

# REQUEST FOR LEGAL SERVICES

RECEIVED

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.

RECEIVED


2019 JUL 29 PM 4:20  
By Dept of the Corporation Counsel at 8:05 am, JUL 26 2019

OFFICE OF THE  
COUNTY COUNCIL

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: <u>ESK</u>	ASSIGNMENT NO. <u>2019-0065</u>	BY: <u>jeo</u>
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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):

Please see attached memo.

DEPARTMENT OF THE CORPORATION COUNSEL

Date 7/29/2019

By ROm

get:ltr:019acc01:ske

(Rev. 7/03)

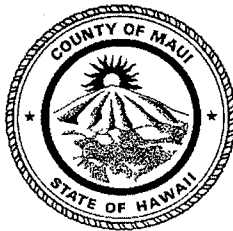
Attachments

MICHAEL P. VICTORINO  
Mayor

MOANA M. LUTEY  
Corporation Counsel

EDWARD S. KUSHI, JR.  
First Deputy


LYDIA A. TODA  
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
FACSIMILE: (808) 270-7152

July 29, 2019

TO: Michael J. Molina, Chair  
Governance, Ethics, and Transparency Committee

FROM: Richelle M. Thomson, Deputy Corporation Counsel   
Peter A. Hanano, Deputy Corporation Counsel

RE: Bank of America's Commitment to Provide Mortgages for Native  
Hawaiians on Hawaiian Home Lands (GET-19)

Resolutions entitled:

1. "Encouraging the State Attorney General to Employ Outside Counsel to Pursue Legal Remedies for Fraudulent Banking Activity"
2. "Authorizing the Employment of Special Counsel to Pursue Sanctions and Other Remedies for Fraudulent Foreclosures"

The resolution entitled "Encouraging the State Attorney General to Employ Outside Counsel to Pursue Legal Remedies for Fraudulent Banking Activity" has been reviewed and executed. This office has no further comment on the proposed resolution.

The second resolution entitled "Authorizing the Employment of Special Counsel to Pursue Sanctions and Other Remedies for Fraudulent Foreclosures" raises certain issues, some of which are addressed in general below. This office respectfully requests the opportunity to provide additional comments on this resolution in executive session, pursuant to Section 92-5(a)(4), Hawaii Revised Statutes.

1. Special counsel.

Pursuant to Section 3-6.6 of the Charter of the County of Maui, the County Council may “retain, employ, or designate, by a vote of two-thirds of its entire membership, special counsel as legal representative for any special matter presenting a real necessity for such employment. Any such employment shall specify the compensation, if any, to be paid for said services.”

Neither the Charter or the Maui County Code require that the specific details of the retainer agreement or the compensation schedule be made public. The Charter is also silent on whether the identity of special counsel is disclosed, although that appears to be past practice.

The proposed resolution does not name a particular proposed attorney or law firm. Such selection and retention must follow the procurement law pursuant to Section 103D-304, Hawaii Revised Statutes. We would appreciate Council's instruction and clarity on whether the Office of Counsel Services should solicit letters of interest and qualifications from attorneys who specialize in these types of matters, or whether Council wishes to have the Department of the Corporation Counsel make such solicitation and selection.

The proposed resolution authorizes a “contingent fee agreement to be negotiated and executed by the Department of the Corporation Counsel” pursuant to 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.” Typically, contingency fee agreements are based on a percentage of the net recovery, and may provide for payment of costs by the client (County). For recoveries that may include monetary damages and other remedies such as injunctive relief, more detailed fee agreements are often used, including the possibility that as the recovery increases, the special counsel's percentage share would decrease.

Corporation Counsel requests additional details regarding the Council's intentions, and additionally, whether such “general retainer” is an advance payment of potential contingent fee recovery, which would be deducted from the special counsel's share upon the successful recovery of monetary damages, or an advance payment toward compensable fees and costs. We note that additional funding beyond the \$25,000 requires Council approval, and request additional details so that any subsequent

negotiations are based on clear authority and parameters. These details are best discussed in executive session.

## 2. Claims.

The resolution related to special counsel appears to be based primarily on the County's potential recovery of damages related to lost property tax revenue on mortgages that were fraudulently foreclosed. This would involve identifying these fraudulently foreclosed mortgages, and then calculating the lost property tax revenue according to the property tax rate then in effect. This could be cost and labor intensive, and will likely require hiring of experts in forensic economic valuations, which can be costly. Additionally, it is possible that some of these potential claims would be time-bared depending on the applicable statute of limitations.

Although not completely clear, the resolution appears to authorize the special counsel to bring suit against the Bank of America for mortgage loans that should have been, but were not made, to Native Hawaiian beneficiaries of DHHL in the amount of \$150 million. We welcome the opportunity to hear additional information from the Committee on its goals for this litigation.

## 3. Parties.

The County is able to bring suit on behalf of itself, as a political subdivision of the State of Hawaii, pursuant to the authority in Section 46-1.5(22), Hawaii Revised Statutes ("Each county shall have the power to sue and be sued in its corporate name").

The resolution's whereas clause at the bottom of Page 2 specifies that any recovery from actions against Bank of America would be allocated (split) between the County and "Hawaiian people who are owed money by Bank of America." The County does not have the authority to bring suit on behalf of private individuals, which would be considered in suit in *parens patriae* (as guardian, trustee, and representative of its citizens).

It's possible that separate legal action brought by individuals could be joined by the County (e.g., a lawsuit brought by Native Hawaiian beneficiaries who were wrongfully denied loans by Bank of America), or a lawsuit brought by the State of Hawaii.

Prior to taking final action on this resolution, this office recommends consultation with the State of Hawaii, Department of Hawaiian Homelands, the Office of Hawaiian Affairs, the State Attorney General's Office, and other Hawaii counties.

# 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

## **Resolution No. \_\_\_\_\_**

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 KOKUA 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.

**Resolution No.** \_\_\_\_\_

APPROVED AS TO FORM AND LEGALITY



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Department of the Corporation Counsel  
County of Maui

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# 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

## **Resolution No. \_\_\_\_\_**

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

## **Resolution No. \_\_\_\_\_**

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;

**Resolution No. \_\_\_\_\_**

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

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Department of the Corporation Counsel  
County of Maui

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