LATE TESTIMONY

Hawaiian Alliance, LLC

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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.

My name is Kale Gumapac, President of Hawaiian Alliance, LLC. I am submitting my testimony in opposition of SB 2472 as it stands with amendments to this bill. My company provides education, counseling, forensic mortgage audit, attorney referrals and paralegal research on mortgage foreclosures to homeowners and attorneys.

The decision you make today will have a far reaching effect on Hawaii's economic stability. SB 2472 should mirror federal law that requires mortgage companies to **produce the original note and not a copy** in federal court to show standing in order to foreclose. The borrower's attorney will submit to Federal Court a motion to compel the mortgage companies to produce the original note with the original signatures. If the mortgage companies do not produce the original note with original signatures, the court will dismiss the foreclosure. Hawaii statutes do not require theses 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 11th 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. For example: If a $600,000 home is foreclosed the State and Counties lose $2200 in tax revenues. Granted the State and the Counties will recoup the taxes when the home is sold. However, the average short sale is on the market for 356 days with the longest short sale 543 days. Tax revenues are not being collected during this time period and last month there were over 1400 foreclosures. Multiply the $2200 in lost revenue by 1000, $2.2 million dollars per month in uncollectable revenue. There is no balance here, it is out of balance and has been out of balance too long.

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. State of Hawaii laws needs to do the same. Hawaiian Alliance supports a strong and healthy mortgage industry but they need to clean up the fraud, predatory lending practices and the illegal transferring of the note and mortgage.

A couple of years ago banks and mortgage companies were satisfied with a 2% profit margins prior to the mortgage industry demise. The Obama stimulus package provided 0% - ¼% interest on almost $1 Trillion loan to banks with the understanding that they would modify 800,000 mortgages. To date they have only modified 4.3% of the 800,000. The banks current interest rates vary from 5.5%-6.75%. Why? They were happy with a 2% margin before and now they are celebrating with 5-7% interest rates and giving their CEO's multi-million dollar bonuses.

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.

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SB 2472 is necessary to 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 theses documents and as a result we believe 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. SB 2472 must further be amended to include non-judicial foreclosure and judicial foreclosure.

HRS 667 (Non-Judicial Foreclosure) took away all the rights of the homeowner and the right to have their day in court. The most devastating and egregious effect on the homeowner. Unfortunately HRS 667 was enacted solely for the benefit of mortgage lender. It was never intended to provide a level playing field for both the mortgagee and the mortgagor.

HRS 667 was intended to provide a streamline way for the mortgage lender to foreclose on homes without going through the State of Hawaii Judicial System. When HRS 667 was passed into law no one had any idea of its devastating consequences to the Hawaii homeowner. There were few foreclosures at the time and it would save money for the lender from having to do a judicial foreclosure.

Mortgage companies and banks have used and continue to use HRS 667 solely for their benefit to foreclose on homes illegally with the protection of the Hawaii Revised Statutes. HRS 667 does not allow the homeowner to introduce evidence of federal violations, predatory lending practices, proof of standing and MERS (Mortgage Electronic Registration Systems) committed by the lender just to name a few. Fraud is committed by the lenders and their attorneys upon the homeowners, Legislature and Judicial System and you the lawmakers have a chance to fix this problem.

There is no process available in HRS 667 for an objection to be made by the homeowner. The mortgagee simply needs to submit an affidavit to the Bureau of Conveyances stating that the homeowner is behind 2 months on their monthly payments and will foreclose. Notices of foreclosure must posted in the newspaper and a notice left at the home. 30 days later the home is auctioned and the lender goes to court to get the courts to evict the homeowner if they haven't abandoned the property.

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Majority of the mortgage lenders today do not want you to know about the ***securitization of the mortgage loan.*** What is securitization? CNBC's House of Cards did an in depth expose.

Securitization is a structured finance process that distributes risk by aggregating debt instruments in a pool, then issues new securities backed by the pool. The term "Securitisation" is derived from the fact that the form of financial instruments used to obtain funds from the investors are securities. As a portfolio risk backed by amortizing cash flows - and unlike general corporate debt - the credit quality of securitized debt is non-stationary due to changes in volatility that are time- and structure-dependent. If the transaction is properly structured and the pool performs as expected, the credit risk of all tranches of structured debt improves; if improperly structured, the affected tranches will experience dramatic credit deterioration and loss.[1] All assets can be securitized so long as they are associated with cash flow. Hence, the securities which are the outcome of Securitization processes are termed asset-backed securities (ABS). From this perspective, Securitization could also be defined as a financial process leading to an issue of an ABS.

