DISSENTING OPINION BY GINOZA, J.

There is much in the majority opinion with which I agree. In particular, I agree that it is appropriate to adopt the three-part test which has similarly been adopted by a number of federal courts and other jurisdictions to determine when fraud constitutes a basis to vacate an arbitration award. See e.g., Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988); Seattle Packaging Corp. v. Barnard, 972 P.2d 577 (Wash. Ct. App. 1999).

I respectfully dissent, however, to the majority's determination that application of that test to the circumstances of this case raises material facts which require an evidentiary hearing. Each part of the test must be met, and I would conclude that Defendant-Appellant Marie Minichino (Minichino) has failed to make a showing that she meets the second part of the test. That is, Minichino has failed to show that the alleged fraud was not discoverable prior to or during the arbitration upon the exercise of due diligence. To the contrary, Minichino's own declaration submitted to the Circuit Court of the Second Circuit (Circuit Court) establishes that she was well aware, during the arbitration hearing, of the alleged fraud she now contends should be the basis to vacate the arbitration award. Moreover, the evidence she now puts forth to prove the fraud are emails she authored and thus were in her control during the arbitration. Minichino simply was unable to locate the emails during the arbitration. Under these circumstances and the adopted test, there are no material facts in dispute that require the Circuit Court to conduct an evidentiary hearing.

I. Background

In this real estate dispute, Plaintiff-Appellee David Low (Low) initiated suit against Minichino asserting that Minichino breached a written agreement to purchase real property from Low, and that Minichino had failed to respond to a demand for arbitration as required by the agreement. The Circuit Court granted Low's motion to compel arbitration and the dispute was submitted to arbitration. The Arbitrator's Decision awarded Low

damages in the amount of $76,000, attorney's fees in the amount of $7,246.52, and costs in the amount of $718.18.

Low filed a motion to confirm the arbitration award, and Minichino, in turn, filed a motion to vacate the arbitration award. Minichino's motion to vacate alleged that the arbitration award was procured by fraud, claiming that Low had lied at the arbitration hearing. Minichino's declaration in support of her motion to vacate states, in relevant part:

> 2. On or about May 26, 2002, I entered into a DROA, as Buyer, to purchase residential property located at 4525 Une Place, Haiku, Maui, from the Plaintiff, David T. Low, as seller, for $646,000.00 . . . .
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> 3. According to Sections C-24 and C-25 of said DROA, certain "financing contingencies[]" . . . required that I had until June 25, 2002, to secure a loan commitment enabling me to complete the intended purchase, or that I had the right to terminate the DROA on or before that date, June 25, 2002, by notifying the Seller of my inability to secure such a loan commitment and therefore my inability to close.
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> 10. At the arbitration hearing, I testified that I gave both oral and written notice to the Seller prior to June 25, 2002, but the Arbitrator accepted the contrary testimony of the Seller, because I was unable to locate a copy of the notice that I provided the Seller prior to June 25, 2002, and because, maintaining a presumption against me, "as a licensed realtor, Defendant had the requisite knowledge and experience to handle real estate transactions . . . and to terminate a purchase" (Paragraphs 1 and 2, Page 3).
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> 11. I was however unable to locate a copy of the written notice that I provided to the Seller prior to June 25, 2002, only because, through no fault of my own, my residence had been flooded twice since then, once on December 31, 2004, and again on October 16, 2006, as shown by the true and correct copies evidencing that damage to my property, and hence to my computer's hard drive and my files, as set forth in Exhibit "G" attached hereto.
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> 12. Knowing that his testimony at the arbitration hearing was false, the Seller nevertheless lied before the Arbitrator, as a direct result of which he was awarded damages in the amount of $76,000.00, attorney's fees in the amount of $7,248.52 [sic], costs in the amount of $718.18, and his share of the Arbitrator's final fees in the amount of $1,224,67.
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> 13. Subsequent to the entry of the arbitration award, I was finally able to locate at my residence a copy of one of the e-mails that I had sent to the Seller, dated June 23, 2002, unequivocally terminating said DROA, a true and correct copy of which is set forth in Exhibit "H"

> attached hereto, proving that the Seller lied at the arbitration hearing and procured the arbitration award in his favor through fraud and perjury at the arbitration hearing and in his pleadings before this Court . . . .

(emphasis added). In a supplemental declaration submitted to the Circuit Court, Minichino attests that after filing her motion to vacate she was able to locate two additional emails that she sent to Low, one on June 21, 2002 and the other on June 22, 2002.

The Circuit Court held a hearing on Low's motion to confirm the arbitration award and Minichino's motion to vacate the award. After considering Minichino's submissions, the Circuit Court granted confirmation of the arbitration award, denied the motion to vacate, and entered judgment for Low.

II. Application of the Test

Hawaii Revised Statutes (HRS) § 658A-23(a)(1) (Supp. 2010) authorizes a court to vacate an arbitration award when the award is procured by fraud. The three-part test to determine whether an arbitration award should be vacated for fraud is articulated in the majority opinion as follows: first, the movant must establish the fraud by clear and convincing evidence; second, the fraud must not have been discoverable, upon the exercise of due diligence, prior to or during the arbitration; and third, the movant must demonstrate that the fraud had a material effect on a dispositive issue in the arbitration.[1]

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[1] For the third part of the test, the majority has chosen not to quote the Bonar test verbatim. I agree with the majority's articulation of the test.

