

June 28, 2019

MEMO TO: GET-10 File

F R O M: Kelly T. King
Council Chair

Kelly King

2019 JUN 28 AM 11:23
OFFICE OF THE
COUNTY COUNCIL

RECEIVED

SUBJECT: **TRANSMITTAL OF LEGISLATIVE PROPOSAL RELATING TO
SPECIAL COUNSEL FOR FRAUDULENT FORECLOSURES** (GET-10)

The attached legislative proposal pertains to Item 10 on your Committee's agenda.

chr:ltr:190628b

Attachment

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO PURSUE SANCTIONS AND OTHER REMEDIES FOR FRAUDULENT FORECLOSURES

WHEREAS, banks bringing foreclosure actions against homeowners even when they cannot prove their legal possession of the underlying notes and mortgages has been recognized as fraudulent in Hawai'i and elsewhere; and

WHEREAS, in the case of Bank of America, N.A. v. Reyes-Toledo, 139 Hawaii 361 (2017), the Supreme Court of Hawai'i recognized and discussed the problems associated with modern mortgage securitization practices, including fraudulent foreclosures; and

WHEREAS, the problems with fraudulent foreclosures have also been documented in books such as "The Big Short: Inside the Doomsday Machine" (2010) by Michael Lewis and "Chain of Title: How Three Ordinary Americans Uncovered Wall Street's Great Foreclosure Fraud" (2017) by David Dayen; and

WHEREAS, in a later stage of the same case, Bank of America, N.A. v. Reyes-Toledo, 143 Hawaii 249 (2018), the Supreme Court of Hawai'i held that "a mortgagor may bring a wrongful foreclosure claim before a foreclosure decree is entered"; and

WHEREAS, as a result of the Reyes-Toledo opinions, homeowners throughout Hawai'i now have greater legal protection against fraudulent foreclosures; and

WHEREAS, nonetheless, justice has not yet been achieved in Maui County; and

WHEREAS, because of its interest in real property taxation, Maui County is a party to many foreclosure actions; and

WHEREAS, fraudulent foreclosure actions have exacerbated Maui County's affordable-housing crisis, negatively impacted Maui County's

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economy, and resulted in a greater need for social services throughout Maui County; and

WHEREAS, Maui County, therefore, has legal interests and an ability to pursue legal action to impose sanctions or other judicial remedies against entities engaged in fraudulent foreclosures and similar illegal activity; and

WHEREAS, the legal action can occur in existing cases in which Maui County is a party, existing cases in which Maui County intervenes, and in new cases brought by Maui County; and

WHEREAS, State courts have broad and inherent power to impose monetary sanctions and other remedies against parties who engage in fraud or other misconduct in litigation, under Section 603-21.9 of Hawaii Revised Statutes, the common law, and other authority; and

WHEREAS, in addition, Bank of America has an “outstanding \$150 million commitment to the Hawaiian people on their homelands,” according to Governor David Ige’s correspondence, dated April 18, 2018, to Catherine P. Bessant, Chief Operations and Technology Officer, Bank of America, a copy of which is attached as Exhibit “A”; and

WHEREAS, on November 2, 2018, the Council adopted Resolution 18-178, entitled “SUPPORTING THE GOVERNOR’S EFFORTS TO INTERVENE BETWEEN NA POE 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,” a copy of which is attached as Exhibit “B”; and

WHEREAS, the retention of special counsel with successful experience in foreclosure defense and in persuading courts to impose monetary sanctions for fraudulent foreclosure or similar misconduct would be beneficial to Maui County and its residents; and

WHEREAS, the special counsel would represent Maui County and seek to obtain money to be partly allocated to the Affordable Housing Fund and partly allocated to the Hawaiian people who are owed money by Bank of America, under the terms of a retention agreement; and

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WHEREAS, the Council has reviewed the similar initiative of the City of Miami, Florida, which has an outside attorney, as documented in Resolution 6021, a copy of which is attached as Exhibit "C"; and

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

WHEREAS the Council finds that there is a real necessity to retain special counsel to represent Maui County in cases relating to fraudulent foreclosure or related misconduct because of the complexity of litigation issues; and

WHEREAS, the special counsel and the Department of the Corporation Counsel will work as a team in this matter; and

WHEREAS, the special counsel's conduct in this matter will reflect the firm's understanding that Maui County is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; now, therefore,

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

1. That the Council authorizes the employment of special counsel to pursue sanctions and other remedies for fraudulent foreclosures;
2. That the compensation for the special counsel will be based on a contingent fee agreement to be negotiated and executed by the Department of the Corporation Counsel on the County's behalf in accord with this resolution and including a general retainer of \$25,000, as an advance payment of attorney's fees, and attorney's fees to be based on an 18 percent contingency fee;
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;

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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;
5. That the expenditures of additional funds or substantial changes to the responsibilities of the parties shall require prior Council approval; and
6. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, and the Director of Finance.