Securitization often utilizes a special purpose vehicle (SPV), alternatively known as a special purpose entity (SPE) or special purpose company (SPC), reducing the risk of bankruptcy and thereby obtaining lower interest rates from potential lenders. A credit derivative is also sometimes used to change the credit quality of the underlying portfolio so that it will be acceptable to the final investors. Securitization has evolved from its tentative beginnings in the late 1970s to a vital funding source with an estimated outstanding of $10.24 trillion in the United States and $2.25 trillion in Europe as of the 2nd quarter of 2008. In 2007, ABS issuance amounted to $3,455 billion in the US and $652 billion in Europe. [2]

Securitization, in its most basic form, is a method of financing assets. Rather than selling those assets "whole," the assets are combined into a pool, and then that pool is split into shares. Those shares are sold to investors who share the risk and reward of the performance of those assets. It can be viewed as being similar to a corporation selling, or "spinning off," a profitable business unit into a separate entity. They trade their ownership of that unit, and all the profit and loss that might come in the future, for cash right now. A very basic example would be as follows. XYZ Bank loans 10 people $100,000 a piece, which they will use to buy homes. XYZ has invested in the success and/or failure of those 10 home buyers- if the buyers make their payments and pay off the loans, XYZ makes a profit.

Looking at it another way, XYZ has taken the risk that some borrowers won't repay the loan. In exchange for taking that risk, the borrowers pay XYZ a premium in addition to the interest on the money they borrow. XYZ will then take these ten loans, and put them in a pool. They will sell this pool to a larger investor, ABC. ABC will then split this pool (which consists of high risk loans and low risk loans) into equal pieces. The pieces will then be sold to other smaller investors, (as bonds).

Who holds the note? There are several investors who bought into the securitized investments and each investor owns a share in the investment. So who has the actual note?

Where is the note if the note has been sold 3 or 4 times? The mortgage notes have disappeared, lost and/or misplaced. A contract that is in question and no longer exists.

State Supreme Courts in 4 states have ruled that MERS is a fictitious (strawman) entity as recent as October 2009. This has caused major turmoil and concern in the mortgage industry because they have no standing, they foreclosed on homes illegally and committed fraud upon the homeowner and courts. In addition, the mortgage lenders and their attorneys perjured themselves with fraudulent affidavits on non-judicial and judicial foreclosures.

Hawaii had almost 10,000 foreclosures last year according to Realty Trac. We are online to almost triple that amount in 2010. Please amend SB 2472 with the following:

- Repeal HRS 667
- Amend the foreclosure laws requiring mortgage companies to provide standing to the courts before a foreclosure can be initiated which includes submitting the original note.
- Require State District Courts to rescind mortgages if fraud is committed by the lender and criminal charges must be filed against all those participating in this reyn's spooner (white collar) crime.

I've included an article from the Las Vegas Review Newspaper reporting on a MERS case that went against the mortgagee. Please repeal HRS 667.

Kale Gumapac
President

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Dawson ruled that Mortgage Electronic Registration Systems must at least provide evidence that it was a representative of the mortgage loan holder, which it failed to do.

"Since MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, it has failed to meet its burden of establishing that it is a real party in interest with standing," Dawson said, affirming the bankruptcy court ruling.

Real estate attorney Tisha Black-Chernine said the ruling is good news for struggling borrowers and home-owners.

"It will have a dramatic effect on lenders being able to foreclose," she said.

Because the decision makes it more difficult to foreclose, she hopes lenders will be more willing to negotiate with homeowners struggling to meet mortgage payments by approving short sales or making other concessions.

In a short sale, a lender agrees to let a homeowner sell his home for less than is owed. This is particularly helpful, because many homeowners owe far more than their homes are worth since home prices have fallen.

Houses sold in short sales typically go for 30 percent more than homes sold after foreclosure, Black-Chernine said.

Appraisers looking at the short sale price will use it in determining the market value. Thus, avoiding foreclosure results in higher market values for other houses, she said.

