IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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RAYMOND GURROBAT,
individually and on behalf of all others similarly situated,
Petitioner/Plaintiff-Appellee/Cross-Appellant,

vs.

HTH CORPORATION; PACIFIC BEACH CORPORATION,
Respondents/Defendants-Appellants/Cross-Appellees.

SCAP-12-0000764

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-12-0000764; CIV. NO. 08-1-2528-12)

February 25, 2014

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH POLLACK, J., JOINS

It must be reaffirmed that because a violation of Hawaiʻi Revised Statutes (HRS) § 481B-14 (Supp. 2000),[1] which

[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

(continued...)

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 may sue for damages pursuant to HRS § 480-13 (Supp. 2005),[4] without alleging any anti-competitive

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[1](...continued)

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.)

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

§ 480-13 Suits by persons injured; amount of recovery; injunctions

(continued...)

effect of the violation. Villon v. Marriot Hotel Services, Inc., 130 Hawaiʻi 130, 306 P.3d 175 (2013) (Acoba, J., concurring and dissenting, joined by Chan, J.) (citing Davis v. Four Seasons Hotel, Ltd., 122 Hawaiʻi 423, 447-49, 228 P.3d 303, 327-39 (2010)) (Acoba, J., dissenting). On that basis, I would vacate the grant of summary judgment by the Circuit Court of the First Circuit (the court) in favor of Defendants-Appellants/Cross-Appellees HTH Corporation and Pacific Beach Corporation (collectively, Defendants).[5]

However, the majority concludes that, in addition to establishing a violation of HRS § 481B-14, Plaintiff-Appellee/Cross-Appellant Raymond Gurrobat (Gurrobat) is required to prove an "anticompetitive injury;" such injury is proven through expert testimony establishing harm to "fair competition;" on remand, Gurrobat must prove an anticompetitive injury; and

[4](...continued)

> (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] I agree with the majority that the court did not err in certifying this as a class action, that Gurrobat was entitled to double damages under HRS § 388-10, that the court erred in holding Pacific Beach Corporation jointly and severally liable, and that HTH Corporation was correctly classified as an employer.

inferentially these requirements apply in future cases. I cannot agree with these propositions. In my view, once a violation is established under HRS § 481B-14, employees denied tip income should not be required to submit additional proof in this case or in any future case to recover.

I.

A.

This case involves the alleged failure of Defendants to inform their customers that a portion of the "service charge" imposed at "banquet[s] or other functions" was not distributed to "the non-managerial employees who provided the service of [] food and beverage[s] to the customers," thereby violating HRS § 481B-14. In his Complaint, Gurrobat alleged that this practice allowed Defendants to attract customers from "law-abiding competitors" by "offer[ing] customers seemingly lower 'base' prices than law-compliant competitors through the retention of tip income." Gurrobat further asserted that by virtue of Defendants' violations they were "engaged in [a UMOC] in violation of HRS § 480-2 inasmuch as violations of any provision of Chapter 481B are deemed to be unfair methods of competition prohibited by HRS § 480-2."

B.

1.

On October 4, 2010, Defendants filed a motion for

summary judgment, acknowledging that they had "distribut[ed] a portion of [the] service charges to their managerial employees,"[6] but contending, inter alia, that they were entitled to summary judgment on Gurrobat's claim for treble damages under HRS §§ 480-2 and 480-13 because Gurrobat "d[id] not have any evidence to prove that the service charge distribution practices of [] Defendants had a negative effect on competition as required by the Hawaiʻi Supreme Court's recent decision in Davis."

2.

In opposition, Gurrobat filed reports of two experts, Andre Tatibouet (Tatibouet) and Paul Brewbaker (Brewbaker). Brewbaker's report explained that, theoretically, a [hotel] that violates HRS § 481B-14 "can both underpay workers and enjoy higher net receipts than other [hotels.]" However, it is unclear from Brewbaker's report whether such hotels would be able to set lower prices as a result of their competitive advantage. On one hand, Brewbaker's report stated that, under certain theoretical assumptions, "no single hotel can exert an influence on market prices or wages." On the other hand, based on the same assumptions, Brewbaker stated that "market prices and wages

[6] I also agree with the majority that Defendants were not entitled to retain a portion of service charges to supplement the income of managerial employees. Instead, Defendants were "required to distribute one hundred percent of the service charge income to non-management service employees[.]" Majority opinion at 42. Thus, the distribution of the service charge to managerial employees, without informing consumers, violated HRS § 481B-14. See id.

