



STATE OF HAWAII  
OFFICE OF THE DIRECTOR

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

335 MERCHANT STREET, ROOM 310

P.O. Box 541

HONOLULU, HAWAII 96809

Phone Number: (808) 586-2850

Fax Number: (808) 586-2856

[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

LINDA LINGLE  
GOVERNOR

JAMES R. AIONA, JR.  
LT. GOVERNOR

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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEES ON CONSUMER PROTECTION & COMMERCE  
AND JUDICIARY

TWENTY-FIFTH STATE LEGISLATURE  
Regular Session 2010

Thursday, March 11, 2010  
2:00 p.m.

**TESTIMONY ON SENATE BILL NO. 2472, S.D. 2 -- RELATING TO MORTGAGE  
FORECLOSURES.**

TO THE HONORABLE ROBERT N. HERKES AND JON RIKI KARAMATSU, CHAIRS,  
AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to comment on Senate Bill No. 2472, S.D. 2, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection ("OCP").

Senate Bill No. 2472, S.D. 2 proposes to require the mortgagee in an alternate power of sale foreclosure procedure to provide the mortgagor with a thirty day written notice of its intent to foreclose, make the mortgagor aware of the availability of mortgage counseling, provide a copy of the promissory note and mortgage documents

to the mortgagor upon their request before initiating foreclosure proceedings, and establish seventy percent of the fair market value of the mortgaged property as fair and reasonable.

The Department has concerns with Senate Bill No. 2472, S.D. 2 as currently drafted. First, the language contained on page 1 of the Bill appears to be extremely confusing. Although the subheading relates to "Foreclosure counseling" the text of the proposal includes a new notification provision, which adds a thirty day written notice of default without clarifying when the thirty day period commences. Under this provision it is unclear as to whether the notice of default would be initiated on the notice of intent to foreclose pursuant to section 667-5(a)(1) or some other provision.

Second, the proposed language associated with the Public sale provision contained on page 5 of the Bill is also problematic. In Hawaii it is highly irregular to insert a specific percentage into a statute as a safe harbor. The proponent(s) of this provision appear to have borrowed the figure of 70 percent from a case in another state. Adopting the case law of another jurisdiction with no connection to Hawaii does not appear to be appropriate, especially since the real estate market of that jurisdiction is most probably markedly different from that in Hawaii. While in certain circumstances a figure of 70 percent may be appropriate, in many others it may not be. Instead of establishing a specific number which may invite abuse and manipulation it would appear to be fairer to all affected parties to adopt a standard that would allow each sale to be



analyzed on its own merits. The foreclosure market determines the standard for the value of a foreclosure sale; not a mechanical 70 percent extrapolation from an appraiser's approximation of fair market value. If a foreclosure market in an area is very strong and regularly brings 90 percent of fair market value, it would be unfair to presume that 70 percent of fair market value is a reasonable value. Similarly, if a foreclosure market in an area is very weak and regularly brings only 50 percent of fair market value, it would be unfair to presume that 70 percent of fair market value is a reasonable value. It is noteworthy that most courts which have examined this issue have rejected the 70 percent rule in favor of a less formulaic, totality of the circumstances approach. See, *Matter of Besing*, 981 F.2d 1488 (5<sup>th</sup> Cir. 1993). In utilizing this approach, the factors most widely considered are the disparity between the value and what was received, the good faith of the parties, and whether the transaction was at arm's length.

Thank you for this opportunity to testify on Senate Bill No. 2472, S.D. 2. I will be happy to answer any questions that the Committees members may have.

**The Honorable Robert N. Herkes, Chair**  
**The Honorable Glenn Wakai, Vice Chair**  
**House Committee on Consumer Protection and Commerce**

**The Honorable Jon Riki Karamatsu, Chair**  
**The Honorable Ken Ito, Vice Chair**  
**House Committee on Judiciary**

**Hearing : Thursday, March 11, 2010, 2:00 p.m.**  
**State Capitol, Conference Room 325**

**IN SUPPORT OF THE INTENT OF SB 2472 SD2**

**Chair and Members of the Committee:**

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, other low and moderate income families who are consumers and families facing default and foreclosure on their homes. We are testifying in support of the intent of SB 2472 SD2 as it may strengthen protections for consumers in the State of Hawaii.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home, what to do if you are in danger of losing your home through foreclosure and issues relating to predatory mortgage lending.

SB 2472 SD2 seeks to require: 1. that a mortgagee provide the mortgagor with thirty days written notice of its intent to foreclose on the mortgage and advise the mortgagor of the availability of mortgage counseling; 2. upon the request of the mortgagor, provide a copy of the promissory note and mortgage documents to the mortgagor prior to commencing foreclosure proceedings; and 3. clarify that a public sale price of seventy per cent of the latest real property tax assessed value is fair and reasonable.

The Legal Aid Society of Hawaii continues to work in conjunction with other interested parties and supports a consolidated foreclosure bill which addresses concerns raised in SB2472 SD2.

The Legal Aid Society of Hawaii offers these amendments to clarify and strengthen the bill. SB 2472 SD 2 Section 3 intends to amend the language in HRS 667-5.7 to mandate that in a public sale of foreclosed property, the property should be sold for not less than 70 percent of fair market value or the property. However, as the language stands currently in SB 2472 SD 2 only a statement that 70% shall be considered fair and reasonable is written, and does not require a minimum 70% sale price. In effect the current language is a meaningless and ineffectual guideline. In light of this The Legal Aid Society of Hawaii proposes language that would require that a foreclosed property sold at auction sell for no less than 70% of its fair market value. The Legal Aid Society of Hawaii suggests this amended language to clarify and strengthen the bill:

"[[§667-5.7]] Public sale. At any public sale pursuant to section 667-5, the successful bidder at the public sale, as the purchaser, shall not be required to make a downpayment to the foreclosing mortgagee of more than ten per cent of the highest successful bid price. The public sale price shall be reasonable and fair. A public sale price of not less than seventy per cent of the fair market value of the mortgaged property owned and occupied by a consumer as established by an appraisal or broker's price opinion shall be reasonable and fair."

The Legal Aid Society of Hawaii supports the intent of the bill, and its efforts to protect the consumers in the State of Hawaii.

**Conclusion:**

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. SB 2472 SD2 attempts to strengthen protections for consumers by requiring mortgage lenders to provide 30 days notice to a mortgagor, by requiring a foreclosing mortgagee to provide a copy of mortgage documents to the mortgagor upon request and by requiring a foreclosed property sold at auction to sell for a minimum of 70% of its fair market value. We support the intent of SB 2472 SD2 and its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.