"It should help buoy home prices," Black-Chernine said.

Bill Uffelman, chief executive officer of the Nevada Bankers Association, a trade group, predicted that most foreclosures will be able to proceed because the real mortgage owners and notes will be able to be identified in most cases. However, he said many homeowners facing foreclosure may be able to stay in their homes longer because of the delay.

"In the end in 99.9 percent of the cases, ownership of the note will be proved," he said.

Hawaiian Alliance, LLC

LATE TESTIMONY

By JOHN G. EDWARDS
LAS VEGAS REVIEW-JOURNAL

Judge rules Mortgage Electronic Registration Systems can't foreclose on home

Homeowners struggling to avoid foreclosure got some good news Tuesday.

U.S. District Judge Kent Dawson upheld a bankruptcy court ruling that makes it harder for lenders to foreclose on home mortgages.

The case, which was heard by a panel of federal judges in November, concerned whether Mortgage Electronic Registration Systems Inc., or MERS, could foreclose on residences on behalf of lenders. The electronic system records the ownership of residential mortgages for the mortgage banking industry.

Dawson said the company could not foreclose on a home because it did not provide evidence that it held the note on the residence and didn't show that it was an agent of the lender.

About half of all U.S. mortgages "whose loans have been securitized, sliced and diced are now held by (MERS)," according to a blog posted by securities analyst Barry Ritholtz.

The case started in bankruptcy court two years ago.

MERS asked bankruptcy Judge Linda Riegle for permission to start foreclosure proceedings against a property owned by Lisa Marie Chong. Bankruptcy trustee Lenard Schwartzer objected, saying the electronic system was not a "real party in interest" in the mortgage loan.

Like many mortgages, Chong's loan had been securitized, meaning it had been pooled or packaged into a security held by investors.

MERS was unable to show that it had possession of the note. The bankruptcy judge ruled in Schwartzer's favor. The decision was appealed to federal court.

In his decision Tuesday, Dawson said the registration system does not lose money when borrowers fail to make payments on home mortgages.

Although the decision is believed to be the first of its kind in Nevada, the Kansas Supreme Court made a similar finding in a similar case.

An attorney for the electronic system did not return a call for comment on whether it will appeal.

Contact reporter John G. Edwards at jedwa...@reviewjournal.com or 702-383-0420.

LATE TESTIMONY

HSBA
Hawaii State Bar Association

Collection Law Section

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Re: Testimony of the Collection Law Section of the Hawaii State Bar Association on House Bill No. 2132 and Senate Bill No. 2472

Dear Committee Members:

My name is David Rosen, I am an attorney in private practice with over 11 years of experience handling foreclosure and Landlord/Tenant legal matters in Hawaii. In that capacity, I am one of approximately a dozen or so attorneys who handle the bulk of foreclosures, both judicial and non-judicial, in Hawaii.

I am also a Director of the Collection Law Section of the Hawaii State Bar Association, which is a voluntary organization made up of attorneys, real estate professionals, and members of Hawaii's lending and debt collection communities. It is on behalf of this organization that I testify here today.

Like you, the Collection Law Section is well aware of the financial upheaval currently taking place. And, like you, we wish that more could be done to help those who are being affected in these difficult times. However, House Bill No. 2132 ("HB 2132") and Senate Bill No. 2472 ("SB 2472") (collectively, "the Bills") will not only fail to provide any meaningful assistance to homeowners, but may actually make matters significantly worse. In particular, the Bills will likely result in delays to the foreclosure process that will harm those who are paying their mortgages and who may be attempting to purchase property in Hawaii. Among other reasons, delaying the foreclosure process increases the fees Associations are forced to charge to paying members to cover fees not being paid by parties in foreclosure.

As a starting point, let me note that this is not the first time that Hawaii has experienced high foreclosure rates. Then, as now, it is important to allow this process to run its course under the legal and financial systems currently in place. With respect to Hawaii's foreclosure and Landlord/Tenant laws, and as someone who has been involved with them for over a decade, I can honestly tell you that the laws as they currently stand are working.

Could they be improved? Yes. However, rather than attempting to do so in a "piece meal" manner and in reaction to anecdotal complaints you may have heard, it would be better to take a more circumspect and prospective approach so that, in the quest to help, more harm is not done.