Given this formulation, however, it appears that Minichino also fails to meet the third part of the test. Although Minichino's declaration states that she only needed to give notice of termination to Low, paragraph C-20 of the DROA titled "Contingency Procedures And Termination Provisions" required notice in writing to escrow. This paragraph states in pertinent part:

> If the Benefitted Party wishes to terminate this DROA because a Contingency for that party's benefit has not been satisfied, the Benefitted Party must deliver to Escrow a written notice terminating this DROA prior to the expiration of the Contingency Period or such other termination period which may be set forth in a specific contingency in this DROA. If the Benefitted Party fails to deliver the written notice to Escrow within such time period, the Contingency shall be deemed to be waived. Each party understands the

(continued...)

The second part of the test precludes a party from asserting fraud to vacate an award if the party could have raised or discovered the purported fraud during the arbitration. "[I]f perjury is 'fraud' . . . since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered it during the arbitration, else he should have invoked it as a defense at that time." Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 35 (2d Cir. 1951). See also, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 307 (5th Cir. 2004) (courts "have held that an arbitration award is not fraudulently obtained when the protesting party had an opportunity to rebut his opponent's claims at the hearing"); Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310, 313 (7th Cir. 1981) (party seeking to vacate arbitration award failed to meet due diligence requirement); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992) ("where the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple"); Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986) (where party seeking to vacate arbitration award suspected individual had falsified documents, failure to subpoena the individual at arbitration "vitiates its claim that the alleged fraud was not discoverable by due diligence"); Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co., 415 F. Supp. 133, 137 (D.N.J. 1976) ("Most courts

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[1](...continued)
requirement to act upon each Contingency according to the strict deadlines described herein.

(Emphasis added). Minichino has not asserted, either to the Circuit Court or to this court, that she gave notice of termination to escrow. Therefore, notwithstanding Minichino's assertion that Low lied about receiving notice of termination, her allegation of perjury appears irrelevant to the material and dispositive issue under the terms of the DROA, *i.e.* whether *escrow* received notice of termination. Because the arbitration award can be construed in this manner, and not reliant on any alleged perjury, this is another reason that the motion to vacate the arbitration award was properly denied.

have held that an arbitration award is not fraudulently obtained . . . when the protesting party had an opportunity to rebut his opponent's claims at the arbitration hearing."); Kirschner v. West Co., 247 F. Supp. 550, 553 (E.D. Pa. 1965) (court denied plaintiffs' motion to vacate arbitration award grounded on claim that defendant's witnesses had committed perjury, stating that "[i]f the perjury of defendant's witnesses was as patent as is now claimed, it should have been made apparent to the arbitrator in the proceedings before him."); Davenport v. Dimitrijevic, 857 So.2d 957 (Fla. Dist. Ct. App. 2003).

Several cases in particular help to delineate the line when the second part of the test has or has not been met. In Bonar, defendant Dean Witter sought to vacate part of an arbitration award when it discovered, post-arbitration, that an expert for the opposing side, Nix, had lied about his credentials. The Eleventh Circuit Court of Appeals vacated the relevant portion of the arbitration award because:

> Dean Witter has shown that it could not have discovered Nix's perjury before or during the arbitration hearing. Because the rules of the American Arbitration Association do not provide for a pre-hearing exchange of witness lists, Dean Witter did not know who would testify as appellees' expert witnesses until the time of the hearing. Without a pre-hearing opportunity to thoroughly investigate Nix's credentials, Dean Witter could not have known the extent to which he lied about them at the hearing.

835 F.2d at 1384. Thus, in Bonar, Dean Witter did not know of the fraud during the arbitration and could not have discovered it.

On the other hand, in Seattle Packaging Corp., the Washington Court of Appeals held that the trial court *did not need to hold an evidentiary hearing* because the party seeking to vacate an arbitration award, SeaPak, had failed to demonstrate that it could not have discovered alleged perjury with due diligence before close of the arbitration hearing. 972 P.2d at 579. The case involved a dispute about the value of a company, and SeaPak claimed an opposing party and an expert gave perjured testimony as to whether the sale of another company was a

comparable sale. After the arbitration hearing, individuals involved in the other sale gave sworn declarations purportedly countering the testimony of SeaPak's opponent and the expert. Addressing SeaPak's motion to vacate the award, the court noted that SeaPak had taken a position on the comparable sale issue at the arbitration hearing and could have obtained the information to counter the alleged perjury by contacting principals involved in the other sale. "Courts routinely deny motions to vacate arbitration awards where fraud would have been discoverable in the exercise of due diligence prior to or during the arbitration." 972 P.2d at 583.