APPROVED AS TO FORM AND LEGALITY

Department of the Corporation Counsel
County of Maui

chr:misc:special counsel resolution b:dr



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

April 18, 2018

Catherine P. Bessant
Chief Operations and Technology Officer
Bank of America
100 North Tryon Street
Charlotte, NC 28255

Dear Ms. Bessant:

I am writing to invite you to Hawai'i this summer to meet with Kehau Filimoe'atu of Nā Po'e Kōkua in order to reach a fair and final settlement of Bank of America's outstanding \$150 million commitment to the Hawaiian people on their homelands. I am offering to serve as host for these talks.

As the governor of Hawai'i, I am strongly urging that the Bank of America finalize its \$150 million Hawaiian commitment before August 10, 2018, the 20th anniversary of meetings on O'ahu and Maui between a delegation of executives from NationsBank and Bank of America with Hawaiian kūpuna (elders), state leaders and Nā Po'e Kōkua, which is the fiscal sponsor and institutional home of the Hawai'i Fair Lending Coalition (hereafter referred to collectively as NPK/HFLC).

It is my understanding that the Hawai'i meetings were the result of an agreement that NationsBank reached with NPK/HFLC on June 28, 1998 in response to Bank of America's failure to meet its Hawaiian commitment by the mid-1998 deadline. In its August 17, 1998 order approving NationsBank's merger with Bank of America, the Federal Reserve Board specifically referenced a NationsBank statement that the new post-merger Bank of America would honor its \$150 million Hawaiian commitment.¹

This commitment was first made in connection with Bank of America's 1993 application to acquire Liberty Bank in Honolulu, which was challenged by NPK/HFLC. The Federal Reserve Board's May 31, 1994 order approving Bank of America's acquisition of Liberty Bank was "specifically conditioned upon compliance with all of the commitments made by BankAmerica in connection with this application,"² which included Bank of America's "commitment of \$150 million to the FHA 247 loan program."³

¹ Board of Governors of the Federal Reserve System. *Order Approving the Merger of Bank Holding Companies: NationsBank Corporation Charlotte, North Carolina* • August 17, 1998, p. 62

² *Ibid.*, 630

³ Letter from Patrick S. Antrim, Senior Counsel, Bank of America to Surjeet Sidhu, Senior Financial Analyst, Board of Governors of the Federal Reserve System, 16 May 1994.

EXHIBIT " A "

Catherine P. Bessant
April 18, 2018
Page Two

Unfortunately, June 2018 marks the 20th year that Bank of America continues to be delinquent on its "four-year commitment to provide \$150 million in residential mortgage loans for native Hawaiians seeking housing on Department of Hawaiian Home Lands."⁴

I am attaching a letter that Ms. Filimoe'atu sent to you on August 24, 2014 that includes a May 3, 2012 letter to her from then Chairman of the Hawaiian Homes Commission, Albert "Alapaki" Nahale-a. I believe that together these two letters provide a fair outline of the history of Bank of America's Hawaiian commitment.

Since becoming the governor of Hawai'i, my cabinet members and I have been working hard to address Hawai'i's intractable affordable housing crisis, including the challenges of homelessness. Tragically, native Hawaiians represent a significant proportion of our state's houseless and under-housed population. One important part of the solution for native Hawaiian families is a home on Hawaiian home lands. However, because of the unique characteristics of these trust lands, access to capital for these families is a real and ongoing challenge. Fulfilling Bank of America's commitment could be an important part of addressing this challenge.

I look forward to hosting you so that you and Nā Po'e Kōkua can do the work necessary to fulfill Bank of America's commitment in Hawai'i. If you are open to accepting this invitation, please RSVP to William (Billy) Oku, Jr. of my office by April 25 with dates in June or July when you can come to Hawai'i. Mr. Oku may be reached at (808) 586-0034 or via email at William.F.Oku@hawaii.gov

I look forward to working with you to reach a long-overdue resolution to this pressing issue.

