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KEALI`I S. LOPEZ
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

AND

THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

MONDAY, FEBRUARY 11, 2013
2:30 P.M.

TESTIMONY ON HOUSE BILL NO. 1417
RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE

TO THE HONORABLE ANGUS L.K. MCKELVEY AND KARL RHOADS, CHAIRS, AND TO THE HONORABLE DEREK S.K. KAWAKAMI AND SHARON E. HAR, VICE CHAIRS, AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on House Bill No. 1417, Relating to Mediation Affecting Judicial Foreclosure. My name is Bruce B. Kim and I am the Executive Director of OCP.

OCP supports H.B. 1417. As reflected in the findings and purpose found in section 1, the legislature has repeatedly, in the 2011 and 2012 sessions, expressed a

desire to make dispute resolution coupled with the assistance of a HUD-certified housing counselor available to homeowners facing foreclosure. Further, since the Mortgage Foreclosure Dispute Resolution ("MFDR") Program's inception (per Act 48, SLH 2011) in October 2011, over two-hundred persons have contacted the MFDR Program seeking dispute resolution, only to be turned away because their lenders filed judicial foreclosures against them. The current MFDR Program is available only in nonjudicial foreclosures but not judicial foreclosures. H.B. 1417 makes pre-foreclosure MFDR dispute resolution and access to a HUD-certified housing counselor available to distressed homeowners facing judicial foreclosure as well.

While mediation in a judicial foreclosure may be ordered in the discretion of the court, only the Third Circuit Court (the island of Hawaii) has a dedicated foreclosure mediation program. Anecdotal evidence suggests that foreclosure mediations in other Circuits are not generally ordered. By making pre-foreclosure dispute resolution available at the option of the distressed homeowner before a foreclosure action is filed, both homeowners and their lenders stand to benefit from the MFDR Program administered by the DCCA, thereby keeping many of these cases out of court. The MFDR's housing counselor component is critical in assisting distressed homeowners better understand the loss mitigation options available to them as alternatives to foreclosure. The MFDR mediators are specifically trained in foreclosure dispute resolution for the MFDR Program with the able assistance (in no particular order) of the Judiciary's Center for Alternative Dispute Resolution, the Mediation Center of the

Pacific, Ku'ikahi Mediation Center, and West Hawaii Mediation Center.

Pre-foreclosure dispute resolution through the MFDR program will help reduce delays and conserve judicial resources. There is emerging evidence that dispute resolution programs in foreclosure are successful in helping distressed homeowners obtain various loss mitigation options from their lender and avoid foreclosure. There is also ample evidence that HUD-certified housing counselors are successful in the majority of circumstances in getting some form of help to distressed homeowners to avoid foreclosure and stay in their homes.

OCP suggests the following technical changes to section 1 of the bill: replace "mortgagor" with "mortgagee" on page 1, lines 11 and 15 and page 2 lines 2, 5 and 7, to clarify that mortgagees, not mortgagors, have avoided dispute resolution by pursuing foreclosures via the Part IA (or Part I prior to Act 182, SLH 2012) judicial foreclosure by action process.

Thank you for the opportunity to testify in support of H.B. 1417. I will be happy to answer any questions that the members of the Committee may have.

Hawaii Bankers Association

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Presentation To
Committee on Consumer Protection and Commerce (CPC)
Committee on Judiciary (JUD)
February 11, 2013 at 2:30 pm
State Capitol Conference Room 325

Testimony in Opposition to Bill H. B. 1417

TO: The Honorable Angus L. K. McKelvey, Chair – CPC
The Honorable Derek S. K. Kawakami, Vice Chair – CPC
Members of CPC

The Honorable Karl Rhoads, Chair – JUD
The Honorable Sharon E. Har, Vice Chair – JUD
Members of JUD

My name is Neal Okabayashi and I am testifying for the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

The Hawaii Bankers Association is opposed to HB 1417, which requires mediation prior to a mortgagee filing a judicial foreclosure action. We believe there is already an abundance of opportunities for lenders and borrowers to discuss alternatives to foreclosure and including this requirement would just needlessly repeat previous discussions and extend the timeframes for ultimate resolution.

When a mortgagor falls delinquent in payments, the lenders initiate discussions with the borrowers either under the Home Affordable Modification Program (HAMP), the rules of the Government Sponsored Enterprises (GSEs) such as Fannie Mae, or the lender's own loan modification programs. Should the borrower meet certain criteria, generally meeting a certain debt-to-income ratio (DTI), there will be a loan modification, which can take the form of interest rate reduction or extending the term of the loan to reach an affordable monthly payment. Generally with the HAMP program is a 31% DTI or in the case of the FDIC program used in the Indy Mac program, 38%.