TEL:  
808-524-5161  
FAX:  
808-521-4120  
ADDRESS:  
1000 Bishop Street, Suite 3018  
Honolulu, HI 96813-4203

Presentation to the House Committee on Consumer Protection & Commerce  
and House Committee on Judiciary

Thursday, March 11, 2010, at 2:00 pm, Conf Rm 325

Testimony for SB 2472, SD 2 Relating to Mortgage Foreclosures

TO: The Honorable Robert N. Herkes, Chair  
The Honorable Glenn Wakai, Vice Chair  
Members of the House Committee on Consumer Protection & Commerce

The Honorable Jon Riki Karamatsu, Chair  
The Honorable Ken Ito, Vice Chair  
Members of the House Committee on Judiciary

My name is Neal Okabayashi of First Hawaiian Bank testifying on behalf of the Hawaii Bankers Association. We support SB 2472, SD 2 as a reasonable compromise of the interests of various stakeholders. We also request a clarifying amendment to correct a drafting error on our part.

Section 1 of the bill provides for a notice of credit counseling no later than 30 days before a foreclosure is commenced. As such, this compliments the HUD requirement of such a notice within 45 days of the borrower's default.

Section 2 of the bill provides that if a mortgagor requests a copy of the promissory note and mortgage, the mortgagee may not commence foreclosure proceedings until it has mailed the documents. Please note that the requirement is that the documents be mailed by registered or certified mail and thus the mortgagee is not required to wait for receipt of the documents prior to commencing foreclosure.

We would suggest an amendment to clarify that this provision applies to an owner-occupant of residential real property. On page 4, line one, we request insertion of the following language after the word "mortgagor": ". . . who is an owner-occupant of residential real property". Thus, the subsection (d) would start by reading: "Upon the request of the mortgagor who is an owner-occupant of residential real property . . ." We do not believe that the terms "owner-occupant" or "residential real property" need to be defined as those are terms are widely known and used in the industry.

Section 3 of the bill essentially codifies a rule that used to be known as the Durrett rule, that a foreclosure sale price of 70% of fair market value is deemed to be fair and reasonable.

I would be happy to answer any questions the Committee may have.

# HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

March 11, 2010

Rep. Robert N. Herkes, Chair,  
and members of the House Committee on Consumer Protection and Commerce  
Rep. Jon Riki Karamatsu, Chair,  
and members of the House Committee on Judiciary  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **Senate Bill 2472, Senate Draft 2 (Mortgage Foreclosures)**  
**Hearing Date/Time: Thursday, March 11, 2010, 2:00 P.M.**

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is the trade association for Hawaii's financial services loan companies, which are regulated by the Hawaii Commissioner of Financial Institutions. Financial services loan companies make mortgage loans and other loans.

The HFSA **supports the intent of this Bill and proposes amendments**. This testimony is based, in part, on my experience as an attorney who has actively done foreclosures for 32 years since 1978.

The purposes of this Bill are to: (a) require thirty days written notice of the mortgagee's intent to foreclose and make the mortgagor aware of the availability of mortgage counseling; (b) require a foreclosing mortgagee to, upon the mortgagor's request, provide a copy of the promissory note and mortgage document before initiating foreclosure proceedings; and (c) clarify that 70% of an appraisal or broker's price opinion is a fair and reasonable public sale price.

This Bill as drafted is a "work in progress". Its scope in Sections 1, 2 and 3 should be limited to power of sale (non-judicial) foreclosures by mortgage lenders of owner-occupied residential properties.

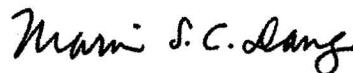
Attached are our proposed revisions to this Bill for the purpose of a House Draft 1.

Section 1 of this Bill concerns the notice of the availability of mortgage counseling. We have clarified that this applies only to power of sale (non-judicial) foreclosures and that the notice needs to be sent (rather than delivered) to the mortgagor by mail.

Section 2 requires the mortgagee (lender) to mail a copy of the promissory note and mortgage document if requested by the mortgagor prior to the mortgagee initiating a power of sale foreclosure. We have clarified that this request only applies to a mortgagor who is an owner occupant of the mortgaged property. Additionally, the mortgagor needs to mail the mortgagee a written request for those copies.

Section 3 states that an auction sales price of 70% of the fair market value of the mortgaged property, as established by an appraisal or broker's price opinion, is fair and reasonable. The proposed revision explains how the 70% calculation is computed when a junior mortgagee (lender) is foreclosing on property that is "subject to" senior liens or encumbrances (such as real property taxes or a first mortgage). We have also changed the word "consumer" to "mortgagor" to be consistent the wording in the rest of this Bill.

We are willing to work with your Committees on any revisions to this Bill. Thank you.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

**Proposed revisions for House Draft 1 to SB 2472, SD 2 (Mortgage Foreclosures)**

1. SECTION 1. Chapter 667, Hawaii Revised Statutes, is amended by adding a new section to part I to be appropriately designated and to read as follows:

§667- Foreclosure counseling. (a) No later than thirty days prior to initiating any power of sale foreclosure under section 667-5, a foreclosing mortgagee shall provide a mortgagor [that] who is an owner-occupant of a mortgaged property that is held in fee simple and is subject to foreclosure, written notice of default and of the mortgagee's right to foreclose. The notice shall be [delivered] sent by first class mail to the address of the mortgaged property or to the address designated by the mortgagor by written notice to the mortgagee as the mortgagor's address for receipt of notice.

2. SECTION 2. Section 667-5, Hawaii Revised Statutes, is amended to read as follows:

[(d) Upon the request of the mortgagor, the mortgagee shall not initiate foreclosure proceedings until the mortgagee has mailed to the mortgagor, by way of registered or certified mail, a copy of the promissory note and mortgage document.]