[will] adjust to reflect the single [hotel's violation of HRS § 481B-14]."

But, Brewbaker allowed that a non-compliant hotel's advantage would diminish over time because "[w]orkers at the [non-compliant hotel] have the mobility to migrate to other [hotels] where they observe that higher effective wages are being paid." Thus, "[t]his, in turn, will increase the supply of labor to those [hotels], and reduce the supply of labor to the [non-law compliant hotel]." Consequently, "[t]he [non-law compliant hotel] will have to pay more to retain its workers, while other [hotels] may in the transition enjoy a temporary reduction in effective wage cost." (Emphasis added.) "At least temporarily, therefore, during the adjustment to a new equilibrium,[7] the economic rents comprising above average return to equity will be enjoyed by the [non-compliant hotel] as reward for violating [HRS § 481B-14]."[8] (Emphasis added.) Brewbaker characterized this as

[7] Brewbaker stated that "[u]ltimately, effective wages have to equilibrate -- all [hotels] paying the same effective wage[.]" Brewbaker also related that this process of equilibration would involve the non-compliant firms "taking from everybody else who is compliant . . . a small amount that adds up to the cheater's economic rent."

It is therefore unclear from Brewbaker's report whether the benefits to the non-compliant firm would remain once a new equilibrium is reached. However, inasmuch as Brewbaker stated that eventually, all hotels would have to pay the same effective wage, it would appear that the benefits to the non-compliant hotel are temporary.

[8] Brewbaker also stated that during the "ensuing adjustment process it is possible . . . for persistent economic rents to arise from cheating, at the expense of other [hotels'] returns." (Emphasis added.) However, Brewbaker did not explain how the competitive advantage gained by the non law-compliant hotels would impact the returns of the other hotels.

a "competitive advantage."

Tatibouet's report stated that based on his experience of over 50 years working in the Hawaiʻi hotel industry, it was his opinion that "Hawaiʻi consumers of banquet services are price sensitive," and "when the net price charged by the hotel . . . is equal or close, the Hawaiʻi consumer will typically prefer the hotel or banquet provider that includes a service charge over one that does not[.]" Accordingly, "[h]otels that retain part of the service charge and do not disclose it have a better cost and revenue structure than hotels that pay the amount to the employees . . . because they are keeping more of the revenue." As a result, "when hotels and banquet providers do not disclose service charge retention, they hold a competitive advantage over those that do disclose this information or those that pay the entirety of the service charge to [their] employees." Tatibouet's report concludes that "this advantage will translate directly into increased revenues and profits for [hotels that violate HRS § 481B-14] and decreased revenues and profits for [hotels that obey HRS § 481B-14]."[9]

In his accompanying memorandum in opposition, Gurrobat argued that to meet the requirements of Davis, he was only

[9] Tatibouet did not explain how the competitive advantage would translate into decreased revenues and profits for hotels that obey HRS § 481B-14. Inasmuch as Tatibouet stated that Hawaiʻi consumers are "price sensitive," he may have assumed that law-compliant hotels would lose income due to price competition.

required to demonstrate that the Defendants "reduced fair competition" by "unfairly creating an incentive for customers to bring their business to Defendants[.]" (Emphasis in original.) (Citing Hawaiʻi Med. Ass'n v. Hawaiʻi Med. Serv. Ass'n, Inc.,(HMA) 113 Hawaiʻi 77, 113, 148 P.3d 1179, 1215 (2006).) Gurrobat characterized the expert reports as demonstrating that "any hotel that complies with the law by distributing the entire service charge has higher labor costs and [a higher] pricing structure than Defendants and is therefore at a competitive disadvantage to Defendants[.]" Thus, according to Gurrobat, "Defendant's unfair acts have a negative effect on competition."

3.

In their reply memorandum, Defendants maintained that Tatibouet and Brewbakers' declarations were insufficient because "Plaintiffs' 'two expert witnesses' admitted in their respective depositions that they have no idea of whether the Pacific Beach Hotel or the Pagoda Hotel gained any type of competitive advantage as a result of their service charge distribution practices," because they could not identify any particular hotels over which Defendants had gained a competitive advantage.