The Consumer Financial Protection Bureau (CFPB) recently introduced voluminous changes to the rules governing mortgage servicing. The rules are so voluminous (approximately 1,500 pages), it will take some time for lenders to get their arms totally around the rules. However, we do know a lender cannot file for foreclosure until the loan is 120 days (4 months) delinquent because, in the words of the CFPB, "This will give borrowers reasonable time to submit modification applications."

Lenders must not only reach out to delinquent borrowers, they must also provide the borrower with written examples of loan modification options. In recognition of the fact that the investor, not the lender, rules on loan modifications, the CFPB requires that the lender be aware of the investor's loan modification programs so the borrower can be evaluated for all alternatives.

Thus, before foreclosure is filed (assuming the borrower applied for loan modification), there has been a thorough review of the borrower's finances to determine if loan modification is possible and, if not, the borrower is informed of the reasons for denial.

The CFPB also requires that even after foreclosure is initiated, if a borrower applies for loan modification, the application must be evaluated and since dual tracking is prohibited, in essence the foreclosure process is suspended at such time.

A loan modification process is similar to a loan application underwriting decision based on the debt and income; in other words the ability to repay the loan obligation. This is an important concept embodied in the new "ability to pay" rules required by Dodd-Frank.

A required mediation process would merely repeat the loan modification process with no different end result other than delay, which results in non-payment of the lender and possibly a condominium association.

When a judicial foreclosure action is brought against a borrower, the court's oversight over the proceedings also provides added protection for the borrower. The court then becomes the independent third party, which can serve in place of the mediation process, and courts have the inherent power to order mediation when appropriate. In fact, there is an ongoing judicial foreclosure mediation program on the Big Island.

We are also very concerned with the mediation program that was created for non-judicial foreclosure actions. There are several requirements which make it very difficult for lenders to comply. For example, the requirement to have individuals authorized to make loan decisions present at the mediation, in person or by phone, is extremely difficult for lenders if the lender has sold the loan to an investor like Fannie Mae or Freddie Mac, or when the approval of a private mortgage insurer is required. The process of obtaining investor or private mortgage insurance approval differs but the lender can do no more than notify the investor and await the result, which although usually quite prompt, still is not instantaneous. For example, on some loans, the data is inputted into a computer and the answer is received the next day. Since the current nonjudicial mediation process does not account for the procedure used for loan modifications, and because it is a Chapter 480 violation, there is a disincentive to use the mediation program, as now statutorily constructed. It seems unfair to impose a requirement that lenders cannot comply with and then deem the inevitable violation to be a chapter 480 violation.

This is just one of the reasons lenders have chosen the more lengthy and costly judicial foreclosure proceedings over the more expedient non-judicial foreclosure actions. We hope there will be some consideration to revise the requirements of the non-judicial foreclosure process to encourage lenders to utilize that alternative.

Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

Neal Okabayashi
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Hawaii Credit Union League
Your Partner For Success

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Testimony to the House Committees on Consumer Protection and Commerce and Judiciary
February 11, 2013

Testimony in Opposition to HB 1417, Relating to Mediation Affecting Judicial Foreclosure

To: The Honorable Angus McKelvey, Chair
The Honorable Derek Kawakami, Vice-Chair
The Honorable Karl Rhoads, Chair
The Honorable Sharon Har, 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 78 Hawaii credit unions, representing approximately 804,000 credit union members across the state. We are opposed to HB 1417, Relating to Mediation Affecting Judicial Foreclosure.

Approximately 60 of Hawaii's credit unions currently offer mortgages.

This bill would require mediation before a judicial foreclosure action. Credit unions often have close relationships with their members, and will do everything within reason to help keep homeowners from losing their homes when a member's mortgage loan becomes delinquent. Credit unions begin working with their members as soon as a potential default becomes apparent and provide their members with alternatives to foreclosure as a matter of course. This may include loan modification, or other alternatives.

Pre-foreclosure mediation will only duplicate these efforts. If the member has been unable to qualify for a loan modification or other alternative by that point, it is highly unlikely that pre-foreclosure mediation will do anything but delay a final resolution. Making mediation mandatory for judicial foreclosures could lengthen the foreclosure process by six to eight months. Lenders, including credit unions, will be more likely to begin the foreclosure process sooner, which is of no benefit to homeowners.

Thank you for the opportunity to provide comments.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law
P.O. Box 4109
Honolulu, Hawaii 96812-4109
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February11, 2013

Rep. Angus L.K. McKelvey, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Karl Rhoads, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1417 (Mediation Affecting Judicial Foreclosure)**
Hearing Date/Time: Tuesday, February 11, 2013, 2:30 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 purposes of this Bill are to: (1) expand the application of mandatory mortgage foreclosure dispute resolution by requiring mortgagees, at the mortgagor's election, to participate in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period, and (2) apply the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this bill and pending an initial court hearing.