**(d) If the mortgagor, who is an owner-occupant of a mortgaged property, requests in writing a copy of the promissory note and mortgage document, the mortgagee shall not initiate foreclosure proceedings under this section until the mortgagee has mailed those copies to the mortgagor by registered or certified mail. The request by the mortgagor shall be in writing and sent by first class mail to the address designated by the mortgagee as the mortgagee's address for receipt of notice.**

3. SECTION 3. Section 667-5.7, Hawaii Revised Statutes, is amended to read as follows:

[[§667-5.7]] Public sale. At any public sale pursuant to section 667-5, the successful bidder at the public sale, as the purchaser, shall not be required to make a downpayment to the foreclosing mortgagee of more than ten per cent of the highest successful bid price. [A public sale price of seventy per cent of the fair market value of the mortgaged property owned and occupied by a consumer, as established by an appraisal or broker's price opinion, shall be fair and reasonable.] **If a mortgaged property is owned and occupied by the mortgagor, a public sale price of seventy per cent of the fair market value of the mortgaged property, as established by an appraisal or broker's price opinion, shall be fair and reasonable. Solely for the purpose of determining the public sale price under this section, if the sale is subject to senior liens or encumbrances, the dollar amount of the senior liens or encumbrances should be included in the public sale price.**

**COMMITTEE ON CONSUMER PROTECTION & COMMERCE****Rep.Robert N. Herkes, Chair****Rep.Glenn Wakai, Vice Chair****Wednesday, March 11, 2010****2:00 p.m., Conf.Rm.325****Testimony in Support of SB 2472**

**Mr.Chair, distinguished Committee members and others:**

**I am Keoni Kealoha Agard, a concerned citizen, and an attorney licensed to practice law in the State of Hawaii for the past 30 years. I testify today on behalf of dozens of individuals who have been personally victimized by predatory lending practices via lenders here and on the Mainland.**

**Chapter 667, HRS provides a fast track to lenders to bring a non judicial foreclosure action against borrowers without any court intervention whatsoever and without the procedural safeguards that are normally provided to any borrower in a courtroom, or in a judicial proceeding. One potential safeguard to assist borrowers in this current national and local economic crisis is to make a sincere effort to begin to level the playing field and to provide some protection to borrowers in this financially strapped economy that we all face today.**

**At least two state legislatures on the Mainland have determined that unless the original is produced, the lender(s) cannot move to foreclose in the absence of same. Those state legislators have reasoned that because the loss of one's personal residence is such a serious matter, that before it takes place, the lender should at the least be required to show the "original" note and**



mortgage to prove it is the true holder of the mortgage and note, thus has proper authority and standing to foreclose. Under Hawaii law, there is no such requirement on the books, at this time.

However, this bill makes it a requirement for lender(s) and their successors to attach the "original" signed mortgage agreement and any subsequent mortgage agreements, notes, or documents that amended or altered the same by the signatories. Without this requirement lenders can wrongfully foreclose on unsuspecting homeowners in Hawaii. Without this requirement, in some instances, lenders can foreclose on Hawaii homeowners without having proper authority against innocent homeowners. This current condition leaves too much room for potential abuse. Instead, protections should be afforded to innocent consumers, Hawaii homeowners. If passed, SB 2472 will provide a much needed safeguard to borrowers who are fighting to preserve and to protect their homes from potential loss, forever.

In 2009, there was a reported 10,000 foreclosures in Hawaii, with those numbers expected to increase substantially in 2010. If you or others have lost their home through foreclosure, you know what a devastating experience that is. As responsible legislators, it is imperative to take steps necessary to provide safeguards to consumers and homeowners who desperately need your kokua. It is the right thing to do.

We thank you for this opportunity to provide testimony before your committee.

sb2472

HAWAII COUNCIL OF ASSOCIATIONS  
OF APARTMENT OWNERS

P.O. Box 726  
Aiea, Hawaii 96701  
Telephone (808) 566-2122

March 9, 2010

Rep. Robert Herkes, Chair  
Rep. Glenn Wakai, Vice-Chair  
House Committee on Commerce & Consumer Protection

Rep. Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice-Chair  
House Committee on Judiciary

RE: Testimony in re SB 2472 SD2 RE Mortgage Foreclosures  
Thursday, March 11, 2010, 2 p.m. Conf. Rm. #325

Chairs Herkes and Karamatsu and Members of the Joint-Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO).

HCAAO takes no position on Sections 1 and 2 of the bill, but we have a strong concern about new language in Section 3<sup>1</sup>.

When condominium associations file for foreclosure to collect on their delinquent maintenance fees, their claim is only for a few thousand dollars and not tens of thousands or hundreds of thousands of dollars. If this bill passes without amendments, condominium, co-op apartments and community associations will not be able to do non-judicial foreclosure to enforce their claims against owners who are delinquent in the payment of maintenance fees.

We are suggesting language that would require the 70% requirement in the sale price in the provision quoted in the footnote only apply to first mortgages and not to condos, co-ops and community associations who are foreclosing on maintenance fee delinquencies, which are always much lower than the first mortgages. In the case of foreclosures by condo, co-op or community associations, the first mortgage remains intact and retains its priority in proceeds of sale.

<sup>1</sup> That language provides that "[A] public sale price of seventy per cent of the market value of the mortgaged property owned and occupied by a consumer, as established by an appraisal or broker's price opinion, shall be fair and reasonable"

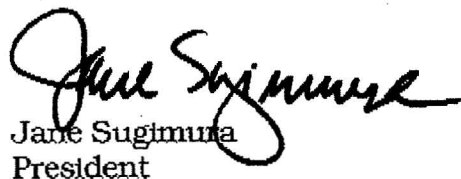
SB2472 SD2 Re Mortgage Foreclosures  
March 9, 2010  
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Having the 70% requirement apply to only first mortgages will be friendly to the consumer. This would protect the unit owner from predatory lending practices while allowing condo, co-op and community associations to do non-judicial foreclosures on the units that are not carrying their fair share of the burden of operating the association and therefore burdening their neighboring unit owners.

We suggest the following replacement language" "A public sale price of seventy per cent of the fair market value of the mortgaged property owned and occupied by a consumer, as established by an appraisal or broker's price opinion, shall be fair and reasonable, **provided that this price will only apply to the foreclosure of a first mortgage.**"

We would appreciate your assistance in changing this language before the bill is finalized so that the "70% of the market value of the mortgaged property" would only apply to the foreclosure of the first mortgage.

Thank you for allowing me to testify on this important bill.

  
Jane Sugimura  
President

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P.O. Box 976  
Honolulu, Hawaii 96808  
March 8, 2010

Honorable Robert N. Herkes  
Honorable Glenn Wakai  
Committee on Consumer Protection and Commerce  
415 South Beretania Street  
Honolulu, Hawaii 96813

and

Honorable Jon Riki Karamatsu  
Honorable Ken Ito  
Committee on Judiciary  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: SB 2472 SD 2

Dear Chairs Herkes and Karamatsu, Vice-Chairs Wakai and Ito and  
Committee Members:

I chair the CAI Legislative Action Committee. CAI has concerns about SB 2472 SD 2 in its current form. Specifically, CAI respectfully requests that the bill be amended to clarify that its provisions do not apply to condominiums and other community associations.

