

COUNCIL OF THE COUNTY OF MAUI
GOVERNANCE, ETHICS, AND
TRANSPARENCY COMMITTEE

October 4, 2019

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Governance, Ethics, and Transparency Committee, having met on August 6, 2019, and September 17, 2019, makes reference to the following:

1. County Communication 19-107, from Councilmember Michael J. Molina, relating to the United States Federal Reserve System's order requiring Bank of America ("BoA") to provide mortgages on Hawaiian Home Lands.
2. County Communication 19-108, from Presiding Officer Pro Tempore Tasha Kama, relating to BoA's \$150,000,000 loan commitment for native Hawaiians on Hawaiian Home Lands.
3. County Communication 19-337, from Presiding Officer Pro Tempore Tasha Kama, transmitting a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO INVESTIGATE AND LITIGATE ACTIONABLE CLAIMS AGAINST BANK OF AMERICA AND THE BANKING AND MORTGAGE INDUSTRY."

The purpose of the proposed resolution is to authorize the employment of special counsel to investigate and litigate actionable claims against BoA and the banking and mortgage industry.

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4. County Communication 19-338, from Council Chair Kelly T. King, attaching copies of County Communication 19-107 from Councilmember Michael J. Molina, and County Communication 19-108 from Presiding Officer Pro Tempore Tasha Kama, relating to the matter.

By correspondence dated June 28, 2019, Council Chair Kelly T. King transmitted a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO PURSUE SANCTIONS AND OTHER REMEDIES FOR FRAUDULENT FORECLOSURES." The purpose of the proposed resolution is to authorize the employment of special counsel to pursue sanctions and other remedies for fraudulent foreclosures.

At the request of the Chair of your Committee, the Department of the Corporation Counsel transmitted a revised proposed resolution, entitled "ENCOURAGING THE STATE ATTORNEY GENERAL TO EMPLOY OUTSIDE COUNSEL TO PURSUE LEGAL REMEDIES FOR FRAUDULENT BANKING ACTIVITY," approved as to form and legality. The purpose of the revised proposed resolution is to encourage State Attorney General Clare E. Connors to employ outside counsel to pursue legal remedies for fraudulent banking activity.

Your Committee notes the following timeline of events in this matter:

- Na Po`e Kokua and the Hawaii Fair Lending Coalition accused BoA of discriminatory lending practices in the form of redlining, the practice of denying services to residents of certain areas based on racial or ethnic composition of those areas, by not providing mortgages on Hawaiian Home Lands.
- In 1994, as a condition of BoA's acquisition of Liberty Bank, the Federal Reserve System ordered BoA to make \$150,000,000 in FHA-247 mortgages available on Hawaiian Home Lands by 1998.

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- BoA provided only \$3,109,502 in mortgages by 1998, but recommitted to meeting the \$150,000,000 settlement by agreeing to pay a \$400,500,000 late fee based on the opportunity cost of its failure to fulfill its required commitment.
- In 2012, the Hawaiian Homes Commission confirmed that the BoA commitment remained unfulfilled.
- In 2018, Governor Ige, showing a commitment to resolve this long-standing issue, invited BoA representative Catherine P. Bessant to meet with representatives from Na Po'e Kokua and the Hawaii Fair Lending Coalition to reach a fair and final settlement.
- Twenty-five years later, preliminary estimates of BoA's late fees are nearly \$400,000,000 based upon data from the United States Department of Housing and Urban Development, lost opportunities for building equity and reaping the benefits of a booming housing market, and paying affordable mortgages rather than skyrocketing rents over the last 20 years for 890 native Hawaiian families, who should have received BoA mortgages by 1998.

Your Committee notes the Council adopted Resolution 18-178, entitled "SUPPORTING THE GOVERNOR'S EFFORTS TO INTERVENE BETWEEN NA PO'E KOKUA, THE HAWAII FAIR LENDING COALITION, AND THE BANK OF AMERICA TO REACH A SETTLEMENT AGREEMENT RELATING TO A \$150 MILLION LOAN COMMITMENT FOR NATIVE HAWAIIANS ON HAWAIIAN HOME LANDS," on November 2, 2018.

Your Committee further notes the Honolulu City Council, Hawaii County Council, and Hawaii State Legislature have adopted similar resolutions supporting actions to promote justice in this matter.

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Your Committee notes the State Attorney General, in an AP News article dated September 3, 2019, stated that “there have been no changes in our position – that there are no legal bases for the state to pursue BoA on its past pronouncements regarding loans to native Hawaiians.”

Your Committee met with representatives from Na Po`e Kokua, the State Department of Hawaiian Home Lands, and an attorney from Starn O’Toole Marcus & Fisher, representing BoA, to hear different sides of the issue. A representative from the Department of the Attorney General declined your Committee’s invitation to attend, citing Section 26-7, Hawaii Revised Statutes, which provides that “the Department may only administer and render legal services, including providing advice and counsel, to the ‘governor, legislature, and such state departments and officers as the governor may direct’.”