With warmest regards,



David Y. Ige
Governor, State of Hawai'i

Attachment

⁴ Board of Governors of the Federal Reserve System. *Order Approving Acquisition of a Bank: BankAmerica Corporation San Francisco, California. Federal Reserve Bulletin* • July 1994, p. 628

c: **Kehaulani Filimoe'atu**
Nā Po'e Kōkua/Hawai'i Fair Lending Coalition

The Honorable Brian E. Schatz
United States Senate

The Honorable Mazie Hirono
United States Senate

Brian T. Moynihan
Chief Executive Officer, Bank of America

Anne M. Finucane
Vice Chair & Chair ESG Committee, Bank of America

Resolution

No. 18-178

SUPPORTING THE GOVERNOR'S EFFORTS TO
INTERVENE BETWEEN NĀ PO'E KŌKUA, 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

WHEREAS, in 1993, Nā Po'e Kōkua (NPK), an organization established to assist native Hawaiians with housing and related matters, formed the Hawaii Fair Lending Coalition (HFLC) and began researching how banks in Hawaii were treating native Hawaiians; and

WHEREAS, among its findings, HFLC discovered that Bank of America (BoFA) was conducting discriminatory lending practices in the form of redlining, the practice of denying services to residents of certain areas based on the racial or ethnic composition of those areas, by not providing mortgages on Hawaiian Home Lands; and

WHEREAS, in May 1994, as a result of HFLC's efforts and as a condition of BoFA's acquisition of Liberty Bank, the Federal Reserve System ordered BoFA to make \$150 million in FHA-247 mortgages available on Hawaiian Home Lands by 1998; and

WHEREAS, by the 1998 deadline, BoFA provided only \$3,109,502 of the \$150 million in FHA-247 mortgages ordered by the Federal Reserve System; and

WHEREAS, in 1998, BoFA recommitted to meet the \$150 million loan commitment to native Hawaiians and to pay a \$4.5 million late fee based on the opportunity cost of its failure to fulfill its required commitment; and

WHEREAS, the BoFA executive responsible for this recommitment was Catherine P. Bessant, then in charge of Community Development, who traveled to Hawaii with other senior bank executives in August 1998 to meet with Governor Cayetano, Hawaiian kupuna, and other community leaders from NPK/HFLC at Iolani Palace; and

EXHIBIT ' B "

Resolution No. 18-178

WHEREAS, in 2012, the Hawaiian Homes Commission unanimously confirmed that the BofA commitment remained unfulfilled, and expressed support for HFLC's consistent and ongoing efforts to hold BofA accountable; and

WHEREAS, on April 18, 2018, Governor Ige invited Catherine P. Bessant to return to Hawaii for a meeting with NPK/HFLC "to reach a fair and final settlement of BofA's outstanding \$150 million commitment to the Hawaiian people on their homelands"; and

WHEREAS, BofA originated \$13,092,314 in loans on Hawaiian Home Lands from 1994-2012, and has made no FHA-247 loans since, according to account information provided by the United States Department of Housing and Urban Development (HUD) on August 20, 2018, in response to a Freedom of Information Act request; and

WHEREAS, based upon HUD data, 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 twenty years for 890 native Hawaiian families who should have received BofA mortgages by 1998, but did not, and the families who did receive loans up to 13 years after the deadline, preliminary estimates for BofA's late fees are approximately \$360.6 million; now, therefore,

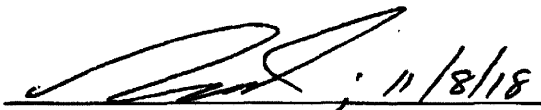
BE IT RESOLVED by the Council of the County of Maui:

1. That it does hereby support the Governor's efforts to intervene between Nā Po'e Kōkua, 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, now twenty years overdue; and
2. That it urges Catherine P. Bessant to return to Hawaii to meet with NPK/HFLC to reach a fair and final settlement, as invited by Governor Ige; and

Resolution No. 18-178

3. That in addition to providing the mortgages on Hawaiian Home Lands as ordered by the Federal Reserve System, BofA must address the estimated \$360.6 million in lost opportunity costs for native Hawaiians on Hawaiian Home Lands and a \$4.5 million late fee for failing to fulfill its required commitment; and
4. That certified copies of this resolution be transmitted to Brian T. Moynihan, Chief Executive Officer, Bank of America; Anne M. Finucane, Vice Chairman, Bank of America; Catherine P. Bessant, Chief Operations and Technology Officer, Bank of America; Jerome H. Powell, Chairman, Board of Governors, Federal Reserve System; Lael Brainard, Chair of the Committee on Consumer and Community Affairs, Board of Governors, Federal Reserve System; the Honorable David Ige, Governor, State of Hawaii; the Honorable Brian Schatz, United States Senator; the Honorable Mazie Hirono, United States Senator; the Honorable Alan Arakawa, Mayor, County of Maui; the Honorable Mel Rapozo, Chair, Kauai County Council; the Honorable Valerie T. Poindexter, Chair, Hawaii County Council; the Honorable Ernest Y. Martin, Chair, Honolulu City Council; and Kehaulani Filimoe'atu, Nā Po'e Kōkua/Hawaii Fair Lending Coalition.