The proposed amendment to Hawaii Revised Statutes Section 667-5.7 (Section 3 of the bill), for example, would virtually eliminate non-judicial foreclosures by associations. Given that other owners directly bear the financial burden imposed by defaulting owners, CAI respectfully submits that it is appropriate to preserve the non-judicial foreclosure remedy to associations.

A simple example will illustrate the problem. If a condominium association auctions a unit worth \$200,000, but which has a \$250,000 mortgage, then no one will bid at the auction. This is because the mortgage lien will remain on title following the association's foreclosure. The association's lien priority is junior to the priority of the mortgage.

Honorable Robert N. Herkes  
Honorable Jon Riki Karamatsu  
March 8, 2010  
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Thus, condominium associations are often the purchaser of last resort. Associations make token bids in such circumstances and (if they are lucky) rent the unit out for a time until the mortgage lender eventually forecloses its superior lien.

Lenders operate on an unpredictable timeline according to priorities that an association is not privy to, so condominium associations are unable to simply assume that if maintenance fees go unpaid that mortgage payments are not being made. Indeed, some owners pay their mortgages but not their maintenance fees.

The point is that if the Committee chooses to move SB 2472 SD2, the bill should distinguish between a mortgagee and association entities. Indeed, it may be necessary to distinguish between first and second mortgagees as well.

CAI respectfully requests that the Committees consider alternative language for H.R.S. Section 667-5.7, such as:

With respect to a public sale conducted by or on behalf of the holder of a first mortgage, a public sale price of seventy per cent of the tax assessed value of the mortgaged property owned and occupied by a consumer shall be fair and reasonable. The reasonableness of a public sale price with respect to a public sale conducted by or on behalf of any other lien holder shall be determined by the totality of the circumstances.

Such language would maintain a reasonableness standard for all public sales. CAI prefers tax assessed value over the current formulation because tax assessed value is readily and publicly ascertainable and it is less susceptible to any potential manipulation.

Section 2 of SB 2472 SD 2 provides for a mortgagee to mail a copy of the promissory note and mortgage documents to a mortgagor. Since H.R.S. Section 514B-146(a) enables condominiums to foreclose using "foreclosure procedures set forth in chapter 667," it is also important to distinguish between mortgage foreclosures and association foreclosures in this instance.

Honorable Robert N. Herkes  
Honorable Jon Riki Karamatsu  
March 8, 2010  
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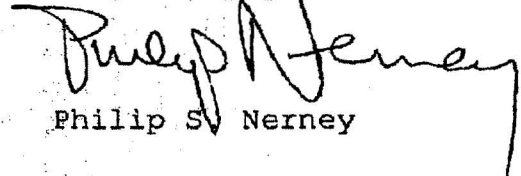
An association does not hold a promissory note or a mortgage and, therefore, cannot produce them. No analogous provision is appropriate in any event because the Declaration of Condominium Property Regime and the By-Laws of an association are recorded documents that are publicly available. There is also no reasonable question as to whether an association is the holder of a statutory lien.

It is possible that clear and unambiguous legislative history, such as in a committee report, *might* suffice to demonstrate that this provision is specifically *not* intended to apply to associations. CAI respectfully requests the inclusion of such language in a committee report, at minimum.

There is, however, some concern that further consideration should be given to how Chapter 667 and Section 514B-146 mesh. The circumstances of mortgagees and associations differ. CAI would prefer language in the statute that differentiates between mortgagees and associations. CAI, thus, would welcome the Committees' choice to give further study to the matter.

Similar comments apply to Section 1 of SB 2472 SD 2. Mortgage counseling is not an appropriate role for associations.

Very truly yours,



Philip S. Nerney

**TESTIMONY OF**

Dr. Solomon D.K. Nalua'I, M.D., Ph.D. (Ret.)

2010 Hawaii State Legislative House Consumer Protection and Commerce (CPC)-15

Chair: Robert N. Herkes (5-Kona)

Vice Chair: Glenn Wakai (31-Moanalua)

Members: Della Au Belatti (25-Makiki)

John M. Mizuno (30-Kalihi)

Rida T.R. Cabanilla (42-Waipahu)

Hermina M. Morita (14-Hanalei)

Mele Carroll (13-Maui/Molokai)

Joseph M. Souki (8-Wailuku)

Ken Ito (48-Kaneohe)

Clift Tsuji (3-South Hilo)

Jon Riki Karamatsu (41-Waialele)

Barbara C. Marumoto (19-Kaimuki)

Sylvia Luke (26-Punchbowl)

Cynthia Thielen (50-Kailua)

Angus L.K. McKlevey (10-Lahaina)

**Cross-Over Bill SB 2472 SD-2: Relating to Mortgage Foreclosures**

Aloha, I'm Dr. Sol Nalua'I, and I speak against SB 2472, SD-2 (Related HB 1960)

I'm here not merely to testify against these bills, but more importantly, I'm here to Give "Notice" to the Hawaii State Legislature, that this law, or any other such laws of the State relating to HRS 667, "Non-Judicial" Mortgage Foreclosure, is in direct violation of "due process of law" of the U.S. Constitution. Elected state officials must be accountable, and enact all laws in compliance with and in conformity to the supreme laws of this land.

The 5<sup>th</sup> Amendment of the Bill of Rights, U.S. Constitution, states, "No person shall be ...deprived of life, liberty, or property, without due process of law"...and the 14th Amendment, "No State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person...the equal protection of the law."

Further, the U.S. Constitution, Article VI, Section 1, Clause 2 and 3, states,... # 2. "This Constitution and the laws of the United States...and all treaties made... shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding"... and # 3. ... "members of the several State legislatures... shall be bound by Oath or affirmation, to support this Constitution...required... to any office of public trust under the United States."

Therefore, Notice is hereby given that this law, or any other such laws of the State relating to HRS 667, "Non-Judicial" Mortgage Foreclosure, must be **immediately repealed and stricken** from the laws of this State, to avoid legal action against the State of Hawaii, and leaders of the Executive, Legislative and Judicial Branches.

