

NO. 27439

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KAM CENTER SPECIALTY CORPORATION,
a Hawai'i corporation, Plaintiff-Appellee

vs.

LWC IV CORPORATION, a Hawai'i corporation,
dba Eastern Garden Chinese Seafood Restaurant;
LAWRENCE CHAN; and LINDA CHAN,
Defendants-Appellants

LWC IV CORPORATION, a Hawai'i corporation,
dba Eastern Garden Chinese Seafood Restaurant;
LAWRENCE CHAN; and LINDA CHAN,
Third-Party Plaintiffs-Appellants

vs.

JOHN E. KOBAYASHI and V.I.P. INVESTMENTS
INC., a Hawai'i corporation, Third-Party
Defendants-Appellees

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2075-10)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama,
Acoba, and Duffy, JJ.)

Defendants-Third-Party Plaintiffs-Appellants LWC IV Corporation (LWC) dba Eastern Garden Chinese Seafood Restaurant (the Restaurant), Lawrence Chan (Lawrence), and Linda Chan (Linda) (the Chans) (collectively, Defendants) appeal from the August 2, 2005 final judgment of the circuit court of the first

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STATE OF HAWAI'I

circuit (the court)¹ that (1) entered judgment on the Complaint for Summary Possession and Assumpsit (Complaint) in the amount of \$74,087.20 for unpaid rent and the Counterclaims in favor of Plaintiff-Appellee Kam Center Specialty Corporation (Kam Center) and against Defendants and awarded Kam Center damages, attorneys' fees, and costs totaling \$337,776.17; (2) entered judgment in favor of Kam Center and against Defendants for possession of the premises (Premises); and (3) dismissed the third-party claims against Third-Party Defendants-Appellees VIP Investments, Inc. (VIP) and John E. Kobayashi (Kobayashi) (collectively Third-Party Defendants or TPDs) and awarded the Third-Party Defendants costs of \$8,934.55.

We affirm the court orders as follows for the reasons stated: (1) the denial of Defendants' Motion for Leave to File Second Amended Third-Party Complaint to add a new fraud allegation because Defendants failed to allege the fraud with particularity; (2) the award of summary judgment in favor of Kam Center as to Kam Center's Complaint because Defendants failed to raise a genuine issue of material fact that the parties agreed to the terms of an unsigned Draft Second Amendment to the subject lease; (3) the award of summary judgment in favor of Kam Center as to Defendants' Counterclaim for tortious interference with their contract with TPDs because Defendants failed to establish damages; (4) the award of summary judgment in favor of Kam Center

¹ The Honorable Eden E. Hifo presided.

for interference with a prospective contractual relationship because Defendants failed to raise a genuine issue of material fact that such a relationship existed between Starbucks, the eventual new tenant of the Premises, and Defendants; and (5) the award of summary judgment in favor of Kam Center as to Defendants' negligence Counterclaim because Defendants failed to establish their negligence claim against Kam Center; (6) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for unfair and deceptive practices under HRS § 480-2 because Defendants' are not "consumers" as defined by HRS § 480-1; and (7) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for tortious interference with prospective business advantage and/or tortious interference with the existing contract with Kam Center because that claim was waived.

We reverse the court's order denying Defendants' Motion for Leave to File Second Amended Answer and Counterclaim and First Amended Third-Party Complaint because it does not appear beyond doubt that Defendants could not prove facts in support of an unfair competition claim under Hawai'i Revised Statutes (HRS) § 480-2 against Kam Center and TPDs.

We vacate the court's award of summary judgment as follows for the reasons stated and remand such matters for further disposition: (1) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for breach

of fiduciary duty because there was an insufficient basis in the record to grant summary judgment on the issue of damages and there is a genuine issue of material fact as to whether Third-Party Defendants' alleged breach of fiduciary duty caused Defendants damages; and (2) the award of summary judgment in favor of Third-Party Defendants as to Defendants' Third-Party Complaint claim for punitive damages inasmuch as the court improperly granted summary judgment on Defendants' breach of fiduciary duty claim.

I.

LWC entered into a lease (Lease) dated August 17, 1999 for the Premises located at 46-023 Kamehameha Highway in Kane'ohe, Hawai'i from Kam Center. Linda, sole owner of LWC, and Lawrence, her husband, guaranteed Defendants' obligations under the Lease. The Lease was for ten years, but could be extended for an additional four years, and rent was fixed at \$8,258 a month until August 31, 2004, and at \$9,535 a month until July 31, 2009. The Chans operated the Restaurant on the Premises.

The Restaurant began losing money in 2000. In 2001, Defendants hired TPDs as their agent to negotiate with Kam Center to obtain a lower monthly rent. Kobayashi was the Chans' "long-time broker" who had represented them in real estate transactions for twenty years. TPDs remained Defendants' agent until October 15, 2003, two months after this lawsuit was filed.

In 2001, Kobayashi negotiated and finalized with Kam Center an amendment to the Lease (First Amendment) that reduced the rent to \$6,128.50 a month until August 31, 2004, in exchange for the payment of percentage rent and 50% of the net proceeds of sale if the Lease was sold. The First Amendment also required that Defendants "operate its business in the demised premises with due diligence and efficiency so as to produce the maximum amount of gross sales which may be produced by such a manner of operation."

Defendants also entered into an Exclusive Right-To-Sell Listing Agreement (listing agreement) with TPDs, seeking to sell the Lease for \$200,000. Defendants also authorized TPDs to renegotiate the terms of the Lease and to try to find a new tenant for the Restaurant. The listing agreement stated, with respect to an agent that "State law requires real estate licensees in Hawaii, prior to preparing any contract, to disclose orally or in writing to Seller and/or Buyer whom it is that they represent." The listing agreement further declared that the licensee could be the seller's agent who "[r]epresents Seller only; unless a disclosed dual agency exist. Seller's agent owes highest duties to Seller, including confidentiality, loyalty, and utmost care." In addition to the standard listing terms, the listing agreement also indicated that the "listing may be automaticall[y] extended until sold, assigned, or cancelled.

Listor will make its best efforts to find an assignee acceptable to Lessor."

LWC apparently continued to lose money during 2001. In 2002, however, LWC returned a profit of \$32,000. Defendants did not pay their monthly rent after November 2002.

Defendants did not receive any offers regarding their Lease until April 2002, when a Carl's Jr. franchise submitted a proposal. Carl's Jr. offered the Chans no cash premium for the remainder of their Lease and required a lease term in excess of what remained on the Chans' Lease. The proposal also required the Chans to undertake an upgrade, estimated to cost between \$50,000 and \$80,000. Apparently this offer was not accepted.

In January 2003, Defendants reduced their listing price for the Lease to \$99,000. Also in January 2003, Defendants closed down the Restaurant, which remained closed throughout all of 2003. Defendants concluded that the Restaurant would be more competitive as a lower-priced restaurant with drive-through service and decided to renovate and reopen as "Sam Woo BBQ Restaurant."

In February 2003, Linda and Kobayashi met with John Fujieki (Fujieki), the president of Kam Center, and Larry Takumi (Takumi), Kam Center's attorney. Defendants sought to obtain a long-term rent reduction before beginning their renovations. Defendants told Fujieki that they would proceed with their plan, which would entail approximately \$85,000 in renovations, if Kam

Center agreed to extend the reduced rent formula to the end of the Lease. Although Defendants were delinquent in the payment of rent, Defendants contend that Fujieki agreed to the proposal, and then instructed Takumi to prepare a second amendment (Draft Second Amendment) to the Lease.

On or about February 18, 2003, Defendants accepted an offer from Richard Tam (Tam) to purchase the Lease for \$80,000.

On February 19, 2003, Takumi sent TPDs the Draft Second Amendment for Defendants' review and response. Defendants received the Draft Second Amendment on that day. Takumi's transmittal memorandum to TPDs stated that Kam Center was providing "for [his] review a draft of the lease amendment for documenting the rent relief requested by your clients, Larry and Linda Chan." The memorandum further stated that the Draft Second Amendment contained a "blank space for a set number to be filled in" regarding the "Recapture of Reduced Rent" because the parties needed to reach an understanding on "a mutually acceptable number that is fair." Takumi asked TPDs, "Please call me with your client's comments on the lease amendment."

By March 2003, Linda knew that Kam Center was considering terminating the Lease due to Defendants' ongoing failure to pay rent. Takumi told TPDs on several occasions in 2003 that Defendants were in default of their Lease. Several times during the late spring and summer of 2003, Takumi informed TPDs that Kam Center had authorized his law firm to file a

summary possession lawsuit against Defendants if Defendants did not pay the back rent. TPDs repeatedly related to Linda that Kam Center required Defendants to pay their growing debt and that Kam Center was contemplating filing a summary possession action because of the Defendants' defaults under the Lease.

In May 2003, Tam's offer was not consummated. At that time, Defendants returned to renovating the Restaurant. Defendants state that on May 8, 2003, they executed the Draft Second Amendment and instructed TPDs to deliver it to Kam Center. According to Defendants, "without [Defendants'] knowledge or consent, [TPDs] kept the [Draft Second Amendment] and did not deliver it to Kam Center until October 2, 2003, nearly five months" after it was signed by Defendants.²

It is unclear from the parties' briefs exactly when or how Coffee Partners Hawai'i (Starbucks) became aware that the Restaurant's lease was available. On June 13, 2003, TPDs received a letter of intent (LOI) from Punanahui, Inc., the real estate agent for Starbucks, offering to negotiate a new 20-year lease of the Restaurant.³ The LOI was addressed to "Star Market,"⁴ and provided in Paragraph 26 that Kam Center would pay

² On the other hand, Kam Center contends that Defendants signed the Draft Second Amendment in May 2003, but that they did not give the signed Draft Second Amendment to TPDs until some unknown time in May or June 2003.

³ Tony Roma's and Big City Diner also submitted letters of intent. Linda states that she "didn't pay too much attention to the other two lease offers" because she preferred to concentrate on the Starbucks offer.

⁴ Star Market is Kam Center's lessor under a pad lease. Star Market and Kam Center also have common officers.

a brokerage commission that Kobayashi and Eric Tema (Tema), Starbucks' real estate agent, would share. The LOI contemplated the issuance of a new lease for the Premises from Kam Center to Starbucks.

TPDs gave the LOI to Takumi, with suggestions for countering the proposed lease terms and rental amounts. The LOI incorrectly identified VIP Investments as Kam Center's broker. In proposing a counteroffer to the [LOI], [Takumi] corrected that error, so that the written counteroffer correctly identified [K]obayashi as the broker for [Defendants]."

On June 17, 2003, Defendants sent Kam Center a letter stating that the renovations would be completed by the end of July and that the new restaurant would open for business on August 8. In the letter, Defendants proposed that they would begin making double rent payments after the Restaurant reopened, which would make the rent current after six months. The letter did not state anything regarding the Draft Second Amendment or a rent reduction. Kam Center did not respond to the June 17, 2003 letter. However, apparently in July, TPDs told Defendants that Kam Center did not like the proposal contained in the letter.

