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LT. GOVERNOR

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KEALI'I S. LOPEZ  
DIRECTOR

EVERETT KANESHIGE  
DEPUTY DIRECTOR

TO THE  
HOUSE COMMITTEES ON  
CONSUMER PROTECTION AND COMMERCE  
AND  
JUDICIARY

THE TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION OF 2012

Wednesday, February 22, 2012  
2:00 p.m.

TESTIMONY ON H.B. 2705  
RELATING TO NEGOTIABLE INSTRUMENTS.

TO THE HONORABLE ROBERT N. HERKES, CHAIR,  
THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR,  
AND MEMBERS OF THE COMMITTEES:

My name is Iris Ikeda Catalani, Commissioner of Financial Institutions  
("Commissioner"), testifying on behalf of the Department of Commerce and Consumer  
Affairs. I would like to provide comments on H.B. 2705 relating to the measure on  
negotiable instruments.

The Department believes that the intent of the measure is admirable to stop unwarranted foreclosures, however, this proposal if passed may not produce the expected results. On its face, the removal of this all important definition will likely result in more harm than good and may have unintended consequences. We provide the following comments regarding the unintended consequences.

1. The purpose of the UCC is to create uniformity amongst the states in the application of its law to allow businesses and commercial activity run more smoothly and with a bit of predictability. To delete a basic definition that is the underlying concept of the law of Article 3, negotiable instruments runs against the spirit and intent of the UCC. The reason why the UCC was established to was prevent these uncertainties that result in confusion and inefficiency for companies.

2. By repealing the definition of who is a "person entitled to enforce" is unlikely to produce the result they are looking for, i.e., providing relief to homeowners facing foreclosure. Eliminating the definition of a person "entitled to enforce" does not take away anyone's right to foreclose. The purpose of that provision does is to limit and make it clear exactly who has a right to enforce certain rights under a negotiable instrument. To delete it would create an uncertainty regarding who can enforce such rights and if anything, could result in more parties trying to get in on the action since the law would no longer limit it to people falling into those 3 categories. Deleting that provision will not preclude Banks from continuing to foreclose.

3. Deleting the definition of who has a right to enforce definition will create confusion and uncertainty in the law, which may add confusion and delay to the process of foreclosure. Confusion and uncertainty over who has a right to enforce will not stop those that are currently enforcing, but it will result in increased litigation, which translates into increased legal fees for the bank and the homeowner, inconsistent applications of the law, further delays in the process/increased backlogs at the already overburdened judicial system as the parties argue whether that person has a right to enforce. Without a clear definition of who is entitled to enforce, the State's judicial system could be faced with a flurry of foreclosure actions by those that would've had a right to enforce under the old law, plus new ones alleging they now have the standing to enforce since the old limitations are gone. Without the guidance of a long settled statute, more parties could allege they have foreclosure rights and courts will be forced to consider the issue on a case by case basis, which could result in inconsistent applications of the law

4. Deleting the definition will also have far reaching unintended consequences beyond mortgages and foreclosures-potentially affecting all transactions involving negotiable instruments in Hawaii. The definition for a "person entitled to enforce" under Title 27, Article 3, HRS applies to a person's rights with respect to all negotiable instruments under Hawaii law, not only mortgages. Deleting that definition may question the rights of anyone holding a negotiable instrument in Hawaii. Negotiable

TESTIMONY ON HOUSE BILL NO. 2705  
February 22, 2012, 2:00 p.m.  
Page 4

instruments include common everyday items as promissory notes, checks and bills of exchange.

Thank you for the opportunity to provide testimony on this measure and I am available to answer any questions the committee might have.



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808-521-4120  
ADDRESS:  
1000 Bishop Street, Suite 301B  
Honolulu, HI 96813-4203

Presentation to the Committees on Consumer Protection & Commerce and Judiciary  
Wednesday, February 22, 2012 at 2:00 p.m.  
Testimony on HB 2705 Relating to Negotiable Instruments

### In Opposition

TO: Honorable Robert N. Herkes and Gilbert S.C. Keith-Agaran, Chairs  
Honorable Ryan I. Yamane and Karl Rhoads, Vice Chairs  
Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 2705. HBA is the trade organization that represents FDIC insured depository institutions doing business in Hawaii.

This bill repeals the definition of "person entitled to enforce".

While we are not sure of the intent of this bill, it appears it is designed to further delay the mortgage foreclosure process, which is already drawn out due to the passage of Act 48 in 2011. Therefore, this bill is unnecessary due to the already extended time to foreclosure. Further current bills HB 1875 and SB 2429 significantly strengthen borrower protection and extend the foreclosure time frames even longer.

The likely result of the bill would be unnecessary litigation over the person entitled to enforce the right to foreclose on a mortgage note. This unnecessary litigation and delay will mean additional costs that will eventually be passed along to the troubled borrower.