Mahalo. Dr, Sol Nalua'I,  
2/23/2010



Sandi Haunani Oguma, RA, e-PRO, RECS  
Island Heritage Realty, Inc.  
1585 Kapiolani Blvd., Ste 1228  
Honolulu, HI 96814  
Licensed in the State of Hawaii since 1992.

**COMMITTEE ON CONSUMER PROTECTION & COMMERCE**

Honorable Representatives Robert N. Herkes, Chair & Glenn Wakai, Vice Chair

**COMMITTEE ON JUDICIARY**

Honorable Representatives Jon Riki Karamatsu, Chair & Ken Ito, Vice Chair

Date: Thursday, March 11, 2010

Time: 2 p.m.

Place: Conference Room 325

**SB 2472 RELATING TO MORTGAGE FORECLOSURES**

I hereby submit my comments in opposition of SB 2472 in hopes that our legislators will hear this plea for our Hawaii homeowners to correct the injustice of the foreclosure tidal wave that has only just begun in our Hawaii nei. The worse is yet to come.

As of February 24, 2010, with information gathered from the Multiple Listing site of the Honolulu Board of Realtors—

- 166 single family homes were listed as “Active, Short Sales”.
- The bulk or 101 of these listings, are located in Tax Map Key (TMK) area 191-199 defined as: Ewa Plains, Makakilo, Waipahu, Central Oahu (Mililani), Aiea and Pearl City).
- The remainder are broken down as follows:
  - 21 listings, TMK area 181-189 to include Makaha, Waianae, Lualualei, Maili and Nanakuli.
  - 17 listings, TMK 141-149 to include Waimanalo, Kailua, Kaneohe (to Kualoa Beach).
  - 8 listings, TMK 131-139 to include everything from Diamond Head to Hawaii Kai.
  - 7 listings, TMK 111-119 to include Salt Lake, Moanalua, Mapunapuna, Kapalama, Kalihi, Kamehameha Heights, Kapalama, Nuuanu, Puunui, Alewa Heights and the Old Pali area.
  - 6 listings, TMK 171-179 to include Whitmore Village, Wahiawa, Wilikina, and the surrounding military areas.
  - 5 listings, TMK 151-159 to include Kaaawa, Kahana, Punaluu, Hauula, Laie, Kahuku, Kuilima, Kawela Bay, Sunset/Velzy, and Pupukea.



- 1 listing, TMK 121-129 to include Downtown, Punchbowl, Kakaako, Nuuanu-Lower, Pauoa, Papakolea, Pacific Heights, Ala Moana, Makiki, Tantalus, Moiliili, Punahou, Woodlawn and Manoa.

Note: As of February 24, 2010 the only TMK area without a Short Sale listing is 161-169: Waimea, Kawaiiloa, Haleiwa, Waialua, Mokuleia and Kaena Point.

If all 166 Active, Short Sale listings went into Foreclosure, the State of Hawaii would lose \$298,860 in annual Real Property Tax Revenue. TMK 191-199 would produce the greatest loss at \$164,688.

In the Condo/Townhome market, based on the same time period, 257 listings appear in the Honolulu Board of Realtors MLS data base as Active, Short Sale broken down as follows:

<u>TMK Area</u>	<u># Listings</u>	<u>Loss of Tax Revenue</u>
• 191-199	143	\$149,052
• 121-129	73	\$156,396
• 141-149	15	\$20,400
• 181-189	8	\$5,796
• 111-119	6	\$6,408
• 131-139	5	\$11,940
• 161-169	4	\$3,744
• 171-179	2	\$864
• 151-159	1	\$1,404

Again, if all 257 listings go into Foreclosure, the total loss of Real Property Tax revenue to the State of Hawaii over a 12 month period is \$356,004. The projected loss of revenue to include single family homes, condos, and townhomes would be: \$654,864.

**RealtyTrac's** year-end report shows a record 2.8-million U.S. properties filed for foreclosure in 2009. Hawaii ranked 15<sup>th</sup> among all 50 states with 9,002 foreclosure filings (or 1 in 56 homes). This number represents foreclosures for the entire state. The top five states are as follows:

1. Nevada 112,097 filings or 1 in 10 homes
2. Arizona 163,210 filings or 1 in 16 homes
3. Florida 516,711 filings or 1 in 17 homes
4. California 632,573 filings or 1 in 21 homes
5. Utah 27,140 filings or 1 in 34 homes

California, Florida, Arizona and Illinois account for 50% of the national total.

Based on the 423 MLS listings reflected in the above report and an average of \$1,548.14 in real property tax per listing, in 2009 the State of Hawaii lost approximately \$13,936,356 in Real Property Tax Revenue due to Foreclosure.

It is clear and evident that the only benefactor of a Foreclosure is the Mortgage Servicer.

The most prominent difference between Foreclosures filed in the Federal Court vs. the State Court is in Federal Court the Mortgage Servicer or Lender must produce the original Promissory Note with original signatures of the borrower(s) adhered to it. In the State Court system a copy is satisfactory.

Why is the original promissory note so important? When loans are bundled and sold off (or change hands) it is very possible that a loan could be sold off a minimum of two times and as many as four times over the life of the loan. In the process of changing hands documents, especially the Promissory Note, goes with it. However, because files begin with the loan originator generally the original documents will either remain with the originator and/or at best with the Mortgage Servicer in the first round of the sell-off—unless the originator was bought out (i.e., when Bank of America bought out Countrywide). In this case, Bank of America should have the original documents that originated with Countrywide in their files.

When the Mortgage Meltdown occurred, a term that many of us would only relate to as something out of television shows such as NCIS is the term “Predatory” lending. Today most of us in the real estate business (with no regard to being a lender, realtor, appraiser or escrow officer) we recognize that many of Hawaii’s sub-prime loans were subject to Predatory Lending.

What is Predatory Lending? It’s a term used to describe unfair, deceptive, or fraudulent practices of some lenders during the loan origination process. From the office of the inspector general of the FDIC, Predatory Lending is broadly defined as “*imposing unfair and abusive loan terms on borrowers*”. Here are examples of unfair and abusive loan terms on borrowers:

- **Unjustified risk-based pricing.** This is the practice of charging more (in the form of higher interest rates and fees) for extending credit to borrowers identified by the lender as posing a greater credit risk. The lending industry argues that risk-based pricing is a legitimate practice; since a greater percentage of loans made to less creditworthy borrowers can be expected to go into default, higher prices are necessary to obtain the same yield on the portfolio as a whole. Some consumer groups argue that higher prices paid by more vulnerable consumers cannot always be justified by increased credit risk.
- **Single-premium credit insurance.** This is the purchase of insurance which will pay off the loan in case the homebuyer dies. It is more expensive than other forms of insurance because it does not involve any medical checkups, but customers almost always are not shown their choices, because usually the lender is not licensed to sell other forms of insurance. In addition, this insurance is usually financed into the loan which causes the loan

to be more expensive, but at the same time encourages people to buy the insurance because they do not have to pay up front.