After receiving a copy of the June 17, 2003 letter, TPDs suggested that Defendants stop the renovations because Starbucks was interested in purchasing their Lease. But according to Kam Center, TPDs informed Linda that Starbucks wanted a lease longer than Defendants' Lease with Kam Center.

Defendants contend that TPDs did not give Defendants a copy of the LOI (or any other documents relating to the Starbucks transaction) or disclose to them what Starbucks was proposing. In June 2003, Linda stopped the renovations and decided that she would resume the renovations only if the Starbucks offer was not successful. According to Kam Center, at TPDs' request, Linda showed the Restaurant to Starbucks representatives on three separate occasions.

On July 1, 2003, Takumi gave TPDs a counteroffer (Counteroffer) to deliver to Starbucks and it contained counterproposals on the terms and conditions for the new lease. With respect to a brokerage commission, Takumi changed paragraph 26 to state that TPDs was acting as the agent for Defendants and that Defendants would pay the real estate commission. Defendants assert that "Takumi made this change even though [Defendants] were not parties to the LOI or Counteroffer and even though [TPDs] never represented that [Defendants] would pay the brokerage commission for the new lease." TPDs did not comment on or object to the revised brokerage commission and delivered the Counteroffer to Starbucks.

On July 22, 2003, Kobayashi sent Takumi the following message:

I guess Starbucks has accepted the counter offer and wants to enter into a dialogue with [Fujieki]. My feeling is before we do that, let's talk to Linda Chan, because she still owes back rent. Linda expected to pay some of it off with some premium up front. Since Starbucks is not giving any premium, Linda Chan is still in the loop.

According to Kam Center, Kobayashi spoke with Linda over the phone in July and August 2003 and personally met with the Chans in July 2003 to discuss the status of his negotiations with Starbucks and Kam Center. In various phone calls, TPDs told Linda that Starbucks planned to invest more than \$500,000 to renovate the Restaurant and that Starbucks had, therefore, requested that it not have to pay rent for the first nine months of its lease, so that it could recoup some of its renovation expenses. TPDs also told Linda that Kam Center had refused Starbucks' demand for nine months of free rent, but that the parties eventually agreed to four months of free rent.

In late July 2003, Kobayashi informed the Chans that Starbucks was getting a new lease directly from Kam Center, and that the Chans were still liable for the back rent. According to Defendants, TPDs suggested that they make a \$10,000 partial payment as a measure of good faith so that TPDs could negotiate with Kam Center for a rent concession. On July 27, 2003, Linda sent a \$10,000 check to Kam Center to be applied towards the back rent owed.

In early August 2003, TPDs related to Defendants that Kam Center said that Defendants needed to pay everything owed under the Lease. However, Defendants responded that they would reopen the Restaurant as they had planned. TPDs then told Linda that Takumi had told TPDs that Kam Center had authorized its attorneys to file a claim for summary possession and damages if

Defendants did not make further payments to Kam Center.

Defendants did not make any further payments.

On August 15, 2003, Kam Center terminated the Lease.

II.

On August 18, 2003, Kam Center filed a Complaint for summary possession and assumpsit against Defendants in the amount of \$74,087.20 for unpaid rent and other charges due under the Lease in the district court of the first circuit (the district court).⁵

On August 29, 2003, Defendants filed an answer, stating a general denial to allegations four through eight of the Complaint.

In September 2003, Defendants' attorney requested copies of the Starbucks LOI and related documents from TPDs.

On September 25, 2003, Defendants filed a non-hearing Motion For Leave To File First Amended Answer to Complaint; a Counterclaim against Kam Center for tortious interference, negligence, and punitive damages; a Third-Party Complaint against TPDs for breach of fiduciary duties and unfair and deceptive acts or practices; and a Demand for Jury Trial and/or Equitable Relief (Demand for Jury Trial).

⁵ Kam Center alleged in the Complaint in numbers four through eight that (4) "[Defendants] rent[] and/or [are] in possession of the property and/or [are] a personal guarantor under the rental agreement of the property"; (5) "[t]here is a written rental agreement for the property"; (6) [Defendants] ha[ve] broken the rental agreement because [of \$74,087.20 in] unpaid rent [and other charges due under the Lease]"; (7) "[w]ritten notice was given to [Defendants] on August 15, 2003 to correct this situation"; and (8) "[d]espite this notice, [Defendants] ha[ve] failed to correct this situation and still [are] in possession of the property."

On September 29, 2003, Kam Center and Defendants entered into a stipulated judgment in favor of Kam Center and against Defendants. The stipulated judgment stated that the Lease was terminated; Defendants shall vacate the Premises by September 30, 2003; and Kam Center's "claim for damages against Defendants and Defendants' defenses against those claims and Defendants' affirmative claims against [Kam Center], both legal and equitable, shall remain for resolution[.]"

On October 3, 2003, the district court granted Defendants' motion.

On October 6, 2003, the district court granted Defendants' Demand for Jury Trial as to non-possession issues only.

On October 9, 2003, the district court committed the case to the court for trial by jury.

On April 14, 2004, Defendants filed a Motion for Leave to File Second Amended Answer to Complaint and Counterclaim and First Amended Third-Party Complaint. Defendants sought to add claims against Kam Center and TPDs for unfair competition under Hawai'i Revised Statutes (HRS) § 480-2.

III.

On April 30, 2004, Starbucks and Kam Center entered into a new lease (Starbucks Lease) of the Premises. The Starbucks Lease states that Defendants had agreed to pay TPDs a commission of \$15,816.50 (the equivalent of two months' rent).

The Starbucks Lease also states that because Kam Center was in litigation with Defendants concerning the prior Lease, if Defendants refused to pay the commission to their agent, then Kam Center would pay the \$15,816.50 as a finder's fee to TPDs.

When Defendants did not pay TPDs the commission, Kam Center paid TPDs a finder's fee on May 10, 2004.

IV.

On July 22, 2004, the court found Defendants' proposed amendments to be futile and denied Defendants' April 14, 2004 motion for leave to amend.

On July 30, 2004, Defendants filed a motion for reconsideration of the court's July 22, 2004 order which denied Defendants' motion for leave to amend.

On September 27, 2004, the court denied Defendants' motion for reconsideration.

On November 18, 2004, Kam Center moved for summary judgment on Defendants' Counterclaim for tortious interference and negligence. Kam Center argued that (1) "Kam Center did not improperly interfere with [D]efendants' business relationships with prospective replacement tenants"; (2) "Kam Center did not improperly interfere with [D]efendants' contract with Kobayashi"; (3) "Kam Center did not owe or breach any duty of care to [D]efendants"; and (4) "the court should find that [D]efendants' counterclaim is frivolous and award Kam Center its reasonable attorneys' fees and costs."

On February 24, 2005, the court granted Kam Center's motion for summary judgment as to Defendants' Counterclaim. However, the court denied Kam Center's request that the court find the Counterclaim to be frivolous.

On March 7, 2005, TPDs filed a motion for summary judgment as to Defendants' Third-Party Complaint on the grounds that (1) Defendants "have no cognizable damages which will support claims for either: [(a)] tortious interference with prospective business and/or economic advantage; or [(b)] breach of fiduciary duty; and [(2) Defendants] are not consumers, rendering them ineligible to make [a] claim for unfair and deceptive acts or practices under [HRS c]hapter 480."

On March 23, 2005, TPDs filed a motion for partial summary judgment as to Defendants' punitive damages claim. TPDs argued that "there is no genuine issue of material fact that [Defendants] cannot show by clear and convincing evidence that [TPDs] acted with the threshold level of malice or willful and wanton conduct necessary to support such a claim."

On April 27, 2005, the court held a hearing on TPDs' two summary judgment motions.

On April 29, 2005, Kam Center filed a second motion for summary judgment on the claims set forth in its August 18, 2003 Complaint. Kam Center sought "an award of \$257,221.77 for rent and other charges owed by [D]efendants under the Lease and the Guaranty of the Lease."

On May 5, 2005, Defendants filed a Motion for Leave to File Second Amended Third-Party Complaint to raise claims of fraud and unfair competition] against TPDs "in light of new evidence that ha[d] recently come to [the] Chans' attention," namely, that TPDs had stated in its March 7, 2005 reply memorandum regarding its motion for summary judgment, and its April 22, 2005 reply memorandum regarding its motion for partial summary judgment on punitive damages that:

The Chans were not parties to the Starbucks transaction. Thus, even if they could raise a genuine issue of material fact of [TPDs'] representation of Kam Center in the Starbucks transaction, it would not involve the same transaction in which the Chans were represented.

On May 24, 2005, TPDs filed a Motion for Taxation of Costs against Defendants. TPDs supplemented their motion on June 1, 2005.

On May 25, 2005, the court granted TPDs' March 7, 2005 motion for summary judgment on Defendant's Third-Party Complaint. The court's order stated in relevant part:

1. There is no genuine issue of material fact to dispute that Third-Party Plaintiff LWC IV Corporation is a corporation. As a matter of law, a corporation cannot bring a claim under HRS Chapter 480 because the individual claimant must be a natural person, which a corporation is not. The individual Third-Party Plaintiffs Lawrence Chan and Linda Chan (hereinafter referred to as "Chans") also do not meet the requirement of Chapter 480 that their claim arise out of a personal real property investment. There is no dispute that the Chans were corporate officers who signed the commercial real estate lease on behalf of the corporation and thereafter signed as guarantors of the commercial lease. As a matter of law, they are not "consumers" under the HRS Section 480-1 definition requiring a "personal investment." Therefore, the Motion is granted as to the Chapter 480 claim.

2. Viewing the evidence in Third-Party Plaintiffs' favor and giving every reasonable inference in favor of Third-Party Plaintiffs, the Court finds that there is nothing in the record on this Motion to support the necessary element of legal causation as to the claims of

tortious interference with prospective business advantage and of breach of fiduciary duty.

3. The Court finds that there is no admissible evidence in the record on this Motion inasmuch as the Declaration of Linda Chan fails to meet the requirements of Chung v. Kaonohi Center Co., 62 Haw. 594 (1980) (discussing the foundation for evidence of damages, i.e. lost profits of an unestablished business). Thus, evidence of the element of damages required for breach of fiduciary duty is absent.

4. Based upon the findings stated in paragraph 2 and 3 above, the Motion is granted as to tortious interference with prospective business advantage and breach of fiduciary duty.