The definition is in chapter 490, which deals with the **Uniform Commercial Code (UCC)** first published in 1952. The UCC is a uniform act promulgated in conjunction with efforts to harmonize the law of sales and other commercial transactions in all 50 states. Once enacted by a state, the UCC is codified into the state's code of statutes. A state may adopt the UCC verbatim as written, or a state may adopt the UCC with specific changes. Unless such changes are minor, they can seriously obstruct the Code's express objective of promoting uniformity of law among the various states. **Thus any changes in UCC should only be made upon the recommendation of the National Conference of Commissioners on Uniform State Laws to avoid any unintended consequences.**

We respectfully request this bill be held by the Committee.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', with a horizontal line drawn through the end of the signature.

Gary Y. Fujitani  
Executive Director

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 1:30 PM

**To:** CPCtestimony

**Cc:** travelmaui@yahoo.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Charles Keoho

Organization: Individual

E-mail: travelmaui@yahoo.com

Submitted on: 2/21/2012

Comments:

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 1:50 PM  
**To:** CPCtestimony  
**Cc:** lynda.e.tobita@hawaii.gov  
**Attachments:** HB 2705 Negotiable Instrum~1.doc (30 KB)

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Lani Ewart  
Organization: Commission to Promote Uniform Legislation  
E-mail: lynda.e.tobita@hawaii.gov  
Submitted on: 2/21/2012

Comments:

**WRITTEN TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON H.B. NO. 2705**

**RELATING TO NEGOTIABLE INSTRUMENTS.**

**BEFORE THE HOUSE COMMITTEES ON CONSUMER PROTECTION &  
COMMERCE AND ON JUDICIARY**

**DATE:** Wednesday, February 22, 2012, at 2:00 p.m.  
Conference Room 325, State Capitol

**WRITTEN TESTIMONY ONLY:** (For further information, please contact Commission to Promote Legislation Commissioner LANI EWART at 547-5600)

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To Chairs Herkes and Keith-Agaran and Members of the Committees:

Thank you for this opportunity to testify on H.B. No. 2705, Relating to Negotiable Instruments.

The State Commission to Promote Uniform Legislation opposes the enactment of H.B. No. 2705.

1. H.B. No. 2705 repeals section 490:3-301, Hawaii Revised Statutes. Article 3 of chapter 490, Hawaii Revised Statutes codifies Article 3 of the Uniform Commercial Code, which is a statutory codification of the law of negotiable instruments that has been adopted by all states.
2. The mission of the State Commission to Promote Uniform Legislation, as indicated by its very name, is to promote the enactment of uniform legislation in Hawaii to the extent feasible.
3. The repeal of section 490:3-301 would take Hawaii out of uniformity with other states.
4. Uniformity aside, the repeal of section 490:3-301 would appear to throw a great deal of ambiguity as to who can enforce any negotiable instrument, including mortgage notes. This may have an adverse impact on the securitization of mortgage notes and perhaps the availability of mortgage financing in Hawaii.

Thank you very much for the opportunity to submit this testimony.



# 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

February 22, 2012

Rep. Robert Herkes, Chair  
and members of the House Committee on Consumer Protection & Commerce  
Rep. Gilbert Keith-Agaran, Chair  
and members of the House Committee on Judiciary  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **House Bill 2705 (Negotiable Instruments)**  
**Hearing Date/Time: Wednesday, February 22, 2012, 2:00 p.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.**

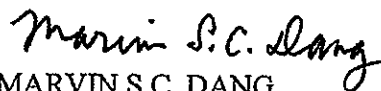
The purpose of this Bill is to repeal the Uniform Commercial Code ("UCC") definition of "person entitled to enforce".

HRS Sec. 490:3-301 clearly defines a "person entitled to enforce" an instrument. This Section has been in Article 3 (Negotiable Instruments) of the Hawaii UCC since that entire Article was enacted in 1991.

This Bill would delete this Section. The deletion would leave a statutory void as to what person is entitled to enforce an instrument. This could unfortunately result in costly litigation to have the courts resolve this issue.

It is unclear why this Section needs to be deleted in its entirety. Without understanding the rationale for this Bill, we suggest that this Bill be deferred.

Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Wednesday, February 22, 2012 1:18 AM

**To:** CPCtestimony

**Cc:** maupaws@gmail.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325  
Testifier position: Support  
Testifier will be present: No  
Submitted by: deann colton  
Organization: Individual  
E-mail: maupaws@gmail.com  
Submitted on: 2/22/2012

Comments:

Thank You, and

Please support this amendment, and thank Mele carol; I have been fighting for my home for 3 1/2 years, making payments, and trying to negotiate my modification; no one knows who can modify, or who is doing what with regard to the proper ownership of my property. I only want to keep it for the rest of my life and pass it on, as I am now 58. I bought it responsibly 11 years ago, but it is a maze of illegal paperwork and corporate deceptions, that have not allowed me to ever finalize my modification, nor at this point, even if I paid it off, no one would know who owns it. Please allow me to keep my rights.