- **Failure to present the loan price as negotiable.** Many lenders will negotiate the price structure of the loan with borrowers. In some situations, borrowers can even negotiate an outright reduction in the interest rate or other charges on the loan. Consumer advocates argue that borrowers, especially unsophisticated borrowers, are not aware of their ability to negotiate and might even be under the mistaken impression that the lender is placing the borrower's interests above its own. Thus, many borrowers do not take advantage of their ability to negotiate.
- **Failure to clearly and accurately disclose terms and conditions,** particularly in cases where an unsophisticated borrower is involved. Mortgage loans are complex transactions involving multiple parties and dozens of pages of legal documents. In the most brazen of predatory cases, lenders or brokers have not only misled borrowers but also actually altered documents after they have been signed.
- **Short-term loans with disproportionately high fees,** such as payday loans, credit card late fees, checking account overdraft fees, and Tax Refund Anticipation Loans, where the fee paid for advancing the money for a short period of time works out to an annual interest rate significantly in excess of the market rate for high-risk loans. The originators of such loans dispute that the fees are interest.
- **Servicing agent and securitization abuses.** The mortgage servicing agent is the entity that receives the mortgage payment, maintains the payment records, provides borrowers with account statements, imposes late charges when the payment is late, and pursues delinquent borrowers. **A securitization is a financial transaction in which assets, especially debt instruments, are pooled and securities representing interests in the pool are issued. Most loans are subject to being bundled and sold, and the rights to act as servicing agent sold, without the consent of the borrower. A federal statute requires notice to the borrower of a change in servicing agent, but does not protect the borrower from being held delinquent on the note for payments made to the servicing agent who fails to forward the payments to the owner of the note, especially if that servicing agent goes bankrupt, and borrowers who have made all payments on time can find themselves being foreclosed on and becoming unsecured creditors of the servicing agent. Foreclosures can sometimes be conducted without proper notice to the borrower. In some states (see Texas Rule of Civil Procedure 746), there is no defense against eviction, forcing the borrower to move and incur the expense of hiring a lawyer and finding another place to live while litigating the claim of the "new owner" to own the house, especially after it is resold one or more times. When the debtor demands that the current claimed note owner produce the original note with his signature on it, the note owner typically is unable or unwilling to do so, and tries to establish his claim with an affidavit that it is the owner, without proving it is the "holder in due course", the traditional standard for a debt**

**claim, and the courts often allow them to do that. In the meantime, the note continues to be traded, its physical whereabouts difficult to discover.**

The reason for requesting the original Promissory Note with the Borrower's original signature is clearly defined in the above paragraph entitled "Servicing Agent and Securitization Abuses". More specifically, it is defined within "Securitization Abuses".

With the above said and given the current foreclosure crisis that Hawaii homeowners are facing, we are requesting that SB 2472 mirror the federal court requirement which is that Lenders must produce the original note and not a copy in order to foreclose.

Hawaii State statutes do not require these documents. As a result, thousands of homes were foreclosed on by the mortgage companies without proving standing. **SB 2472 must be amended to require the original note with the original signatures and be produced at the beginning of the foreclosure process and not a copy or facsimile of.**

Predatory lending practices are Federal infractions. If the Federal courts require original mortgage documentation with original signatures why is it that our State judicial system does not?

By amending SB 2472 to **require the original note** and not a copy, in doing so the homeowner/consumer is protected within the State of Hawaii. In the same manner, I request that HRS 667, the non-judicial foreclosure law, be repealed. By requiring the original mortgage promissory note and repealing HRS 667, this would be a big step towards helping to stabilize Hawaii's already upside down economy before it worsens.

In conclusion, every legislator's district/precinct throughout the State is impacted by Short Sales, Foreclosures, Auctions, Bank Repossession and REO's. Real Property Tax Revenues within each area is dwindling and the impact it will have on Hawaii's crippling State budget is the tip of the iceberg of worse conditions that are headed our way.

**RealtyTrac** estimates that the number of foreclosure filings in 2010 will rise to 3.5-million. What percent of this number will Hawaii realize? Now is the time for legislators to step up to the plate to help their constituents. Change the language and help your constituents, families and friends.

Respectfully submitted,

*Sandi Haunani Oguma*

Sandi Haunani Oguma

A resident of Kailua , Oahu, Hawaii.

5/5

Name: Davelyn Aniu  
Address: P.O. Box 563  
City, State, Zip Code: Pahoa, Hawaii 96778  
Phone: (808) 640-8812  
Email: davelynaniu@yahoo.com

**COMMITTEE ON CONSUMER PROTECTION & COMMERCE**

Rep. Robert N. Herkes, Chair  
Rep. Glenn Wakai, Vice Chair

**COMMITTEE ON JUDICIARY**

Rep. Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice Chair

DATE: Thursday, March 11, 2010  
TIME: 2:00 p.m.  
PLACE: Conference Room 325

**SB 2472 RELATING TO MORTGAGE FORECLOSURES.**

I am submitting my comments in opposition of SB 2472 in hoping that someone in the legislature will hear this plea for the homeowner to correct the injustice of the foreclosure tidal wave that is just starting in Hawaii.

You can make a difference to the current foreclosure crisis in Hawaii. SB 2472 should mirror federal law. Lenders must **produce the original note and not a copy** in federal court to show standing in order to foreclose. Hawaii statutes do not require these documents and as a result thousands of homes were foreclosed on by the mortgage companies without proving standing. SB 2472 must be amended to require the **original note with the original signatures** be produced at the beginning of the foreclosure process and not a copy. **If you do this we can support SB 2472.**

Hawaii is ranked 11<sup>th</sup> worst state on foreclosures for the month of January 2010 with 1400 foreclosures and showing a steeper decline in months to come. The present form of SB 2472 with the current amendments will not help the homeowner or the State of Hawaii in their tax collections as it has been watered down. The bankers and mortgage companies who had a hand in the amendments know it's a joke and they are patting themselves on their backs because they have

pulled another one over you the legislators and the homeowners. There is no balance here, it is out of balance and has been out of balance for over a decade.