At a hearing on November 17, 2010, the court granted Defendants' motion for summary judgment as to Gurrobat's claim under HRS §§ 480-2 and 480-13. The court reasoned that Gurrobat's experts failed to raise a material fact regarding the

"nature of the competition" because he did not identify any competitors who were harmed by the Defendants' practices:

> The Court agrees with [Defendants'] position here. The standards are provided in Davis v. Four Seasons. Basically the plaintiff must still allege and prove antitrust injury by alleging the nature of competition in order to ensure that the injury results from a competition-reducing aspect or effect of defendant's behavior.
>
> It's not that plaintiffs don't have a basis or a cause of action to raise. The Court is ruling basically on there being no material issue of fact with regard to the evidence that will be introduced to support the anticompetitive injury aspect of the case.
>
> And specifically foundationally the Court believes that the expert or the plaintiff's two experts had to have at least a foundation in fact or evidence of one or the other of the following:
>
> One, that there was another hotel that either did not require service charges or required service charges and then distributed 100 percent of them to its service employees or disclosed the withholding to its customers. And basically the two experts had no knowledge of an existent market at all or the existence of any hotel that could provide either one of those two.
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> On that basis, the opinions were not minimally based on facts. And for that reason, the defendant's motion is granted.

(Emphases added.) The result reached by the court was essentially consistent with this court's decision in Davis.

II.

A.

In Davis, a majority of this court held that plaintiffs alleging a violation of HRS § 481B-14 were required to allege "the nature of the competition." Davis, 122 Hawaiʻi at 438, 228 P.3d at 318. Under this requirement, plaintiffs must show "with some particularity . . . actual damage caused by anticompetitive conduct." Id. at 439, 228 P.2d at 319 (emphases added) (internal

quotation marks omitted). The Davis majority rejected arguments that the "deeming" clause in HRS § 481B-4 rendered it unnecessary to prove the nature of the competition because "the requirement that the plaintiff allege the "nature of the 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 [HRS Chapter 480]," i.e., the "causation requirement." Id. at 438-39, 228 P.2d at 318-19.

This requirement was said to be consistent with federal case law, which "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.'" Id. at 439, 228 P.3d at 319 (emphasis added) (internal brackets and punctuation omitted) (quoting Robert's Hawaiʻi School Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawaiʻi 224, 254 n.31, 982 P.2d 853, 883 n.31 (1999)). "Antitrust injury" was defined as "'an injury of the type the antitrust laws were intended to prevent, one that flows from that which makes defendants' acts unlawful.'" Id. (emphasis added) (quoting Robert's Hawaiʻi School Bus, 91 Hawaiʻi at 254 n.31, 982 P.2d at 883 n.31).

The Davis majority further explained that under federal law, to "allege and prove antitrust injury," a plaintiff must "allege the nature of the competition in order to ensure that the

injury results from a competition-reducing aspect of the defendant's behavior." Id. at 445, 228 P.3d at 325 (emphasis added) (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 (1990)). Thus, Davis held that, based on the "causation requirement" in HRS § 480-13(a), every plaintiff alleging that a violation of HRS § 481B-14 constituted a UMOC under HRS § 480-2 must demonstrate an injury to competition. Id.

B.

In nearly every subsequent case brought by hotel employees, the state and federal trial courts dismissed the plaintiffs' claims under HRS § 481B-14 because the plaintiffs failed to allege the "nature of the competition" as required by Davis. See Villon, 130 Hawaiʻi at 149, 306 P.3d at 194 (Acoba, J., concurring and dissenting) (citing cases[10]). In several of these cases, the plaintiffs attempted to argue that the defendants had harmed competition by charging lower prices as a result of their failure to comply with HRS § 481B-14. However, based on the federal authorities cited in Davis, the Hawaiʻi

[10] The concurring and dissenting opinion in Villon cited Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc., CV. No. 09-00016 DAE-LEK, 2010 WL 8938524 (D. Haw. Dec. 29, 2010) (Ezra, J.), Wadsworth v. KSL Grand Wailea Resort, Inc., 818 F. Supp. 2d 1240 (D. Haw. 2010) (Kay, J.), Kyne v. Ritz Carlton Hotel Co., 835 F. Supp. 2d 914 (D. Haw. 2011) (Kay, J.), and Davis v. Four Seasons Hotel, Ltd., CV. No. 08-00525 HG-BMK, 2011 WL 5025521 (D. Haw. Oct. 20, 2011) (Gillmor, J.), as cases either dismissing the plaintiff's HRS § 481B-14 claims brought through HRS §§ 480-2 and 480-13 or granting summary judgment against the plaintiff on such claims. 130 Hawaiʻi at 149, 306 P.3d at 194 (Acoba, J., concurring and dissenting).

