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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON FINANCE

THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Wednesday, February 29, 2012
10:00 a.m.

TESTIMONY ON HOUSE BILL NO. 2019, RELATING TO MORTGAGES.

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR,
AND TO THE HONORABLE MARILYN B. LEE, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify concerning H.B. No. 2019. My name is Bruce B. Kim and I am the Executive Director of OCP. OCP supports the intent of the bill with comments.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("Task Force") pursuant to Act 162. The Task Force met over the course of the past two years and submitted separate reports to the Legislature. The reports covered many of the issues surrounding the foreclosure crisis affecting the State and proposed legislation

addressing this complex subject. The first report led to the adoption of Act 48 which sought to reform the foreclosure process and enact significant consumer protections especially in the area of nonjudicial foreclosures. This year the Task Force through its various working groups devoted a significant amount of time and effort in attempting to strengthen Act 48. Ultimately, the Task Force's working groups came up with a number of recommendations intended to provide clarity and certainty to both lenders and borrowers in the foreclosure process. It is my sincere hope that the measures submitted by the Task Force this year will lead to further implementation of Act 48, particularly utilization of the DCCA's alternate dispute resolution program created back in October under Act 48.

The Task Force did not consider changes relevant to H.R.S. Chap. 506 or to Chap. 667 concerning deficiency judgments. OCP generally supports the intent of the bill that eliminates deficiency judgments against "owner occupants" as that term is defined in Act 48 and only under certain limited circumstances. HRS § 667-21(b). However, it may not be equitable to grant an owner blanket forgiveness of the entire deficiency judgment in circumstances where the homeowner holds an interest in other real property, including investment properties. Perhaps additional conditions to that effect would be appropriate.

OCP appreciates the opportunity to testify on H.B. No. 2019 and would be happy to answer any questions the committee may have.



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Presentation to the Committee on Finance
Wednesday, February 29, 2012 at 10:00 a.m.
Testimony on HB 2019 Relating to Mortgages

In Opposition

TO: Honorable Marcus R. Oshiro, Chair
Honorable Marilyn B. Lee, Vice Chair
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 2019. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

This bill prohibits attempts to collect on any shortfall resulting from a sale that does not pay off the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale.

A **short sale** is a sale of real estate in which the proceeds from selling the property will fall short of the balance of debts secured by liens against the property and the property owner cannot afford to repay the liens' full amounts, whereby the lien holders agree to release their lien on the real estate and accept less than the amount owed on the debt. Any unpaid balance owed to the creditors is known as a *deficiency*. Short sale agreements do not necessarily release borrowers from their obligations to repay any deficiencies of the loans, unless specifically agreed to between the parties. In certain cases, the entire unpaid debt is forgiven but in other cases, an agreement is reached so the borrower does pay a portion or all of the remaining unpaid balance depending on the financial condition of the borrower.

A short sale is often used as an alternative to foreclosure because it mitigates additional fees and costs to both the creditor and borrower; however both will often result in a negative credit report against the property owner.

This proposed law if enacted will have the unintended consequence of possibly limiting the use of a short sale as a loss mitigation tool. This proposal would take away the right of a lender to pursue a deficiency for both judicial and nonjudicial foreclosures.

All mortgage loans were underwritten on the basis that the entire loan would be repaid over time. To change the contract between the lender and borrower that converts a recourse loan to a non-recourse loan after the loan was funded presents severe legal ramifications. Certainly, if mortgage loans become non-recourse, lenders would have to consider a larger down payment requirement to protect itself against loss.

The bill in 667-(1) limits collection of a deficiency to "a financial institution as defined in HRS 37D-1". A financial institution is defined under this section as follows:

"Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including without limitation banks, savings banks, savings and loan companies or associations, financial services loan companies, and credit unions."

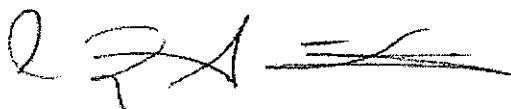
On January 11, 2012, a Consumer Financial Protection Bureau press statement contained a quote as follows: *"Until now, a significant part of the mortgage market — which includes independent lenders, brokers, servicers, and others unaffiliated with banks and depository institutions — has not been subject to federal supervision. This "nonbank" mortgage sector included many of the largest subprime lenders during the housing bubble. The Dodd-Frank Wall Street Reform and Consumer Protection Act significantly reformed the gaps in federal supervision of the mortgage market by providing the CFPB with authority to supervise a range of mortgage participants."*

Therefore, another unintended consequence may be to allow nonbank lenders, insurance companies, private individual lenders, etc. exemption under this law. This just further discriminates against Hawaii banks that did not contribute to this mortgage dilemma.

