CONCURRING AND DISSENTING OPINION BY ACOBA, J.

Assuming, arguendo, for purposes of this case, that Hawai'i Revised Statutes (HRS) §§ 485-25(a)(2) and (3) (1993) do not embody a scienter requirement[1] and in light of the majority's reliance on Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680 (1980), in this court's construction of HRS § 485-25(a)(1) to (3) (1993), I would remand this case to the circuit court of the first circuit, in order to consider the presence of scienter,[2] or lack thereof, on the part of Respondents-Appellants-Appellants TriVectra, Inc., Curtis N. Gushi, and Donovan D. Oda (collectively Appellants) as a mitigating or aggravating factor in determining the propriety of the imposition of the maximum civil penalty of $100,000 on Appellants under HRS § 485-20.5(a) (1993) by Appellee-Appellee Ryan S. Ushijima, in his capacity as Commissioner of Securities,

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[1] It is arguable that, in our interpretation of Hawai'i Revised Statutes (HRS) § 485-25(a)(2) and (3) (1993), those provisions should be construed as embodying a scienter requirement inasmuch as (1) the language of 485-25(a)(2) resembles the common law definition of fraud, see Kawaihae v. Hawaiian Ins. Cos., 1 Haw. App. 355, 360, 619 P.2d 1086, 1090 (1980) (noting that "[f]raud" has been defined as "[a] false representation of a matter of fact . . . which deceives and is intended to deceive another so that he shall act upon it to his legal injury"), and 485-25(a)(3) expressly refers to "fraud or deceit," see Manns v. Skolnik, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996) (concluding that I[ndiana C[ode] § 23-2-1-12(3), virtually identical in language to HRS § 485-25(a)(3), which "makes it unlawful to engage in a manner which 'operates or would operate as fraud or deceit upon any person[,]'. . . expressly include[s] as an element an intent to defraud" (emphasis in original)), (2) the legislative history indicates that the legislature's objective was to interdict "securities fraud," (emphasis added), see Hse. Stand. Comm. Rep. No. 406, in 1985 House Journal, at 1175, and (3) strict liability should not be easily read into statutes, cf. State v. Rushing, 62 Haw. 102, 105, 612 P.2d 103, 106 (1980) (opining that "the legislative purpose to impose absolute liability should not be discerned lightly by the courts"). However, since the question of whether scienter attaches to 485-25(a)(2) and (3) is not raised by Appellants, I do not discuss it further.

[2] As used by the United States Supreme Court in Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680, 686 n.5 (1980), the term "scienter" is defined as "a mental state embracing intent to deceive, manipulate, or defraud."

Department of Commerce and Consumer Affairs, State of Hawai'i (the Commissioner).

Under Aaron, the Court, in deciding whether an injunction should issue, concluded that scienter is not an element required to be pled or proven under sections 17(a)(2) and (a)(3) of the Securities Act of 1933. See Aaron, 446 U.S. at 700-01. The majority observes that HRS §§ 485-25(a)(2) and (a)(3) appear identical to those provisions of the Securities Act of 1933. Majority opinion at 26. As recognized in Aaron, although scienter need not be plead or proven for violations of sections 17(a)(2) and (3), it nevertheless can be considered in determining relief. See Aaron, 446 U.S. at 701 (stating that "a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief"). Inasmuch as the imposition of a fine, like equitable relief, is an alternate or complementary remedy for the same violations under HRS §§ 485-25(a)(1), (2), and (3), and as here, where violations were found under all three provisions, it would be reasonable and logical that "scienter or lack of it" be considered as "one of the aggravating or mitigating factors" in arriving at the amount of the fine.

Appellants contended that the award of a $100,000 fine was arbitrary and capricious. It is evident the Commissioner took the position that scienter was not required under HRS § 485-25(a)(2) or (a)(3) and accordingly did not consider the lack of

scienter as a mitigating factor in assessing the maximum fine. The majority observes that "the [C]ommissioner did not find that [Appellants] acted with malicious or willful intent." Majority op. at 38. Yet, the maximum fine allowed of $100,000 was imposed upon Appellants for their supposed violations. Inasmuch as the majority has construed HRS § 485-25 pursuant to Aaron, I believe that a remand is appropriate in order for the Commissioner to consider as a mitigating or aggravating factor, in imposing such a fine, whether Appellants' violations of HRS § 485-25(a)(2) and (a)(3) were made with scienter.