect to show antitrust injury).

"'the problem lies with consumers who may not leave tips for the service employees, mistakenly thinking that the service charges they paid were tips, so they did not leave additional tips for service employees.'") (emphases in original) (quoting H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155).

In light of the dual purpose of HRS § 481B-14 and the determination by the legislature that a violation of HRS § 481B-14 is deemed unlawful within the meaning of HRS §§ 480-2, a showing of anticompetitive effect is inapplicable to suits under HRS § 481B-14. Cf. Town Hotels, 246 F. Supp. 2d at 476 (concluding that the language in Brunswick and Atlantic Richfield regarding anticompetitive effect is "not relevant" when the purposes of the antitrust law at issue go beyond the protection of competition). As pointed out before, reliance on the language in Brunswick that plaintiffs must prove the "anti-competitive effect of a violation" overlooked the reality that "federal precedent does not contain any analogous provision to HRS § 481B-4 and 481B-14 or reflect the same concerns." Davis, 122 Hawaiʻi at 459, 228 P.3d at 339 (Acoba, J, dissenting) (emphasis added).

V.

Hawaiʻi courts have decided that Davis effectively precluded enforcement of violations of HRS § 481B-14 through HRS §§ 480-2 and 480-13. In their Opening Brief, Plaintiffs contend that as a result of Davis, enforcement of HRS § 481B-14 though

HRS § 480-2 is no longer "viable." Plaintiffs point out that "judges in both the federal and state courts have interpreted [Davis] as requiring proof of predatory pricing that has a negative effect on competition -- a burden of proof that no plaintiff could prove in cases such as this, which seek to recover unpaid portions of service charges." Therefore, "every judge to address claims brought under §§ 480-2 and 480-13 for violations of § 481B-14 [has] dismissed those claims, either for want of proof or as inadequately alleged."

Similarly, Amici note that Davis "is being applied in the lower courts to require wage earners to prove impossible antitrust theories of market injury." According to Amici, hotels have "thus far argued successfully in the lower courts" that under Davis, "neither hotel employees nor consumers can effectively recover under HRS § 481B-14." "[N]ot a single employee's claim under [c]hapter 480 has survived the dispositive motions stage, and one of the two pending consumer cases resulted in a judgment for the hotel under [c]hapter 480."[11]

A.

In cases brought under HRS § 481B-14, plaintiffs have attempted to allege the "nature of the competition" by arguing that a restaurant or hotel may "'reduce the published cost of its

[11] Amici do note, however, that judgement was entered for the consumers in the other case in state circuit court.

food and beverages by improperly profiting from the imposition of a non-disclosed service charge.'" See, e.g., Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc, CV. No. 09-00016 DAE-LEK, slip. op. at 45 (D. Haw. Dec. 29, 2010) (Ezra, J.). However, under the federal standard, if the only effect is that a defendant may charge lower prices, the plaintiff must allege that the pricing is predatory in order to demonstrate an "anticompetitive effect." See Atlantic Richfield, 495 U.S. at 339-40 ("Antitrust injury does not arise . . . until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct . . . in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect."). This is because "'cutting prices in order to increase business often is the very essence of competition.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." Atlantic Richfield, 495 U.S. at 340. Therefore, low prices "cannot give rise to antitrust injury." Id.

B.

Judge Kobayashi, addressing the HRS § 481B-14 claim in this case, stated that "the chapter 480 claim is virtually impossible to prove." Villon, 2011 WL 4047373 at *10.

Similarly, in Rodriguez, Judge Ezra stated that "to satisfy the 'nature of the competition' requirement, a plaintiff must demonstrate that its injury 'stems from the negative effect on competition caused by [a defendant's] violation' to ensure that it does not stem from 'some pro-competitive or neutral effect of the defendant's antitrust violation.'" Id. at 47 (quoting Davis, 122 Hawaiʻi at 440, 445, 228 P.3d at 320, 325) (emphasis in original). Judge Ezra held that the plaintiffs failed to allege how their injury, or, that "the percentage of the service charge withheld" was the result of "the negative effect of competition, the advantage [d]efendant improperly gains over other hotels and restaurants." Id.; see also Wadsworth v. KSL Grand Wailea Resort, Inc., 818 F. Supp. 2d 1240, 1267 (D. Haw. 2010) (Kay, J.) (noting that "if the only effect on competition that Plaintiffs allege is lower prices, they must show that those lower prices are predatory").

