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July 23, 2020

Victor Brock
President, Mortgage Bankers Association of Hawai‘i
Hawai‘i State Federal Credit Union
Via electronic mail victorb@hsfcu.com

Re: ALTA Loan Policies and the Application of the Royal Commission of Inquiry’s Preliminary Report—*Legal Status of Land Titles throughout the Realm* as proof of loss

Dear Mr. Burding:

As the Mortgage Bankers Association of Hawai‘i was made aware, the Royal Commission completed its third preliminary report on the subject of the legal status of land titles throughout the Hawaiian Islands, which can be accessed online,¹ and that the American Land Title Association (“ALTA”) was notified that all land transactions done after January 17, 1893, to include deeds and mortgages, are void.²

According to section 3(ii) under “conditions” of the ALTA loan policy (adopted 6-17-06), the “Insured shall notify the Company promptly in writing...in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage.” When “shall” is used in contracts it “must be given a compulsory meaning; as denoting [an] obligation.”³ In other words, when the lender has become aware “of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage,” they are obligated to “notify the Company promptly in writing.” Title insurance

¹ Royal Commission of Inquiry’s Preliminary Report—*Legal Status of Land Titles throughout the Realm* (July 16, 2020) (online at: https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Land_Titles.pdf).

² Letter from the Royal Commission of Inquiry to the American Land Title Association (July 20, 2020) (online at: [https://hawaiiankingdom.org/pdf/RCI_Ltr_to_ALTA_\(7.20.20\).pdf](https://hawaiiankingdom.org/pdf/RCI_Ltr_to_ALTA_(7.20.20).pdf)).

³ *Black’s Law Dictionary*, 6th ed., 1375 (1990).

is defined as a “policy issued by a title company after searching the title, representing the state of that title and insuring the accuracy of its search against claims of title defects.”⁴

Before lenders accept the mortgages offered by the borrowers to secure the repayment of their loans, they require the borrowers to purchase loan policies that covers the debt owed in order to protect the lenders. The borrower purchases the loan policy in escrow where the one-time premium is reflected in line #1109 of the closing statement, which is also known as the U.S. Department of Housing and Urban Development settlement statement. Because the loan policy only covers the debt, its coverage reduces when the borrower makes the monthly payments to the lender so that when the borrower makes the final payment the policy coverage ends.

One of the escrow companies in the Hawaiian Kingdom is Title Guaranty Hawai‘i that also serves as agent that underwrites title insurance policies for Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Fidelity National Title Insurance Company, and First American Title Insurance Company. Title Guaranty Hawai‘i and the aforementioned title insurance companies are also members of ALTA and utilize ALTA’s insurance policy forms.

Title Guaranty Hawai‘i claims it “examines records relating to the property as far back as the original source to verify the ownership of the title.”⁵ In escrow, this is called a title search, which is an “examination of the records of the registry of deeds or other office which contains records of title documents to determine whether title to the property is good.”⁶ If Title Guaranty Hawai‘i did examine the records of land title transactions that go back to its origin in the nineteenth century, as it claims, it would have uncovered, from the public records, the same evidence that was provided in the Royal Commission’s third preliminary report on the status of land titles in the Hawaiian Islands.

The preliminary report on land titles renders all title reports done by escrow companies in Hawai‘i, to include Title Guaranty Hawai‘i, as inaccurate, which, consequently, triggers the coverage of the remaining debt owed by the borrower. The preliminary report also serves as “proof of loss” under section 4, conditions, of the ALTA loan policy where the “proof of loss must describe the defect...that constitutes the basis of loss or damage.”

Consequently, monthly payments by the borrower is replaced by the insurance coverage of the remaining debt owed to the lender. In light of the coronavirus pandemic and the loss of jobs throughout Hawai‘i, borrowers who no longer have the income to make their monthly

⁴ *Id.*, 806.

⁵ Title Guaranty Hawai‘i, *Services* (online at: <https://www.tghawaii.com/services/>).

⁶ Black’s Law, 1487.

payments now have protection under the insurance policies they purchased at escrow. Furthermore, lenders that have initiated foreclosures will have to withdraw their actions and collect the remaining debt owed under the loan policies by filing a notice of claim.

In the event the lenders refuse to file a notice of claim under the terms of their loan policies that they required the borrower to purchase for them, the Royal Commission shall view the monthly payments made by borrowers, after having received this letter of correspondence, being personal property, as evidence of the war crime of pillaging⁷ because borrowers purchased the loan policy to pay for their debt in the event their title is defective or void.

Furthermore, should the lenders refuse to withdraw their foreclosure proceedings and not file a notice of claim, the Royal Commission shall view the amount covered in the loan policy as the personal property of the borrower by virtue of the payment of its premium. The lender did not purchase the loan policy but is merely the beneficiary of the contract paid for by the borrower. The lenders' refusal to recover their losses under the loan policies and exact payment through foreclosure is evidence of the war crime of pillaging. That is to say, the remaining debt owed by the borrower is covered by the loan policy whether the borrower is in foreclosure or not. According to Professor Schabas,

The *actus reus* of pillage [in the Hawaiian Kingdom] consists of the appropriation of [personal] property belonging to members of the civilian population without the consent of the owner. ... The *mens rea* requires that the perpetrator act with the specific intent of depriving the owner of the [personal] property without consent.⁸

Because the loan policy and the monthly payments have a direct nexus to the debt owed to the lender, the borrower is presumed to consent to the conditions of the loan policy it purchased. If the lender, who has knowledge of the defect in title which voids the mortgage lien, the borrower is not considered to have given its consent of making monthly payments unless the title insurance company refutes the evidence of title defects provided in the Royal Commission's third preliminary report. Consent is tied to the validity of the mortgage lien, and, therefore, an invalid mortgage voids the consent. Furthermore, section 3(ii) of the aforementioned ALTA loan policy does not require the borrower to notify the lender of the defect in title. Rather it clearly states, "in case Knowledge shall come to an Insured."

⁷ William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations in the Hawaiian Kingdom* 163, 168 (2020) (online at: [https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_\(2020\).pdf](https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf)).

⁸ *Id.*, 163.

An alternative for lenders throughout Hawai‘i, who are represented by the Mortgage Bankers Association of Hawai‘i, is to work with the Council of Regency in order to rectify land titles and mortgage liens. As stated to ALTA in the aforementioned letter of correspondence from the Royal Commission that should they be “acceptable to the Council of Regency’s proposed remedial prescriptions it may contact the undersigned at the address or email above,” the same offer applies to the lenders.

The Royal Commission recognizes that war crimes and human rights violations cannot continue to be committed with impunity and the perpetrators must be held accountable. The Royal Commission also acknowledges that the Council of Regency must have a “cooperative relationship aimed at guaranteeing the realization of the rights and interests of the civilian population and the correct administration of the occupied territory.”⁹

As a government of an occupied State, the Council of Regency’s foremost priority is to protect and enforce the “rights and interests of the civilian population” of the Hawaiian Kingdom in accordance with international humanitarian law and human rights law.

Sincerely,



David Keanu Sai, Ph.D.

Head, Hawaiian Royal Commission of Inquiry

cc: Wendy Oshiro, Vice President, Mortgage Bankers Association of Hawai‘i (via email)
Lisa Tarumoto, Treasurer, Mortgage Bankers Association of Hawai‘i (via email)
Patsy Saiki, Secretary, Mortgage Bankers Association of Hawai‘i (via email)
Yvonne Ako, Director, Mortgage Bankers Association of Hawai‘i (via email)
Pete Castillejos, Director, Mortgage Bankers Association of Hawai‘i (via email)
Jennifer Coutts, Director, Mortgage Bankers Association of Hawai‘i (via email)
Leonard Fernandez, Director, Mortgage Bankers Association of Hawai‘i (via email)
Anders Hostelley, Director, Mortgage Bankers Association of Hawai‘i (via email)
Mark James, Director, Mortgage Bankers Association of Hawai‘i (via email)
Daren Kimura, Director, Mortgage Bankers Association of Hawai‘i (via email)

⁹ Federico Lenzerini, *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom*, in the Royal Commission of Inquiry’s Preliminary Report—*The Authority of the Council of Regency of the Hawaiian Kingdom*, para. 20 (2020) (online at: https://hawaiiankingdom.org/pdf/RCI_Preliminary_Report_Regency_Authority.pdf).

Reina Miyamoto, Director, Mortgage Bankers Association of Hawai'i (via email)
Linda Nakamura, Director, Mortgage Bankers Association of Hawai'i (via email)
Rusty Rasmussen, Director, Mortgage Bankers Association of Hawai'i (via email)
Keith Rogers, Director, Mortgage Bankers Association of Hawai'i (via email)
Kelly Tasaki, Director, Mortgage Bankers Association of Hawai'i (via email)
Bill Burding, President-Elect, ALTA Board of Governors
Mary O'Donnell, President, ALTA Board of Governors
Diane Tomb, Chief Executive Officer, ALTA (via email)
Steve Gottheim, Senior Counsel, ALTA (via email)
Jack Legal, President, Hawai'i Association of Realtors
Derek C. Lau, President-Elect, Hawai'i Association of Realtors
David Ige, Governor, State of Hawai'i
Josh Green, Lieutenant Governor, State of Hawai'i
Ron Kouchi, President of the Senate, State of Hawai'i
Scott Saiki, Speaker of the House of Representatives, State of Hawai'i
Clare E. Connors, Attorney General, State of Hawai'i
Kenneth Hara, Adjutant General, State of Hawai'i
Kirk Caldwell, City & County of Honolulu Mayor
Harry Kim, Hawai'i County Mayor
Michael Victorino, Maui County Mayor
Derek Kawakami, Kaua'i County Mayor
Brian Schatz, United States Senator, State of Hawai'i
Mazie Hirono, United States Senator, State of Hawai'i
Ed Case, United States Representative, State of Hawai'i
Tulsi Gabbard, United States Representative, State of Hawai'i