5. Third-Party Plaintiffs assertion that paragraph 17 of the Third-Party Complaint is sufficient under notice pleading to claim Intentional Infliction of Emotional Distress (hereinafter "IIED") is rejected. The language contained therein gave notice of alleged punitive damages but not IIED. Even if IIED were deemed to have been sufficiently pleaded, the [c]ourt finds that the facts as set forth by Third-Party Plaintiffs do not as a matter of law satisfy the requirement of "Outrageousness" required for IIED. See Hac v. University of Hawai'i, 102 Hawai'i 92 (2003).

(Emphases added.)

Also on May 25, 2005, the court granted TPDs' March 23, 2005 motion for partial summary judgment on punitive damages. The court stated that because the court had granted TPDs' motion for summary judgment on all other claims alleged in the Third-Party Complaint, there were no claims remaining.

Further on May 25, 2005, the court granted Kam Center's April 29, 2005 motion for summary judgment.

On May 30, 2005, the court denied Defendants' Motion for Leave to File Second Amended Third-Party Complaint as well as TPDs' request for sanctions against Defendants.⁶

On August 2, 2005, a final judgment was entered.

⁶ Thereafter, on June 3, 2005, Kam Center filed a Motion for Award of Attorneys' Fees and Costs against Defendants. On June 27, 2005, the court granted Kam Center's June 3, 2005 motion for fees and costs.

On June 30, 2005, the court granted TPDs' May 24, 2005 (and supplemented on June 1, 2005) Motion for Taxation of Costs against Defendants.

On August 9, 2005, Defendants filed their notice of appeal.

V.

It is established that "[a]n award of summary judgment is reviewed de novo under the same standard applied by [the trial court]." French v. Pizza Hut, Inc., 105 Hawai'i 462, 466, 99 P.3d 1046, 1050 (2004) (citing Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) (other citations omitted)). The standard for granting a motion for summary judgment is settled:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Taniguchi v. Ass'n of Apartment Owners of King Manor, Inc., 114 Hawai'i 37, 46, 155 P.3d 1138, 1147 (2007) (quoting Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004) (other citations omitted)) (emphasis in original). In a motion for summary judgment, "[a]ll evidence and inferences must be viewed in the light most favorable to the non-moving party." French, 105 Hawai'i at 466, 99 P.3d at 1050 (citing Maquire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)).

VI.

First, as to Defendants' April 14, 2004 Motion for Leave to File Second Amended Answer and Counterclaim and First Amended Third-Party Complaint, Defendants sought to add claims

against TPDs and Kam Center, respectively, for unfair competition under HRS § 480-2. HRS § 480-2(a) (1993) states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." In that regard this court has stated, "Two distinct causes of action have emerged under [HRS] § 480-2(a): 1) claims alleging unfair methods of competition; and 2) claims alleging unfair or deceptive acts or practices." Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 109, 148 P.3d 1179, 1211 (2006) (some emphasis omitted). "Any person may bring an action based on unfair methods of competition declared unlawful by [HRS § 480-2]." HRS § 480-2(e) (Supp. 2006). Any "person" includes a corporation. HRS § 480-1 (1993 & Supp. 2006). Because Defendants are a corporation, they are a "person" within the meaning of HRS § 480-1, and, thus, qualify to bring an action for unfair competition under HRS § 480-2(a).

This court has said that "HRS § 480-2, as its federal counterpart in the [Federal Trade Commission] Act [(FTCA)], was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen." Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 616, 607 P.2d 1304, 1311 (1980) (footnote omitted), overruled on other grounds by Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 982 P.2d 853 (1999). In enacting HRS

§ 480-2, the legislature "recognize[d], as did the Congress of the United States in 1914 when it enacted the [FTCA], that it is impractical to enact a law prohibiting each unfair method of competition or unfair or deceptive act or practice in the conduct of trade and commerce after the need therefor comes to light." Hawaii Med. Ass'n, 113 Hawai'i at 109, 148 P.3d at 1211 (quoting Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 60-61, 905 P.2d 29, 35-36 (1995) (quoting Hse. Stand. Comm. Rep. No. 55, in 1965 House Journal, at 538)).

Accordingly, this court has relied on the congressional statement with regard to the FTCA that "[w]hether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances." Id. (citations omitted); see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532-33 (1935) (stating that "[w]hat are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest" (capitalization and citations omitted)).

The foregoing was reiterated in Robert's Hawaii Sch. Bus, 91 Hawai'i at 255 n.34, 982 P.2d at 884 n.34:

Although HRS § 480-2 does not define unfair competition, it "was constructed in broad language in order to constitute a flexible tool to stop and prevent [unfair competition and] fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen and

businesswomen." Han v. Yang, 84 Hawai'i 162, 177, 931 P.2d 604, 619 (App. 1997) (quoting Ai, 61 Haw. at 616, 607 P.2d at 1311) (footnote omitted) (some brackets added and some omitted); see also [6 Julian von Kalinowski et al., Antitrust Laws and Trade Regulation § 111.07, at 111-18 (2d ed. 1998); 1 Rudolph Callmann, Unfair Competition, Trademarks and Monopolies, § 2.08, at 27-28 (4th ed. 1997)]; Restatement (Third) of the Law of Unfair Competition § 1, cmt. g, at 9-11 (1995).

As to the unfairness component, it was explained that

"[g]enerally speaking, competitive conduct 'is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Id. (quoting State ex rel. Bronster v. U.S. Steel Corp., 82 Hawai'i 32, 51, 919 P.2d 294, 313 (1996) (citations and brackets omitted)). This court observed that "[t]he word 'unfair' . . . means conduct that [(1)] threatens an incipient violation of an antitrust law, or [(2)] violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or [(3)] otherwise significantly threatens or harms competition.'" Id. (quoting Cel-Tech Commc'ns Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 544 (Cal. 1999)) (brackets in original).

VII.

In their memorandums in opposition to Defendants' motion to amend, TPDs and Kam Center each argued that Defendants' proposed claim for unfair competition against them was futile. In that regard, "[a] denial of leave to amend under Hawai'i Rules

of Civil Procedure (HRCP) Rule 15(a)⁽⁷⁾ is within the discretion of the trial court." Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd., 100 Hawai'i 149, 158, 58 P.3d 1196, 1205 (2002) (citing Fed. Home Loan Mortg. Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 162, 969 P.2d 1275, 1280 (1998)). This court has followed the standard applied by the federal courts, namely, that,

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules requires, be "freely given."

Id. at 160, 58 P.3d at 1207 (quoting Fed. Home Loan Mortg., 89 Hawai'i at 162, 969 P.2d at 1280 (citation omitted)) (emphases added). In other words, "[w]hile HRCP Rule 15(a) provides that leave to amend the pleadings should be 'freely given when justice so requires,' the trial court does not abuse its discretion in refusing leave to amend where such an amendment would be futile." Fed. Home Loan Mortg., 89 Hawai'i at 166, 969 P.2d at 1284.

⁷ HRCP Rule 15(a) (2001) provides:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

“ “[A]n amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss for failure to state a claim pursuant to [HRC] Rule 12(b)(6).” Office of Hawaiian Affairs v. State, 110 Hawai‘i 338, 365, 133 P.3d 767, 794 (2006) (quoting Lucente v. Int’l Bus. Machs. Corp., 310 F.3d 243, 258 (2d Cir. 2002)) (brackets and other citations omitted). Relatedly, “[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.” In re Estate of Rogers, 103 Hawai‘i 275, 280, 81 P.3d 1190, 1195 (2003) (citations omitted). In evaluating a complaint, “[t]he court must accept [the] plaintiff’s allegations as true and view them in the light most favorable to the plaintiff” Buscher v. Boning, 114 Hawai‘i 202, 212, 159 P.3d 814, 824 (2007).

VIII.

This court has said that a claim for unfair competition under HRS § 480-2(a) requires that the nature of the competition be sufficiently alleged. Hawaii Med. Ass’n, 113 Hawai‘i at 111, 148 P.3d at 1213. Defendants’ proposed amendment to its Counterclaim against Kam Center stated:

22. For their fourth claim for relief, [Defendants] reallege and by this reference expressly incorporate herein the allegations contained in Paragraphs 1 through 21, above.

23. [Kam Center] and [Defendants] were in competition for a new investor for the subject premises.

24. [Kam Center] encouraged, induced and/or caused [TPDs] to breach their fiduciary duties and duties of absolute loyalty to [Defendants] in order to compete with [Defendants] for a new investor in the subject premises.

25. The acts or omissions of [Kam Center] complained of above constitute unfair methods of competition and violated and/or are actionable under Chapter 480, HRS, including but not limited to HRS § 480-2(e) and HRS § 480-13.

26. [Defendants] were injured as a result of the above and are entitled to treble damages.

(Emphases added.) Accepting Defendants' allegations against Kam Center as true, and viewing them in a light most favorable to Defendants, see Buscher, 114 Hawai'i at 212, 159 P.3d at 824, it does not "appear[] beyond doubt that [Defendants] can prove no set of facts in support of [their] claim that would entitle [them] to relief." Rogers, 103 Hawai'i at 280, 81 P.3d at 1195 (citations omitted).

Defendants alleged that Defendants were in competition with Kam Center for a new investor for the Premises. Defendants also alleged that Kam Center acted unfairly by virtue of encouraging, inducing, or otherwise causing TPDs, Defendants' real estate agent, "to breach their fiduciary duties and duties of absolute loyalty to [Defendants] in order to compete with [Defendants] for a new investor in the subject premises." Such conduct, if regarded as true, would seemingly "significantly threaten[] or harm[] competition" and, thus, is unfair. Robert's Hawai'i School Bus, 91 Hawai'i at 255 n.34, 982 P.2d at 884 n.34 (internal quotation marks and citation omitted).

IX.

In its memorandum in opposition, Kam Center contended that Defendants and Kam Center were not competitors. According to Kam Center, Kam Center and Defendants were working together

"to achieve the same goal, i.e., getting Starbucks (or any other acceptable tenant), to take over the Premises under a new lease" with Kam Center. However, the evidence viewed in a light most favorable to Defendants indicates that Defendants were not in search of a new investor to enter into a new lease with Kam Center, but instead hired TPDs to sell their existing Lease and were open to negotiating a longer lease if Defendants were not bypassed. Thus, it appears that Defendants and Kam Center were in competition for a new investor for the Premises.

Also, Kam Center contended in its opposition memorandum that Defendants "have no evidence of any unfair conduct that could support an unfair competition claim against [Kam Center]." However, Defendants argued that Kam Center competed unfairly because although Kam Center knew that TPDs were breaching the fiduciary duties it owed to Defendants with respect to the Starbucks proposal, Kam Center did not eschew the proposal when it was presented by TPDs.

Furthermore, according to Defendants, Kam Center used TPDs to pursue the Starbucks proposal by holding out the lure of a brokerage commission. The evidence shows that the original Starbucks LOI stated in paragraph 26 that TPDs represented Kam Center and that Kam Center would pay the brokerage commission for the proposal. Defendants argue that the original Starbucks LOI evinced Starbucks' belief that TPDs were representing Kam Center

and supports an inference that TPDs did something to cause Starbucks to reach that conclusion.