Most Hawaii banks use the judicial foreclosure process to preserve their right to obtain a deficiency judgment in order to limit their potential loss. The decision to seek a deficiency should be made on a case by case basis taking into consideration the troubled borrower's financial condition and any other circumstances and not dictated by law.

We asked that this bill be held.

Thank you for the opportunity to provide our testimony.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', followed by a horizontal line.

Gary Y. Fujitani
Executive Director



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February 29, 2012

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol, Room 308
Honolulu, Hawaii 96813

RE: H.B. 2019, Relating to Mortgages

HEARING: Wednesday, February 29, 2012, at 10:00 a.m.

Aloha Chair Oshiro, Vice Chair Lee, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR provides **comments** on H.B. 2019 which prohibits deficiency judgments to recover the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale.

In general, a short sale is a sale of real estate in which the proceeds from selling the property will fall short of the balance of debts secured by liens against the property. In a short sale, lien holders must agree to release their lien on the real estate and accept less than the amount owed on the debt. Any unpaid balance owed to the creditors is referred to as a deficiency.

HAR notes that, if deficiency judgments are prohibited for short sales, there may be certain tax implications for borrowers. Presently, the terms of a short sale are determined by negotiation with lien holders. Short sale agreements do not necessarily release borrowers from their obligations to repay any deficiencies of the underlying loans, unless it is specifically agreed to between the parties as part of the negotiation process.

Even if a borrower is forgiven from paying on the remaining deficiency owed after a short sale, there may still be additional tax obligations to the borrower. If the lender does not obtain a deficiency judgment, the borrower may be subject to paying tax on the amount forgiven, which is treated as income for federal tax purposes (via a 1099 tax form).

HAR believes that for short sales, the final agreement between the parties is the appropriate document to specify whether a deficiency judgment will be pursued, as the result of the negotiations between the parties. Therefore, we believe that disallowing deficiency judgments in this context is not sound public policy.

Mahalo for the opportunity to provide comments.





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Testimony to the House Committee on Finance
Wednesday, February 29, 2012

Testimony in Opposition to HB 2019, Relating to Mortgages

To: The Honorable Marcus Oshiro, Chair
The Honorable Marilyn Lee, Vice-Chair
Members of the Committee on Finance

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 81 Hawaii credit unions, representing approximately 811,000 credit union members across the state. Approximately 60 of our credit unions write mortgage loans in the State of Hawaii. We are in opposition to HB 2019.

HB 2019 seeks to bar the collection of a deficiency judgment in the case where a short sale or foreclosure sale of a residential property does not pay off the balance of a mortgage loan.

Short sales are often a desirable alternative to foreclosure because of the lesser costs and fees on both sides. However, a short sale does not mean that the borrower is automatically forgiven of the remainder of their mortgage debt.

We submit that these provisions would inject unnecessary risk and uncertainty into both the short sale process and the mortgage foreclosure process. The provisions regarding relief from deficiency judgments in Act 48, developed by the Mortgage Foreclosure Task Force in 2010 after long and serious deliberation are adequate and should not be expanded.

Thank you for the opportunity to provide comments.



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Calvin Pang, Esq.
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.
Executive Director

The Honorable Marcus R. Oshiro, Chair
The Honorable Marilyn B. Lee, Vice Chair
House Committee on Finance

Hearing : Wednesday, February 29, 2012, 10:00 a.m.
State Capitol, Conference Room 308

In support of HB 2019 Relating to Foreclosures

Chair and Members of the Committees:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("Legal Aid"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in Legal Aid's Consumer Unit. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, tax debt, and other consumer debt problems.

We are testifying **in support** of HB 2019 as it would strengthen protections for mortgage consumers in the State of Hawai'i.

HB 2019 seeks to prohibit deficiency judgments to recover any remaining balances on mortgage loans, when the property is sold in a foreclosure action or through a short sale. In the short sale process, a distressed property is sold prior to foreclosure for a sale price less than the amount owed on the mortgage. HB 2019 would limit these protections to continuously owner-occupied properties, in situations where the mortgagor used the proceeds of the mortgage to purchase the property, the mortgage has not been refinanced, and the mortgagee is a financial institution.