federal district courts concluded that "where the only effect on competition is lower prices, such lower prices must be predatory in order to result in an antitrust injury." Wadsworth, 818 F. Supp. 2d at 1267 n.13, accord Rodriguez, 2010 WL 8938524, at *19. Consequently, the district courts concluded that it was "virtually impossible" for hotel employees to enforce a violation of HRS § 481B-14 through HRS §§ 480-2 and 480-13, Villon v. Marriot Hotel Servs., Inc., CV. No. 08-00529 LEK-RLP, 2011 WL 4047373, at *19 (D. Haw. Sept. 8, 2011).

C.

Thus, nearly insurmountable obstacles resulted from the Davis majority's reliance on federal cases "premised on the Supreme Court's conclusion that the purpose of the federal antitrust laws was the protection of competition." Villon, 130 Hawaiʻi at 148, 306 P.3d at 193 (Acoba, J., concurring and dissenting). However, "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[.]" Id. at 148-49, 306 P.3d at 193-94.[11] The citation of the Davis majority

[11] The Davis majority and the majority opinion in Villon reached a similar conclusion regarding the legislative history of HRS § 481B-14. The majority opinion in Villon stated that "throughout [HRS § 481B-14's] journey through the legislature, the concern for employees was never abandoned," and further stated that "[w]e have previously recognized that 'the legislative history of H.B. 2123 indicates that the legislature was concerned that when a (continued...)

to federal precedent overlooked the fact that such precedent "does not contain any analogous provision to . . . HRS § 481B-14 or reflect the same concerns."[12] Id. at 149, 306 P.3d at 194 (internal quotation marks and emphasis omitted).

Hence, Davis "wrongly imported federal antitrust law into HRS § 481B-14," and "essentially decreed that the purpose of HRS § 481B-14 was to promote competition, even though the purposes of HRS § 481B-14 were broader." Id. at 151, 306 P.3d at 196. "As a result, Davis established barriers to the enforcement of HRS § 481B-14 through HRS § 480-13" that were contrary to the intention of the legislature. Id.

[11](...continued)
hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted." Villon, 130 Hawaiʻi at 139-140, 306 P.2d at 184-84 (quoting Davis, 122 Hawaiʻi at 434, 228 P.3d at 314) (emphasis in original). Nevertheless, neither Davis nor the majority herein acknowledge the conflict between the recognition that the purposes of HRS § 481B-14 were broader than the promotion of competition and the requirement in Davis that plaintiffs allege the "nature of the competition." As explained supra and infra, because the purposes of HRS § 481B-14 transcend the protection of competition, there is no reason to require employees, who the legislature intended to protect, to show harm to competition to sue under HRS §§ 480-2 and 480-13.

[12] Significantly, even some federal courts do not require plaintiffs to allege that they were harmed by a "competition reducing aspect of the defendant's behavior" to demonstrate "antitrust injury" when an action based on section 4 of the Clayton Act is derived from a statute "whose purpose transcends the protection of competition." Villon, 130 Hawaiʻi at 148, 306 P.3d at 193; see also, e.g., Town Hotels Ltd. v. Marriot Int'l Inc., 246 F. Supp. 2d 469, 476 (S.D.W. Va. 2003). Similarly, a leading antitrust treatise suggests that it is unnecessary to show injury to competition under such circumstances 2A Areeda et al., Antitrust Law § 359 (3d ed. 2007) ("When a plaintiff is one of those that the statute would protect from an alleged violation that does not depend on actual injury to competition, the plaintiff suffers antitrust injury and may recover without showing a detriment to the market." (emphasis added)).

III.

A.