Your Committee agreed the employment of special counsel for this matter was warranted.

Your Committee notes the total compensation for the investigation shall not exceed \$25,000. Your Committee further notes within 30 days of the contract date, the special counsel will submit its confidential report to the Governance, Ethics, and Transparency Committee with an analysis of the County’s actionable claims.

Your Committee discussed amending the proposed resolution attached to County Communication 19-337, authorizing Maui County to employ special counsel to investigate this matter. Your Committee discussed the possibility of litigation once results of the investigation are received.

Your Committee further discussed a reference of discrimination towards Filipinos, in addition to native Hawaiians, consistent with language on page 628 of the Federal Reserve Bulletin, July 1994, be added to the second Whereas paragraph of the proposed resolution.

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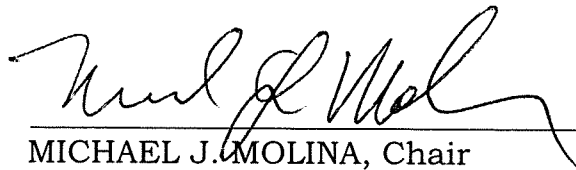
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Your Committee voted 9-0 to recommend adoption of the revised proposed resolution to authorize Maui County to employ special counsel to investigate this matter. Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and members Hokama, Kama, King, Lee, Paltin, Sinenci, and Sugimura voted "aye."

Your Committee is in receipt of a revised proposed resolution, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO INVESTIGATE ACTIONABLE CLAIMS AGAINST BANK OF AMERICA AND THE BANKING AND MORTGAGE INDUSTRY," approved as to form and legality by the Department of the Corporation Counsel, incorporating your Committee's recommended revisions and nonsubstantive revisions.

Your Governance, Ethics, and Transparency Committee RECOMMENDS that Resolution _____, as revised herein and attached hereto, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO INVESTIGATE ACTIONABLE CLAIMS AGAINST BANK OF AMERICA AND THE BANKING AND MORTGAGE INDUSTRY," be ADOPTED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



MICHAEL J. MOLINA, Chair

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO INVESTIGATE ACTIONABLE CLAIMS AGAINST BANK OF AMERICA AND THE BANKING AND MORTGAGE INDUSTRY

WHEREAS, wrongful foreclosure and other bad acts or failures to act committed by the banking and mortgage industry exacerbate Maui County's affordable housing crisis, negatively impact Maui County's economy, and have resulted in decreased real property tax revenue and increased County expenditures related to housing and social services throughout Maui County; and

WHEREAS, the above-described actions or failures to act include the Bank of America's failure to fulfill loan commitments to native Hawaiians, Filipinos, and others, as described on page 626 of the Federal Reserve Bulletin, July 1994, attached as Exhibit "A"; and

WHEREAS, the Council would like to retain special counsel with relevant expertise and experience to investigate actionable claims related to actions or failures to act by the banking and mortgage industry that have harmed and continue to harm the County's interests; and

WHEREAS, the Council alone is authorized to retain or employ special counsel by resolution adopted by a two-thirds vote; and

WHEREAS the Council finds there is a real necessity to retain special counsel to investigate actionable claims against Bank of America and other banking and mortgage industry participants; and

WHEREAS, the Council recognizes the procurement of contracts on the County's behalf, including for special counsel, is usually a function of the executive branch; and

WHEREAS, because the County's proposed legal action on wrongful banking and mortgage industry activity is a Council-initiated action, it is appropriate for the Council Chair, as the legislative branch's chief procurement officer, to execute the contract with special counsel; now, therefore,

Resolution No. _____

BE IT RESOLVED by the Council of the County of Maui:

1. That the Council authorizes the employment of special counsel to represent the County to investigate actionable claims for wrongful foreclosure and other bad acts or failures to act committed by the banking and mortgage industry; and
2. That the total compensation for the investigation shall not exceed \$25,000. Within 30 days of the date of the contract, the special counsel will submit its confidential report to the Council's Governance, Ethics, and Transparency Committee with an analysis of the County's actionable claims; and
3. That compensable costs include fees for printing and witnesses; fees for copies necessarily obtained for use in the case; fees of the clerk and marshall; fees of the court reporter for necessary transcripts; docket fees; compensation of court-appointed experts and interpreters; and pre-approved travel; and
4. That non-compensable costs include telephone calls; facsimile charges; postal charges; messenger charges; fees for computerized legal research; investigative expenses; and other costs reasonably considered part of a law firm's overhead; and
5. That the expenditures of additional funds or substantial changes to the responsibilities of the special counsel require prior Council approval; and
6. That the Council must adopt a resolution expressly authorizing the filing of a complaint, motion, or other legal papers in court prior to a special counsel submitting documents on the County's behalf with any State or Federal court or agency; and
7. That certified copies of this resolution be transmitted to the Council Chair, the Mayor, the Corporation Counsel, the Director of Council Services, and the Director of Finance.