The mortgage lenders don't want the amendments because it would be very difficult if not impossible for them to produce the original note and it is within the purview of the mortgagor to submit a motion to compel the lender to produce the original note in Federal Court. Why doesn't the State of Hawaii do the same thing?

You legislators must amend SB 2472 requiring the **original note be provided and not a copy of the note** to give it teeth and to help protect us the homeowner and the State of Hawaii. In **addition, you must find a way to repeal HRS 667, the non-judicial foreclosure law.** By requiring the **original note and repealing HRS 667** you legislators will help to stabilize the Hawaii economy.

Respectfully submitted,  
Davelyn Aniu

**Donna R Walker**  
**13-3546 Luana St**  
**Pahoa, HI 96778**  
Phone: 808-965-9745  
Email: jenizaryuhm1@aol.com

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Respectfully submitted,

Donna R Walker



Henry James  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 330-1096  
krowhj@yahoo.com

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Respectfully submitted,

Henry James

A'oPohakuku Rodenhurst  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 393-1100  
huiea77@hawaii.rr.com

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I would like to formally introduce myself to you. O wau o R. A'oPohakuku Rodenhurst. I am the Kaula (prophet) of the Spiritual Nation of Ku: Hui Ea/ Council of Sovereigns. I am the Kahu (minister) of Na Ho'omana Hoike'ana (Church of Divine Revelation). I am also the President of the Coalition of Peoples Against Police Brutalities and Abuses. I specialize in spiritual, traditional, cultural Ho'oponopono, rehabilitation and restoration of human lives.

I am submitting my comments in opposition of SB 2472 in hoping that someone in the legislature will hear this plea for the homeowner to correct the injustice of the foreclosure tidal wave that is just starting in Hawaii.

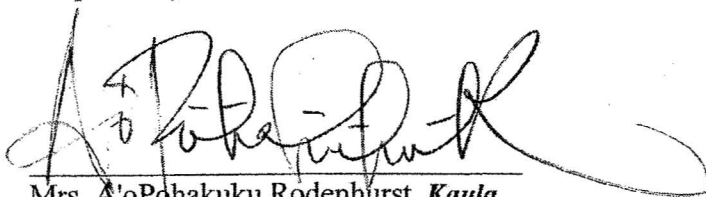
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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A'oPohakuku Rodenhurst', written in a cursive style with a long horizontal flourish extending to the right.

Mrs. A'oPohakuku Rodenhurst, *Kaula*  
Spiritual Nation of Ku/Hui Ea:  
Council of Sovereigns

KaNa'i Rodenhurst  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 398-1993  
[huiea77@hawaii.rr.com](mailto:huiea77@hawaii.rr.com)

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Respectfully submitted,

KaNa'i Rodenhurst

Keala Rodenhurst  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 292-5334  
kopaa96744@yahoo.com

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Respectfully submitted,

Keala Rodenhurst



Luckie Rodenhurst  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 845-4440  
huiea77@hawaii.rr.com

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Respectfully submitted,

Luckie Rodenhurst

Po'okela Rodenhurst  
46-263 Auna Street  
Kaneohe, HI 96744  
(808) 255-7388  
onepookela@yahoo.com

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Po'okela Rodenhurst

Name: Karen Norberg  
Address: Po Bx 578  
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Respectfully submitted,

Name Karen Norberg

Name: Amy Rymal  
Address: Po Bx 985  
City, State, Zip Code: Puunene, HI 96784  
Phone: 808-270-7301  
Email: [craziamers@yahoo.com](mailto:craziamers@yahoo.com)  
DATE: Thursday, March 11, 2010

TIME: 2:00 p.m.

PLACE: Conference Room 325

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Respectfully submitted,

Name Amy Rymal

Name: Lisa Shaw  
Address: 241 Oluea Circle  
City, State, Zip Code: Kihei, HI 96753  
Phone: 808-269-6402  
Email: [lisalulu123@msn.com](mailto:lisalulu123@msn.com)

**COMMITTEE ON CONSUMER PROTECTION & COMMERCE**

Rep. Robert N. Herkes, Chair  
Rep. Glenn Wakai, Vice Chair

**COMMITTEE ON JUDICIARY**

Rep. Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice Chair

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Respectfully submitted,  
Name Lisa Shaw

Name: Sanford Fujimori  
Address: Po Bx 91  
City, State, Zip Code: Puunene, HI 96784  
Phone: 808-276-2072  
Email: [sanfordfujimori@yahoo.com](mailto:sanfordfujimori@yahoo.com)

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Respectfully submitted,

Name Sanford Fujimori



Name: Alvin Vierra  
Address: 308 Aulike St  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 281-1567  
Email:

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Respectfully submitted,  
Name  
Alvin Vierra

--  
SL.Kaneakua (Lani)

Name: Claudette Fraser  
Address: P.O. Box 10401  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 264-9142  
Email:

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Respectfully submitted,  
Name  
Claudette Fraser

SL.Kaneakua (Lani)

Name: Roderick Fraser  
Address: P.O. Box 10401  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 264-9142  
Email:

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Respectfully submitted,  
Name  
Roderick Fraser

Name: CHEVETTE NAKIHEI  
Address: 2098 PUUOHANA ROAD  
City, State, Zip Code: Wailuku, HI 96793  
Phone: 808 633-4831  
Email: [vetnakihei@yahoo.com](mailto:vetnakihei@yahoo.com)

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Name  
Chevette Nakihei

Name: Erin Mcmillen  
Address: 6135 Hana Hwy.  
City, State, Zip Code: Hana, HI 96708  
Phone: 808 268-7572  
Email:

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Name  
Erin Mcmillen

Name: Janielle Pacheco  
Address: 6135 Hana Hwy.  
City, State, Zip Code: Hana, HI 96708  
Phone: 808 268-7572  
Email: [kapaakea@hotmail.com](mailto:kapaakea@hotmail.com)

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Name  
Janielle Pacheco

Name: Donnalee L. Curimao  
Address: 3500 L. Honoapiilani Rd. Apt 18-D  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 669-6084  
Email: [Meleana1839@hotmail.com](mailto:Meleana1839@hotmail.com)