In essence, HB 2019 seeks to prevent a situation where a lender purchases the foreclosed property with a low bid, or agrees to sell the property at a price less than what is owed on the mortgage loan, and then subsequently seeks to recover in court the difference in sale price and mortgage owed from the prior homeowner. HB 2019 would prevent a “double recovery” by the lender when it subsequently sells the property to a third-party buyer while suing the homeowner for the mortgage deficiency.

HB 2019 would thereby assist in helping consumers’ financial recovery by avoiding state court actions by lenders to recover deficiencies, as well as bankruptcy filings by homeowners seeking to discharge debts arising from such deficiency judgments. In addition, the bill would reduce abusive debt collection practices by third parties who purchase at deep discounts the rights to collect deficiencies.

Legal Aid supports HB 2019, and also recommends incorporating the amendments in the CPC and JUD’s report to amend HB 2019 to: (1) cover refinanced mortgage loans; (2) eliminate the uninterrupted occupancy requirement; and (3) apply the measure to situations in which the homeowner relinquishes the property deed in lieu of foreclosure. These amendments would help to ensure that the bill helps many more distressed Hawai’i homeowners.

Conclusion:

For the above reasons, we respectfully request passage of HB 2019, including the recommended amendments. We appreciate the committee’s recognition of the need to protect mortgage consumers in the State of Hawai’i and support HB 2019’s attempts at doing so. Thank you for the opportunity to testify.



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House Committee on Finance
Wednesday, February 29, 2012, 10:00 a.m.
State Capitol, 415 South Beretania Street
Conference Room 308

HB 2019: SUPPORT WITH AMENDEMENTS

Chair Herkes, Vice Chair, and Committee Members:

My name is Jeff Gilbreath, Executive Director of Hawaiian Community Assets, a HUD-approved housing counseling agency that provides free foreclosure prevention counseling services through our statewide offices. In my capacity as Executive Director I also served with the State Mortgage Foreclosure Task Force since in 2011 to present; however, the views I express here are my own and not that of the Task Force.

HB2019 would go a long way to help our families and keiki by prohibiting deficiency judgments for remaining balances on mortgage loans for certain residential property sold in judicial foreclosures or short sales. And for this reason, Hawaiian Community Assets strongly supports HB2019 with amendments.

Amendment #1: Cover refinance as well as purchase mortgage loans. With interest rates at record lows, most homeowners have refinanced their mortgages to reduce their monthly payments and weather the economic and housing storms. It makes sense that HB2019 cover refinance as well as purchase mortgage loans in order to reflect this reality in our local housing market, especially as national refinancing campaigns and implementation of the National Mortgage Settlement get under way in the coming year.

Amendment #2: Cover deeds in lieu of foreclosure and short sales. Deeds in lieu of foreclosure and short sales both avoid foreclosure and require the homeowner to voluntarily relinquish the property. Homeowners who make this tough decision to “let go” of their home should not have to incur financial penalty by way of a deficiency judgment for accepting and moving forward in a dignified way to prevent foreclosure.

To articulate the need for anti-deficiency protection for our Hawaii families, as well as the amendments listed above, I have outlined the following key points to provide context.

Financial and emotional impacts of foreclosure on our families should be enough. Each day, we work with homeowners going through the extremely painful process of foreclosure. As a homeowner it is not only the financial costs, but the emotional anguish, that has them questioning themselves as providers, adequate as a husband or a wife, and whether or not they

will make good on a promise to make leave their children better off than themselves. Losing a home through foreclosure is devastating to homeowners and a 2010 National Coalition on Homelessness Report shows loss of housing has “real, lasting, and long-term affects on our children in all aspects of their lives”, today and tomorrow. The financial and emotional impacts a family undergoes should be enough – an additional deficiency penalty, due in part to across-the-board low home values within our communities due to foreclosure, is not sufficient reason to increase financial liability of a family.

Limited benefits of deficiency judgments for loan holders; high costs for homeowners. It is safe to say the adverse effects on former homeowners far outweigh any actual benefits to loan holders when it comes to deficiency judgments. As it stands, loan holders realize limited benefit as a result of deficiency judgments. Such judgments are often uncollectible, and, as a result, loan holders have traditionally dedicated little time to collect on them. However, the cost of a deficiency judgment on family whose home was foreclosed on due to loss of a job, reduced income, increase in expenses, and out-of-control medical costs, could mean bankruptcy or worse, homelessness – two realities that can not only cost the family themselves, but our communities and our State.