Finally, in Halliburton Energy Services, Inc. v. NL Industries, 618 F. Supp. 2d 614 (S.D. Tex. 2009), after arbitration proceedings had concluded, plaintiff Halliburton discovered documents in its own possession that it had failed to produce during arbitration, but which it contended established fraud by other parties, the Tremont parties. Halliburton's argument that the arbitration award should be vacated under the Bonar test was rejected by the court, which explained in part:

> In *Bonar*, after finding that the amended motion to vacate was timely, the court emphasized that the alleged fraud on which it was based "must not have been discoverable upon the exercise of due diligence prior to or during the arbitration." *Bonar*, 835 F.2d at 1383 (citations omitted). The moving party in that case showed that "it could not have discovered the perjury before or during the arbitration hearing." *Id.* at 1384. In sharp contrast, Halliburton cannot argue that it could not have discovered the documents at issue or the alleged fraud - the Tremont Parties' failure to produce those documents - before or during the arbitration hearing. The newly submitted documents were in *Halliburton's own files* during the relevant period. Even *if* the Tremont Parties also had the newly submitted documents in their files and even *if* the Tremont Parties intentionally withheld them in the arbitration - neither of which Halliburton shows - Halliburton could have discovered the documents (and the Tremont Parties' failure to produce them) during the arbitration simply by looking in its own files.
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> The courts have not read *Bonar* as Halliburton does. The Eleventh Circuit, in considering a motion to modify or correct an arbitration award under section 11 of the FAA, has cited *Bonar* for the proposition that arbitration awards cannot be modified based on fraud that could have been discovered earlier. In *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, the court cited *Bonar* in noting that "judicial review of arbitration decisions is 'among the

> narrowest known to the law,'" and that "[t]hat narrow review is why a court cannot vacate an arbitration award for fraud based on information available before or during the arbitration that the parties, through lack of diligence, failed to discover." 508 F.3d 995, 1001 (11th Cir.2007) (citing *Bonar*, 835 F.2d at 1383) (additional citation omitted). The *AIG Baker Sterling Heights* court held that the district court had erred in modifying the award, lamenting that while "[t]he parties elected to settle their dispute by arbitration rather than litigation," the appeal was pending "after more than three years of litigation." *Id.*

618 F. Supp. 2d at 633-34 (brackets and emphasis in original).

In the instant case, Minichino's declaration states she testified at the arbitration hearing that she gave timely oral and written termination notice to Low, but that "the Arbitrator accepted the contrary testimony of [Low] because I was unable to locate a copy of the notice that I provided [to Low.]" She therefore took a position on the very point she wishes to now re-litigate (i.e., whether she gave timely notice to Low), and the Arbitrator assessed the credibility of the parties based on the evidence presented at that time. Minichino was not only aware of the alleged fraud (Low's alleged perjury) during the arbitration, but also, similar to Halliburton, she now seeks to show fraud by pointing to evidence she located post-arbitration that was in her control throughout. These circumstances should not be a sufficient basis for meeting the second part of the test.

The Hawai‘i Supreme Court has consistently expressed the principle that "[b]ecause of the legislative policy to encourage arbitration and thereby discourage litigation, judicial review of an arbitration award is confined to the strictest possible limits." Gadd v. Kelley, 66 Haw. 431, 441, 667 P.2d 251, 258 (1983) (quoting Mars Constructors, Inc. v. Tropical Enters., Ltd., 51 Haw. 332, 336, 460 P.2d 317, 319 (1969) (internal quotation marks omitted); Tatibouet v. Ellsworth, 99 Hawai‘i 226, 54 P.3d 397 (2002). In striking the balance between preventing a fraudulently procured arbitration award and encouraging arbitration (thereby limiting litigation), it makes sense that a party who is aware of, or could have discovered, an

alleged fraud prior to or during the arbitration proceeding, cannot get a second bite at the apple. This is especially true where evidence to prove the alleged fraud is in the control of the party seeking to vacate the award.

Minichino claims that flood damage at her home affected her ability to locate copies of the emails sent to Low. She does not state in her declaration whether she testified about these circumstances at arbitration. Low's counsel submitted a declaration to the Circuit Court attesting that, during arbitration, Minichino did not mention her evidence was lost because of a flood and she did not request adjournment of the hearing to allow her to look for the evidence.[2] Without explanation, Minichino now claims she was able to locate the emails post-arbitration. Rather than diligently addressing Low's alleged perjury at the arbitration hearing, when she was already aware of it, Minichino belatedly seeks a second opportunity to present evidence that she failed to present to the Arbitrator. The fact that Minichino not only knew of the fraud at the time of the arbitration but had in her control evidence of the alleged fraud undermines her claim that the fraud was not discoverable by due diligence.

III. Conclusion

Under the adopted three-part test, I would conclude that there is no material fact in dispute requiring an evidentiary hearing, and I would affirm the Circuit Court's December 26, 2007 judgment.

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[2] It is relevant to note that, if Minichino needed additional time during the arbitration proceeding to locate the emails, she could have made such a request. If, for some reason, the Arbitrator failed to give her a reasonable time to locate the emails, that issue could be addressed by the courts. Under HRS § 658A-23(a)(3), an arbitration award can be vacated when "[a]n arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement[.]"