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 9:24 PM

**To:** CPCtestimony

**Cc:** mauarii@hotmail.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Jaydene Phillips-Tehiva

Organization: Individual

E-mail: mauarii@hotmail.com

Submitted on: 2/21/2012

**Comments:**

I ask for your support of HB2705 that amends the definition of a person entitled to enforce a negotiable instrument as it relates to mortgages and promissory notes. I understand that this provision was originally revised in an attempt to curtail check fraud. Unfortunately, it is currently being used by banks to foreclose on Hawaii homeowners without proof of actual ownership or holder in due course status. This abuse of the original intent of the law can allow anyone to hold a mortgage promissory note without showing any assignments or actual ownership. Passage of HB2705 will help to close a legal loophole allowing fraudulent foreclosures in Hawaii.



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Honolulu, Hawaii 96826-2097  
Telephone: (808) 941.0556  
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Web site: [www.hcul.org](http://www.hcul.org)  
Email: [info@hcul.org](mailto:info@hcul.org)



Testimony to the House Committee on Consumer Protection and Commerce  
And the House Committee on Judiciary  
Wednesday, February 22, 2012

Testimony in opposition to HB 2705, Relating to Negotiable Instruments

To: The Honorable Robert Herkes, Chair  
The Honorable Ryan Yamane, Vice-Chair  
The Honorable Gil Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair  
Members of the Committees

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. We are in opposition to HB 2705, Relating to Negotiable Instruments.

This bill would repeal the definition of "person entitled to enforce" in Chapter 490, the Uniform Commercial Code. This could mean that negotiable instruments will become unenforceable, which could lead to many unintended consequences. While we are unsure of the intent of this legislation, it seems that it is intended to delay foreclosure, or other types of collections. This could be harmful to an already tightened lending market.

Thank you for the opportunity to testify in opposition.

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 8:12 PM

**To:** CPCtestimony

**Cc:** karen@redwoodgames.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Karen Chun

Organization: Individual

E-mail: karen@redwoodgames.com

Submitted on: 2/21/2012

**Comments:**

Please pass this law to eliminate the loophole that allows the banks to foreclose upon homes where the bank has used fraudulent signatures to forge the assignment of loan back to them. If I forged an assignment of loan, I'd go to jail. It is wrong to allow the banks to PROFIT by fraud.

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 7:21 PM

**To:** CPCtestimony

**Cc:** cindyalbury@hotmail.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Cynthia Albury

Organization: Individual

E-mail: cindyalbury@hotmail.com

Submitted on: 2/21/2012

Comments:

I urge your support of HB2705 that amends the definition of a person entitled to enforce a negotiable instrument as it relates to mortgages and promissory notes. I understand that this provision was originally revised in an attempt to curtail check fraud. Unfortunately, it is currently being used by banks to foreclose on Hawaii homeowners without proof of actual ownership or holder in due course status. This abuse of the original intent of the law can allow anyone to hold a mortgage promissory note without showing any assignments or actual ownership. Passage of HB2705 will help to close a legal loophole allowing fraudulent foreclosures in Hawaii.

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 7:14 PM

**To:** CPCtestimony

**Cc:** schlag@me.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Janna Schlag  
Organization: Individual  
E-mail: schlag@me.com  
Submitted on: 2/21/2012

**Comments:**

I urge your support of HB2705 that amends the definition of a person entitled to enforce a negotiable instrument as it relates to mortgages and promissory notes. I understand that this provision was originally revised in an attempt to curtail check fraud. Unfortunately, it is currently being used by banks to foreclose on Hawaii homeowners without proof of actual ownership or holder in due course status. This abuse of the original intent of the law can allow anyone to hold a mortgage promissory note without showing any assignments or actual ownership. Passage of HB2705 will help to close a legal loophole allowing fraudulent foreclosures in Hawaii.

**Dale J. Parsons Jr.**

P.O. Box 53, Hana, Hawaii 96713

Phone: 808-870-8990 / Fax: 808-244-6814 / Email: [djp@alohanews.com](mailto:djp@alohanews.com)

February 21, 2012

The Hawaii State Legislature - Submitted Testimony  
RE: HB2705 – Relating to Negotiable Instruments  
Report title: Negotiable Instruments; Enforcement; Bank Deposits and  
Collections; Uniform Commercial Code

Honorable Chairman and Legislature Members:

I urge your support of HB2705 that amends the definition of a person entitled to enforce a negotiable instrument as it relates to mortgages and promissory notes.