Kam Center pointed out that its attorney revised paragraph 26 of the LOI to state that TPDs represented Defendants (rather than Kam Center) and that Defendants would pay the brokerage commission. However, as Defendants asserted in reply, Kam Center did not include language making Defendants "a party to the agreement or requiring their approval." In addition, Defendants pointed out that Kam Center "did not attempt to obtain any confirmation that [Defendants] were aware of and approved either the original or revised [LOI], despite the significant liability it raised for [Defendants]." Accordingly, it does not appear beyond doubt that Defendants could not prove facts in support of an unfair competition claim against Kam Center. See Rogers, 103 Hawai'i at 280, 81 P.3d at 1195. Thus, the court abused its discretion in denying Defendants' motion to amend as to Kam Center and its order is reversed.

X.

As to Defendants' proposed amendment to its Third-Party Complaint against TPD, the amendment stated:

19. For their third claim for relief, [Defendants] reallege and by this reference expressly incorporate herein the allegations contained in Paragraphs 1 through 18, above.

20. [Kam Center] and [Defendants] were in competition for a new investor for the subject premises.

21. In addition to and/or by breaching their fiduciary duties and duties of absolute loyalty to [Defendants], [TPDs] assisted [Kam Center] in competing with [Defendants] for a new investor for the subject premises.

[22.] The acts or omissions of [TPDs] complained of above constitute unfair methods of competition and violated

and/or are actionable under Chapter 480, HRS, including but not limited to HRS § 480-2(e) and HRS § 480-13.

[23.] Sellers were injured as a result of the above and are entitled to treble damages.

(Emphases added.) Accepting Defendants' allegations against TPDs as true, and viewing them in a light most favorable to Defendants, see Buscher, 114 Hawai'i at 212, 159 P.3d at 824, it does not "appear[] beyond doubt that [Defendants] can prove no set of facts in support of his or her claim that would entitle him or her to relief." Rogers, 103 Hawai'i at 280, 81 P.3d at 1195 (citations omitted).

Defendants alleged that Kam Center and Defendants were in competition for a new investor for the Premises. Defendants also alleged that TPDs acted unfairly by breaching their fiduciary duties and duties of absolute loyalty and assisted Kam Center in competing with Defendants. Such conduct, if regarded as true, would seemingly "significantly threaten[] or harm[] competition" and, thus, is unfair. Robert's Hawai'i Sch. Bus, 91 Hawai'i at 255 n.34, 982 P.2d at 884 n.34 (internal quotation marks and citation omitted).

XI.

In its motion in opposition, TPDs argued that Defendants' claim for unfair competition would be futile because Defendants could not show the existence of a conflict of interest, which according to TPDs was required for Defendants to raise a claim of unfair competition. TPDs contended that Kam Center, Defendants, and TPDs had a "common goal" and cooperated

in securing Starbucks as a new tenant. But as argued by Defendants in their reply memorandum, "[t]he fact that the parties may have had a common goal, however, did not give [TPDs] the right to breach their duties to [Defendants] or to arrange for a transaction that was against [Defendants'] best interests in attempting to achieve that 'common goal.'" In her deposition, Linda denied knowledge of an actual agreement that TPDs assisted Kam Center and Starbucks in reaching. Linda also maintained that she did not give TPDs permission to negotiate the transaction that resulted in the termination of Defendants' Lease without payment of any compensation, and expose Defendants to liability for all the back rent, free rent that Starbucks would receive under the new lease, and the brokerage commission for the new lease. Accordingly, it does not appear beyond doubt that Defendants could not prove facts in support of an unfair competition claim against TPDs. See Rogers, 103 Hawai'i at 280, 81 P.3d at 1195. Thus, the court abused its discretion in denying Defendants' motion to amend to add a claim for unfair competition against TPDs and its order is reversed.

XII.

As to Defendants' Counterclaim against Kam Center for "tortious interference,"⁸ Defendants argue on appeal that "based

⁸ In its Counterclaim against Kam Center, Defendants alleged:

8. [Kam Center] knew or had reason to know that [Defendants] had retained [TPDs] as [Defendants'] real estate agents and [Kam Center] had a duty to refrain from

(continued...)

on the evidence, a reasonable person could conclude that Kam Center tortiously interfered with the contractual relationship that existed between Kobayashi and [the] Chans."

As set forth by this court in Lee v. Aiu, 85 Hawai'i 19, 32, 936 P.2d 655, 668 (1997), the requisite elements of tortious interference with a contractual relationship are as follows:

(1) a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach the contract; (4) the absence of justification on the defendant's part; (5) the subsequent breach of the contract by the third party; and (6) damages to the plaintiff.

(Quoting Weinberg v. Mauch, 78 Hawai'i 40, 50, 890 P.2d 277, 287 (1995)). In its motion for summary judgment, Kam Center maintained that "Kam Center did not improperly interfere with [D]efendants' contract with Kobayashi" inasmuch as the third, fifth, and sixth elements of Defendants' claim for tortious interference are not satisfied.

(...continued)

interfering with that relationship.

9. [Kam Center] also knew or had reason to know that [TPDs] would be procuring proposals from prospective investors who were interested in acquiring the subject premises and [Kam Center] had a duty to refrain from interfering with [Defendants'] prospective business advantage and/or relationship with those investors.

10. [Kam Center] tortiously, wrongfully and/or without right or privilege interfered with [Defendants'] relationship with [TPDs] and/or [Defendants'] prospective business advantage and/or relationship with the potential investors.

11. Among other things, [Kam Center] wrongfully encouraged, caused and/or induced [TPDs] to act and/or hold themselves out as [Kam Center's] agent, rather than as [Defendants'] agent, and/or to solicit proposals whereby the prospective investors by-passed [Defendants] and offered to acquire the leased premises directly from [Kam Center].

(Emphases added.)

As to the sixth element regarding "damages to the plaintiff," Lee v. Aiu, 85 Hawai'i at 32, 936 P.2d at 668 (citation omitted), Kam Center, citing an excerpt of Linda's deposition, contended that "Linda Chan even admits that she cannot fathom how [D]efendants could prove their damages under this claim."⁹ A review of Linda's deposition indicates that Linda had not discussed how much in damages were claimed against Kam Center and that she had no idea of how she was going to determine such an amount. Furthermore, Defendants did not so much as address the sixth element of their claim in their motion in opposition to Kam Center's summary judgment motion. Thus, Defendants failed to raise a genuine issue of material fact as to whether the sixth element of their claim was satisfied. Accordingly, the court properly awarded summary judgment in favor of Kam Center as to Defendants' Counterclaim for tortious interference with a contractual relationship.¹⁰

XIII.

Next, Defendants argue on appeal that "Kam Center's

⁹ Kam Center cited to the following passage from Linda's deposition:

Q. Mr. Nishida asked you how much money in damages you were claiming against Mr. Kobayashi. And I have a similar question for you. Do you know how much money you are claiming in damages against the landlord in this lawsuit?

A. We haven't discussed that.

Q. Do you have any idea how you are going to figure that out?

A. No.

(Emphases added.)

¹⁰ In light of our holding, we need not reach the parties' remaining contentions regarding this claim.

misconduct constituted tortious interference with the Starbucks agreement that could have potentially included [the] Chans as a party," supports a claim for tortious interference with a prospective contract. In a claim of tortious interference with a prospective contract, the following elements are required:

[A] plaintiff alleging the tort of intentional interference with prospective contractual relations must plead and prove (1) a prospective contractual relationship existed between the plaintiff and a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally interfered with the relationship; (4) the defendant acted without proper justification; (5) the defendant's interference caused the third party to fail to consummate the prospective contract with the plaintiff; and (6) the defendant's interference caused damages to the plaintiff.

Kutcher v. Zimmerman, 87 Hawai'i 394, 395, 957 P.2d 1076, 1077 (App. 1998) (emphasis added).

In its motion for summary judgment, Kam Center argument in its entirety was that Defendants did not have a legitimate claim for tortious interference with a prospective contract with Starbucks as follows:¹¹

As Linda Chan testified, her goal was for Starbucks to enter into a new lease with Kam Center, so that LWC's obligation to pay rent under its lease would cease. Starbucks did enter into a lease with Kam Center. Thus, Kam Center did not purposefully interfere with [D]efendants' relationship with Starbucks, cause any impairment of the relationship, or cause any damages to the [D]efendants. To the contrary, Kam Center gave [D]efendants what they wanted by signing a lease with Starbucks. Moreover, as Linda Chan recognized, Kam Center was not obligated to enter into a lease with [D]efendants' chosen replacement (Starbucks).

Kam Center cannot now be criticized for consummating the very transaction that Defendants themselves proposed to

¹¹ It should be noted that in its motion for summary judgment, Kam Center also argued that Defendants did not have a legitimate claim against Kam Center for tortious interference with a prospective contract with Tony Roma's and Big City Diner. However, in their memorandum in opposition to Kam Center's motion, as well as on appeal, Defendants do not argue that there was a prospective contract with Tony Roma's or Big City Diner. Thus, our discussion is limited to whether there was a prospective contract between Defendants and Starbucks.

Kam Center. Accordingly, [D]efendants' claim for tortious interference with prospective economic advantage must be dismissed.

(Emphasis added.)

Apparently as to the first element of this tort, Defendants asserted in their memorandum in opposition that there was a prospective contractual relationship between Defendants and Starbucks "because it was possible for a three-way agreement to have been arranged" between Starbucks, Kam Center, and Defendants. (Emphasis added.) Purportedly to support its assertion, Defendants stated:

Specifically, Starbucks agreed to a monthly rent \$1,779.75 to \$2,909.50 per month greater than what Kam Center was entitled to receive under the existing Lease and Starbucks is essentially paying a "premium" that could have been applied to the amounts [Defendants] owed. Even with the free rent, Kam Center will be receiving \$75,152 more in rent for the first 5 years of the new lease, alone, and that was more than enough to cover the amounts which [Defendants] owed.

It is unclear how Defendants' statement here could suggest that "a potential contractual relationship existed" between Starbucks and Defendants. Defendants do not offer any evidence that Starbucks intended to, or was somehow obligated to, contract with Defendants or to pay the amount Defendants' owed to Kam Center. Thus, there is no basis for concluding that the "possibility" of a three-way contract satisfies the first element that "a prospective contractual relationship existed."

To the contrary, the evidence indicates that a prospective contractual relationship did not exist between Defendants and Starbucks. It is undisputed that Starbucks sought

at least a 20-year lease, but that Defendants' Lease had only 10 years remaining. In this connection, Tema, Starbucks' broker stated that "if the existing lessee doesn't have a lot of term, there's really no value at all to a person like a Starbucks. There is no value whatsoever. We have absolutely no use for an existing tenant's improvements whatsoever."