Resolution No. _____

APPROVED AS TO FORM AND LEGALITY

A handwritten signature in black ink, appearing to read 'RDM', is written above a horizontal line.

Department of the Corporation Counsel
County of Maui

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the safe and sound operation of such institutions. To accomplish this end, the CRA requires the appropriate federal supervisory authority to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution," and to take that record into account in its evaluation of this application.¹⁵

The Board has received comments from the Hawaii Protestants and an individual in California ("California Protestant") (the California Protestant and the Hawaii Protestants to be referred to collectively as "Protestants") critical of the efforts of BankAmerica, its subsidiary banks, and Liberty to meet the credit and banking needs of their communities. The Hawaii Protestants allege that Bank of America FSB has not generally met the convenience and needs of minority and low- and moderate-income individuals, and in particular, illegally discriminates in its efforts to meet the credit needs of native Hawaiians and Filipinos residing in its banking communities.¹⁶ The California Protestant alleges generally that Bank of America National Trust and Savings Association ("Bank of America - California"), BankAmerica's subsidiary bank operating in California, has not met the banking and credit needs of minorities, and in particular, Hispanics, and low- and moderate-income individuals in five counties in California.

In its consideration of the convenience and needs factor, the Board has carefully reviewed the entire record of CRA performance of BankAmerica, its subsidiary banks, and Liberty; all comments received on this application, and BankAmerica's response to those comments; and all the other relevant facts of record, in light of the CRA, the Board's regulations, and the Statement of the Federal Financial Supervisory Agencies Regarding the Community Reinvestment Act ("Agency CRA Statement").¹⁷

The Board also has evaluated the CRA performance record of Bank of America FSB, taking into consideration the fact that BankAmerica did not commence its activities in Hawaii until August 1992, and that the bank's overall volume of lending decreased in 1993 due, in part, to BankAmerica's reorganization of HonFed's operations and loan programs.

15. 12 U.S.C. § 2903.

16. The Hawaii Protestants maintain that data required to be filed by Bank of America FSB under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) ("HMDA") indicate that the bank's lending policies result in discriminatory treatment of individuals of Hawaiian and Filipino ancestry, and that the outreach efforts of both Bank of America FSB and Liberty are targeted primarily to nonminorities.

17. 54 *Federal Register* 13,742 (1989).

Record of CRA Performance

A. CRA Performance Examinations

The Agency CRA Statement provides that a CRA examination is an important and often controlling factor in the consideration of an institution's CRA record, and that these reports will be given great weight in the applications process.¹⁸ In this case, the Board notes that all of BankAmerica's subsidiary banks evaluated for CRA performance received "outstanding" or "satisfactory" ratings from their primary regulators during their most recent examinations. Bank of America FSB received a "satisfactory" rating from its primary federal regulator, the OTS, at its most recent examination for CRA performance as of September 7, 1993, and Bank of America — California received an "outstanding" rating from its primary federal regulator, the Office of the Comptroller of the Currency (the "OCC"), at its most recent examination for CRA performance as of January 28, 1994. Liberty received a "satisfactory" rating from its primary federal regulator, the FDIC, at its most recent examination for CRA performance as of May 27, 1992.

B. CRA Record of Performance of Bank of America FSB

HMDA Data. The Hawaii Protestants allege that 1992 HMDA data filed by Bank of America FSB indicate that the bank's lending policies resulted in discriminatory treatment of individuals of Hawaiian and Filipino ancestry.¹⁹ The Board has carefully reviewed these comments and the 1992 data in light of the preliminary 1993 HMDA data for the bank which represents the first full year of data accumulated under BankAmerica's ownership of the former HonFed. These data indicate that the volume of loan applications received from individuals within the Asian/Pacific Islander group²⁰ was proportional to that group's representation in the community, and that denial rates for that group were lower than denial rates for white applicants.²¹

18. *Id.* at 13,745.

19. The Hawaii Protestants also allege that Bank of America FSB has "redlined" the islands of Molokai and Lanai, which have large populations of Filipinos and native Hawaiians, by excluding them from the bank's delineated lending area. The OTS reviewed these exclusions in its most recent examination and determined that they were reasonable, noting that the primary owner of land on Lanai is converting the land to an affluent resort area, and that Molokai has a limited population to sustain a market presence.

20. Under the HMDA, separate reporting of loans made to native Hawaiians or Filipinos is not required, because these ethnic groups are included in the category of Asian/Pacific Islander for reporting purposes.

21. In 1993, the bank received 62 percent of HMDA-related loan applications from Asian/Pacific Islanders (60 percent of the population), with 65 percent of the banks' HMDA-related loans originated to