Following Davis, the majority herein concludes that Gurrobat must demonstrate how Defendants' conduct "negatively affect[s] competition." Majority opinion at 55. However, in contrast to the decisions authored by the Federal District Court, see n.10 supra, and contrary to the reasoning of the court in its motion granting summary judgment in favor of Defendants, the majority concludes that this requirement is satisfied by showing "that Defendants' practice of withholding a portion of the service charge without disclosure to customers allowed them to charge lower base prices than law-compliant competitors, thereby reducing 'fair competition' in the market for hotels, restaurants, and banquet service providers." Majority opinion at 56 (emphases added). Moreover, according to the majority, "there is no requirement that plaintiffs asserting a claim based on HRS § 481B-14 prove the existence of law-compliant competitors[.]" Majority opinion at 53.

Respectfully, nothing in Davis refers to "fair competition" or supports the conclusion that the "nature of the competition" requirement can be satisfied by a showing of harm to "fair competition." Davis also did not suggest that this requirement can be met by showing that defendants may charge lower base prices than their competitors. Rather, the cases

cited by Davis demonstrate that Gurrobat could not prove that Defendants' conduct had the requisite anticompetitive effect by showing that Defendants could charge lower prices unless he demonstrated that such prices were predatory. See Villon, 130 Hawaiʻi at 149, 306 P.3d at 194 ("[U]nder 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.'") (Acoba, J., concurring and dissenting).

Further, even assuming arguendo that harm to competitors in the form of reduced prices could constitute the requisite antitrust injury, inasmuch as Davis required plaintiffs to demonstrate "actual damage caused by anticompetitive conduct," id. at 439, 228 P.2d at 319 (emphasis added) (internal quotation marks omitted), it is apparent that Gurrobat could not satisfy the requirements of Davis without identifying a law-compliant competitor that was actually harmed by Defendant's conduct.

B.

The majority's conclusion that the ability to charge lower base prices suffices to allege "the nature of the competition" is contrary to Davis. To reiterate, Davis relied heavily on federal precedent, including Atlantic Richfield in concluding that plaintiffs were required to allege "the competition-reducing aspect of the defendant's behavior" to meet

the "causation requirement" of HRS § 480-13(a). 122 Hawaiʻi at 445, 228 P.3d at 325. In Atlantic Richfield, the plaintiffs were retailers of gasoline and competitors of the retailers of gasoline who purchased their gasoline from the defendant ARCO, a producer of gasoline. The plaintiffs asserted that ARCO instituted a vertical maximum price-fixing scheme[13] with its retailers in violation of section 1 of the Sherman Act. 495 U.S. at 332. The plaintiffs requested damages under section 4 of the Clayton Act. See Atlantic Richfield, 495 U.S. at 333. Under then controlling precedent, a vertical maximum price-fixing scheme was a per se violation of the Sherman Act. Albrect v. Herald Co., 390 U.S. 145, 152-53 (1968), overruled by Khan, 522 U.S. at 19. The plaintiffs alleged that by engaging in the vertical maximum price-fixing scheme, ARCO and the retailers had "fix[ed] prices at below market levels." Atlantic Richfield, 495 U.S. at 332.

Atlantic Richfield acknowledged that a vertical maximum-price-fixing scheme was a per se violation of the Sherman Act. Nevertheless, the Supreme Court disagreed with the proposition that the plaintiffs "suffered antitrust injury

[13] In a vertical price-fixing scheme, the supplier of a product, i.e., gasoline, sets constraints on the price that retailers of that product, i.e., gas stations, can set when they sell the product to consumers. See State Oil v. Khan, 522 U.S. 3, 15 (1997). In a vertical maximum price-fixing scheme, the supplier informs retailers that they cannot sell a product above a set maximum price.

because of the low prices produced by the vertical restraint." Atlantic Richfield, 495 U.S. at 338. According to the Supreme Court, "[t]he antitrust laws were enacted for the protection of competition, not competitors." Id. (emphases in original) (internal quotation marks removed). Moreover, "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." Id. at 340 (emphasis added). Hence, inasmuch as "antitrust injury does not arise . . . until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct," non-predatory low prices "cannot give rise to antitrust injury." Id. at 339-340 (emphases added).