Although Fujieki's deposition testimony intimated that Kam Center would do anything within reason to ensure that the deal with Starbucks went through, Fujieki's deposition does not suggest that there was a prospective contractual relationship between Defendants and Starbucks.¹² Instead, Tema's deposition testimony that "the best way to approach this deal in order to release [Defendants] of their liability [was] to go and negotiate a longer term deal with [Kam Center,]" indicates that Starbucks

¹² In his deposition, Fujieki answered as follows with regard to the Starbucks transaction:

- Q. You can answer the question.
A. My main thing was the deal had to go through.
Okay? So it didn't matter to me.
Q. So if Mr. Kobayashi was breaching fiduciary duties that he owed to the Chans, that didn't matter to you either?
A. I didn't know if he did or did not. It's not for me. He didn't represent me.
Q. And as far as --
A. If he's representing them --
Q. So it didn't matter to you?
A. I had no idea or it didn't even enter my mind.
Q. And it didn't enter your mind because it didn't matter to you.
A. My main concern is the deal had to go through, what do we do to make the deal go through.
Q. And you were going to do what had to be done to make the deal go through?
MR. ASHFORD: Objection. Vague.
A. Within reason.

(Emphases added.)

was interested in dealing directly with Kam Center, and not with Defendants.

Because the first element is not satisfied we need not address the remaining elements required in a claim for tortious interference with prospective contractual relationship. Accordingly, the court properly awarded summary judgment in favor of Kam Center as to this claim.

XIV.

As to Defendants' Counterclaim against Kam Center for negligence, to reiterate, the court granted summary judgment in favor of Kam Center. On appeal, Defendants also argue that "Kam Center acted negligently with respect to the Starbucks transaction." It is well established that the elements of a negligence cause of action include "[a] duty or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks[.]" Dairy Rd. Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 419, 992 P.2d 93, 114 (2000) (citations omitted). "The general rule is that a person does not have a duty to act affirmatively to protect another person from harm." Lee v. Corregedore, 83 Hawai'i 154, 159, 925 P.2d 324, 329 (1996). As we have stated, "[t]he exceptions to this general rule arise when a 'special relationship' exists between the actor and the individual facing harm." Id. In a negligence claim,

a duty is owed when, considering the policies favoring recovery against those limiting liability, the sum total of those policies leads the law to say that a

particular plaintiff is entitled to protection. Thus, a new duty will not be imposed upon members of society without a logical, sound, and compelling reason.

Blair v. Ing, 95 Hawai'i 247, 270, 21 P.3d 452, 475 (2001) (citing Lee v. Corregedore, 83 Hawai'i at 166, 925 P.2d at 336); see also Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 518-19 (1970) ("Duty, however, is a legal conclusion which depends upon the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection[]" and, therefore, "in determining the duty imposed on the defendant, if any, we must weigh the considerations of policy which favor the plaintiff's recovery against those which favor limiting the defendant's liability." (Internal quotation marks and citation omitted.)).

In this case, Defendants do not suggest any reason why Kam Center, as the Defendants' landlord, owed them a duty under a negligence theory. On the other hand, Kam Center argues that "[t]here is no sound reason for the law to impose a duty on Kam Center to protect or otherwise assist or be concerned with the Chans' well-being" and that "[t]his was a purely arms-length, commercial transaction." Because Defendants failed to establish that Kam Center owed them a duty, the court properly awarded summary judgment in favor of Kam Center as to Defendants' negligence claim. See French, 105 Hawai'i at 470, 99 P.3d at 1054 (the moving party bears the ultimate burden of persuasion) (citations omitted). Accordingly, we need not reach the remaining contentions regarding Defendants' negligence claim.

XV.

As to Kam Center's Complaint, Kam Center filed a motion for summary judgment which the court granted. In that regard, Defendants argue that the court "erred in applying the higher rent provided for by the [L]ease to calculate Kam Center's damages[,]" rather than the rent provided by the Second Amendment. In its motion, Kam Center argued inter alia for an award of damages calculated on the Lease. In opposition to Kam Center's motion, Defendants argued that the unsigned Draft Second Amendment should provide the basis for Kam Center's damages because "the parties agreed to all of the material terms, and Kam Center's attorney drafted the Second Amendment, which represented the entire agreement with respect to the extension of reduced rent."

But despite alleging that "the parties agreed to all of the material terms," Defendants did not point to any part of the record that raises a genuine issue of material fact that the parties in fact agreed to all of the material terms of the unsigned Second Amendment.¹³ Thus, Defendants failed to

¹³ On the other hand, Takumi's transmittal memorandum contradicts Defendants' assertion that the parties agreed to all of the material terms. Takumi's memorandum plainly states, "I am enclosing for your review a draft of the lease amendment for documenting the rent relief requested" by Defendants, indicating a lack of finality as to the Second Amendment. (Emphasis added.)

Furthermore, in its reply memorandum in support of its summary judgment motion, Kam Center pointed out that during Fujieki's "deposition, Defendants' counsel admitted that the proposed amendment was never executed, and that the contemplated transaction was never completed." (Emphasis in original.) Fujieki's deposition states in pertinent part:

BY [DEFENSE COUNSEL]:

Q. Mr. Fujieki, I was asking you to review the

(continued...)

"demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." French, 105 Hawai'i at 470, 99 P.3d at 1054 (citations and emphasis omitted). Therefore, the court properly granted summary judgment in favor of Kam Center as to the Complaint.

It should be noted that Defendants also argued that "Kam Center's failure to sign [the Draft Second Amendment] is irrelevant, as [the] Chans' detrimental reliance on the agreement, as evidenced by their commencement of renovations for Sam Woo, is sufficient to make the agreement enforceable."

(...continued)

document that's marked as Exhibit No. 5, specifically, the document that's identified as a Second Amendment of Lease. Have you had sufficient opportunity to look at Exhibit No. 5.

A. Yeah.

Q. Does this document, the second amendment of lease, refresh your recollection as to whether there were negotiations for a further reduction in rent?

A. I don't remember. You know, to be honest with you, I don't remember. I'm looking at this and I didn't sign this, so --

Q. I'm not representing that it was executed.

A. Yeah.

Q. It was not completed. I'll represent to you that this transaction was not completed. I'm just asking you whether you recall that there were negotiations.

(Emphasis added.)

In addition, Kam Center argued in its reply memorandum that "[a]s Kam Center's president, Mr. Fujieki testified that any proposal to reduce Defendants' rent first required Defendants to pay their overdue rent, but that Defendants never did pay their rent." Fujieki's deposition states in pertinent part:

Q. . . . Do you recall whether there were subsequent negotiations for the reduction of lease rent, perhaps for -- to extend the time for the reduced rent?

A. I don't remember. I know we tried -- we reduced it to try to help them out, and I think part of that was so that they could come current, but they never did.

(Emphasis added.)

(Citing Credit Assocs. of Maui, Ltd. v. Carlbon, 98 Hawai'i 462, 469, 50 P.3d 431, 438 (App. 2002) ("Performance or part performance of a contract required to be in writing will take the matter out of the statute of frauds, where the party seeking to enforce it has acted to his [or her] detriment in substantial reliance upon the oral agreement." (Quoting Shannon v. Waterhouse, 58 Hawai'i 4, 5-6, 563 P.2d 391, 393 (1977).)).

(Emphases added.) But Defendants' argument presumes the existence of an underlying agreement between the parties, see Honolulu Rapid Transit Co. v. Paschoal, 51 Haw. 19, 26, 449 P.2d 123, 127 (1968) (stating that "[i]t is a fundamental principle of law that there must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract" (citations omitted)), which again, Defendants have not shown.

However, Defendants concede that "the parties had not agreed on the percentage of the sale price that Kam Center would be entitled to if [the] Chans sold their Lease" under the Second Amendment.¹⁴ Defendants assert that the percentage of the sale price term "was immaterial as [the] Chans were not intending to sell." As Kam Center points out, "[i]n a commercial transaction, price is undeniably an essential term." (Citing Miller v. Pepper, 2 Haw. App. 629, 631, 638 P.2d 864, 866 (1982); Molokai

¹⁴ As to this term, Takumi's transmittal memorandum states that "Fujiaki requested that I send you the lease amendment with the understanding that a mutually acceptable number that is fair, will be filled in Paragraph 6 when the lease amendment is executed and delivered." (Emphasis added.)

Ranch, Ltd. v. Morris, 36 Haw. 219, 225 (Terr. 1942).).

Accordingly, Defendants' assertion does not dissuade us from concluding that Defendants failed to raise a genuine issue of material fact as to the lack of agreement on the terms of the Second Amendment.

XVI.

Turning to Defendants' Third-Party Complaint against TPDs and Defendants' claim for unfair and deceptive practices, as indicated previously, HRS § 480-2(a) states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." (Emphasis added.) This court has held "as a matter of law that a broker or salesperson actively involved in a real estate transaction invariably engages in 'conduct in any trade or commerce.'" Cieri, 80 Hawai'i at 65, 905 P.2d at 40. Thus, a real estate broker such as TPDs may be subject to liability pursuant to HRS chapter 480. Id.

However, unlike an unfair competition claim where "any person" may bring an action, HRS § 480-2(e), pursuant to HRS § 480-2(d), "[n]o 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." (Emphases added.) HRS § 480-1 defines a "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts

to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

(Emphases added.)

Before the court, Defendants' counsel argued that Linda made a "personal investment" through a subchapter S corporation. Defendants assert that "the restaurant and the Lease were truly a personal investment" because (1) "Linda was the sole shareholder of LWC"; and (2) "the Lease was the sole asset of LWC." As the court ruled, "[t]here is no dispute that the Chans were corporate officers who signed the commercial real estate lease on behalf of the corporation and thereafter signed as guarantors of the commercial lease." Defendants' counsel agreed that LWC "is definitely not a natural person."

Because the corporation is not a natural person, it cannot be deemed a "consumer" as defined in HRS § 480-1. Hawaii Med. Ass'n, 113 Hawai'i at 110, 148 P.3d at 1212 (stating that HRS § 480-2(d) "limits enforcement of the unfair or deceptive acts or practices clause to consumers, the attorney general or the director of the officer of consumer protection" and, therefore, "denies businesses standing to sue under the 'deceptive acts or practices' clause of § 480-2(a)[]" (citation and emphasis omitted)); see also Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 435, 114 P.3d 929, 941 (App. 2005) (stating that "[a]t the outset, it is evident that McElroy Inc. does not have standing to bring suit under [HRS] chapter

[480] because a corporation is not a natural person"); Hunt v. First Ins. Co. of Hawaii, Ltd., 82 Hawai'i 363, 373, 922 P.2d 976, 986 (App. 1996) (stating that "HRS §§ 480-2 and -13 limits private causes of action, based upon unfair and deceptive acts or practices, to 'consumers[,]'" which HRS § 480-1 defines as a "natural person" and, therefore, because the grocery store "is not a 'natural person,' it is also not a 'consumer' as defined by HRS § 480-1 and . . . has no private cause of action pursuant to HRS § 480-13").