While they may be well intended, the Bills are unnecessary, vague, subject to abuse, and potentially harmful to the general public.

First, **the debt counseling notice contemplated by the Bills is already being provided by most, if not all, lenders under federal mandates. Likewise, most, if not all, lenders are already providing mortgagors with copies of their loan documents (i.e., promissory note, mortgage, account statement, and any assignments or transfers of the loan documents) upon request.** Consequently, the Bills are unnecessary.

Second, any modifications to the existing foreclosure laws create new bases for confusion and increased litigation. Desperate or unscrupulous mortgagors use these changes to assert new arguments as to why they should be allowed to delay and avoid their contractual obligations. These assertions are rarely successful, but they do delay the process and burden the judicial system, which is compelled to interpret the application of new statutory requirements.

Such delays harm lenders, by compelling them to bear the resulting legal expenses, and innocent third parties, who are compelled to "subsidize" their neighbors' unpaid Association dues. In some instances this has resulted in increased AOAO dues charges of hundreds of dollars per month for those members who are paying. This issue has reached epidemic proportions in areas such as Miami and Las Vegas, where some Associations have significantly more members who are not paying than those that are.

Third, the Bills' reliance on HUD's conduct is also potentially problematic. The State of Hawaii cannot compel a federal agency, such as HUD, to do anything. Consequently, should HUD decide not to approve counselors, or should no counselors be willing to provide such services in Hawaii, the Bills could be interpreted as prohibiting non-judicial foreclosures altogether. This could result in lenders being unwilling to lend on new mortgages in Hawaii, borrowers in Hawaii having to pay more to obtain a mortgage, and/or our courts being overwhelmed with judicial foreclosures.

Fourth, the vagueness of language in the Bills is also highly problematic. In particular, the Bills require notice of the availability of mortgage counseling before any foreclosure action is "initiated." However, the term "initiated" is not defined, and could mean when a default letter is first sent or when an auction is noticed.

Also, there are no "cure" or "safe harbor" provisions. Consequently, if a lender fails to provide the required notice at the appropriate time, it is not clear whether or how a lender could "cure" this defect. Compelling the lender to restart the entire foreclosure process would appear to be unduly burdensome and expensive and confusing to the mortgagor. Instead permitting the lender to provide the notice and wait for 30 days before proceeding would satisfy the intent of the Bills, but is not provided for.

Fifth, the Bills fail to address how the change would affect the large number of pending foreclosure matters, where the required notice may not have been given, but which may not go to auction for sometime because the lender is engaging in ongoing efforts to work with the mortgagor. Similarly, in the case of HB 2132, it is not clear what, if any, notice must be given prior to the DCCA's issuance of the approved form of notice, which is not contemplated for a year.

Sixth, SB 2472 is more comprehensive than HB 2132. However, it only applies to non-judicial foreclosure actions. In addition to the concerns about the counseling notice requirement, SB 2472 would require a foreclosing mortgagee to provide, upon request of a mortgagor, a copy of the note and mortgage. **Again, this is already being done by most, if not all, foreclosing mortgagees.**

While mandating such a requirement would not appear to be objectionable on its face, when a borrower may request this documentation is unclear from SB 2472, which only provides that the mortgagee may not "initiate" a foreclosure proceeding until this documentation is provided. Does this mean that once the foreclosure action is already "initiated" the mortgagee no longer has any obligation to provide the documentation, or that once it is "initiated" the mortgagor no longer has a right to request the documentation?

Seventh, SB 2472 attempts to impose a "fair market" valuation requirement with respect to non-judicial foreclosure sales. This requirement makes absolutely no sense in a non-judicial foreclosure because, by presumption of law, a foreclosing mortgagee is already waiving its right to seek a deficiency judgment if it forecloses non-judicially. See HRS § 667-38. Moreover, if a property had significant equity, the mortgagor would have likely wanted and been able to sell the property prior to the non-judicial auction.

This provision is particularly onerous for junior lien holders and associations who may be proceeding via a power of sale. This is because the sale price when a junior lien or association lien is foreclosed will take into consideration any senior lien(s) and, therefore, will usually not meet the seventy per cent requirement.