Inherent disadvantage of homeowners in the deficiency judgment process. When loan holders follow through on collecting deficiency judgments from homeowners, it is the borrower who is at an extreme disadvantage. The housing industry has done a great job in the last 10 years of making mortgage documents extremely complex, hard to understand, and so lengthy that it often takes attorneys to weed through their meaning. Therefore, when deficiency judgments are pursued borrowers do not have the ability to negotiate with lenders and thereby have to carry this extra financial burden after they have already lost their home to foreclosure. This practice is unfair, particularly when recession has caused more of us to become unemployed and our property values have decreased on average \$42,000 according to the Center for Responsible Lending.

Deficiency judgments hurt Hawaii’s economic recovery by sending our money out-of-state. The vast majority of mortgages foreclosed in Hawaii are held by out-of-state entities. Therefore, when deficiencies are collected, rather than returning money to Hawaii lenders or creditors, it goes to judgment creditors on the mainland.

Thank you for your consideration of my testimony.



Jeff Gilbreath
Executive Director

HAWAII FINANCIAL SERVICES ASSOCIATION

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

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February 29, 2012

Rep. Marcus R. Oshiro, Chair
and members of the House Committee on Finance
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2019 (Mortgages)**
Hearing Date/Time: Wednesday, February 29, 2012, 10:00 a.m.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA opposes this Bill.

The purpose of this Bill is to prohibit deficiency judgments to recover the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale.

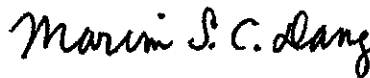
Section 1 of this Bill involves a "short sale" where a property is voluntarily sold by an owner, but the sales proceeds is not enough to pay off all liens on the property such as mortgage liens. This Bill would allow a person who has occupied a residential property as a principal residence to avoid being responsible for any monies still owing on a mortgage loan (that was used to initially buy the property) after the property is sold at "short sale".

Section 2 of this Bill involves a foreclosure of a property in which the monies from the sale is not enough to pay off all liens on the property such as mortgage liens. This Bill would allow a person who has occupied a residential property as a principal residence to avoid being liable under a deficiency judgment for any monies still owing on a mortgage loan (that was used to initially buy the property).

It does not appear to be sound public policy to create a state law which uses a broad brush approach to enable homeowners to escape the obligation to pay the balance of their mortgage loans after a short sale or a foreclosure sale. The federal bankruptcy law already provides such an option.

If this Bill becomes law, there will undoubtedly be unwanted consequences. Lenders might not readily consent to future short sales. Loan underwriting standards of lenders could be tightened. Existing and potential homeowners would be negatively affected.

Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

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House Committee on Finance

Hearing: Wednesday, February 29, 2012, 10:00 a.m.
Conference Room 308, State Capitol, 415 South Beretania Street

IN SUPPORT OF HB 2019

Chair Oshiro, Vice Chair Lee, and Committee Members:

My name is George Zweibel. I am a Hawaii Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui. Earlier, I was a regional director and staff attorney at the Federal Trade Commission enforcing consumer credit laws as well as a legal aid consumer lawyer. I have served on the Legislature's Mortgage Foreclosure Task Force since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

HB 2019 would prohibit deficiency judgments for remaining balances on mortgage loans for certain residential property sold in judicial foreclosures or short sales. **I strongly support HB 2019. However, to protect more than a small number of homeowners who have lost their homes, I respectfully recommend revising HB 2019 to also cover refinance mortgage loans and deeds in lieu of foreclosure and to eliminate the uninterrupted occupancy requirement.**

(1) Cover refinance as well as purchase mortgage loans. Most homeowners have refinanced their mortgages, *e.g.*, to reduce their monthly payments when interest rates dropped. Moreover, most loan-related abuses occurred in refinance transactions after time or appreciation created substantial home equity. Some states broadly prohibit deficiency judgments in residential judicial foreclosures. For example, Oregon broadly bars deficiency judgments after residential foreclosure sales. Or. Rev. Stat. § 86.770(2)(2009). North Dakota prohibits deficiency judgments for owner-occupied residential property with four or fewer units up to 40 contiguous acres in size. N.D. Cent. Code § 32-19-03 (2011). California prohibits deficiency judgments where a loan holder consents to a short sale of a dwelling of not more than four units. Cal. Civ. Proc. Code § 580e.