I understand that this provision was originally revised in an attempt to curtail check fraud. Unfortunately, it is currently being used by banks to foreclose on Hawaii homeowners without proof of actual ownership or holder in due course status. This abuse of the original intent of the law can allow anyone to hold a mortgage promissory note without showing any assignments or actual ownership.

Passage of HB2705 will help to close a legal loophole allowing fraudulent foreclosures in Hawaii.

Mahalo nui loa,

A handwritten signature in black ink, appearing to read "Dale J. Parsons, Jr.", with a long horizontal stroke extending to the right.

Dale J. Parsons, Jr.



Submitted Testimony for 2/22/12  
HB2705

*Virginia Parsons*

Hana, Hawaii

February 21, 2012

The Hawaii State Legislature - **Submitted Testimony**

RE: HB2705 – Relating to Negotiable Instruments

Report title: **Negotiable Instruments; Enforcement; Bank Deposits and Collections; Uniform Commercial Code**

Honorable Chairman and Legislature Members:

I am a paralegal and litigation assistant in foreclosure defense. I have witnessed the abuse of HRS 490: §3-301 and I urge you to please support HB2705 that repeals and/or amends the UCC definition of "person entitled to enforce" a negotiable instrument as it relates to mortgages and promissory notes. UCC §3-301 originally defined the "rights of a holder." In 1990, the banking industry convinced the legislatures nationally <sup>1</sup>to revise the statute to add:

*"A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument"* [emphasis supplied].

The alleged purpose of this revision was pushed by the banking industry and financial institutions in 1990s under the guise of curtailing check fraud.<sup>2</sup> Since the 1990s, banks have become much more sophisticated and check writing has been substantially reduced with the use of debit cards as well as check fraud with the later technology of thumbprint ID, software safeguards and advanced surveillance that make it much more difficult to pass a bad check. The uses for UCC § 3-301

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<sup>1</sup> All but 2 states acquiesced. To this day, New York has maintained the original UCC statute.

<sup>2</sup> LexisNexis: ARTICLE: Check Fraud in the Courts After the Revisions to U.C.C. Articles 3 and 4 Winter, 2005 located at: <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=57+Ala.+L.+Rev.+351&k>

Submitted Testimony for 2/22/12  
HB2705

have dramatically decreased and the 1990 revision has become outdated and abused.

More recently this statute has been used to allow banks, without proof of actual ownership or holder in due course status, to foreclose on homeowners even when there are fraudulent and actually void documents filed before the court. The proof of the holder status has become so faint in our law that **anyone** could allege to hold a mortgage promissory note and need not show actual or authentic notes, transfers, assignments or rights of ownership. The statutory obligation to provide adequate documentation has become so blurred, lax and distorted that it has allowed pervasive abuse to the detriment of the borrower and affording very little due process.

The time has come to roll back the revisions to 490: § 3-301 in legislation and repeal the statute or amend the language to relate only check fraud and specifically not mortgages and promissory notes. I support HB2705 and respectfully request that this legislature repeal the language, "*even though the person is not the owner of the instrument or is in wrongful possession of the instrument*" as it relates to mortgage promissory notes.

Mahalo for your consideration.

Virginia Parsons

*Virginia Parsons*

P.O. Box 53

Hana, HI 96793

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 3:45 PM

**To:** CPCtestimony

**Cc:** LLLD79@yahoo.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Linda Ladera

Organization: Individual

E-mail: LLLD79@yahoo.com

Submitted on: 2/21/2012

Comments:

I support HB2705 along with Mele Carroll. Please do what is right for the people of Hawaii and do not give away our homeowners rights to banks who have already caused a disastrous mess for all of America by their fraudulent ways. Please help the people who have worked hard for their homes all of these years. Thank you.

Linda Ladera

**Testimony for HB2705 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 3:38 PM

**To:** CPCtestimony

**Cc:** marcyfrommaui@gmail.com

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2705

Conference room: 325  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Marcy Koltun-Crilley  
Organization: Individual  
E-mail: marcyfrommaui@gmail.com  
Submitted on: 2/21/2012

**Comments:**

I STRONGLY support Rep. Carroll's bill HB 2705 repeal UCC definition of &quot;person entitled to enforce&quot;.

Frankly I was amazed that we even have a law that says:

&quot; A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.&quot;

This means that if a bank is in wrongful possession of a promissory note - it can still enforce the note. It gives banks the ability to steal homes from the people of Maui, and that has been what they have been doing here and all over the country.

Banks are good at finding loop holes. That is what they are doing with ACT 48, a good law that banks are still trying to skirt around.

I am certain banks are counting on this current law and will try anything to keep it.

Do NOT give banks permission to steal from the people of Hawaii. Please pass this bill.

I am so proud of our legislators because they have shown the courage to do what is right and have resisted intense pressure from the banking lobby before.

Thank You

Marcy Koltun-Crilley  
Maui Home Owner  
Kihei, Hi, 96753  
808-874-5644