Eighth, there are also ambiguity problems with this valuation provision. It is unclear how close in time to the sale the appraisal must be and how the appraisal should value the subject property. In the case of virtually all non-judicial foreclosure actions, the mortgagor is uncooperative, which means that the appraisal would need to be conducted without an interior inspection of the property. Not knowing the inside condition of the property makes it virtually impossible to accurately value and could result in valuation disputes between the mortgagor and the foreclosing mortgagee that, again, would delay and increase the expense of the process. SB 2472 is also silent as to the consequence, if any, of a sale that does not satisfy the "fair and reasonable" sale price requirement.

In summation, with rare exceptions, existing federal laws and state foreclosure and Landlord/Tenant laws appear to be functioning adequately and provide sufficient mechanisms and time for adequate notice to be given to borrowers and for borrowers to obtain documentation and negotiate with their lenders. While certain individuals may have complaints and may believe that a particular lender or association is behaving unfairly or unreasonably, these situations make up a very small percentage of the total number of foreclosures and, in such instances, there are legal remedies that are already available, which are currently being used very aggressively by borrowers who believe they have been wronged.

Again, foreclosing on a property is very expensive. At a minimum, it is going to costs a lender or association several thousand dollars and in many instances it can cost more than $10,000 to complete a foreclosure. Foreclosing also takes a long time. In my decade of experience, I have never seen, nor heard of, anyone complete a foreclosure action in less than 6 months from the date of the initial default. Usually, this process takes more than a year. During that time, the lender is carrying the cost of the loan and may have to pay the real property taxes, lease rent, and insurance on the property. Consequently, it is in a lender or an association's best interest, a fact of which they are well aware, to exhaust all efforts to work out a modification or other arrangement with a homeowner prior to referring a matter to legal counsel and/or proceeding with foreclosure.

To the extent that you are inclined to disagree with my assessment of the state of Hawaii's existing laws, we encourage you to consider an overhaul of the non-judicial foreclosure process by amending the Part II (HRS § 667-21 *et. seq.*) non-judicial foreclosure statute. The Part II law, which was enacted in 1998, after years of consideration and input from the various constituencies involved in the process, was rendered useless by a number of procedural defects, including a requirement that the borrower being foreclosed upon execute the conveyance deed following the auction. See HRS § 667-31(a). Thus, a foreclosure under this law could not occur without the participation of the party who was losing his/her property.

It should, therefore, come as no surprise that not a single foreclosure action appears to have occurred under this statute. Instead, associations and lenders have been forced to foreclose under Hawaii's Part I non-judicial foreclosure statute, which was enacted in 1859, and which does not contain many of the clarifications and protections contained within Part II.

Should the Committees be willing to consider this proposal, members of our section would welcome the opportunity to work with other interested parties in recommending amendments to the Part II statute that would make it the preferred vehicle for carrying out foreclosures. Such an undertaking would allow for a careful and thoughtful review in place of consideration of the Bills currently in play and could be presented for consideration next session.

Such a review could also address inefficiencies in the existing process such as how to adequately notice a party whose whereabouts are unknown or who may be deceased. Presently, addressing such issues can add thousands of dollars and months of delay to a foreclosure. These types of amendments would result in benefits to all interested parties.

Thank you for this opportunity to testify.

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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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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 theses 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.**

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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,

Rose Delfin

LATE TESTIMONY

Hawaii Credit Union League
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LATE TESTIMONY

Testimony to the House Committee on Consumer Protection and Commerce and the
House Committee on Judiciary
Thursday, March 11, 2010 at 2:00 pm

Testimony in opposition of SB 2472 SD2, Relating to Mortgage Foreclosures

To: The Honorable Robert Herkes, Chair
The Honorable Glenn Wakai, Vice-Chair
Members of the Committee on Consumer Protection and Commerce

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

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 90 Hawaii credit unions, representing approximately 810,000 credit union members across the state.

We are in opposition to SB 2472 SD2, Relating to Mortgage Foreclosures. This bill would needlessly lengthen the foreclosure process, which would be burdensome to all parties involved.

Thank you for the opportunity to testify.

Name: Mary Ann Saindon
Address: HC1 Box 5247
City, Keaau State, HI Zip Code: 96749
Phone: (808)769-3987
Email: sane@joimail.com

LATE TESTIMONY

COMMITTEE ON CONSUMER PROTECTION & COMMERCE
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Respectfully submitted,
Mary Ann Saindon