Furthermore, the legislative history of HRS § 480-1 indicates that the word "personal" was inserted before "investment" in order "to clarify that the provision is to protect individual consumers, rather than businesses." Cieri, 80 Hawai'i at 68, 905 P.2d at 43 (quoting Hse. Stand. Comm. Rep. No. 716-90, in 1990 House Journal, at 1113) (emphasis added). In Joy A. McElroy, M.D., Inc., the Intermediate Court of Appeals considered "whether the contribution of personal funds for improvements on leased commercial property can be considered a personal investment." 107 Hawai'i at 435, 114 P.3d at 941. The ICA concluded that the plaintiffs "were not 'consumers' as defined in HRS § 480-1" because it was "unclear how improvements to the leased commercial space could be considered an investment, much less a personal investment, where the named lessee was McElroy Inc. and McElroy and Chang-Stroman were only guarantors

on the Lease and officers of the corporation." Id. at 436, 114 P.3d at 942.

Thus, as TPDs argue, "[t]he mere fact that they are natural persons does not make sophisticated businesspersons such as Lawrence Chan and Linda Chan personal investors in real estate. Their involvement as corporate officers and then guarantors of a corporate tenant's commercial lease does not transform the private dispute between businesspersons into a consumer transaction." Therefore, the court properly granted TPDs' motion for summary judgment as to Defendants' HRS chapter 480 claim in their Third-Party Complaint.

XVII.

Also as to Defendants Third-Party Complaint against TPDs, the court decided as to Defendants' claim for tortious interference with prospective business advantage that there was "nothing in the record . . . to support the necessary element of legal causation[.]" Defendants do not appeal from the court's decision in favor of TPDs as to this claim.

On appeal, however, Defendants argue that TPDs tortiously interfered with respect to their existing contractual relationship with Kam Center. (Citing Lee v. Aiu, 85 Hawai'i at 32, 936 P.2d at 668.). In response, TPDs contend that Defendants failed to raise such a claim before the court and that such failure must be considered a waiver. "Generally, 'failure to raise or properly reserve issues at the trial level would be

deemed waived.'" Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai'i, 251, 273 n.21, 151 P.3d 732, 754 n.21 (2007) (quoting Enoka v. AIG Hawai'i Ins. Co., 109 Hawai'i 537, 546, 128 P.3d 850, 859 (2006) (internal quotation marks and citation omitted)).

In reply, Defendants do not argue that an exception to this general rule applies. See Kernan v. Tanaka, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993) (stating that "[a]n appellate court will deviate from this rule only when justice so requires" (quoting Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984) (citations omitted)) (other citation omitted)).

Furthermore, Defendants do not argue they expressly plead or argued a claim for tortious interference with existing contractual relationship against TPDs at any point during the proceedings below.

Instead, without citing any authority, Defendants assert that "a claim against Kobayashi for tortious interference with [the] Chans' existing lease and contractual relationship with Kam Center is actually implicit in the early pleadings in this case." (Emphasis added.) Defendants relate that they alleged, with respect to TPDs, the following in their Third-Party Complaint:

10. [TPDs] acted negligently and/or breached these duties to [Defendants] by failing to use their best efforts in representing and/or by representing and/or acting on behalf of [Kam Center] with respect to the subject premises.

11. [TPDs] also tortiously interfered with [Defendants'] prospective business and/or economic advantage with potential investors who were interested in acquiring the premises covered by the Lease by acting and/or holding

themselves out as agents for [Kam Center] in negotiating with these potential investors.

12. In addition, [TPDs] steered these potential investors away from [Defendants] and towards [Kam Center] and encouraged these potential investors to bypass [Defendants] and seek to acquire the subject premises directly from [Kam Center].

(Emphases added.) Defendants maintain that it is clear that they alleged that "(1) Kobayashi acted on behalf of and represented Kam Center with respect to the subject premises; and (2) that Kobayashi steered potential investors away from [the] Chans and towards Kam Center, thereby encouraging a bypass of [the] Chans' existing lease." According to Defendants, "[i]mplicit in this argument and theory is that by bringing potential investors directly to Kam Center, Kobayashi delivered a better alternative to Kam Center, and thus directly caused Kam Center to terminate [the] Chans' existing lease."

Hawai'i Rules of Civil Procedure (HRCP) Rule 8(a)(1) (2007) requires "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This court has said that HRCP Rule 8(a)(1) "is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests. It is not necessary to plead under what particular law the recovery is sought." Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 545 (1971) (citation and ellipsis omitted). However, contrary to Defendants' contentions, paragraphs 10, 11, and 12 do not provide TPDs with "fair notice" of a claim that TPDs tortiously interfered with Defendants' contractual relationship

with Kam Center "and the ground upon which it rests." See Hall, 53 Haw. at 221, 491 P.2d at 545 (citation omitted).

In paragraphs 10, 11, and 12, Defendants do not allege that there was a contract between Kam Center and Defendants, that TPDs knew of the contract, that TPDs intentionally induced Kam Center to breach the contract, that TPDs actions were not justified, that Kam Center breached the contract, or that Defendants sustained damages as required to establish a prima facie case of tortious interference with a contractual relationship. See Lee v. Aiu, 85 Hawai'i at 32, 936 P.2d at 668. Although "direct allegations on every material point necessary to sustain a recovery on any legal theory" are not required if the complaint contains "allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial[,]" Marsland v. Pang, 5 Haw. App. 463, 475, 701 P.2d 175, 186 (1985) (internal quotation marks and citation omitted), no such inference can be drawn based on paragraphs 10, 11, and 12 of Defendants' Third-Party Complaint.

In addition, as TPDs argue, Defendants "had ample and repeated opportunities to raise a claim against [TPDs] of [tortious interference with contractual relationship] with Kam Center." TPDs correctly observe that not only did Defendants "allege tortious interference with prospective economic benefit with respect to potential investors such as Starbucks, but they also alleged against Kam Center a claim for [tortious

interference with contractual relationship] with [TPDs]."

Defendants could have conveniently pled that TPDs tortiously interfered with its Lease with Kam Center, but did not.

It should also be observed that Defendants contend that their claim against TPDs for tortious interference with their contractual relationship with Kam Center was not raised for the first time on appeal because "as a claim [for] unfair competition includes a claim for tortious interference [with contractual relationship], [the] Chans attempted to raise a claim for tortious interference [with contractual relationship] by way of amending the Third-Party Complaint to include a claim for unfair competition." (Citing Sportsmen's Boating Corp. v. Hensley, 474 A.2d 780 (Conn. 1984).). Defendants contend that the "court's repeated denial of [Defendants'] attempts to amend the Third-Party Complaint . . . precluded [Defendants] from raising a claim [against TPDs] for tortious interference" with contractual relationship with Kam Center. (Emphasis added.) Defendants appear to concede that a claim against TPDs for tortious interference with contractual relationship with Kam Center was not in fact raised below. Assuming arguendo that a claim for unfair competition includes a claim for tortious interference with contractual relations, we concluded supra that the court did not abuse its discretion in denying Defendants' motion for leave to amend their Third-Party Complaint to raise a claim for unfair competition under HRS § 480-2 against TPDs. Accordingly,

Defendants' claim for tortious interference with existing contractual relations against TPDs is deemed waived.¹⁵

XVIII.

Additionally, as to Defendants' Third-Party Complaint against TPDs, to reiterate, the court decided in favor of TPDs as to Defendants' breach of fiduciary duty claim on the grounds that "evidence of the element of damages . . . [was] absent" and, further, that "there [was] nothing in the record to support the necessary element of legal causation[.]" In their Third-Party Complaint, Defendants had alleged breach of fiduciary duty against TPDs:

COUNT I

(Breach of Fiduciary Duty by Brokers)

8. For their first claim for relief, [Defendants] reallege and by this reference incorporate herein the allegations contained in Paragraphs 1 through 7, above.

9. [TPDs] were fiduciaries who owed [Defendants] a duty of care to use their best efforts to accomplish the purposes for which they were engaged, to refrain from representing parties whose interests were adverse to [Defendants], and/or to avoid conflicts of interest.

10. [TPDs] acted negligently and/or breached these duties to [Defendants] by failing to use their best efforts in representing and/or by representing and/or acting on behalf of [Kam Center] with respect to the subject premises.

11. [TPDs] also tortiously interfered with [Defendants'] prospective business and/or economic advantage with potential investors who were interested in acquiring the premises covered by the Lease by acting and/or holding themselves out as agents for [Kam Center] in negotiating with these potential investors.

12. In addition, [TPDs] steered these potential investors away from [Defendants] and towards [Kam Center] and encouraged these potential investors to bypass [Defendants] and seek to acquire the subject premises directly from [Kam Center].

¹⁵ Accordingly, we need not reach TPDs' alternative argument that under Lee v. Aiu, Defendants cannot show the third and fifth elements required in a claim for tortious interference with contractual relationship.

13. [Defendants] were damaged as a result of the above and are entitled to actual, special and/or general damages in amounts to be proven at trial.

(Emphases added.)

The parties do not dispute that the Chans engaged Kobayashi and VIP Investments "to sell and/or renegotiate their lease with Kam Center" and, thus, entered into a real estate broker and principal relationship. In that regard, "[t]he rules of agency apply to the relationship between a real estate broker and principal." Prop. House, Inc. v. Kelley, 68 Haw. 371, 377, 715 P.2d 805, 810 (1986) (citing Miller v. Berkoski, 297 N.W.2d 334, 338 (Iowa 1980)). As such, "[t]he law imposes upon a real estate broker a fiduciary obligation comprised of utmost good faith, integrity, honesty, and loyalty, as well as a duty of due care and diligence." Id. (citing Rose v. Showalter, 701 P.2d 251, 252 (Idaho Ct. App. 1985)).

Of particular importance, "a real estate agent bears a duty to make a full, fair, and timely disclosure to the principal of all facts within the agent's knowledge which are, or may be, material to the transaction and which might affect the principal's rights and interests or influence his actions." Id. (citing Mersky v. Multiple Listing Bureau of Olympia, 437 P.2d 897, 899 (Wash. 1968); Sierra Pac. Indus., 163 Cal. Rptr. 764, 766 (Cal. Ct. App. 1980)). Furthermore, "[u]nless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs

entrusted to him and which, as the agent has notice, the principal would desire to have[.]” Id. (quoting Restatement (Second) of Agency § 381, at 182 (1958)). In granting TPDs’ motion, the court assumed “that there [was] a genuine issue of material fact as to whether there was a breach[.]” TPDs do not dispute that they owed a fiduciary duty to Defendants, and do not argue that they did not breach such a duty.