Relying on similar reasoning, other courts have dismissed or cast doubt on plaintiffs' efforts to enforce HRS § 481B-14 through HRS §§ 480-2(e) and 480-13. See, e.g., Wadsworth, 818 F. Supp. 2d at 1267 (Kay, J.) (noting that "if the only effect on competition that Plaintiffs allege is lower prices, they must show that those lower prices are predatory" and holding that "the allegations in Paragraph 14 are insufficient to allege the nature of the competition as required by the court in

Davis"); Kyne v. Ritz-Carlton Hotel Co., 835 F. Supp. 2d 914, 930 (D. Haw. 2011) (Kay, J.) (rejecting arguments that the defendant "has gained an unfair competitive advantage over competitor hotels" by "[r]educing the published cost of its food" and that employees and hotels "compete for the amount customers are willing to pay for food and beverage services"); Davis v. Four Seasons Hotel Ltd., 2011 WL 5025521, at *4 (D. Haw. Oct. 20, 2011) (Gillmor, J.) (dismissing HRS § 480(e) claim because "employees must show that the defendant's violation had a negative effect on competition").

Finally, plaintiffs have attempted to argue that competition was harmed because they were in competition with the hotels that employed them for service charges or tips. This argument was rejected because "[p]laintiffs do not provide any case law or support for the proposition that employees can compete with their employers for gratuity." Rodriguez, slip. op. at 48. "Indeed, the common law of Hawaiʻi suggests that employees have a duty not to compete with their employers." Id. (emphasis in original) (citing Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1085 (9th Cir. 2003)). Therefore, Judge Ezra rejected this contention as well and dismissed the HRS § 481B-14 counts of the plaintiffs' complaint for the failure to state a claim. Thus, it is apparent that employees have not been able to satisfy the requirement that they allege "the nature of the competition."

VI.

But, as discussed supra, the requirement that plaintiffs allege an "anticompetitive effect" of a HRS § 481B-14 violation is unsubstantiated by the authorities cited by Davis. Under a proper construction of HRS §§ 480-2, 480-13, 481B-4, and 481B-14, it is only necessary to confirm that HRS § 481B-14 was violated. Because the statutory scheme manifestly provides that violations of HRS § 481B-14 are "deemed" a UMOC under HRS § 480-2, employee plaintiffs should be able to recover for resulting injury pursuant to HRS § 480-13. Viewing HRS § 480-13 as a "causation requirement" that mandates plaintiffs to allege "the nature of the competition" renders the term "deemed" superfluous. Under the statutory framework, the drafters of HRS § 481B-14 intended to allow plaintiffs access to the remedies in HRS § 480-13 once a violation of HRS § 481B-14 was found.

In effect, Davis nullified the word "deemed" in HRS § 481B-4. Respectfully, Davis also wrongly imported federal antitrust law into HRS § 481B-14. This essentially decreed that the purpose of HRS § 481B-14 was to promote competition, even though the purposes of HRS § 481B-14 were broader. As a result, Davis established barriers to the enforcement of HRS § 481B-14 through HRS § 480-13. See Davis, 122 Hawaiʻi at 458, 228 P.3d at 338 (Acoba, J., dissenting) (stating that it is "incongruous to assert . . . that in addition to alleging injury for an already

per se violation of HRS § 480-2(e), [p]laintiffs must also allege 'actual damage caused by anti-competitive conduct'").

VII.

Significantly, under the reasoning in Davis, consumers also would be categorically precluded from suing for violations of HRS § 481B-14. The requirement that the "nature of the competition" be alleged arguably applies to all suits seeking damages under HRS § 480-13, and consequently would equally bar attempts by consumers to enforce HRS § 481B-14. As a result, consumers would be required to demonstrate that the conduct of the hotels or restaurants "negatively affects competition."

The holding on the certified question allows employees to enforce violations of HRS § 481B-14 through HRS §§ 388-6, 388-8, and 388-10. However, the same statutory option is not available to consumers. As reiterated before, the legislature intended HRS § 481B-14 to protect both consumers and employees. Therefore, consumers, like employees, are entitled to the remedies afforded them under HRS § 481B-4 for a violation of HRS § 481B-14, without having to allege any anticompetitive effect of the violation.

VIII.

The difficulties faced by employees and consumers in successfully vindicating violations of HRS § 481B-14 under HRS §§ 480-2 and 480-13 are the result of the requirement that they

demonstrate the "nature of the competition" in suits under HRS §§ 480-2 and 480-13. Construed to require plaintiffs to demonstrate the predatory effect of such competition, this directive conflicts with the plain language of HRS §§ 481B-4, 480-2 and 480-13, and undermines the expressed legislative intent that HRS § 481B-14 protect employees and consumers. The proper construction of HRS §§ 481B-4 and 481B-14 is that once a plaintiff employee or consumer has alleged and proved that a hotel or restaurant violated HRS § 481B-14, damages under HRS § 480-13 may be recovered.

/s/ Simeon R. Acoba, Jr.

/s/ Derrick H. M. Chan