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Name  
Donnalee L. Curimao



Name: Phillip Pelekane  
Address: P.O. Box 2400  
City, State, Zip Code: Wailuku, HI 96793  
Phone: 808 281-4700  
Email: [ppelekane@yahoo.com](mailto:ppelekane@yahoo.com)

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Respectfully submitted,  
Name  
Phillip Pelekane



Name: Ramani  
Address: 3950 Kalai Waa #W101  
City, State, Zip Code: Kihei, HI 96753  
Phone: 808-875-7308  
Email: [ramani001@hawaii.rr.com](mailto:ramani001@hawaii.rr.com)  
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Respectfully submitted,

Name Ramani (legal name)

Name: George and Tremaine Balberdi  
Address: 802 Makamaka St  
City, State, Zip Code: Kahului, HI 96732  
Phone: 808 276-6097  
Email:

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Respectfully submitted,

Name

George and Tremaine Balberdi

--

SL.Kaneakua (Lani)

Name: George and Tremaine Balberdi  
Address: 802 Makamaka St  
City, State, Zip Code: Kahului, HI 96732  
Phone: 808 276-6097  
Email:

DATE: Thursday, March 11, 2010  
TIME: 2:00 p.m.  
PLACE: Conference Room 325

**SB 2472 RELATING TO MORTGAGE FORECLOSURES.**

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Name  
George and Tremaine Balberdi

--  
SL.Kaneakua (Lani)

Name: Annie Kekona  
Address: 822 Kuhio PL  
City, State, Zip Code: wailuku, HI 96793  
Phone: 808 242-5644  
Email:

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Respectfully submitted,  
Name  
Kupuna Annie Kekona

Name: Stanley Chook  
Address: 25 Keonelo Way  
City, State, Zip Code: Wailuku, HI 96793  
Phone: 808  
Email:

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Respectfully submitted,  
Name  
Kupuna Stanley Chock

SL.Kaneakua (Lani)

Name: Ewalani Shim  
Address: 158 Waimaluhia Lane #103  
City, State, Zip Code: Wailuku, HI 96793  
Phone: 808  
Email:

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Respectfully submitted,  
Name  
Kupuna Ewalani Shim

Name: Eugene Saffery  
Address: 448 Naholo Circle  
City, State, Zip Code: Kahului, HI 96732  
Phone: 808  
Email:

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Respectfully submitted,  
Name  
Kupuna Eugene Saffery



Name: Patricia Nishiyama  
Address: 320 Kaeo PL  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 281-1567  
Email: [kupuna@wisperhawaii.net](mailto:kupuna@wisperhawaii.net)

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Respectfully submitted,  
Name  
Patricia Nishiyama  
SL.Kaneakua (Lani)



Name: Kupuna Eunice Puou  
Address:  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 661-9504  
Email:

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Respectfully submitted,  
Name  
Kupuna Eunice Puou

SL.Kaneakua (Lani)

Name: Tony Vierra  
Address: 98 Thea Pl  
City, State, Zip Code: Makawao, Hi 96768  
Phone: 808 205-8327  
Email:

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Respectfully submitted,  
Name

Tony Vierra

Name: Kupuna Olive Silva  
Address: P.O. Box 4073  
City, State, Zip Code: Kahului, Hi 96733  
Phone: 808  
Email:

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Name  
Kupuna Olive Silva

Name: Kupuna William Waiohu  
Address: Kauaula Valley  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808  
Email:

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Respectfully submitted,  
Name  
Kupuna William Waiohu

Name: Kupuna Ophra Kaina  
Address: 5080 I Hanawai St  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 669-8191  
Email:

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Respectfully submitted,  
Name  
Kupuna Ophra Kaina

Name: Sila Kaina  
Address: 5080 I Hanawai St  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 669-6191  
Email:

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Respectfully submitted,  
Name  
Sila Kaina

Name: Bernie Kaina  
Address: 5080 I Hanawai St  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 669-8191  
Email:

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Respectfully submitted,  
Name  
Bernie Kaina



Name: De Ann Kaina  
Address: 5080 I Hanawai St.  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 661-8191  
Email:

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I am submitting my comments in opposition of SB 2472 in hoping that someone in the legislature will hear this plea for the homeowner to correct the injustice of the foreclosure tidal wave that is just starting in Hawaii.

You can make a difference to the current foreclosure crisis in Hawaii. SB 2472 should mirror federal law. Lenders must **produce the original note and not a copy** in federal court to show standing in order to foreclose. Hawaii statutes do not require these documents and as a result thousands of homes were foreclosed on by the mortgage companies without proving standing. SB 2472 must be amended to require the original note with the original signatures be produced at the beginning of the foreclosure process and not a copy. **If you do this we can support SB 2472.**

Hawaii is ranked 11<sup>th</sup> worst state on foreclosures for the month of January 2010 with 1400 foreclosures and showing a steeper decline in months to come. The present form of SB 2472 with the current amendments will not help the homeowner or the State of Hawaii in their tax collections as it has been watered down. The bankers and mortgage companies who had a hand in the amendments know it's a joke and they are patting themselves on their backs because they have pulled another one over you the legislators and the homeowners. There is no balance here, it is out of balance and has been out of balance for over a decade.

The mortgage lenders don't want the amendments because it would be very difficult if not impossible for them to produce the original note and it is within the purview of the mortgagor to submit a motion to compel the lender to produce the original note in Federal Court. Why doesn't the State of Hawaii do the same thing?

You legislators must amend SB 2472 requiring the **original note be provided and not a copy of the note** to give it teeth and to help protect us the homeowner and the State of Hawaii. **In addition, you must find a way to repeal HRS 667, the non-judicial foreclosure law.** By requiring the **original note and repealing HRS 667** you legislators will help to stabilize the Hawaii economy.

Respectfully submitted,  
Name  
De Ann Kaina

SL.Kaneakua (Lani)



Name: Lana Vierra  
Address: 308 Aulike St.  
City, State, Zip Code: Lahaina, HI 96761  
Phone: 808 281-1351  
Email:

DATE: Thursday, March 11, 2010  
TIME: 2:00 p.m.  
PLACE: Conference Room 325

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Respectfully submitted,  
Name  
Lana Vierra  
SL.Kaneakua (Lani)

Name: Krystale Kaneakua  
Address: 771 Makawao Ave  
City, State, Zip Code: Makawao, Hawaii 96768  
Phone: 808 870 7831  
Email: [kk77@hawaii.edu](mailto:kk77@hawaii.edu)

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