XIX.

In general, “[a]n agent’s breach of fiduciary duty may create several distinct bases on which the principal may recover monetary relief or receive another remedy.” Restatement (Third) of Agency § 8.01 cmt. d (2006). Damages is an essential element in a claim for breach of fiduciary duty. See, e.g., Shands v. Tex. State Bank, 121 S.W.3d 75, 77 (Tex. App. 2003) (concluding that the trial court’s award of summary judgment to the defendant bank on a claim for breach of fiduciary duty was proper “because there was no evidence that the [defendant’s] alleged improper conduct resulted in legally compensable damages to [the plaintiff]”); R.M. Newell Co., Inc. v. Rice, 236 A.D.2d 843, 844 (N.Y. App. Div. 1997) (concluding that the defendants “were properly granted summary judgment” because “[a]s a matter of law, [the] plaintiff did not sustain damages, an essential element of its causes of action against [the] defendants” for breach of fiduciary duty (citations omitted)).

In its motion for summary judgment, TPDs argued "there [was] no evidence of damages to support a claim for breach of fiduciary duty." Specifically, TPDs' contended that "the Chans are unable to show actual damages but only speculative damages, such as benefits that would have redounded to their advantage IF Starbucks, Big City Diner, or Tony Roma's had purchased the remainder of the Chans' lease or IF landlord were willing to waive the twin defaults and continue the Chans' lease notwithstanding the prospects of having a national company such as Starbucks as a new tenant." (Capitalization in original.) According to TPDs, "[t]he Chans have no evidence to raise a genuine issue of material fact that either contingency would occur. All of the evidence instead points to a conspicuous absence of damages." (Emphasis in original.)

XX.

This court has stated that "a distinction is made in the law between the amount of proof required to establish the fact that the injured party has sustained some damage and the measure of proof necessary to enable the jury to determine the amount of damage." Ferreira v. Honolulu Star-Bulletin, Ltd., 44 Haw. 567, 575, 356 P.2d 651, 656 (1960). Further, "[i]t is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount." Id. (citations omitted). But "the rule that uncertainty as to the amount does not necessarily prevent recovery is not to be

interpreted as requiring no proof of the amount of damage." Id. at 575-76, 356 P.2d at 656 (citations omitted). In that connection, "[t]he extent of plaintiff's loss must be shown with reasonable certainty and that excludes any showing or conclusion founded upon mere speculation or guess." Id. at 576, 356 P.2d at 656 (emphasis added). And as stated previously, "[t]he court must construe the evidence in the light most favorable to the non-moving party." French, 105 Hawai'i at 471, 99 P.3d at 1055 (citing Wong-Leong v. Haw'n Indep. Refinery, Inc., 76 Hawai'i 433, 439, 879 P.2d 538, 544 (1994)).

XXI.

As to damages, Defendants first argue that they are entitled to compensatory damages. "Compensatory damages seek to compensate the injured party for the injury sustained, in hopes of restoring a plaintiff to his or her position prior to the tortious act[.]" Bynum v. Magno, 106 Hawai'i 81, 85, 101 P.3d 1149, 1153 (2004) (internal quotation marks, brackets and citations omitted).

A.

Defendants argue that because of Kobayashi's breach, they are entitled to at least "the difference between the rent under the Second Amendment and the original Lease." In response, TPDs argue that Defendants raise this argument for the first time on appeal and, thus, that argument should be waived.

However, in their memorandum in opposition to TPDs' motion for summary judgment, Defendants argued that "the damages arising out of Kobayashi's breach include, among other things as set forth later, the amounts which the [c]ourt may find [the] Chans owe Kam Center." Defendants continued that they "sustained the above-noted damages due to Kobayashi's failure to inform Kam Center of [the] Chans' signed Second Amendment." Thus, Defendants' argument that because of Kobayashi's breach, they are entitled to at least "the difference between the rent under the Second Amendment and the original Lease" is not waived. Viewed in a light most favorable to Defendants, "the difference between the rent under the Second Amendment and the original Lease" can be determined with reasonable certainty and, thus, there is a genuine issue of material fact as to whether Defendants sustained damages as a result of TPDs' alleged breach of fiduciary duty.

B.

1.

Defendants also submitted that they are entitled to "the lost profits [the] Chans suffered by their inability to open Sam Woo."¹⁶ Defendants contended that "Sam Woo's new concept, lower menu prices and drive through service would have been profitable and would have made approximately \$300,000-\$350,000

¹⁶ It should be noted that in its memorandum in opposition to TPDs' summary judgment motion, Defendants argued that they also sustained "damages result[ing] from Kobayashi's failure to inform Chans of Kam Center's demands." However, because Defendants do not raise that argument on appeal, we need not address it.

over the term of the Lease, including the option period, after repayment of the back rent due to Kam Center, which are based on Linda's restaurant experience." Defendants apparently inadvertently omitted a one-page spreadsheet calculating lost profits as an exhibit to their motion in opposition to TPDs' motion for summary judgment. Instead, Defendants relied upon Linda's declaration, which was attached to their motion in opposition. Linda's declaration states in pertinent part:

29. In 2002, the Kaneohe restaurant had made a net profit of \$32,000, and I was confident that it would do better under the new Sam Woo BBQ Restaurant concept I planned. As my husband and I first started the Easter Garden Chinese Seafood Restaurant concept in 1992 and the Kaneohe restaurant was the fourth we had opened, I have enough experience in the business to know that my new concept would have done well. However, as a business decision, I was willing to sell the Lease at an acceptable price.

(Emphasis added.) TPDs contend that "[t]he alleged evidentiary foundation for [Defendants'] argument that a \$32,000 profit in 2002 meant that they 'would have made at least that amount each year had the Lease not been terminated' is not shown."

2.

In Chung v. Kaonohi Ctr. Co., 62 Haw. 594, 606, 618 P.2d 283, 291 (1980), this court held that "where a plaintiff can show future profits in a new or unestablished business with reasonable certainty, damages for loss of such profits may be awarded." (Emphasis added.) In adopting this rule, the Chung court "reject[ed] the harsh rule [of several jurisdictions] which forecloses recovery merely because a business is new or unestablished." Id. This court concluded that "it would be

grossly unfair to deny a plaintiff meaningful recovery for lack of a sufficient 'track record' where the plaintiff has been prevented from establishing such a record by defendant's actions." Id.

Chung instructs that "the evidence necessary to show future profits with reasonable certainty depends on the circumstances of each individual case." Id. The Chung court stated that "[w]hile absolute certainty is not required, the court or jury must be guided by some rationale [sic] standard in making an award for loss of future profits." Id. (citations omitted) (emphasis added). In this case, the evidence of future profits that Defendants submitted is the Chans' experience in the restaurant business and the history of their Eastern Garden Restaurants.

Under the circumstances of this case, Linda's assertion in her declaration that "[i]n 2002, the Kaneohe restaurant had made a net profit of \$32,000, and I was confident that it would do better under the new Sam Woo BBQ Restaurant concept I planned" (emphasis added), does not provide a reasonably certain basis upon which to show future profits. Cf. id. at 606-07, 611, 618 P.2d at 291-92, 294 (concluding that "the jury had sufficient data from which to make a rational judgment as to the loss of future profits and on which to base its award" because the key witness on anticipated profits, a real estate and business appraiser, "valued the proposed Chinese kitchen using three

different valuation approaches—a reproduction cost analysis, a comparative market analysis, and an income stream analysis” and “[i]n reaching a final valuation figure, [the witness] relied primarily on his income stream analysis, but included both the reproduction cost analysis and comparative market analysis as a check on that figure” (footnotes omitted); Ferreira, 44 Haw. at 572, 576, 356 P.2d at 654-55, 656 (concluding that the “plaintiff’s evidence failed to present any measure by which the jury could reasonably fix the amount of damages” where the plaintiff “relied wholly upon his own testimony and exhibits in his efforts to establish damages” but that plaintiff’s “testimony fail[ed] to show any statement, direct or indirect, as to the precise or even approximate loss sustained by him in terms of dollars and cents.” The plaintiff essentially “testified that from long experience in the theatrical business, he was cognizant of the beneficial effect of newspaper advertising upon the operation of his business” but “[n]o figures or data were produced to enable the jury to make any reasonable mathematical computation of the loss allegedly incurred by him as a result of defendant’s failure to advertise.”). Thus, similar to Ferreira, the court’s award of summary judgment in favor of TPDs as to Defendants’ claim for lost profits was proper.

XXII.

Defendants also assert that “Kobayashi’s breach of fiduciary duties and deception is so egregious that, at the very

least, a reasonable person could conclude that the evidence supported an award of punitive damages."¹⁷ To reiterate, the court stated that it granted TPDs' partial motion for summary judgment on Defendants' punitive damages claim because there were no claims remaining after the court granted TPDs' motion for summary judgment on all other claims alleged in the Third-Party Complaint.

On appeal, TPDs argue that Defendants failed to raise their punitive damages argument before the court and, thus, are precluded from raising it on appeal. According to TPDs, had "the Chans raised the argument to the [court], the [court] could and should have proceeded to the merits of the motion on punitive

¹⁷ An award of punitive damages reflects the dual purposes of "punishing the defendant for aggravated misconduct and deterring the defendant and others from engaging in like conduct in the future." Masaki v. Gen. Motors Corp., 71 Haw. 1, 12, 780 P.2d 566, 573 (1989). In that regard,

"something more" than mere commission of a tort is required to justify the imposition of punitive damages, as we have repeatedly emphasized that "[p]unitive damages may be awarded only in cases where the wrongdoer 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.'"

Id. at 12-13, 780 P.2d at 573 (quoting Kang v. Harrington, 59 Haw. 652, 660-61, 587 P.2d 285, 291 (1978).) (brackets in original).

Defendants argue that "[d]espite the fiduciary duties imposed by law on real estate brokers and agents, Kobayashi continually and consistently ignored these duties and acted in his own interests to the extreme detriment of his clients." According to Defendants, "[t]he evidence showed that Kobayashi actually deceived [the] Chans by withholding the LOI and Counteroffer and leading them to believe that Starbucks was interested in their Lease." Defendants further state that "[s]uch misconduct is even more egregious in light of the fact that, as [the] Chans' real estate broker, [the] Chans sought assistance from Kobayashi and placed a great level of trust in him and his efforts."

damages" instead of granting TPDs' motion for partial summary judgment on punitive damages. However, as pointed out by Defendants in their reply brief, Defendants made nearly the identical argument in their memorandum in opposition to TPDs' motion for summary judgment and motion for partial summary judgment on punitive damages.