A foreclosure action is the last resort for a lender when a borrower's mortgage loan is delinquent. Before commencing a foreclosure action (whether judicial or nonjudicial), a lender will consider many pre-foreclosure options such as a loan modification, a short sale, or a deed in lieu of foreclosure. Requiring a lender to additionally participate in the Mortgage Foreclosure Dispute Resolution ("MFDR") program before filing a judicial foreclosure action, which is what this Bill envisions, is unnecessarily duplicative.

The existing MFDR Program, which is in Part V of Chapter 667 of the Hawaii Revised Statutes, is a pre-nonjudicial foreclosure program. The MFDR Program was designed as a pre-nonjudicial foreclosure program because non-judicial foreclosures do not have third party oversight. The MFDR Program has some flaws and an unduly lengthy timeline of about 6 to 7 months or longer. Judicial foreclosures have a judge overseeing the process by hearing motions, issuing orders, and at times referring the lender and the borrower to mediation. A judicial foreclosure generally takes a year to 18 months to complete. If the MFDR Program is expanded to apply to judicial foreclosures, this Program will unnecessarily extend the time that it takes to complete a judicial foreclosure. The added time will increase the delinquency and add to the costs of the foreclosure process.

Thank you for considering our testimony.

Marvin S. C. Dang

MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

kawakami2 - Rise

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 07, 2013 9:21 PM
To: CPCtestimony
Cc: tabraham08@gmail.com
Subject: *Submitted testimony for HB1417 on Feb 11, 2013 14:30PM*

HB1417
Submitted on: 2/7/2013
Testimony for CPC/JUD on Feb 11, 2013 14:30PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Troy Abraham	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing , improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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House Committee on Consumer Protection & Commerce
House Committee on Judiciary

Hearing: Monday, February 11, 2013
2:30 p.m.

IN SUPPORT OF HB 1417

Chair McKelvey, Chair Rhoads, Vice Chair Kawakami, Vice Chair Har and Committee Members:

My name is George Zweibel. I am a Hawai'i Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawai'i, 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 served as a borrower representative on the Legislature's Mortgage Foreclosure Task Force ("Task Force") in both 2010 and 2011, and participated in formulating many of the Task Force recommendations that were implemented in Act 48 (2011) and Act 182 (2012).

HB 1417 would expand the applicability of mandatory foreclosure dispute resolution by requiring mortgagees, at the mortgagor's election, to participate in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period, and applies the dispute resolution requirement to judicial foreclosure actions filed prior to the bill's effective date and pending an initial court hearing. **I strongly support HB 1417.**

Foreclosure mediation has been highly successful in Connecticut, Nevada, and a number of other states and localities, helping homeowners and loan holders or servicers reach agreements involving loan modification or other loss mitigation, thereby avoiding foreclosure as well as unnecessary expense and delay. In Hawai'i, mortgage foreclosure dispute resolution is available upon request in non-judicial foreclosures pursuant to Act 48, but lenders have increasingly chosen to foreclose judicially instead. After getting off to a slow start, the judiciary's pilot foreclosure mediation program in Hawaii's Third Circuit Court is now reporting a high rate of success in foreclosure actions, helping to alleviate the pressure on that circuit's civil docket. The Hawai'i Access to Justice Commission has repeatedly recommended expansion of the judicial foreclosure mediation program to the other circuits.

Enacting legislation that makes mortgage foreclosure dispute resolution equally available in all foreclosures – whether judicial or non-judicial – and subject to the same rules, is essential. This will give all owner-occupants facing foreclosure in Hawai'i an equal opportunity to have a trained mediator help the parties determine whether they can agree on a better outcome.

Finally, the likelihood that HB 1417 will achieve its goals is greatly enhanced by its inclusion of provisions requiring that foreclosure dispute resolution be made available before a judicial foreclosure action is filed and by applying it retroactively to existing actions.

Thank you for considering my testimony on this timely and important bill.

Barbara L. Franklin, Esq., Attorney at Law

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House of Representatives
Committee on Judiciary

Hearing: Monday, February 11, 2013, 2:30 p.m.

In Support of HB No. 1417 - Mediation affecting Judicial Foreclosure

Chair Rhoads, Vice Chair Har, and Committee Members:

The purpose of this letter is to provide the members of the committee, with my testimony in support of HB 1417. I am an attorney in private practice and represent consumers who have difficulty or are behind on paying their mortgages.

The legislation will provide reasonable steps to resolve mortgage arrearages. It is my understanding that the mediation program available in the Third Circuit has a high rate of success in keeping borrowers in the homes, thus preventing decay, vandalism, and community displacement, and possibly even bankruptcy.

Thank you for this opportunity to provide comments on HB 1417.

Sincerely,

Barbara L. Franklin, Esq.