The facts of the instant case are analogous to those presented in Atlantic Richfield. As in that case, Defendants' failure to inform consumers that they were not distributing the service charge to their employees was a per se violation of Hawaiʻi antitrust law under HRS § 481B-4. Davis, 122 Hawaiʻi at 445 n.35, 228 P.3d at 325 n.35. However, the only competition-reducing aspect of Defendants' behavior identified by Gurrobat is the ability to charge lower prices. Under Atlantic Richfield, such lower prices "benefit consumers regardless of how those prices are set." 495 U.S. at 338. Hence, under Davis, Gurrobat has not provided sufficient evidence to allege the "nature of the competition." The federal authority adopted by Davis therefore

renders it impossible for Gurrobat to meet his burden on summary judgment.

Additionally, contrary to the position of the majority, HMA does not allow Gurrobat to prove the "nature of the competition" under HRS § 480-13 by simply showing that Defendants' conduct "enables the defendant to create incentives for customers who purchase banquet services from defendants instead of competitors who did not engage in the unlawful conduct." Majority opinion at 57. In HMA, the plaintiffs alleged, inter alia, that the conduct of the defendants, "threaten[ed] the continuity of care provided to patients," and required the plaintiffs to "expend considerable resources seeking reimbursement that could otherwise be available to provide enhanced healthcare services," and made it "more costly and difficult . . . to enhance the availability and quality of care that all patients receive." 113 Hawaiʻi at 112, 148 P.3d at 1214. This court noted that such practices would, inter alia, "impede or interfere with physicians' ability to provide effective healthcare services to their patients." Id. at 113, 148 P.3d at 1215. In other words, in HMA the plaintiffs alleged that the defendants' actions would harm patients, i.e., the "consumers" of healthcare. Id.; see also Wadsworth, 818 F. Supp. 2d at 1268 ("In HMA, the plaintiffs had clearly specified the market, as well as a harm to the market and competition in the

form of increased prices because of the defendant's behavior." (emphasis added)).

Thus, HMA does not contradict the federal precedent suggesting that plaintiffs must show an injury to consumers, rather than competitors, to demonstrate that "the loss stems from a competition reducing aspect of the defendant's behavior[,]" Atlantic Richfield, 495 U.S. at 344, as the majority argues. Consequently, the majority's position that Gurrobat can allege "the nature of the competition" by showing that Defendants can "charge lower base prices than law-compliant competitors" conflicts with the requirements set forth in Davis.

C.

According to the majority, Davis concluded that it was necessary to allege the "nature of the competition" to "maintain the distinction between claims of UMOC and [unfair and deceptive acts and practices (UDAP)]." In HMA, this court held that when a UDAP claim could also constitute a UMOC, a plaintiff was required to allege the "nature of the competition" to maintain "the distinction between [UDAP claims] and [UMOC claims] that are based upon such acts and practices." HMA, 113 Hawaiʻi at 111, 148 P.3d at 1213. However, as opposed to the Davis majority, the holding in HMA was limited to situations where alleging the nature of the competition was necessary to preserve the distinction between UDAP claims and UMOC claims. 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 contrast, the majority in Davis held that "the pleading requirement [set forth in HMA was] based on differences in the nature of the underlying cause of action." Davis, 122 Hawaiʻi at 437 n.26, 228 P.3d at 317 n.26 (emphasis added) (majority opinion). Thus, the Davis majority did not limit its holding to distinguishing between UMOC and UDAP claims as the majority herein relates.

D.

Also, the majority's position that Gurrobat can allege the "nature of the competition" without identifying any law-compliant competitor cannot be supported under Davis. To reiterate, Davis held that proving the "nature of the competition" "requires a showing, with some particularity, of actual damage caused by anticompetitive conduct[.]" Davis, 122 Hawaiʻi at 439, 228 P.3d at 319 (internal quotation marks omitted). Plainly, even if lower prices could be used to show anticompetitive conduct, there would be no "actual damage" unless there was a law-compliant competitor who actually lost business due to the lower prices charged by the Defendants. Without proof of the existence of a law-compliant competitor, there would be no harm to anyone other than employees because consumers would

receive lower prices and no hotels would lose revenue to other hotels, although all of the hotels would presumably pay their employees less. Insofar as the majority accepts that a "hypothetical" competitor would be sufficient under Davis, respectfully this would be incorrect inasmuch as a hypothetical competitor would not be a real entity that in fact suffered "actual damage." Hence, any notion that Gurrobat was not required to prove the existence of a law-compliant hotel also cannot be rationalized under Davis.