Furthermore, TPDs filed a motion for summary judgment "on the punitive damages claim of the Third-Party Complaint, on the grounds that there is no genuine issue of material fact that [Defendants] cannot show by clear and convincing evidence that [TPDs] acted with the threshold level of malice or willful and wanton conduct necessary to support such a claim." Thus, contrary to TPDs' contention, Defendants' argument relating to punitive damages is not raised for the first time on appeal.

Except for the issue of waiver, TPDs in their answering brief do not argue that Defendants are not entitled to punitive damages. At this point, inasmuch as the court improperly granted summary judgment on Defendants' breach of fiduciary duty claim, the court was wrong in granting summary judgment on the related punitive damages claim.

XXIII.

Defendants also asserted that under Lee v. Aiu, 85 Hawai'i at 33, 936 P.2d at 669, as a result of TPDs' alleged breach of fiduciary duty, they sustained damages in the form of attorney's fees. As a general rule, attorney' fees "cannot be

awarded as damages or costs unless so provided by statute, stipulation or agreement." Uyemura v. Wick, 57 Haw. 102, 108, 551 P.2d 171, 176 (1976) (citing Salvador v. Popaa, 56 Haw. 111, 530 P.2d 7 (1974); Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 72, 487 P.2d 769, 771 (1971)).

However, Lee recognized the exception to this general rule that was established in Uyemura. Lee v. Aiu, 85 Hawai'i at 32-33, 936 P.2d at 668-69. This exception provides that "where the wrongful act of a defendant causes a plaintiff to engage in litigation with a third party in order to protect his or her rights or interests, attorney's fees incurred in litigating with that third party may be chargeable against the wrongdoer as an element of the plaintiff's damages." Id. at 33, 936 P.2d at 669 (citing Uyemura, 57 Haw. at 110, 551 P.2d at 176) (footnote omitted). This court has said that

[i]n order to recover attorneys' fees under this principle, the plaintiff must establish: (1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant, or because of defendant's tortious conduct, that is, that the party sought to be charged with the fees was guilty of a wrongful or negligent act or breach of agreement; (2) that the litigation was with a third party, not with the defendant from whom the fees are sought to be recovered; (3) that the attorneys' fees were incurred in that third-party litigation; and (4) whether the fees and expenses were incurred as a result of defendant's breach of contract or tort, that they are the natural and necessary consequences of the defendant's act, since remote, uncertain, and contingent consequences do not afford a basis for recovery[.]

Id. (quoting Uyemura, 57 Haw. at 109, 551 P.2d at 176 (citations omitted)) (emphases added) (brackets in original).

In its memorandum in opposition to TPDs' summary judgment motion, Defendants contended that under Lee v. Aiu, "Kobayashi is liable for [the] Chans' attorneys fees because his misconduct and breach of fiduciary duties resulted in [the] Chans' present dispute with Kam Center." Defendants further argued that "had Kobayashi kept both [the] Chans and Kam Center informed, [the] Chans[' Lease] would not have been terminated and thus, would have never been involved in this lawsuit."

In its memorandum in reply, TPDs contended that "attorney's fees will not fulfill the damages element for breach of fiduciary duty" because Defendants' "involvement in litigation with [Kam Center] does not meet" the fourth element, "whether the fees and expenses were incurred as a result of defendant's breach of contract or tort, that they are the natural and necessary consequences of the defendant's act, since remote, uncertain, and contingent consequences do not afford a basis for recovery," id. at 33, 936 P.2d at 669 (quoting Uyemura, 57 Haw. at 109, 551 P.2d at 176 (citations omitted)).

According to TPDs, "[n]ot only did the Chans' non-payment of rent trigger [Kam Center's] Complaint, but the length and complication of the litigation was also of the Chans' own making, i.e. the assertion of the Counterclaim on which summary judgment was recently granted against the Chans." TPDs do not address the other elements of Lee in their memorandum in opposition.

Kam Center's Complaint filed against Defendants was for "unpaid rent and other charges due under the Lease." However, based on the facts recounted supra, there is a genuine issue of material fact as to whether Kam Center terminated the Lease and filed the Complaint against Defendants because of TPDs' alleged breach of fiduciary duty. Therefore, a genuine issue of material fact remains as to whether Defendants are entitled to attorney's fees under Lee.

XXIV.

With respect to the final element of Defendants' breach of fiduciary duty claim, as noted previously, the court determined there was "nothing in the record to suggest . . . legal causation as to breach of fiduciary duty." In a claim for breach of fiduciary duty, "the plaintiff must [also] demonstrate that the defendant's conduct proximately caused injury in order to establish liability." LNC Inves., Inc. v. First Fid. Bank, N.A., 173 F.3d 454, 465 (2d Cir. 1999) (citing R.M. Newell Co., Inc. v. Rice, 653 N.Y.S.2d 1004, 1005 (N.Y. App. Div. 1997) (affirming grant of summary judgment against plaintiff because "as a matter of law, any damages sustained by plaintiff were not proximately caused by wrongful conduct on the part of defendants, an essential element of plaintiff's causes of action against defendants[]")).

In its motion for summary judgment, TPDs asserted that "[a]ny alleged damages with respect to [Defendants'] Lease with

[Kam Center] would have occurred regardless of any conduct by [TPDs] and, as a matter of law, a breach of fiduciary duty, if any, was not a cause of their alleged damages." (Emphasis in original.) TPDs further contended that "any loss sustained as a result of Starbucks' and [Kam Center's] new lease would have occurred regardless of any alleged breach of fiduciary duty." According to TPDs, Kam Center "had every right to re-lease the premises and, had [Kam Center] not done so, the Chans would still be personal guarantors of the ongoing Lease obligations."

However, there is a genuine issue of material fact as to whether TPDs' alleged breach of fiduciary duty in withholding the signed Second Amendment from Kam Center caused Kam Center not to agree to and execute the Second Amendment. As Defendants argued in opposition to TPDs' summary judgment motion, Defendants sustained damages "due to Kobayashi's failure to inform Kam Center of [the] Chans' signed Second Amendment":

Had Kobayashi delivered to Kam Center [the] Chans' signed Second Amendment when he received it in May 2003, Kam Center would have known of [the] Chans' decision to go forward with their earlier plan to renovate and reopen. This concealment by Kobayashi was deliberate, as providing Kam Center with such information would have caused Kam Center not to terminate [the] Chans' Lease, and avoided the subsequent negotiations with Starbucks, thereby avoiding Kobayashi's prospects for a commission. As such, Kobayashi's failure to provide Kam Center with [the] Chans' signed Second Amendment back in May of 2003 caused Kam Center to pursue other alternatives, namely the Starbucks transaction which provided for the termination of [the] Chans' Lease, which has now resulted in [the] Chans' lost profits and their present exposure to Kam Center.

(Emphasis added.)

As noted earlier, there is also a genuine issue of material fact as to whether TPDs' alleged breach of fiduciary

duty caused Defendants to incur attorney's fees in litigating with Kam Center following the termination of the Lease. Viewed in a light most favorable to Defendants, there is a genuine issue of material fact as to whether TPDs caused the damages alleged by Defendants. Accordingly, the court's award of summary judgment with respect to Defendants' breach of fiduciary duty claim was error as a matter of law.

XXV.

Finally, as to Defendants' Motion for Leave to File Second Amended Third-Party Complaint, Defendants argue that the court "abused its discretion in denying [the] Chans' motion to raise a claim for fraud against Kobayashi." To reiterate, on May 5, 2005, Defendants filed their Motion for Leave to File Second Amended Third-Party Complaint to raise, inter alia, a claim of fraud against TPDs "in light of new evidence that ha[d] recently come to [the] Chans' attention." On May 31, 2005, the court denied Defendants' motion.

TPDs assert that "a new fraud allegation would have been futile as stated in the proposed amendment for failure to allege the fraud with particularity." HRCP Rule 9(b) (2003) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." In that connection, "[t]he rule is designed, in part, to insure the particularized

information necessary for a defendant to prepare an effective defense to a claim which embraces a wide variety of potential conduct." Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 30, 837 P.2d 1273, 1288 (1992) (citing 5 Wright & Miller, Federal Practice and Procedure § 1296 at 580 (1990)). This court has said that "under [HRCF] Rule 9(b) general allegations of 'fraud' are insufficient because they serve little or no informative function; rather, a plaintiff must state the circumstances constituting fraud or mistake with particularity (e.g., allege who made the false representations) and specify the representations made." Id. at 30-31, 837 P.2d at 1288 (citing Ellis v. Crockett, 51 Haw. 45, 59, 451 P.2d 814, 823 (1969) (internal citations omitted)).

Defendants' proposed amendment stated:

COUNT IV

24. For their fourth claim of relief, [Defendants] reallege and by this reference expressly incorporate herein the allegations contained in Paragraphs 1 through 23, above.

25. Despite [Kobayashi's] obligations and representations to [Defendants], [Kobayashi] failed to act on behalf of [Defendants] and/or acted on behalf of another entity or individual in the transaction with a new investor for the subject premises.

26. The acts or omissions of [Kobayashi] complained of above constitutes fraud.

27. [Defendants] were injured as a result of the above and are entitled to punitive damages.

(Emphases added.) Plainly, Defendants' allegations with respect to the fraud allegation did not "state the circumstances constituting fraud . . . and specify the representations made." Id. (citations omitted). Thus, Defendants' fraud allegations

were insufficient. Id. Hence, the court did not abuse its discretion in denying Defendants' motion to amend.¹⁸

XXVI.

Accordingly, in light of the foregoing, the following are affirmed: (1) the denial of Defendant's Motion for Leave to File Second Amended Third-Party Complaint to raise a claim for fraud against TPDs; (2) the award of summary judgment in favor of Kam Center as to Kam Center's Complaint; (3) the award of summary judgment in favor of Kam Center as to Defendants' Counterclaim for tortious interference with the existing contract between Defendants and TPDs; (4) the award of summary judgment in favor of Kam Center as to interference with a prospective contractual relationship with Starbucks; (5) the award of summary judgment in favor of Kam Center as to Defendants' Counterclaim for negligence; (6) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for unfair and deceptive practices under HRS § 480-2; and (7) the award of summary judgment in favor of TPDs' as to Defendants' Third-Party Complaint claim for tortious interference with prospective business advantage.

The following is reversed: the court's order denying Defendants' Motion for Leave to File Second Amended Answer and Counterclaim and First Amended Third Party Complaint with respect

¹⁸ Accordingly, we need not reach TPDs remaining contention that "a motion to amend filed while a dispositive motion is pending falls within 'undue delay, bad faith or dilatory motive on the part of the movant,' warranting denial."

to Defendant's HRS § 480-2 unfair competition claims against Kam Center and TPDs.

The following are vacated and remanded: (1) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for breach of fiduciary duty; and (2) the award of summary judgment in favor of TPDs as to Defendants' Third-Party Complaint claim for punitive damages.

DATED: Honolulu, Hawai'i, September 27, 2007.

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