2. Eliminate uninterrupted occupancy requirement. Oregon and North Dakota have no such requirement. Although Arizona does bar deficiency judgments solely for purchase money mortgages, it requires only that the

property be utilized as a single one or two-family dwelling. Ariz. Rev. Stat. Ann. § 33-729 (2011). At most, HB 2019 should be limited to “owner-occupants,” as that term is defined in chapter 667.

3. Cover deeds in lieu of foreclosure. Deeds in lieu of foreclosure and short sales both avoid foreclosure and involve the voluntary relinquishing of the property by the homeowner. Moreover, the reasons for prohibiting deficiency judgments described below apply equally in both situations. Accordingly, Section 1 should apply to both, not just short sales.

REASONS FOR ESTABLISHING ANTI-DEFICIENCY PROTECTION

- **Prevent “double recovery” by loan holder.** In the vast majority of foreclosures, the property is purchased by the loan holder. Often there is no competitive bidding. Even if there is, bidders other than the mortgagee are required to pay 10% of the purchase price on the spot. In this context, the mortgagee can bid low and obtain a judgment for the deficiency, then sell the property on the open market for a higher price, thereby receiving a “double recovery” at the expense of the borrower, who is still liable for the “deficiency.” Barring deficiency judgments would eliminate the incentive to sell (or buy) property for less than it is worth.
- **Avoid borrower bankruptcy filings.** Struggling homeowners who have lost their homes to foreclosure but still face deficiency liability may be forced to file for bankruptcy. This is humiliating and traumatic for debtors and will be reported by credit bureaus for ten years. Bankruptcy also hurts creditors. With few or no assets to distribute, all unsecured creditors receive little or nothing when the debts are discharged in the bankruptcy.
- **Limit effects of foreclosure on homeowners.** Losing a home through foreclosure is devastating to homeowners and their families. It is hard to justify the added imposition of personal liability on a homeowner following the loss of his/her home, with the indefinite threat of garnishing wages or taking other assets. Protecting such persons from the additional burden of personal liability greatly increases their prospects for financial recovery and avoiding bankruptcy.
- **Reduce unfair shifting of risk to borrowers.** Borrowers cannot “negotiate” with lenders regarding deficiency liability or other boilerplate provisions buried in the voluminous mortgage documents they are required to sign. In effect, lenders thereby shift all risk to borrowers. This is unfair, particularly when recession has caused widespread unemployment and reduced property values.
- **Deficiency judgments provide minimal benefit to loan holders.** Deficiency

judgments are often uncollectible and little effort has traditionally been made to collect on them. Accordingly, the adverse effects on former homeowners far outweigh any actual benefits to loan holders.

- Deficiency judgments hinder Hawaii's economic recovery. The vast majority of mortgages foreclosed in Hawaii are held by out-of-state entities. Therefore, when deficiencies are collected, rather than returning money to Hawaii lenders or creditors, it goes to judgment creditors on the mainland.
- Sale of deficiency judgments to debt buyers. Deficiency judgments, or the right to seek a deficiency, are increasingly being sold to third parties who purchase them at a deep discount, then aggressively attempting to collect on them regardless of the former homeowner's ability to pay, opening the door to abusive debt collection practices.

Thank you for your consideration of my testimony.

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 28, 2012 4:44 PM
To: FINTestimony
Cc: aforges@dcca.hawaii.gov
Subject: Testimony for HB2019 on 2/29/2012 10:00:00 AM
Attachments: HB2019_CCA-OCP_02-29-12_FIN.pdf

Testimony for FIN 2/29/2012 10:00:00 AM HB2019

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Adrienne Forges
Organization: SOH - OCP
E-mail: aforges@dcca.hawaii.gov
Submitted on: 2/28/2012

Comments:

Name and Title of Person Testifying:
Bruce B. Kim, Executive Director
Office of Consumer Protection
Department of Commerce and Consumer Affairs

Committee(s): Finance

Date of Hearing: Wednesday, February 29, 2012, 10:00 a.m.

Testimony on House Bill No. 2019

Please call if you have questions. Thank you.

Adrienne Forges
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