Thus, the majority incorrectly concludes that "the circuit court erred in granting Defendants' motion for summary judgment because Gurrobat . . . satisfied the 'nature of the competition requirements under Davis.'" Majority opinion at 61. To the contrary, as explained supra, a plain reading of Davis and the authorities cited therein would have confirmed that Gurrobat was not entitled to recover under HRS §§ 480-2 and 480-13. See Part III B., supra. The court cannot be faulted for correctly applying the precedent established by Davis.

IV.

Additionally, the majority states that "Davis does not stand for the proposition that in order to recover for an UMOC claim for a violation of HRS § 481B-14, the plaintiff must prove that his or her injury resulted from the negative effect on

competition."[14] Majority opinion at 59. However, in Davis, the majority stated that, due to the "nature of the competition requirement" the plaintiff must demonstrate "that he or she was harmed as a result of actions of the defendant that negatively affect competition." Davis, 122 Hawaiʻi at 438, 228 P.2d at 318 (emphasis in original). Davis further characterized this requirement as a "causation requirement" that necessitated the plaintiff show that the injury "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation[.]" Id. at 439, 228 P.2d at 319 (emphases added) (internal citations omitted). Finally, Davis explained that under the federal precedent that it relied upon, "'a plaintiff can recover only if the loss stems from an anticompetitive aspect or effect of the defendant's behavior.'" Id. at 325, 228 P.3d at 325 (quoting Atlantic Richfield, 495 U.S. at 344) (emphasis added). Thus, it is apparent from the language of Davis that Gurrobat would be required to show that his injury was the result of the anticompetitive effect of the violation.

This conclusion is consistent with the authorities cited in Davis. For example, in Brunswick, the plaintiffs alleged that the defendants acquired several failing bowling

[14] However, the majority opinion also appears to state that such a showing is required inasmuch as the majority states that Gurrobat was required to show that his injury "flows from the defendant's conduct that negatively affects competition or harms fair competition." Majority opinion at 60 (emphasis added).

centers, and that due to these acquisitions, the defendant was large enough "to lessen competition in the market it had entered by driving smaller competitors out of business." 429 U.S. at 481. However, the plaintiffs were only harmed because the defendant prevented the acquired centers from failing, thereby ensuring that those centers continued to compete with the plaintiffs. Id. Thus, inasmuch as the plaintiffs were not harmed by any reduction in competition, but rather an increase in competition, the Supreme Court concluded that the plaintiffs could not demonstrate "antitrust injury."

In other words, in Brunswick, the plaintiffs attempted to demonstrate a negative effect on competition by showing that the defendant could drive smaller competitors out of business.[15] Nevertheless, the plaintiffs could not show that their injury resulted from that negative effect. This failure led the Supreme Court to conclude that the plaintiffs could not satisfy the "antitrust injury" requirement.

The majority, on the other hand, asserts that Davis does not require plaintiffs to show that they were harmed as a result of the anticompetitive effect of the violation because this would be contrary to the holding in Davis that "the plaintiff need not be a consumer, a competitor of, or in

[15] Brunswick did not discuss whether this was actually sufficient to show a negative effect on competition.

competition with the defendant in order to have standing under HRS § 480-13(a)." Majority opinion at 59. However, the issue of whether the employees could bring a UMOC claim at all was not at issue in Davis, inasmuch as HRS § 480-2(e) clearly states that any person can bring a UMOC action. Nevertheless, to reiterate, Davis concluded that plaintiffs must demonstrate that they were "harmed as a result of actions of the defendant that negatively affect competition." Davis, 122 Hawaiʻi at 438, 228 P.2d at 318 (emphasis in original). In contrast, it was pointed out that the result of this holding was to "preclude enforcement of HRS § 418B-14 though HRS §§ 480-2 and 480-13." Villon, 130 Hawaiʻi at 149, 306 P.3d at 194 (Acoba, J., concurring and dissenting).

In sum, the language of Davis and the authorities it cited confirm that plaintiffs must not only show that an act has an anticompetitive effect, but that they were harmed "as a result" of the actions that negatively affect competition. Consequently, respectfully, the majority's conclusion to the contrary based on Davis is incorrect.

V.