APPROVED AS TO FORM AND LEGALITY



EDWARD S. KUSHI, JR.
Department of the Corporation Counsel
County of Maui

2018-1501/2018-1576

paf:ldm:18-290c

COUNCIL OF THE COUNTY OF MAUI

WAILUKU, HAWAII 96793

CERTIFICATION OF ADOPTION

It is HEREBY CERTIFIED that RESOLUTION NO. 18-178 was adopted by the Council of the County of Maui, State of Hawaii, on the 2nd day of November, 2018, by the following vote:

MEMBERS	Michael B. WHITE Chair	Robert CARROLL Vice-Chair	Aiika ATAY	Eleanora COCHRAN	S. Stacy CRIVELLO	Donald S. GUZMAN	G. Riki HOKAMA	Kelly T. KING	Yuki Lai K. SUGIMURA
ROLL CALL	Aye	Aye	Aye	Aye	Aye	Aye	Excused	Aye	Aye


COUNTY CLERK



AGENDA ITEM COVER PAGE

File ID: #6021

Resolution

Sponsored by: Commissioner Ken Russell, Mayor Francis Suarez

A RESOLUTION OF THE MIAMI CITY COMMISSION ACCEPTING ALL FUNDS AGREED TO OR AWARDED AS SANCTIONS AFTER ATTORNEYS' FEES AND COSTS ARE DEDUCTED ("FUNDS") IN ANY CASE WHERE BRUCE JACOBS, ESQ. OR HIS LAW FIRM OBTAINS SANCTIONS AGAINST BANK OF AMERICA, JP MORGAN CHASE, U.S. BANK, FANNIE MAE, OR ANY OTHER MORTGAGE SERVICERS OR ANY OF THEIR COUNSEL FOR FRAUD ON THE COURT INVOLVING FORGERY, PERJURY, OBSTRUCTION OF JUSTICE, DESTRUCTION OF EVIDENCE, BACKDATING OF RECORDS, AND/OR DEFIANCE OF COURT ORDERS; DESIGNATING THE SPECIAL REVENUE ACCOUNT TITLED "FORECLOSURE SANCTIONS AFFORDABLE HOUSING TRUST FUND" TO RECEIVE THE FUNDS; DIRECTING THE CITY MANAGER TO DEVELOP A FRAMEWORK IN ORDER TO UTILIZE OR DISTRIBUTE THE FUNDS TO CREATE AFFORDABLE HOUSING THROUGHOUT THE CITY OF MIAMI AND THE STATE OF FLORIDA.

EXHIBIT ' C '



**City of Miami
Legislation
Resolution**

City Hall
3500 Pan American Drive
Miami, FL 33133
www.miamigov.com

File Number: 6021

Final Action Date:

A RESOLUTION OF THE MIAMI CITY COMMISSION ACCEPTING ALL FUNDS AGREED TO OR AWARDED AS SANCTIONS AFTER ATTORNEYS' FEES AND COSTS ARE DEDUCTED ("FUNDS") IN ANY CASE WHERE BRUCE JACOBS, ESQ. OR HIS LAW FIRM OBTAINS SANCTIONS AGAINST BANK OF AMERICA, JP MORGAN CHASE, U.S. BANK, FANNIE MAE, OR ANY OTHER MORTGAGE SERVICERS OR ANY OF THEIR COUNSEL FOR FRAUD ON THE COURT INVOLVING FORGERY, PERJURY, OBSTRUCTION OF JUSTICE, DESTRUCTION OF EVIDENCE, BACKDATING OF RECORDS, AND/OR DEFIANCE OF COURT ORDERS; DESIGNATING THE SPECIAL REVENUE ACCOUNT TITLED "FORECLOSURE SANCTIONS AFFORDABLE HOUSING TRUST FUND" TO RECEIVE THE FUNDS; DIRECTING THE CITY MANAGER TO DEVELOP A FRAMEWORK IN ORDER TO UTILIZE OR DISTRIBUTE THE FUNDS TO CREATE AFFORDABLE HOUSING THROUGHOUT THE CITY OF MIAMI AND THE STATE OF FLORIDA.

WHEREAS, the City of Miami ("City") is a national leader in holding major banks accountable for improper actions in their handling of mortgage loans; and

WHEREAS, the City has initiated litigation against Bank of America, J. P. Morgan Chase, Wells Fargo, and Citibank (collectively, "Banks") for violations of the Fair Housing Act seeking damages caused to the City as a result of discriminatory and predatory loans resulting in expedited foreclosures; and

WHEREAS, the litigation against the Banks has been fought to the United States Supreme Court and has resulted in new law helping local governments to address issues relating to housing in their communities; and

WHEREAS, the improper actions of the Banks that resulted in foreclosures have significantly harmed the City, the State of Florida ("State"), as well as other communities across the nation; and

WHEREAS, the harm caused by the improper actions includes, but is not limited to, reducing the availability of affordable housing; and

WHEREAS, the affordable housing crisis is a serious issue in the City and the State that requires substantial additional resources in order to make a significant impact; and

WHEREAS, the City has just completed the largest and most comprehensive affordable housing study in its history; and

WHEREAS, the City is well prepared to dispense funds in a manner that aligns with the needs of the State to address affordable housing issues; and

WHEREAS, Bruce Jacobs, Esq. and his law firm (collectively, "Jacobs") have committed to tender to the City, for the purpose of advancing affordable housing, all funds agreed to or awarded as sanctions against Bank of America, JP Morgan Chase, U.S. Bank, Federal National Mortgage Association ("Fannie Mae"), or any other mortgage servicers or any of their Counsel,

after attorneys' fees and costs are deducted ("Funds"), in any foreclosure involving fraud on the court including but not limited to forgery, perjury, obstruction of justice, destruction of evidence, backdating of records, and/or defiance of court orders related to evidence of standing to foreclose or any false claims about a loan boarding process used to admit documents under false pretenses; and

WHEREAS, the City agrees Jacobs shall be entitled to a contingent attorney's fee equal to eighteen percent (18%) of any funds awarded or agreed to as sanctions, less any attorneys' fees separately awarded to Jacobs for his work by any Court imposing sanctions; and

WHEREAS, the Funds are to be appropriated by separate Resolution; and

WHEREAS, it is appropriate for the City Commission to (i) accept all Funds in any case where Jacobs obtains sanctions against Bank of America, JP Morgan Chase, U.S. Bank, Fannie Mae, or any other mortgage servicers or any of their counsel in any foreclosure involving fraud on the court including but not limited to forgery, perjury, obstruction of justice, destruction of evidence, backdating of records, and/or defiance of court orders related to evidence of standing to foreclose or any false claims about a loan boarding process used to admit documents under false pretenses (ii) designate the special revenue account titled "Foreclosure Sanctions Affordable Housing Trust Fund" to receive the Funds, and (iii) direct the City Manager to develop a framework in order to utilize or distribute the Funds to create affordable housing throughout the City as well as the State;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. The recitals and findings contained in the Preamble to this Resolution are adopted by reference and incorporated as if fully set forth in this Section.

Section 2. The City Manager is authorized¹ to accept all Funds in any case where Jacobs obtains sanctions against Bank of America, JP Morgan Chase, U.S. Bank, Fannie Mae, or any mortgage servicers or any of their counsel for fraud on the court involving forgery, perjury, obstruction, destruction of evidence, backdating of records, defiance of court orders, false, forged, fraudulent evidence of standing to foreclose, and/or any false claims about a loan boarding process used to admit documents under false pretenses.

Section 3. The special revenue account titled "Foreclosure Sanctions Affordable Housing Trust Fund" is hereby designated to receive the Funds. The funds shall be protected and dedicated solely to creating affordable housing throughout the City and the State and for no other purpose unless ordered by the Court(s) imposing sanctions.

Section 4. The City Manager is directed¹ to develop a framework to utilize or distribute the Funds to create affordable housing throughout the City and the State.

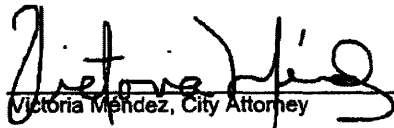
Section 5. The City agrees Jacobs shall be entitled to a contingency fee equal to eighteen percent (18%) of any Funds awarded or agreed to as sanctions, less any amounts separately awarded to Jacobs for his work by any Court imposing sanctions.

Section 6. This Resolution shall become effective immediately upon its adoption and signature of the Mayor.²

¹ The herein authorization is further subject to compliance with all requirements that may be imposed by the City Attorney, including but not limited to, those prescribed by applicable City Charter and City Code provisions.

² If the Mayor does not sign this Resolution, it shall become effective at the end of ten (10) calendar days from the date it was passed and adopted. If the Mayor vetoes this Resolution, it shall become effective immediately upon override of the veto by the City Commission.

APPROVED AS TO FORM AND CORRECTNESS:


Victoria Méndez, City Attorney

6/4/2019