

REQUEST FOR LEGAL SERVICES

Date: July 25, 2019
From: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee


TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Edward S. Kushi, Jr., Esq.

Subject: BANK OF AMERICA'S COMMITMENT TO PROVIDE MORTGAGES FOR NATIVE HAWAIIANS ON HAWAIIAN HOME LANDS (GET-19)

Background Data: Please review the attached proposed resolutions and, if appropriate, approve as to form and legality. A hard copy of the proposed resolutions are requested with your response.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY
☐ OTHER:

Requestor's signature  Michael J. Molina	Contact Person <u>Shelly Espeleta</u> (Telephone Extension: <u>7134</u>)
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☐ ROUTINE (WITHIN 15 WORKING DAYS) ☐ RUSH (WITHIN 5 WORKING DAYS)
☐ PRIORITY (WITHIN 10 WORKING DAYS) ☐ URGENT (WITHIN 3 WORKING DAYS)

☒ SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): July 29, 2019
REASON: For possible posting on August 6, 2019, Committee meeting agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO:	ASSIGNMENT NO.	BY:
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TO REQUESTOR: ☐ APPROVED ☐ DISAPPROVED ☐ OTHER (SEE COMMENTS BELOW)
☐ RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE):

DEPARTMENT OF THE CORPORATION COUNSEL

Date _____

By _____

get:ltr:019acc01:ske

(Rev. 7/03)

Attachments

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

get:misc:019areso01

Resolution

No. _____

ENCOURAGING THE STATE ATTORNEY GENERAL TO EMPLOY OUTSIDE COUNSEL TO PURSUE LEGAL REMEDIES FOR FRAUDULENT BANKING ACTIVITY

WHEREAS, banks bringing foreclosure actions 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 banking activity; and

WHEREAS, the problems with fraudulent banking activity 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, fraudulent banking activity has exacerbated the State's affordable-housing crisis, negatively impacted the State's economy, and resulted in a greater need for social services throughout the State; and

WHEREAS, the State, therefore, has legal interests and an ability to pursue legal action to impose sanctions or other legal remedies against entities engaged in fraudulent banking activity; 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; and

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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"; and

WHEREAS, on April 4, 2019, the Hawai'i State Senate adopted Senate Concurrent Resolution 19-245, Senate Draft 1, entitled "SUPPORTING THE GOVERNOR'S EFFORTS IN INVESTIGATING AND URGING THE BANK OF AMERICA TO RETURN TO HAWAII TO MEET WITH NA PO'E KŌKUA AND THE HAWAII FAIR LENDING COALITION REGARDING A \$150,000,000 LOAN COMMITMENT FOR NATIVE HAWAIIANS ON HAWAIIAN HOMELANDS"; and

WHEREAS, Bank of America's failure to resolve its \$150 million loan commitment to Native Hawaiians may constitute fraudulent banking activity; and

WHEREAS, the retention of outside counsel with successful experience in persuading courts to provide legal remedies for fraudulent banking activity would be beneficial to the State and its residents; now, therefore,

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

1. That the Council encourages Clare E. Connors, Attorney General, State of Hawaii, to employ outside counsel to pursue legal remedies for fraudulent banking activity; and
2. That certified copies of this resolution be transmitted to the Honorable David Y. Ige, Governor, State of Hawaii; Clare E. Connors, Attorney General, State of Hawaii; the Honorable Scott D. Saiki, Speaker of the House, State of Hawaii; the Honorable Ronald D. Kouchi, Senate President, State of Hawaii; Maui County's delegation to the State Legislature; the Honorable Michael P. Victorino, Mayor, County of Maui; and Moana Lutey, Corporation Counsel, County of Maui.

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APPROVED AS TO FORM AND LEGALITY

Department of the Corporation Counsel
County of Maui

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