The majority ultimately concludes that Gurrobat "satisfied the test set forth in Davis" because he "produced declarations from two experts . . . [Tatibouet and Brewbaker,] who opined that any hotel that complies with the law by distributing the entire service charge has higher labor costs and

pricing structure and is therefore at a competitive disadvantage [to] a hotel that does not comply." Majority opinion at 56.

Thus, proof of the nature of the competition, as the majority sees it, rests on Gurrobat's experts. The majority contends that "proof of how a defendant's conduct negatively affected competition does not necessarily require expert testimomy[.]" Majority opinion at 58. However, in the instant case, the only evidence that Defendants' conduct enabled them to charge lower prices or negatively affected competition at all was provided by Tatibouet and Brewbaker's reports. The majority does not provide examples of how Gurrobat could satisfy this requirement without resort to expert testimony.

Respectfully, the majority's reliance on the reports of Tatibouet and Brewbaker in concluding that Gurrobat demonstrated harm to "fair competition" will impose unnecessary barriers to employees seeking to recover treble damages under HRS § 480-13 for violations of HRS § 481B-14. Unlike in the instant case, not all plaintiffs will be a representative of a class action or a member of a class, and not all employees injured by their employer's failure to distribute a service charge to them as tip income will be able to secure and to afford experts to establish an impact on competition.[16]

[16] The majority argues that it is not necessary for Gurrobat to prove that the Defendants "lowered their prices or that [the Defendants'] conduct (continued...)

Plainly, under the statute, the legislature "deemed" that a violation was sufficient to establish a UMOC. HRS § 481B-4. Thus, there is no reason under the plain language of the statute to continue to require employees to make any showing of harm to competition to recover under HRS §§ 480-2 and 480-13 for violations of HRS § 481B-14. Villon, 130 Hawaiʻi at 151, 306 P.3d at 196 (Acoba, J., concurring and dissenting); Davis, 122 Hawaiʻi at 458, 228 P.3d at 338 (Acoba, J., dissenting).

VI.

However, the majority still maintains that a plaintiff "can recover under HRS §§ 480 and 480-13 for violations of HRS § 481B-14, if the plaintiff alleges and proves (1) a violation of HRS Chapter 480; (2) an injury to the plaintiff's business or property that flows from the defendants conduct that negatively affects competition or harms fair competition;[17] and (3) proof of damages." Majority opinion at 60 (emphasis added). In doing so, the majority relies on testimony elicited from Gurrobat's experts. Inasmuch as this is an appeal from an order granting summary judgment, presumably on remand a trial will be held on

[16](...continued)
injured other hotels[,]" but only that Defendants' "conduct is harmful to fair competition." Majority opinion at 58. However, it is not indicated how Defendants' conduct affected "fair competition" other than that Defendants' conduct "allowed them to charge lower base prices than law-compliant competitors." Majority opinion at 57-58.

[17] In doing so the majority relies on Davis' requirement of demonstrating a "negative affect on competition," and on harm to "fair competition" addressed in the discussion supra.

whether there was an "anticompetitive injury" based on the experts' declarations. See majority opinion at 61-62.[18] Brewbaker and Tatibouet's reports reveal the difficulties that may be experienced by Gurrobat and future plaintiffs in proving at trial (as opposed to at a hearing on summary judgment) that a violation of HRS § 481B-14 negatively affected competition. It would seem foreseeable that opposing expert testimony may be offered to establish that there was no "harm to fair competition" as the result of a violation.

VII.

In any event, a showing of the nature of the competitive injury is not and should not be required. 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 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).

[18] The majority contends that there are "no issues with respect to" whether Gurrobat demonstrated a negative effect on competition. Majority opinion at 62. However, on any future motion for summary judgment or at trial, Defendants will be entitled to obtain opposing expert testimony. Thus, such issues may become apparent during the proceedings on remand.

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 via HRS §§ 481B-4 and 480-2 on evidence that HRS § 481B-14 was violated. The statutory text evinces a manifest intent by the legislature to allow those who have suffered a violation under HRS § 481B-14 a cause of action to enforce their rights under HRS § 480-13 without a showing of injury to competition among the employers. Id.

Respectfully, the majority approach still poses a barrier that is inconsistent with the legislative intent manifested in the plain language of the statute 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." Villon, 130 Hawaiʻi at 151, 306 P.3d at 196 (Acoba, J., concurring and dissenting).

VIII.

Based on the foregoing, I respectfully concur and dissent.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack