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Nā Po‘e Kōkua

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NĀ PO‘E KŌKUA, a Hawaii nonprofit corporation, on behalf of native Hawaiians, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> BANK OF AMERICA CORPORATION, <p style="text-align: center;">Defendant.</p>) NO. 1:22-cv-00238)) COMPLAINT FOR DAMAGES,) INJUNCTIVE, AND EQUITABLE) RELIEF, RACKETEER) INFLUENCED AND CORRUPT) ORGANIZATIONS ACT (RICO),) FILED PURSUANT TO 18 U.S.C. §) 1962(c), 18 U.S.C. §§ 1964 (a)(c),) AND 18 U.S.C. §§ 1341,1343; THE) KU KLUX KLAN ACT, 42 U.S.C. §) 1983; AND FOR THE) ESTABLISHMENT OF A HAWAII) CONSTRUCTIVE TRUST) RE: \$150 MILLION FHA-247 LOAN
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) COMMITMENT; DEMAND FOR
) TRIAL BY JURY; EXHIBITS 1
) THROUGH 19; SUMMONS IN A
) CIVIL ACTION
)
)
)

**COMPLAINT FOR DAMAGES, INJUNCTIVE, AND EQUITABLE
RELIEF, RACKETEER INFLUENCED AND CORRUPT
ORGANIZATIONS ACT (RICO), FILED PURSUANT TO 18 U.S.C. §
1962(c), 18 U.S.C. §§ 1964 (a)(c), AND 18 U.S.C. §§ 1341, 1343;
THE KU KLUX KLAN ACT, 42 U.S.C. § 1983; AND FOR THE
ESTABLISHMENT OF A HAWAII CONSTRUCTIVE TRUST
RE: \$150 MILLION FHA-247 LOAN COMMITMENT**

COMES NOW, Nā Po‘e Kōkua, a Hawaii nonprofit corporation, on behalf of native Hawaiians (hereinafter “Nā Po‘e Kōkua”), and files this Complaint for Damages, Injunctive, and Equitable Relief, Racketeer Influenced and Corrupt Organizations Act (RICO), filed pursuant to 18 U.S.C. §1962(c), 18 U.S.C. §§ 1964 (a)(c), and 18 U.S.C. §§1341,1343; The Ku Klux Klan Act, 42 U.S.C. § 1983; and for the Establishment of a Hawaii Constructive Trust RE: \$150 Million FHA-247 Loan Commitment [hereinafter “Complaint”] against Bank of America Corporation (“BAC”); by and through the undersigned attorneys, and states:

NATURE OF THE CASE

1. When Hawaii became a state in 1959, Dr. Martin Luther King Jr. addressed the very first Hawaii state legislature and said, “you can never know what it means to those of us caught for the moment in the tragic and often dark

midnight of man's inhumanity to man, to come to a place where we see the glowing daybreak of freedom and dignity and racial justice."

2. In 1965, Hawaii's beloved Reverend Abraham Akaka of the Kawaiaha'o Church, who famously called for Hawaii to be called the Aloha state, sent Hawaiian leis hand-sewn by his congregation to Dr. King and the civil rights leaders to wear during their historic march from Montgomery to Selma Alabama.

3. In this lawsuit, on behalf of all native Hawaiians, plaintiff is following the next glowing daybreak of freedom, dignity and racial justice to finally hold BAC accountable for decades of discriminatory practices and its open and notorious denial of a \$150 Million FHA-247 originated loan commitment made to federal banking regulators in 1994 for the benefit of native Hawaiians, which was due to be completed in 1998, and remains unfulfilled.

Sandra Perez, former Bank of America, N.A. Community Investment Officer, Affidavit-

4. On May 4, 2022, Nā Po'e Kōkua obtained an Affidavit from Sandra Perez ("Perez"), former Vice President, Community Investment Officer at Bank of America, N.A. ("BANA")¹, who worked at BANA during the years 1994-2000.

[Exhibit 1, PDF pps. 2-13]

5. Ms. Perez was part of the dedicated executive team assigned to handle

¹ Bank of America, N.A. ("BANA") is an indirect wholly owned subsidiary of Bank of America Corporation ("BAC"), which through its predecessor entity, BankAmerica Corporation, operated retail banks in Hawaii from 1992-1997, and is therefore implicated in the loan commitment allegations although not specifically named as a party defendant hereto.

BANA's response to Nā Po'e Kōkua's inquiry in 1997 about the status of the unfulfilled \$150 Million FHA-247 mortgage loan commitment. [Exhibit 1, ¶ 18]

6. As stated in the Perez Affidavit: "By 1997, BANA decided to leave its retail presence in Hawaii. However, BANA had not fulfilled the Commitment made to the Federal Regulators." [Exhibit 1, ¶ 15]

7. Ms. Perez reviewed the 2020 federal case filings in *Bank of America, et al., v. County of Maui*, Case No.: 1:20-cv-00310-JMS-WRP2020 (DHI), and stated that "BANA's argument was laced with the truth but polluted with lies", noting its "calculated use of terminology" in replacing Commitment with its words of choice being "goal, initiative, pledge, or aspiration" used to describe its \$150 million dollar FHA-247 mortgage loan commitment made to native Hawaiians. Perez concluded that BANA's lawsuit against Maui County "at its core presents a false narrative." [Exhibit 1, ¶¶ 2, 3]

8. "The genesis of the \$150 Million Commitment was not because BANA was feeling philanthropic, it was because BANA was being accused of discrimination and violations of federal law", Perez said in her Affidavit. [Exhibit 1, ¶ 3]

9. On April 23, 1994, the Office of Thrift Supervision ("OTS") held a Public Hearing in Honolulu as it reviewed the proposed acquisition of Liberty Bank in Hawaii by BANA. [Exhibit 1, ¶ 9]

10. Nā Po‘e Kōkua and the Hawaii Fair Lending Coalition (“HFLC”) testified at this Public Hearing and presented evidence to the OTS that BANA was "redlining" in communities where Native Hawaiians and Filipinos lived by denying them home loans. [Exhibit 1, ¶ 12]

11. BANA hired a private security company to work at the Public Hearing with the job of keeping audio/video recording devices out of the hearing room, particularly reporters with cameras. However, video was taken outside of the hearing room. [Exhibit 1, ¶ 10]

12. Perez observed that “community members were forced to enter through the doors monitored by security guards while Bankers had the freedom to come and go through a different set of doors without bother.” [Exhibit 1, ¶ 11]

13. According to the Perez Affidavit:

“Also seen in the video, a hired BANA security guard grabbed the bag of one of the members of the HFLC who was attending the Hearing to testify with evidence of the alleged redlining violations. As this dramatic incident unfolded, it was apparent why the Bank wanted to keep the media out. The video was very disconcerting to BANA. BANA did not want the video circulated and aired.” [Exhibit 1, ¶ 12]

14. Ms. Perez stated that “[a]fter the 1994 OTS Public Hearing, the Federal Regulators ultimately approved BANA's acquisition of Liberty Bank but on a condition detailed in BANA's formal commitment to Federal Banking Regulators which was for BANA to lend \$150 Million in FHA-247 loans within 4 years, or by 1998". [Exhibit 1, ¶ 13]

15. Ms. Perez further stated “[b]y 1997, BANA decided to leave its retail presence in Hawaii. However, BANA had not fulfilled the Commitment made to the Federal Regulators” and that “[t]he failure to fully meet the Commitment could have clouded ..[BANA’s].. exit from Hawaii.” [Exhibit 1, ¶ 15]

16. In 1998, the BANA working group, that included Ms. Perez, along with NPK and HFLC, negotiated in good faith, an understanding that BANA had every intention to fully fulfill the Commitment, *albeit late*. [Exhibit 1, ¶¶ 19, 21-22]

17. Ms. Perez went on to say:

“It was a top priority for our team to ensure BANA was able to make the transition out of Hawaii and work cooperatively with NPK and HFLC to fulfill the Commitment made in 1994. BANA executives formulated a plan to fulfill the commitment and lend \$150 Million in FHA-247 loans within 3 years. The main executive from Oregon said that the amount and the time frame was totally doable.” [Exhibit 1, ¶¶ 19, 21]

18. In April of 1998, NationsBank and BANA announced a \$62 billion merger, which would create the largest U.S. bank ranked by assets.

19. Ian Chan Hodges was present at the July 1998 public hearing on the merger of NationsBank and BANA held by the Federal Reserve, together with a copy of the video taken April 23, 1994 in Hawaii and was prepared to testify at that hearing and show a copy of the video to Federal Regulators, regarding BANA’s continued discriminatory and redlining practices. [Exhibit 1, ¶ 27]

20. Ms. Perez stated: “I assured Mr. Chan Hodges that this merger would be beneficial to fulfill the Commitment and not to worry. I asked him not to show the

tape or the data to the media or the Federal Regulators.” [Exhibit 1, ¶ 28]

21. The Perez affidavit continues:

“August of 1998, after the Federal Reserve's Public Hearing in San Francisco, the small working group along with NationsBank's top executives, including Catherine Bessant, flew to Hawaii to meet with the non profit partners and government officials, to reassure, in good faith, that the \$150 Million Commitment would be honored. It was during this visit that additional considerations were made to facilitate the Commitment, because BANA did not have a retail presence. NPK negotiated for BANA to agree to help establish and fund the first Native Hawaiian owned Bank.” [Exhibit 1, ¶29]

22. BANA successfully sought approval for the mega merger between NationsBank and BANA, arguing that the joint resources of two mega banks would ensure that the Commitment to finally redress years of historic injustice and alleged racial discrimination, after failing to meet the 4 year deadline for the original \$150 Million Commitment, would be met. [Exhibit 1, ¶ 30]

23. Ms. Perez herself wrote the Community Development section of the NationsBank/BANA merger application that was approved by both BANA's and NationsBank's legal departments, and ultimately filed with the Federal Reserve Board. Perez stated that “..it was the \$150 Million Commitment, and only this Commitment, that was mentioned by the Federal Reserve Board in its order approving the NationsBank/ BANA merger.” [Exhibit 1, ¶ 32]

24. Once again, as a condition of the NationsBank/BANA merger, the two mega banks were committed to fulfill the Commitment to fund \$150 Million in

FHA-247 loans, and BANA was fully aware this was an enforceable commitment made and not an initiative, or aspirational goal. [Exhibit 1, ¶ 34]

25. Ms. Perez also reviewed a July 20, 2007 "revised summary report", that was a page and a half financial spreadsheet titled "Amounts Towards \$150 Million Hawaii Commitment" financial data spreadsheet, which was filed with the Court in the *Bank of America v. County of Maui* 2020 federal case. [Exhibit 1, ¶ 37]

26. After her review of the BANA financial spreadsheet, Ms. Perez stated:

"The spreadsheet appears to be "padded" created for the purpose of showing BANA funded over \$150 million to meet its "aspirational goals" after the fact. For example, the first spending line shows a \$10 million credit with no actual payment of money by BANA. It is clear BANA is applying credits for entries that have nothing to do with the \$150 Million Commitment in FHA 247 Loans." [Exhibit 1, ¶ 42]

27. Ms. Perez concluded her remarks by stating:

"I believe that in 1994 BANA was guilty of discrimination and violations of the CRA, and that is why in 1994 BANA agreed to lend \$150 Million on Hawaiian Homelands. There was certainly a meeting of the minds in 1998 when we were all working towards making sure BANA made the Commitment whole and paid a late fee for the lost opportunities to Native Hawaiians. There was a meeting of the minds when the NationsBank executive team flew out to Hawaii with the BANA working group...

...

After the merger with NationsBank, I believe BANA made a deliberate decision to create this false narrative stating that there was no commitment and if there was a commitment that BANA honored it, that is of course only if one existed, which it did not according to BANA.

BANA can play fast and loose with its words for almost as long as it can masterfully play around with numbers, all while another generation of Native Hawaiians endure a housing crisis in their homeland." [Exhibit 1, ¶¶

48-51][Italics added]

The Racketeering Claim 1

28. Nā Po‘e Kōkua alleges that BAC created and carried out a scheme or artifice to defraud native Hawaiians from their vested entitlement to BAC’s \$150 Million FHA-247 loan commitment, in order to obtain money or property from a litany of third parties over many years, while utilizing the United States mail and wire services to foster its scheme to defraud and cover-up its scheme to defraud.

29. Nā Po‘e Kōkua alleges that BAC’s scheme or artifice to defraud native Hawaiians is actionable now, pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), that is clear from BAC’s connected flow of mail and wire fraud predicate acts committed from 1994 to 2020, as specifically described, and identified within the Predicate Acts Matrix to this Complaint.

The Ku Klux Klan Act Claim 2

30. Nā Po‘e Kōkua alleges that BAC’s \$150 Million FHA-247 loan commitment denial, represents a unilateral taking of legitimate property interests previously vested to native Hawaiians, spawning from an unconstitutional denial of due process under color of state law, in violation of native Hawaiian’s civil rights.

31. BAC captured two individuals from the Department of Hawaiian Homelands (“DHHL”), Ben Henderson² (now deceased) (“Henderson”) and Micah

² For all times material hereto, Ben Henderson was the Deputy to the Chairman working directly for Micah Kane, Chairman of the Hawaiian Homes Commission,

Kane (“Kane”), together with, one representative from the Federal Reserve Bank of Richmond (“FRBR”) with oversight responsibilities for BAC bank purchases, A. Linwood Gill (“Gill”), and one Patricia Robinson (“Robinson”), a Federal Reserve Board General Counsel with oversight responsibilities for bank mergers and acquisitions.

32. All four officials knowingly helped BAC falsely disavow the \$150 Million Commitment to fund FHA-247 loans for Native Hawaiians to develop their homelands, secretly, without Hawaiian Homeland Commission knowledge, consent, approval or authority, and are all named in the Racketeering Enterprise for Claim 1, as a result of their own activities.

33. Nā Po‘e Kōkua alleges in Claim 2 that Kane and Henderson were also State of Hawaii actors related to the Civil Rights violations alleged, within the meaning of the Ku Klux Klan Act.

34. BAC unilaterally disavowed its commitment to fund \$150 Million in FHA-247 originated loans for native Hawaiians, by whittling away its commitment over a period of years and then by completely denying that it ever existed to begin with, through subterfuge, through the specific frauds alleged, and through cover-ups, that Nā Po‘e Kōkua alleges represent direct evidence of BAC’s continuing scheme or artifice to defraud native Hawaiians of legitimate property rights

and acting under Kane’s immediate direction and control.

recognized by the Judicial and Legislative Branches of the Hawaii State Government.

Establishment of Hawaii Constructive Trust Claim 3-

35. Nā Po‘e Kōkua alleges that BAC’s 1994 \$150 Million FHA-247 mortgage loan origination commitment vested legitimate property rights for native Hawaiians when made under Hawaii law, that likewise created the Res of a Trust established for the benefit of native Hawaiians, with the Hawaiian Homes Commission, as Trustee.

36. Nā Po‘e Kōkua alleges that the Trust Res is BAC’s Commitment that remains active, pending and executory, for which native Hawaiians seek forced funding from BAC now, and the establishment of a Constructive Trust by this Court, in equity.

THE PARTIES

37. Plaintiff, Nā Po‘e Kōkua is a Hawaii nonprofit corporation, whose stated purpose is to assist native Hawaiians with housing and related matters, organized and existing under the laws of the United States with principal place of business in Kahului, Hawaii, and is otherwise *sui juris*.

38. Plaintiff, Nā Po‘e Kōkua who brings its claims on behalf of native Hawaiians, has actual authority from the State of Hawaii Office of the Governor, the Legislature of the State of Hawaii, all four County Governments within the

State of Hawaii, and the Hawaiian Homes Commission, to represent the interests of native Hawaiians for purposes of the Complaint *sub judice*.

39. Interested Party, the Department of Hawaiian Home Lands (“DHHL”), was established by the Hawaiian Homes Commission Act of 1920, as amended (“HHCA”), that was passed by the United States Congress and signed into law by President Warren Harding on July 9, 1921 (chapter 42, 42 Stat. 108). The HHCA provides for the rehabilitation of the native Hawaiian people through a government-sponsored homesteading program. Native Hawaiians are defined therein as individuals having at least 50 percent Hawaiian blood.

40. Defendant, Bank of America Corporation (“BAC”) is organized under the laws of the United States, with principal place of business in Charlotte, North Carolina. BankAmerica Corporation, a predecessor entity of BAC, held subsidiaries that operated retail banks in Hawaii from 1992 through 1997.

41. Interested party, Bank of America, N.A. (“BANA”) is an indirect wholly owned subsidiary of Bank of America Corporation (“BAC”), which through its predecessor entity, BankAmerica Corporation, operated retail banks in Hawaii from 1992–1997, and is therefore implicated in the loan commitment allegations although not specifically named as a party defendant hereto.

JURISDICTION AND VENUE

42. Nā Po‘e Kōkua’s Claims 1-2 for relief arise under the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(1)(B), 18 U.S.C. § 1962(c); 18 U.S.C. §§ 1964 (a)(c); 18 U.S.C. §§ 1341, 1343; and The KKK Act, 42 U.S.C. § 1983.

43. This Court has original subject matter jurisdiction over Claims 1-2, pursuant to 28 U.S.C. § 1331.

44. Nā Po‘e Kōkua’s Claim 3 is a pendent party State of Hawaii Claim for Constructive Trust, against Defendant, BAC, regarding the same set of inextricably intertwined operative facts presented for Claims 1-2, for which this Court has supplemental jurisdiction, pursuant to 28 U.S. Code § 1367, that is discretionary with this Honorable Court.

45. For all times material hereto, Defendant, BAC was involved with substantial business activities, communications, and court filings, related to its \$150 million dollar FHA-247 loan commitment made to native Hawaiians in this District.

46. From 1994 through 1997 Defendant, BAC, by and through a wholly owned subsidiary, operated thirty-nine bank locations on Hawaii soil, which is materially intertwined with the *sine qua non* of Na Po‘e Kōkua’s Complaint, as the \$150 Million FHA-247 originated loans were to be made by and through Defendant’s Hawaii branch locations.

47. For all times material hereto, Defendant, BAC's wholly owned subsidiary, BANA conducted business operations and activities in the District of Hawaii, with actual or apparent authority from its parent, Defendant, BAC.

48. BANA has, and continues to have, a footprint on Hawaiian soil from substantial involvement with the filing, the prosecution, and the disposition of, hundreds, if not thousands, of foreclosure cases filed in this District, regarding Countrywide originated or purchased mortgage loans, having purchased Countrywide Financial Corporation's ("Countrywide") entire existing business operations, on or about July 1, 2008.

49. BANA has and continues to have, a footprint on Hawaiian soil from substantial and material involvement with the filing of Countrywide mortgage assignments in the State of Hawaii Bureau of Conveyances and the Office of the Assistant Registrar of the Land Court, regarding Countrywide originated or purchased mortgage loans sold to Hawaii homeowners in this District.

50. Although Defendant's branch banking offices officially left Hawaii in 1997, Defendant's concrete footprint remains on Hawaiian soil that will not wash away from a changing tide.

51. For all times material hereto, Defendant's wholly owned subsidiary BANA either filed, caused to be filed, or assisted in the prosecution of hundreds, if

not thousands, of Countrywide originated or purchased mortgage foreclosures actions in this District, that is both widespread and continuing.

52. Venue is proper under 28 U.S.C. § 1391 (b)(1)(2), because Defendant conducted substantial business activities in the District of Hawaii, and because a substantial part of the acts or omissions giving rise to the claims raised below occurred in the District of Hawaii, including loan commitment activities, meetings, appearances, communications, and court filings, from 1994-2022.

ARTICLE III STANDING

53. To have standing under Article III, Section 2 of the United States Constitution, a plaintiff must satisfy these elements and has the affirmative burden to do so:

54. First, plaintiff must have suffered an “injury in fact,” as an invasion of a legally protected interest that is (a) a concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

55. Second, there must be a causal connection between the injury and the conduct complained of; that is, the injury must be fairly traceable to the challenged action of the defendant rather than the result of independent action of a third party.

Id.

56. Third, it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 561.

57. Fourth, to establish standing when injunctive relief is sought, the “injury in fact” element requires an additional showing: In addition to past injury, the plaintiff must demonstrate a “sufficient likelihood” of being affected by the unlawful conduct in the future. *Wooden v. Bd. of Regents of Univ. Sys. of Ga*, 247 F. 3d 1262, 1284 (11th Cir. 2001).

58. Nā Po‘e Kōkua, on behalf of native Hawaiians, has suffered an injury in fact, based upon substantial rights afforded to native Hawaiians, and from injuries sustained to those legitimate business and property rights claimed, directly and proximately caused by, and as a result of, Defendant’s loan commitment scheme, default, subterfuge, continued cover-ups, intimidations, related pattern of racketeering activity, and civil rights violations.

59. Defendant’s continuing dissemination of false and fraudulent statements, representations, and accountings, from on or about, December 15, 2003 through July 10, 2020, as predicate acts in furtherance of BAC’s scheme to defraud native Hawaiians, also represents a continuing violation of 42 U.S.C. § 1983, as deprivations of native Hawaiians civil rights under color of State of Hawaii law.

60. Nā Po‘e Kōkua claims injuries to legitimate business and property interests, as determined by Hawaii state law, and/or to be interpreted from

operative Ninth Circuit Court of Appeals caselaw, directly and proximately caused by the actions of BAC, that can be redressed by a favorable court decision.

61. Whether a harm is to a “specific business or property interest [is] a categorical inquiry typically determined by reference to state law.” *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005).

62. Nā Po‘e Kōkua claims injuries to property caused by Defendants, based upon legitimate claims of entitlement, or intangible property interests, that are recognized property interests in the State of Hawaii for native Hawaiians, including, but not limited to, lost entitlements, failed commitments, failed recommitments, lost opportunities, sunk out of pocket expenditures, and compounded interest thereon.

63. FHA-247 mortgage loan commitments made, but not originated or funded by Defendant, BAC, for which native Hawaiians claim legitimate entitlement equal \$136,907,686 (\$150,000,000 FHA-247 mortgage loan commitment, less \$13,092,314 FHA-247 mortgage loans actually originated from 1994-2012), plus interest thereon, from June 28,1998 to the present date.

64. Nā Po‘e Kōkua additionally claims an estimated \$848,542,083 (computed through May, 2022) from lost opportunity injuries, directly and proximately caused by BAC's loan commitment failure to 1,325 native Hawaiian families that should have received timely FHA-247 mortgages from BAC, but did

not.

65. Additionally, on or about June 28, 1998, BAC agreed to pay a \$4.5 million late fee, with at least \$1 million earmarked for initial capital for the establishment of a Native Hawaiian Bank. (“late fee”).

66. In anticipation that BAC would fulfill its late fee payment to native Hawaiians, together with a minimum of one million dollars earmarked to provide initial capital for the Native Hawaiian Bank during its organizational processes, out of pocket expenditures were made by Nā Po‘e Kōkua, in detrimental reliance thereon.

67. Homan and Associates, Inc., by and through Paul Homan, a former Special Trustee for American Indians for the Clinton Administration, was hired by Native Hawaiian Bank for preparation of the OCC bank charter application required to go forward, that resulted in out-of-pocket expenditures to Mr. Homan of \$30,380 in furtherance thereof.

68. The Native Hawaiian Bank charter application was ultimately denied for lack of sufficient startup capital, which should have included BAC’s \$1 million late fee (minimum) earmarked for startup capital to the Native Hawaiian Bank.

69. BAC’s \$150 million dollar FHA-247 loan commitment made specially to benefit native Hawaiian homeownership in Hawaiian homelands, created a

legitimate claim of entitlement as a recognized intangible property interest for native Hawaiians to receive for FHA-247 mortgages, pursuant to Hawaii state law.

70. BAC's meticulous alteration of its FHA-247 mortgage commitment to a generic "lending and investment goal," then simply an "unenforceable," "aspirational goal," used as a scheme or artifice to defraud native Hawaiians from FHA-247 home ownership on the basis of race or national origin to obtain money or property, also represents an injury to the business interests of Nā Po'e Kōkua, on behalf of native Hawaiians, as a legal entitlement to business relations with BAC on Hawaiian homelands unhampered by BAC's schemes prohibited by racketeering predicate act statutes.

71. In that regard, Nā Po'e Kōkua also claims injuries to business interests by virtue of "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes" on Hawaiian homelands, committed by BAC. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002).

72. Nā Po'e Kōkua claims entitlement to interest for all categories of injuries delineated above, from 1998 to the present date.

73. Interest is compensation for the lost opportunity of being able to spend or invest money sooner. *Metcalf v. Voluntary Employees' Ben. Ass'n of Hawaii*, 52 P.3d 823, 830 (Haw. 2002).

74. The State of Hawaii has recognized property interests in a range of intangible entitlements. *In re Maui Elec. Co., Ltd.*, 408 P.3d 1 (Haw. 2017).

75. The legitimate claims of entitlement that constitute property interests are “created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law—rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.” *In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawaii 228, 241, 287 P.3d 129, 142 (2012) (quoting *Int’l Broth. of Painters & Allied Trades v. Befitel*, 104 Hawaii 275, 283, 88 P.3d 647, 655 (Haw. 2004)); *In re Maui Elec. Co., Ltd.*, 408 P.3d , 12 (Haw. 2017).

THE \$150 MILLION LOAN COMMITMENT CLEANUP ENTERPRISE

76. For all times material hereto, BAC, the Federal Reserve Board (“FRB”), specifically, by and through, former FRB Vice President- Acquisition Oversight Representative, A. Linwood Gill, III., individually (“Gill”), former FRB General Counsel for Bank Mergers and Acquisitions, Patricia Robinson, individually (“Robinson”), the Department of Hawaiian Home Lands (“DHHL”), specifically, by and through, former Chairman of the Hawaiian Homes Commission, Micah Kane, individually (“Kane”), and former Deputy Chairman of the Hawaiian Homes Commission, Ben Henderson (deceased), individually (“Henderson”), and other individuals and entities known and unknown, constituted an “Association-In-Fact-

Enterprise” as defined by Title 18, U.S.C. § 1961 (4) (hereinafter collectively “The \$150 Million Loan Commitment Cleanup Enterprise,” “Loan Commitment Cleanup Enterprise” or “Enterprise”).

77. Nā Po‘e Kōkua alleges for at all time material hereto that Bank of America Corporation has conducted the affairs of the Enterprise through a pattern of racketeering activity, as defined by Title 18, United States Code §§ 1961(5), with predicate acts as defined by 18 U.S.C. §§ 1341 and 1343.

GENERAL ALLEGATIONS - NĀ PO‘E KŌKUA

The BAC \$150 Million Dollar False Loan Commitment to Fund FHA-247 Loans-

78. In the 1990’s, the Federal Reserve Board ("FRB"), and the Office of Thrift Supervision³ ("OTS"), both federal regulators with oversight over Defendant BAC and its subsidiaries, recognized an illegal pattern and practice of racially discriminatory lending practices against native Hawaiians.

79. BAC engaged in an illegal practice of “redlining” against Native Hawaiians by racially profiling them and refusing to provide them any mortgage loans on Hawaiian Home Lands and other Hawaii neighborhoods.

80. The Fair Housing Act (“FHA”) prohibits discrimination regarding home purchase, home ownership and related mortgage loan servicing, on the basis of

³ The Office of Thrift Supervision (“OTS”) became The Office of the Comptroller of the Currency ("OCC"), on and after July 21, 2011.

race, ethnicity, or national origin, pursuant to 42 U.S.C. §§ 3601-3618 and 24 CFR Part 100.

81. The FHA forbids “discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race...” 42 U.S.C. § 3604(b).

82. The FHA further makes it unlawful for “any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3605(a).

83. The FHA allows any “aggrieved person” to file a civil action seeking damages for a violation of the statute. §§ 3613(a)(1)(A), 3613(c)(1).

84. The FHA provides that an “‘Aggrieved person’ includes any person who— (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.” 42 U.S.C. § 3602(i).

85. The Hawaii Fair Lending Coalition (“HFCLC”) challenged BAC’s discriminatory practices of “redlining” Hawaiian communities, particularly with respect to lands administered by the Department of Hawaiian Home Lands, and

other disparities in bank lending practices that prevented native Hawaiians from accessing loans to finance homes on Hawaiian Home Lands and in other native Hawaiian neighborhoods.

86. In December of 1993, the HFLC challenged BAC's 1993 application to acquire Liberty Bank in Honolulu.

87. On January 4, 1994, the Federal Bureau of Investigation ("FBI") informed HFLC that the FBI would be "conducting an investigation regarding allegations that Bank of America Hawaii has possibly discriminated in lending money to persons of Hawaiian and Filipino ancestry."

88. Prior to regulatory approval of its acquisition of Liberty Bank, and in response to a request from regulators, BAC made a commitment to the FRB and the OTS, with independent legal significance to native Hawaiians when made, to provide \$150 million in FHA-247 mortgage loans on Hawaiian Home Lands between 1994 to 1998. (hereinafter "\$150 Million Loan Commitment" or "FHA-247 originated loans").

89. Section 247 of the National Housing Act "authorizes mortgage insurance to lenders to offer a means to provide home ownership opportunities to individuals of Native Hawaiian bloodlines. FHA insures loans made to Native Hawaiians to purchase one- to four-family dwellings located on Hawaiian Home Lands ("HHL")."

90. On May 16, 1994, Bank of America Senior Counsel Patrick S. Antrim wrote a letter to the Federal Reserve Board boasting that “Development of lots by DHHL will go hand-in-hand with Bank of America Hawaii’s commitment of \$150 million to the FHA-247 loan program. FHA- 247 is only open to Native Hawaiian beneficiaries of the Hawaiian Home Lands trust. This is the largest commitment ever made to the program in Hawaii.”

91. On May 31, 1994, the Federal Reserve Board entered an Order approving Bank of America’s acquisition of Liberty Bank (“Liberty Bank Acquisition Order”). The Order referenced Bank of America’s “four-year commitment to provide \$150 million in residential mortgage loans for native Hawaiians seeking housing on Department of Hawaiian Home Lands” and, expressly stated that: “the Board’s approval [of the Liberty Bank merger] is specifically conditioned upon compliance with all of the commitments made by Bank America in connection with this application and with the conditions referred to in this order.”

92. The 1994 FRB’s Liberty Bank acquisition order expressly provided that both the FRB and the OTS had to approve the Liberty Bank acquisition, and both regulators expressly conditioned approval of the acquisition on performance of the \$150 million loan commitment.

93. A May 16, 1994 letter from Bank of America Senior Counsel Patrick S. Antrim to Surjeet Sidhu, Senior Financial Analyst, Board of Governors of the Federal Reserve System memorialized BAC's \$150 Million FHA-247 mortgage loan origination commitment made to native Hawaiians, that Defendant, BAC now claims never existed. [Exhibit 2]

94. BAC's \$150 million loan commitment was viewed by many native Hawaiians, as the result of continued community and regulatory pressure placed on BAC by native Hawaiians, to reverse historical redlining policies and practices at BAC that were prevalent through the 1990's.

95. By the end of 1995, BAC, by and through its subsidiary bank locations on Hawaiian soil, had not originated a single FHA-247 mortgage on Hawaiian Home Lands.

96. In the spring of 1997, BAC contracted to sell its Hawaii branches to American Savings Bank and in the summer of 1997 sought regulatory approval for that sale, notwithstanding that BAC had only originated *less* than \$2 million in FHA-247 loans at that point.

97. On or about May 28, 1997, Michael O'Neill, BankAmerica's Chief Financial Officer publicly stated: "The investment required to improve the profitability of our Hawaii unit could be put to better use for our shareholders in

other areas,” as found here: <https://www.latimes.com/archives/la-xpm-1997-05-28-fi-63054-story.html>.

98. However, BAC’s original FHA-247 \$150 million loan commitment was made, irrespective of profitability, as a condition of BAC’s approval from the FRB and the OTS to acquire Liberty Bank that required advance approval from federal banking regulators.

99. On August 13, 1997, Hawaii’s then largest daily newspaper the Honolulu Advertiser published a front-page story with the headline, “Bank Vows to Make Homelands Loans.”

100. The Honolulu Advertiser reported that “Under pressure from beneficiaries, Chairman Kali Watson of the Department of Hawaiian Homelands asked the state attorney general's office on July 28 for an investigation of the bank’s lending practices on Hawaiian homes.”

101. The article also reported that BAC had made a commitment to continue funding the \$150 million loan commitment “through its Honolulu mortgage unit, Honolulu Mortgage Co., and Bank of America's Community Development division, which will maintain a presence in Hawaii.”

102. On August 21, 1997, Hawaiian Homes Commission Chairman Kali Watson wrote to the OTS regarding the proposed acquisition of BAC’s Hawaii branches by American Savings Bank stating that the Department of Hawaiian

Home Lands has not been satisfied with BAC's performance in meeting its \$150 million loan commitment:

“In the past three and one-half years, more than \$64 million in home loans have been made on Hawaiian home lands. Only a small portion of these loans were made by BoA. We are concerned that there be assurance that Bank of America will honor its commitment to native Hawaiians.”

103. On December 5, 1997, after receiving regulatory approval, BAC's Hawaii branches and deposits were transferred to American Savings Bank.

104. On April 13, 1998, Bank of America reached an agreement to merge with NationsBank, a deal that ultimately created a new BAC; as the largest bank in the United States.

105. As of April 13, 1998, Bank of America had originated approximately \$3 million in qualifying FHA-247 loans, notwithstanding that its deadline to complete its \$150 million loan commitment to Hawaiian Home Lands was only two months hence.

106. On May 21, 1998, Bank of America received a Memo from Ian Chan Hodges (“Chan Hodges”) warning that the bank was in imminent danger of defaulting on its four-year \$150 million commitment to the beneficiaries of Hawaiian Home Lands.

107. The Chan Hodges Memo demonstrated that Bank of America was obligated to pay a late fee of \$4.5 million to avoid default on its \$150 million commitment. The sum \$4.5 million was equal to the opportunity cost at that time of Bank of America's failure to fulfill its commitment by the May 31, 1998 due date. Bank of America was still obligated to complete the \$150 million loan commitment and pay additional late fees for any further delay in fulfilling the commitment.

108. This Chan Hodges Memo stated that by investing \$4.5 million in a Native Hawaiian Community Development Financial institution ("CDFI"), BankAmerica should be able to avoid immediate default on its \$150 million commitment to the Federal Reserve Board.

109. On June 28, 1998, the Hawaii Fair Lending Coalition reached an agreement, in principle, with NationsBank regarding support for the creation of a Native Hawaiian CDFI. NationsBank (and its successors) agreed to provide:

- a. A minimum of \$1 million initial capital to be invested in the Native Hawaiian CDFI and up to \$3.5 million with match;
- b. \$125,000 in organizing grants;
- c. In-kind professional assistance as requested; and
- d. NationsBank/Bank of America executives to travel to Hawaii for meeting with CDFI organizers, DHHL Chair and Governor related thereto.

110. On August 17, 1998, the Federal Reserve Board announced its approval of the proposal of NationsBank to merge with Bank of America.

111. The Board's approval was again specifically conditioned on compliance with all the commitments made in connection with the application, including Bank of America's \$150 million commitment to native Hawaiians - the only specific "CRA-related" commitment mentioned in the entire Federal Reserve order approving the merger.

112. On October 30, 1998, NPK/HFLC issued a joint press release with Bank of America with the headline, "Native Hawaiian Group Announces Pledge of Major Assistance from Bank of America in Establishing a Native Hawaiian Owned Bank." [Exhibit 3]

113. In the press release, Cathy Bessant, who had been named president of the Bank of America Community Development Banking Group earlier that week, stated:

"Four years ago, Bank of America developed a program to provide mortgage loans to native Hawaiians on Hawaiian Home Lands. Today, we are not only planning to step-up this commitment to native Hawaiians, we also plan to augment it by supporting the grass-roots efforts of Na Po'e Kokua in establishing a Native Hawaiian CDFI." [Exhibit 3]

114. On November 3, 1998, *American Banker* published a story with the headline, "B of A Targets Maui for Native-Run Bank."

115. The article described how BAC had “pledged to help establish a native-Hawaiian controlled community development bank on the island of Maui” and “would invest as much as \$3.5 million in the venture.”

116. The initial 1994 BAC broken FHA-247 \$150 million loan commitment, ultimately led BAC, through subterfuge, to engage in multiple re-commitments, commitment modifications, *ex parte* altered term modifications, and altered funding “goal” failures, throughout the entire period of 1994 through 2007, at which time BAC took the official position that it had honored its \$150 million loan commitments made to native Hawaiians, or that it never had an enforceable commitment at all, that continues to this day.

117. BAC never intended to fulfill its FHA-247 \$150 million loan commitment made to native Hawaiians, because from 1994 through 1998 BAC’s branch location subsidiaries, originated just twenty-six (26) mortgages, averaging \$119,600 each, totaling \$3,109,502, prior to completing transfer of deposits from BAC Hawaii to American Savings Bank, on or about December 5, 1997.

118. BAC’s willful sale of its Hawaiian branches to American Savings Bank in 1997 effectively sabotaged its ability to originate \$150 million in FHA-247 mortgage loans for native Hawaiians going forward, however, BAC could still have purchased FHA-247 mortgage loans originated by other short term lending institutions and did not.

119. It is clear from BAC's early words and deeds that BAC did not believe FHA-247 originated mortgage loans were a good enough investment, related to native Hawaiian mortgages, not that an enforceable commitment was not made.

120. During the period 1998 through on or about January 10, 2003, BAC continued the ruse publicly that it would "step-up" the \$150 million FHA-247 loan commitment, when in fact, BAC only originated \$7,238,283 in FHA-247 mortgages on Hawaiian soil during that extended time period.

121. On January 10, 2003, Doug Woodruff, BAC President of Community Development Banking sent a letter via mail and facsimile transmission to Na Kupuna o Maui care of and addressed to Mr. Puuhonua D. Kanahela. [Exhibit 4]

122. The January 10, 2003 Woodruff letter stated, in pertinent part:

The original commitment of \$150 million was made to the Department of Hawaiian Home Lands *in 1994 when BankAmerica Corporation maintained more than 30 retail branches in Hawaii* and the company expected the substantial release of Hawaiian Home Lands for development. Unfortunately, the release of property occurred at a slower pace than expected. *In addition, the company's ability to meet its commitment on a timely basis was further impeded by the 1997 sale of the Hawaii branch network to a third party.* The successor company, Bank of America Corporation, no longer maintains any branches, retail mortgage offices, or SBA loan offices in Hawaii.

...

Bank of America continues to seek out appropriate and financially sound transactions that will help to achieve

its commitment. In that regard, we welcome the opportunity to discuss any specific suggestions or opportunities you may have. I look forward to finding solutions that will help us achieve our commitment and will improve opportunities for native Hawaiians. [Exhibit 4] [Italics added]

123. The January 10, 2003 Woodruff letter contains false and fraudulent representations of material fact, because: (1) BAC's \$150 million FHA-247 mortgage commitment was made prior to BAC's acquisition of Liberty Bank in Hawaii, or simultaneously therewith, and as a condition of the approved merger between BankAmerica Corporation and Liberty Bank; (2) BAC willfully sabotaged its ability to originate its FHA-247 loan commitment to native Hawaiians by selling its Hawaiian branch locations before fulfilling its commitments; and (3) in exchange for \$150 million of FHA-247 mortgage loans originated for native Hawaiians, BAC was now seeking "appropriate and financially sound transactions," not FHA-247 mortgage loan originations for native Hawaiians. [Exhibit 4]

124. BAC continued to portray false narratives regarding BAC's original \$150 million loan commitment, from 1998 through January 10, 2003, so that BAC could seek and obtain favorable FRB approvals for acquisitions of multiple financial institutions nationally, wherein several FRB orders approving those acquisitions continued to reference BAC's original \$150 million loan commitment, or re-

commitments made to native Hawaiians, in an effort to acknowledge the existence of multiple objections made by native Hawaiians to the FSB in that time period.

125. On June 30, 2003, the Comptroller of the Currency replied to a letter from David Po, a member of HFCLC, inquiring about Bank of America's \$150 million commitment to federal banking regulators, stating:

“In 1994, BankAmerica Corporation made a commitment to the Office of Thrift Supervision (OTS) ‘to achieve \$150,000,000 of residential loans on Department of Hawaiian Home Lands (DHHL) through the FHA 247 program.’ When BankAmerica and NationsBank merged in 1998, the Office of Thrift Supervision (OTS) received DHHL’s comment letter concerning the outstanding commitment. The OTS forwarded this letter to FRB and the bank’s response was to continue to honor all outstanding commitments.”

126. Nā Po‘e Kōkua alleges that BAC’s clearly established \$150 million FHA-247 loan commitment created legitimate property interests for native Hawaiians that were, and still are, cognizable under the laws of the State of Hawaii.

127. The BAC’s \$150 Million FHA-247 commitment was and remains a foregone conclusion. According to the Perez affidavit [Exhibit 1], the only thing that changed was BAC’s deliberate decision to create a false narrative stating that there was no commitment and if there was a commitment that BAC honored it.

BAC’s 2003 Pivot & Dump, After the Lapse of the First Five Year Period-

Big Lie #1 Whittling Away-

128. On December 15, 2003, BAC's President of Community Development Banking, Douglas B. Woodruff, sent a letter to Micah Kane, the Chairman of the Hawaiian Homes Commission and the chief administrator of DHHL, stating:

“From Bank of America's perspective, it has provided over \$121 million in financing commitments, technical assistance, and grants in support of affordable housing benefitting native Hawaiians from the time of its original commitment in 1994 up to December 31, 2002. However, this letter will serve to confirm that Bank of America has agreed that only \$69,391,673 will be counted towards the \$150 million commitment as set out in the June 27, 2003 letter from Ben Henderson, thereby leaving \$80,608,327 as the remaining outstanding amount of the commitment to be fulfilled.” [Exhibit 5]

129. There is no such letter penned by Ben Henderson to BAC, dated June 27, 2003, as referenced by Woodruff in Exhibit 5, *supra*, in the possession of DHHL.

130. The Department of Hawaiian Home Lands did not agree to turn a \$150 million FHA-247 loan commitment into a partial \$80,608,327 “lending commitment,” defined as: “financing commitments, technical assistance, and grants in support of affordable housing benefitting native Hawaiians,” and there is no such letter agreeing to those terms in the possession of DHHL.

131. The stated reduction from \$150 million to \$80,608,327 cited in BAC's December 15, 2003 letter to Micah Kane is fiction, as is the \$121 million in BAC's "perspective" previously provided up to December 31, 2002. [Exhibit 5]

132. BAC's efforts here were to create a *Chinese Wall* between BAC, Ben Henderson and Micah Kane, in order to foster a false narrative going forward from that point, and by changing the narrative from FHA-247 loan commitment to "lending commitment" going forward.

133. Nā Po'e Kōkua alleges that the BAC reference to the alleged June 27, 2003 DHHL Ben Henderson letter was subterfuge by BAC, representing a denial of native Hawaiians' rights to due process of law, under color of State of Hawaii law, unlawfully attempting to shave \$69,391,673 off the top of the Federal Reserve ordered commitment in one fell swoop.

134. On December 15, 2003, Micah Kane sent a letter to Federal Reserve Bank of Richmond Vice President A. Linwood Gill, III, asking the FRB to approve the changes delineated above, and remarkably, making new reference to "lending commitment" and abandoning the previously used title "loan commitment."

[Exhibit 6]

135. In Micah Kane's December 15, 2003 letter to FRB oversight, A. Linwood Gill, III., on p. 4, n. 2, the letter states:

“In a meeting between DHHL and BoA held on November 6, 2003, BoA agreed that only \$69,391,573 will be counted towards the \$150 million commitment, thereby leaving \$80,608,327 as the outstanding amount of the commitment to be fulfilled.” [Exhibit 6]

136. Nā Po‘e Kōkua alleges that the text of this December 15, 2003 letter to Federal Reserve Bank of Richmond’s A. Linwood Gill, III from Micah Kane was drafted by BAC and accompanied BAC’s December 15, 2003 letter received by Micah Kane from BAC for submission to the FRB quickly, on the same day, December 15, 2003. [Exhibit 5][Exhibit 6]

137. The Micah Kane December 15, 2003 letter to FRBR Gill was neither drafted, approved, or sent, with the actual knowledge, approval, or consent from the Hawaiian Homes Commission, in charge of administration for the Department of Hawaiian Home Lands for the State of Hawaii, or by Nā Po‘e Kōkua, and as such, represents a *rogue act* of Micah Kane, an individual, under color of state law. [Exhibit 6]

138. At the December 15, 2003 community meeting of the Hawaiian Homes Commission, Commissioners stated that they did not have knowledge of or approve any agenda or action related to Bank of America’s \$150 million commitment.

139. On December 23, 2003, Micah Kane sent a second letter to Federal Reserve Bank of Richmond Vice President A. Linwood Gill, III, further buttressing

the new changed term “lending commitment,” after having abandoned the title “loan commitment” on December 15, 2003, and added this gratuitous changed commitment:

“Furthermore, BoA has no objection in having the Federal Reserve Board include the Lending Commitment as outlined in this letter to any order approving the proposed merger between BoA and FleetBoston.” [Exhibit 7]

140. The December 23, 2003 letter from Micah Kane to A. Linwood Gill, III was neither drafted, approved, or sent, with the actual knowledge, approval, or consent from the Hawaiian Homes Commission, in charge of administration for the Department of Hawaiian Home Lands for the State of Hawaii, or by Nā Po‘e Kōkua, and as such, represents *a rogue act* of Micah Kane, an individual, under color of state law. [Exhibit 7]

141. During the January 16, 2004 Public Hearing on the proposed merger between BAC and FleetBoston Financial Corporation at the Federal Reserve Bank of San Francisco, Patricia Robinson, who served as an FRB panelist, made the following false statement of material fact as recorded in the hearing transcript:

“MS. PAT ROBINSON: I just want to make one statement. And as Mr. -- as the secretary's office has explained to you repeatedly, the commitment was not a commitment to the board. The commitment was not a condition of the orders in the past cases. The commitments, however, were commitments with, you know, two community groups which oftentimes banks do enter into. That's been explained to you repeatedly.”

142. Nā Po‘e Kōkua alleges that BAC should be estopped from making continued claims, and false and fraudulent representations that a “commitment” was never made to native Hawaiians, that is clearly a false narrative used in BAC’s scheme to defraud that repeats itself multiple times in the Complaint *sub judice*.

Big Lie #2 Cutting to the Core-

143. On March 16, 2007, James W. Feild, Senior Vice President, Community Development Banking for BAC sent a letter to Ben Henderson, Deputy to the Chairman at Department of Hawaiian Home Lands, stating:

“As you are aware, Bank of America has worked diligently for more than 13 years to achieve our goal of lending or investing \$150,000,000 to help native Hawaiian families reach their dream of home ownership on native soil, we are proud to report that we have surpassed our goal with the help of the Department of Hawaiian Homelands and many individuals and organizations involved in native Hawaiian issues. The attached report summarizes the loans, grants and investments that make up our \$151,720,630 in production to date. Please review the attached report and indicate your agreement or contact me with any questions.” [Exhibit 8]

144. BAC’s March 16, 2007 letter to Ben Henderson again represented an *ex parte* false or fraudulent narrative portrayal, as it further expanded the term “lending commitment” to a “goal of lending or investing” \$150,000,000 to help native Hawaiian families. [Exhibit 8]

145. BAC's change made it no longer a commitment, but rather, just a goal.

146. The addition of the "or investing" substance modification rendered the entire original FHA-247 loan commitment, as well as the prior December 15, 2003, *ex parte* modification to just "lending commitment" meaningless in application, as a means to redress years of BAC's historically documented redlining practices.

147. The *ex parte* commitment modifications and false narratives exacted by BAC from 2003-2007 served to help BAC render its original FHA 247 commitment moot, through a series of planned false and fraudulent pretenses, false narrative, and key false statements of material facts presented as the truth going forward and continuing to this day. [Exhibit 4][Exhibit 5][Exhibit 6][Exhibit 7] [Exhibit 8]

148. Nā Po'e Kōkua alleges that every single time BAC uses a historically false and fraudulent narrative to this day, that the use of that historically false and fraudulent narrative for purposes of continuing to carry out its scheme and artifice to defraud native Hawaiians of its original \$150 Million FHA-247 loan commitment, represents a new and continuing predicate act for purposes of the Racketeer Influenced Corrupt Organizations Act, that remains actionable by native Hawaiians in the Complaint *sub judice*.

149. The continuity of BAC's false and fraudulent pretenses made in order to obtain money or property are delineated in the Predicate Acts Matrix hereto, and

reveal an uninterrupted chain of acts in furtherance of its scheme or artifice to defraud native Hawaiians, which continues to this day.

150. On July 16, 2007, Phillip A. Wertz (“Wertz”), BAC’s Assistant General Counsel wrote a one-page letter to FRB Vice President A. Linwood Gill, III, in connection with the application to acquire LaSalle Bank stating:

“This letter responds to the comment letter submitted by the Hawaii Fair Lending Coalition (“HFLC”), dated July 3, 2007. The HFLC letter was submitted in connection with the Application by Bank of America Corporation, Charlotte, North Carolina (“Bank of America”) to the Board of Governors of the Federal Reserve System (the “Board”) for prior approval to acquire ABN AMRO North America Holding Company (“ABN AMRO NA”).

The HFLC has raised questions about Bank of America's performance under a 1993 commitment to provide \$150 million in *support for lending on Hawaiian home lands*. As of June of this year, Bank of America has *made loans exceeding \$151 million and have satisfied all obligations relating to this commitment*. The Board has reviewed and considered this issue in several previous transactions involving Bank of America. Bank of America believes that there are no material issues raised by this letter that merit consideration of the application.

Accordingly, Bank of America requests that the Board proceed with swift approval of the Application.” [Exhibit 9][Italics added]

151. The July 16, 2007 Wertz letter was copied to Ian Hodges, HFLC, Office of the Comptroller of the Currency, and to the United States Department of

Justice, but not to the State of Hawaii, DHHL Ben Henderson, DHHL Micah Kane or anyone else. [Exhibit 9]

152. The July 16, 2007 letter to the FRB was a false and fraudulent statement of material fact, as BAC did not make “loans exceeding \$151 million,” and because the original commitment was for FHA-247 originated mortgage loans to native Hawaiians, not for “support for lending on Hawaiian home lands”. [Exhibit 9]

153. On September 14, 2007, the FRB approved the LaSalle Bank and Bank of America merger, stating in a footnote:

“One commenter reiterated comments made in connection with the BAC/Fleet Order and BANA/MBNA Order, urging the Board not to approve the proposal until BAC meets certain “commitments” regarding its lending programs in Hawaii and its goal for mortgage lending to Native Hawaiians on Home Lands. *See e.g.* BOA/Fleet Order at 232-33.” *Id.*

“BANA has represented that it has complied with its commitment to the State of Hawaii’s Department of Hawaiian Home Lands by making loans and investments exceeding \$151 million under the terms of that commitment.” *Id.*

154. Nā Po‘e Kōkua alleges that it is easy to see a direct connection between BAC’s efforts to obtain money or property as a result of multiple bank purchases, precisely at the same time that the false and fraudulent representations were made

to carry out BAC's continuing scheme to defraud native Hawaiians of legitimate property interests.

155. BAC's false and fraudulent representations were directly tied to BAC's receipt of money from bank acquisitions, directly tied to the deprivation of native Hawaiians constitutional rights under color of Hawaii state law, and the direct and proximate cause of injuries to native Hawaiians' legally cognizable property rights.

156. This one example shows the level and extent of BAC control exercised over both A. Linwood Gill and DHHL Ben Henderson, because Gill never asked Henderson (or DHHL Kane) in advance, whether BAC's Phillip A. Wertz's claims were true, before injecting that "complied" language into a commitment order permitting BAC to purchase LaSalle Bank, for financial gain, upon false and fraudulent statements made. [Exhibit 9][Exhibit 10][Exhibit 11]

157. Conversely, DHHL Ben Henderson would have been relegated to calling BAC's Phillip A. Wertz *a liar*, after the fact, in order to officially dispute Wertz's claims made to Gill, for purposes of seeking approval for BAC's LaSalle Bank purchase. [Exhibit 9][Exhibit 10][Exhibit 11]

158. The July 16, 2007, BAC Phillip A. Wertz letter to A. Linwood Gill, III, stating as fact, that BAC made loans exceeding \$151 million and fulfilled its Hawaiian loan commitment, was mailed to Gill some seven (7) weeks before Ben Henderson's October 3, 2007 letter to BAC, *infra*, stating that "BoA contributions

toward fulfillment of its commitment appear to be in order”. [Exhibit 9][Exhibit 10][Exhibit 11]

159. The July 16, 2007 BAC Wertz letter to FRBR Gill was delivered to Gill four (4) days before BAC’s two-page DHHL \$151 million credit summary titled: “Amounts Towards \$150 Million Hawaii Commitment” was completed, as “Revised July 20, 2007,” and a week before it was even received by DHHL Ben Henderson in Hawaii on July 23, 2007. [Exhibit 9][Exhibit 10][Exhibit 11]

160. Nā Po‘e Kōkua alleges that BAC’s level of control over Henderson, Kane, and Gill is obvious, as BAC even cited false and fraudulent statements of fact regarding the Hawaiian Loan Commitment, as foregone conclusions, prematurely, that also evidences BAC’s power and control over Enterprise Members.

161. Nā Po‘e Kōkua alleges that in so doing, BAC took control over otherwise legitimate individuals and entities in furtherance of its scheme or artifice to defraud native Hawaiians.

162. BAC’s \$150 million FHA-247 mortgage loan commitments made to native Hawaiians created legitimate property interests for native Hawaiians when made, under Hawaiian state law.

163. BAC officially stated that it had completed its \$150 million FHA-247 commitment on or about July 16, 2007 [Exhibit 10] and BAC continues to

propagate these same false narratives to this day, which Nā Po‘e Kōkua claims represent connected and continuing racketeering predicate acts in furtherance of its ongoing scheme or artifice to defraud native Hawaiians.

164. On October 3, 2007, Ben Henderson replied to BAC’s March 16, 2007 letter, (and July 20, 2007, two page spreadsheet titled: “Amounts Towards \$150 Million Hawaii Commitment”, received by DHHL on July 23, 2007 per a date stamp on the letter, four months after the date of the letter), and stated:

“I apologize for the delay in responding to you regarding Bank of America’s (BoA) commitment to provide \$150,000,000 in lending or investment to help native Hawaiian families fulfill their goal of home ownership on Hawaiian home lands.

It has taken us time to review the revised summary report you provided dated July 20, 2007. The statement of BoA contributions toward fulfillment of its commitment appear to be in order. The Department of Home Lands (DHHL) is therefore pleased to formally acknowledge that the \$150,000,000 commitment has been met by Bank of America.” [Exhibit 11][Italics added]

165. As previously alleged, Ben Henderson (deceased) was the Deputy Director of DHHL, working directly for Micah Kane, Director of DHHL as of October 3, 2007, and under Kane’s immediate direction and control.

166. Notwithstanding that Henderson had no legal authority to draft the October 3, 2007 letter [Exhibit 11], assuming that Henderson was wrongfully directed to do so by Kane, neither had legal authority as representatives of the State

of Hawaii, that Nā Po‘e Kōkua alleges, *infra*, is a Trustee for native Hawaiians regarding BAC’s \$150 Million Commitment Trust and administration thereof.

167. In that regard, Henderson’s/Kane’s unauthorized October 3, 2007 letter [Exhibit 11] also represented a breach of fiduciary duties owed to native Hawaiians, in addition to a deprivation of native Hawaiians’ constitutional rights under color of state law.

168. Nā Po‘e Kōkua, alleges in the alternative, on information and belief, that BAC, not DHHL Ben Henderson, wrote the self-serving draft text for that Henderson letter, using precisely the same false narratives that BAC previously provided to FRBR Gill for LaSalle Bank purchase approval.

169. Nā Po‘e Kōkua alleges that Ben Henderson’s October 3, 2007 letter to BAC represented a denial of native Hawaiians rights to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, under color of State of Hawaii law. [Exhibit 11]

170. The October 3, 2007, Ben Henderson letter to BAC was neither drafted, approved, or sent, with the actual knowledge, approval, or consent from the Hawaiian Homes Commission, in charge of administration for the Department of Hawaiian Home Lands for the State of Hawaii, or by Nā Po‘e Kōkua, and as such, represents *a rogue act* of Ben Henderson, and/or Micah Kane, either or both acting individually, under color of state law.

171. Regardless, BAC had no legal right to take away legitimate property interests, which BAC created, from native Hawaiians by using meticulously created false and fraudulent statements and representations over a period of years, while utilizing United States mail and wire services, while exercising control over Henderson, Kane, Gill and Robinson, and in furtherance of its scheme to defraud native Hawaiians of those vested interests that continues to this day.

172. BAC's conduct continues to demean and demoralize native Hawaiians to this day and remains actionable now specifically as a result thereof.

173. Nā Po'e Kōkua claims that BAC's continued false narratives are actionable now, wholly caused by BAC's own arrogance, and above reproach mentality, through BAC's continuing use of the United States mail and wire services to transmit its same false narratives through July, 2020, resulting in this timely filed Complaint against BAC.

174. BAC never provided specific financial details to DHHL or other representatives from the State of Hawaii, regarding the thirty-nine summary report line items totaling \$151,720,630 through June 2007. [Exhibit 10]

175. Ben Henderson merely acknowledged that DHHL reviewed "the revised summary report," not financial detail for those 39 line items totaling \$151,720,630, as no financial detail was provided by BAC to Henderson. [Exhibit 10]

176. No accounting, audit, or detailed financial analysis was ever performed by DHHL or other representatives from the State of Hawaii, regarding BAC's July 20, 2007, 39 line item spreadsheet accumulation totaling \$151,720,630. [Exhibit 10]

177. The actual numbers cited on BAC's Revised July 20, 2007 - 39 line item summary report totaling \$151,720,630 are also false and fraudulent, because DHHL credits taken thereon cannot be reconciled with BAC Wertz's statement made to FRBR Gill that BAC already "made loans exceeding \$151 million." [Exhibit 9][Exhibit 10]

The Four Corners of BAC's Revised 7/20/2007 Spreadsheet: False & Fraudulent

178. BAC has no records to support the total of the FHA-247 loan commitment credits taken, the authorization thereof, or payments allegedly made, as delineated in BAC's Revised July 20, 2007 spreadsheet presented to Ben Henderson for comment. [Exhibit 10]

179. In a May 3, 2012 letter to the Hawaii Fair Lending Coalition, Hawaiian Homes Commission Chair Albert "Alapaki" Nahale-a stated that after reviewing Ben Henderson's October 3, 2007 letter and related documents, the Hawaiian Homes Commission reached the following conclusions:

"a. That the Deputy to the Chair "signed off" on the commitment without approval of the Hawaiian Homes Commission;

b. That the expansion of the scope of the commitment which allowed BankAmerica to claim a credit of \$3 and \$4 for every dollar they invested in infrastructure - thereby reducing their balance at a faster rate - was not brought before the Commission; and

c. That no “late fee” - such as was agreed to in 1998 - was charged to BankAmerica for being nine years late in fulfilling its \$150 million commitment.” *Id.*

180. Commission Chairman Albert Nahale-a concluded his May 3, 2012

letter to HFLC as follows:

“Last month, in a unanimous vote, the Hawaiian Homes Commission agreed to support the Hawaii Fair Lending Coalition in its efforts to negotiate with Bank of America on behalf of our beneficiaries in order to achieve a formal settlement so that BofA's \$150 million commitment can finally be fulfilled.” *Id.*

181. On September 21, 2012, Ms. Kehau Filimoe‘atu of the HFLC submitted initial comments to the Office of the Comptroller of the Currency, regarding the pending approval of applications to merge Bank of America Oregon, N. A. and Bank of America Rhode Island, N.A. into Bank of America, related to Bank of America’s unfulfilled \$150 million loan commitment.

182. In the comments, Ms. Filimoe‘atu stated that the Hawaiian Homes Commission Chair letter, dated, May 3, 2012, invalidated DHHL Ben Henderson’s letter, dated October 3, 2007.

183. On October 1, 2012, Rahdi Thayu, Assistant General Counsel for BAC responded to the OCC regarding HFLC Ms. Filimoe‘atu’s comments in connection

with BAC's pending applications for approval by the OCC, but never addressed the Hawaiian Homes Commission Chair's letter. [Exhibit 12]

184. Instead, the October 1, 2012, Rahdi Thayu letter to the OCC stated, that:

“The [HFLC] letter raised concerns about the performance of Bank of American Corporation, BAC's ultimate parent corporation, under its \$150 million commitment to support lending on Hawaiian Home Land. I attach a copy of a letter from the State of Hawaii Department of Hawaiian Home Lands, dated October 3, 2007. This letter serves as confirmation that BAC has satisfied this commitment.” [Exhibit 12]

185. On October 9, 2012, Ms. Filimoe'atu responded to Rahdi Thayu's October 1, 2012 letter in an email to the to the OCC.

186. In this October 9, 2012 email, Ms. Filimoe'atu stated:

“We were gratified to see that in its response to our initial comments Bank of America's legal department generally acknowledges the bank's “\$150 million commitment to support lending on Hawaiian home lands.” However, we were also somewhat surprised that BofA chose to respond to our comments by simply attaching the very same letter (dated 10/3/07) that the Hawaiian Homes Commission had determined to be invalid in its May 3, 2012 letter to HFLC, which was incorporated into our initial comments.” *Id.*

187. BAC did not make a \$150 million commitment to *support lending*, but rather, made a \$150 million commitment to native Hawaiians, specifically to originate and fund FHA-247 mortgage loans to native Hawaiians, and as such, Rahdi Thayu's October 1, 2012 letter to the OCC includes false and fraudulent

statements of fact for the purpose of furthering BAC's loan commitment scheme to defraud native Hawaiians.

188. On December 8, 2014, a conference call was held between Nā Po'e Kōkua, BAC's Cathy Bessant, who was BAC's chief of technology and operations at the time, and Andrew Plepler, who was BAC's Global Environmental, Social and Governance Executive at the time. The conference call was recorded. Cathy Bessant - in response to a request from Nā Po'e Kōkua during the call for documentation backing up BAC's Revised 7/20/2007 summary report - stated: "I don't think there's any way to recreate what backs it up." [Exhibit 13]

189. It is axiomatic that if nonprofit Nā Po'e Kōkua received a small grant of \$1,500 from a foundation, it would still need to provide the foundation with detailed documentation of what was spent by the funded program, yet BAC claimed fulfilled loan commitment expenditures exceeding \$151 million with no supporting documentation whatsoever.

Hawaii Governor Ige Involvement-

190. Governor David Ige sent a letter to BAC's Chief of Operations and Technology Cathy Bessant dated April 18, 2018, which stated, in pertinent part:

"I am writing to invite you to Hawai'i this summer to meet with Kehau Filimoe'atu of Nā Po'e Kōkua in order to reach a fair and final settlement of Bank of America's outstanding \$150 million commitment to the Hawaiian

people on their homelands. I am offering to serve as host for these talks.

As the governor of Hawai‘i, I am strongly urging that the Bank of America finalize its \$150 million Hawaiian commitment before August 10, 2018, the 20th anniversary of meetings on O‘ahu and Maui between a delegation of executives from NationsBank and Bank of America with Hawaiian kūpuna (elders), state leaders and Nā Po‘e Kōkua, which is the fiscal sponsor and institutional home of the Hawai‘i Fair Lending Coalition (hereafter referred to collectively as NPK/HFLC).

It is my understanding that the Hawai‘i meetings were the result of an agreement that NationsBank reached with NPK/HFLC on June 28, 1998 in response to Bank of America’s failure to meet its Hawaiian commitment by the mid-1998 deadline. In its August 17, 1998 order approving NationsBank’s merger with Bank of America, the Federal Reserve Board specifically referenced a NationsBank statement that the new post-merger Bank of America would honor its \$150 million Hawaiian commitment.” *Id.*

191. The “agreement” to which Governor Ige was referring was a commitment by Bank of America to pay a late fee based on the May 1998 memo from the Hawaii Fair Lending Coalition, as previously stated.

192. On May 18, 2018, BAC’s Brian Putler, Senior Vice President, State Government Western Region, sent a letter to Governor David Ige stating: “I am writing on behalf of BAC to thank you for your letter of April 18, 2018... We appreciate your interest in this matter and assure you that the bank fulfilled – and

exceeded by many times – the \$150 million lending and investment goal through our community development loans and investments in Hawaii.” [Exhibit 14]

193. The May 18, 2018 Putler letter is materially false and fraudulent because the bank did not fulfill, and certainly did not exceed by many times, its \$150 Million FHA-247 mortgage loan origination Commitment that vested legitimate property rights upon native Hawaiians when made, *supra*. [Exhibit 14]

194. On July 6, 2018, Governor David Ige filed a Freedom of Information Act (“FOIA”) request with the Board of Governors of the Federal Reserve System seeking “[a]ll records concerning, mentioning, or related to Hawaii, native Hawaiians and/or BankAmerica's four-year commitment to provide \$150 million in residential mortgage loans for native Hawaiians seeking housing on Department of Hawaiian Home Lands.” *Id.*

195. On September 14, 2018, Andrew Plepler, Global Environmental, Social and Governance Executive at Bank of America stated, in response to an August 27, 2018 letter from the Honorable Robert Carroll, Council Member East Maui, that was previously mailed to BAC’s Catherine P. Bessant:

“[A]s a result of several recent inquiries on the topic, and out of respect for those who have questioned whether the commitment was satisfied, we have recently spent considerable time reviewing once again the history and records related to our \$150 million commitment. As part of this recent review, we have examined reports and spreadsheets documenting our progress against this goal.

We have also reviewed records and correspondence dating back to 1998, including correspondence with the Hawaiian Homes Commission and the Department of Hawaiian Home Lands . . . we were able to meet our \$150 million commitment.” *Id.* [Exhibit 15, PDF p. 3]

196. Plepler’s September 14, 2018 letter was a false pretense engaged to further BAC’s continuing scheme or artifice to defraud native Hawaiians. [Exhibit 15, PDF p. 3]

197. Plepler reviewed no more than a few pages, as the financial details for BACs alleged expenditures [Exhibit 10]) were never provided to Governor Ige, the HHC, or the DHHL and does not exist in Hawaii public records, nor does BAC have any supporting documentation according to BAC’s Bessant’s statement on the December 8, 2014 conference call which Plepler participated in. [Exhibit 13]

198. On November 2, 2018, the Maui County Council unanimously adopted Resolution 18-178 to support Hawaii Governor David Ige’s efforts to have Nā Po‘e Kōkua and the Hawaii Fair Lending Coalition reach a settlement with Bank of America.

199. On January 22, 2019, the Federal Reserve Board provided 690 pages of documents partially responsive to Governor Ige’s FOIA request, while omitting other material and relevant records specifically requested.

200. BAC unofficially met with Governor David Ige regarding the \$150 Million Commitment in Hawaii on or about January 25, 2019, and again, in Washington D.C., on or about February 22, 2019.

201. On April 22, 2019, Governor Ige appealed the Federal Reserve Board's "apparently inadequate search for certain records and its determination that other records are exempt under the deliberative process privilege."

Legislative and County Council Support-

202. On April 4, 2019, the Hawaii State Senate adopted Senate Concurrent Resolution 19-245, Senate Draft 1, entitled "Supporting the Governor's Efforts in Investigating and Urging the Bank of America to Return to Hawaii to Meet with Nā Po'e Kōkua and the Hawaii Fair Lending Coalition Regarding a \$150,000,000 Loan Commitment for Native Hawaiians on Hawaiian Homelands." By September 4, 2019, every county in Hawaii had passed resolutions, all unanimously, supporting the Governor's efforts to have Nā Po'e Kōkua, the Hawaii Fair Lending Coalition, and Bank of America reach a settlement agreement relating to a \$150 million loan commitment for native Hawaiians on Hawaiian Home Lands.

United States Senator Brian Schatz Involvement-

203. On July 2, 2019, US Senator Brian Schatz, at the time a member of the Senate Banking Committee, stated in a videotaped community meeting, in response to a question from Nā Po'e Kōkua, that "...[i]n 1993 Bank of America

acquired Liberty Bank, which was a local bank. And as a condition of acquiring that local bank they made a commitment to do about 150 million dollars in loans on Department of Hawaiian Homelands and they lied, they never did it.” *Id.*

County of Maui Involvement and Nā Po‘e Kōkua Support-

204. On August 6, 2019, a hearing of the Maui County Council's Governance, Ethics and Transparency Committee was held to consider Bank of America’s failure to fulfill its \$150 million loan commitment and to authorize the employment of special counsel to pursue sanctions and other remedies for fraudulent foreclosures.

205. On July 8, 2020, two days before the County Council was set to vote on a resolution to employ special counsel, Andrew Plepler in a letter to the Honorable Alice Lee, Maui County Council stated, *inter alia*, as excerpted in pertinent part:

“In May 1994, the Bank announced that it would lend \$150 million to native Hawaiians for homes on Hawaiian Home Lands by the end of 1998. The Bank contemplated meeting that goal by originating FHA-247 loans, which are available only to native Hawaiians who purchase or build a home on Hawaiian Home Lands as their primary residence. *By 1997, however, the Bank determined that it could not meet its \$150 million lending goal exclusively through FHA-247 loans due to external factors such as competition from other banks and limitations on the availability of leases on native Hawaiian Home Lands...*

Although the Bank exited the consumer banking business in Hawaii in 1999, it continued working to fulfill its \$150 million pledge. By the end of 2002, the Bank had provided or committed nearly \$160 million. . . .

In November 2003, after discussions with DHHL and HHC, Bank of America agreed that just \$69,391,673 of the nearly \$160 million it had invested in Hawaii would count toward its \$150 million pledge. Over the next four years, the Bank worked closely with a liaison from DHHL and HHC who tracked progress toward the \$150 million lending goal. In 2004, the Bank provided nearly \$19.5 million in mortgage loans, revolving lines of credit, and grants to community groups dedicated to promoting native Hawaiian homeownership. In 2005, the Bank lent or committed another \$17.3 million. That number grew to \$41.2 million in 2006. And in the first few months of 2007 alone, the Bank provided \$4.2 million more. . . .

The facts outlined above cannot be rebutted. Although some native Hawaiians continue to insist that the pledge remains unfulfilled, their arguments are premised on one-sided, incomplete, and, at times, inaccurate recitations. . .

Bank of America fulfilled its \$150 million pledge to promote native Hawaiians' homeownership on Hawaiian Home Lands more than a decade ago. For that reason alone the County has no basis to sue the Bank. But even if the County disagrees with this factual conclusion, there is no legal basis for the County of Maui to bring claims against the Bank. Among other reasons, any lawsuit would be destined to fail because the Bank's pledge was an aspirational goal, not a binding contract; the County has no authority to enforce it in any event; and any lawsuit is long since time-barred. For these reasons, the Bank respectfully requests that the Council reject the resolution." [Exhibit 16][Italics added]

206. Andrew Plepler's July 8, 2020 letter is riddled with false and fraudulent statements of fact, used as a cunning device to deceive others, in furtherance of BAC's continued efforts to foster its false narratives and schemes to defraud native Hawaiians. [Exhibit 16]

207. There were no “external factors” other than BAC’s desire to sell 39 BAC branch locations in Hawaii in 1997, a business decision that was financially motivated, as publicly stated by Bank of America at the time, *supra*. [Exhibit 16]

208. Despite anemic competition, BAC originated zero qualifying FHA-247 mortgages in the first two years, 1994 and 1995, of its commitment.

209. In the subsequent years leading up to the 1998 deadline to complete the commitment, BAC originated just 26 FHA-247 mortgages totaling \$3,109,502, achieving a market share of just 3.2%.

210. Plepler’s July 8, 2020 representation that “[t]he facts outlined above cannot be rebutted”, are rebutted within the four corners of the two page summary report attached to James Feild’s March 16, 2007 letter to DHHL’s Ben Henderson, dated “Revised 7/20/2007.” [Exhibit 10][Exhibit 16]

211. Plepler’s statement that “the Bank’s pledge was an aspirational goal” is the ultimate insult to injury to native Hawaiians, considering the totality of facts to the contrary.

212. Plepler’s statement that “any lawsuit is long since time-barred” ignores the fact that material false and fraudulent representations made in his very July 8, 2020 letter are actionable, considering the reach of the federal racketeering statute related to BAC’s continuing schemes to defraud.

July 10, 2020, Maui County Council Resolution 20-97 - BAC Response-

213. On July 10, 2020, the Council of the County of Maui Council passed Resolution 20-97 to hire special counsel to pursue claims against Bank of America and other mortgage lenders for “failure to fulfill loan commitments, fraudulent foreclosures, and similar unlawful conduct.”

214. On July 10, 2020, BAC electronically filed a Complaint for Declaratory Judgment against the County of Maui in the United States District Court for the District of Hawaii, Case No. 1:20-cv-00310-JMS-WRP.

215. On July 10, 2020, BAC electronically filed in Case No. 1:20-cv-00310-JMS-WRP a document titled: “BofA Hawaii Announces Major Programs For Hawaiian Homelands and Filipino Housing” as Doc. No. 1-1, that stated, *inter alia*: “The program includes: • A \$150 million residential *mortgage loan goal by 1998* on Department of Hawaiian Home Lands under the FHA 247 program.” [Exhibit 17][Italics added]

216. BAC did not have a mortgage loan goal by 1998, it had an FHA-247 mortgage loan commitment by 1998, and as such, BAC’s statement within Doc. 1-1 electronically filed with this court is materially false and fraudulent. [Exhibit 17]

217. On July 10, 2020 BAC electronically filed in Case No. 1:20-cv-00310-JMS-WRP a document titled: “*Draft Talking Points for Hawaii \$150 million commitment (8/1/07)*”, as Doc. 1-2, pages 3-4. [Exhibit 18, PDF pps. 4-5][Italics added]

218. On July 10, 2020 BAC electronically filed in Case No.: 1:20-cv-00310-JMS-WRP, Andrew Plepler's July 8, 2020 letter to the Honorable Alice Lee, Maui County Council, as Doc. 1-8, that contains the same materially false and fraudulent statements of facts regarding the Hawaii Loan Commitment, as previously stated.
[Exhibit 19]

219. BAC's electronic filings made on July 10, 2020 in Case No.: 1:20-cv-00310-JMS-WRP contain materially false, fraudulent and misleading statements of fact and representations as false pretenses in furtherance of its continuing scheme or artifice to defraud native Hawaiians of BAC's original FHA-247 loan commitments. [Exhibit 17][Exhibit 18][Exhibit 19]

220. In Case No. 1:20-cv-00310-JMS-WRP, at Doc. 1, pps. 35-36, BAC sought declaratory judgement that any suit filed against BAC regarding its \$150 Million FHA-247 Loan Commitment would be prohibited, as a matter of law, seeking this relief:

“WHEREFORE, Plaintiffs pray that this Court:

(A) Enter a judgment declaring that there was no contract between Plaintiffs and the County;

B) Enter a judgment declaring that the County has no standing to bring a claim against Plaintiffs for an alleged failure to meet BANA's \$150 million lending goal;

(C) Enter a judgment declaring that any actionable claims the County has against Plaintiffs for an alleged failure to meet BANA's \$150 million lending goal are barred by the statute of limitations;

(D) Enter a judgment declaring that any actionable claims the County has against Plaintiffs for an alleged failure to meet BANA's \$150 million lending goal are barred by laches;

(E) Enter a judgment declaring that any actionable claims the County has against Plaintiffs for an alleged failure to meet BANA's \$150 million lending goal are preempted by federal law; and

(F) Grant Plaintiffs such additional or other relief as it deems just and proper, including an award of reasonable attorneys' fees and the costs of this action.

DATED: Honolulu, Hawaii, July 10, 2020." *Id.*

221. On September 18, 2020, the County of Maui filed a two-page motion to dismiss for failure to state a cause of action. [1:20-cv-00310 Doc. 26]

222. On December 28, 2020, the Chief U.S. District Judge for the District of Hawaii this Court Granted the County of Maui's Motion to Dismiss Complaint, stating in the conclusion of the Court's order that "the Bank appears to have filed this lawsuit to achieve a tactical advantage... It is reasonable to infer that this was done to place the County in a defensive position before the County's threat of future litigation could take on a concrete form." [1:20-cv-00310 Doc. 39]

July 10, 2020, Maui County Council Resolution No.: 20-97 and Lack of Movement by Legal Counsel-

223. On August 24, 2021, acting on its concerns that "no legal claims have been filed on the County's behalf under Resolution 20-97, more than a year after its adoption, the Maui County Council passed Resolution 21-133 which resolved:

“That the Council urges the Department of the Corporation Counsel to *work with* special counsel Bronster Fujichaku Robbins, a Law Corporation, *as well as counsel Bruce Jacobs of Jacobs Legal, PLLC, to file legal claims on the County’s behalf under Resolution 20-97 and to support Na Po‘e Kokua in its efforts to pursue justice to hold Bank of America accountable for its unfulfilled \$150 million FHA-247 commitment and its fraudulent foreclosures..” Id. [Italics added]*

224. In the past nine months neither Maui County’s Department of the Corporation Counsel or Bronster Fujichaku Robbins has acted on the Maui County Council’s instructions under Resolution 21-133 to work with Bruce Jacobs to file legal claims, to support Na Po‘e Kokua, or in holding Bank of America accountable.

225. Nā Po‘e Kōkua alleges that BAC’s various false and fraudulent letters and other documents mailed and electronically transmitted through the years regarding BAC’s \$150 million FHA-247 loan commitment to native Hawaiians represent predicate acts in furtherance of BAC’s ongoing scheme to defraud and to cover up said scheme to defraud native Hawaiians of those benefits.

226. It has been 24 years now since the 1998 deadline passed for Bank of America to complete its \$150 million FHA-247 mortgage loan commitment to the beneficiaries of Hawaiian Home Lands.

227. This condition was imposed by both the Federal Reserve Board and the Office of Thrift Supervision, in their respective orders, approving Bank of America, FSB's merger with Liberty Bank in 1994.

228. From calendar year 1994, through and including, 2012, BAC originated a total of one hundred-six (106) FHA-247 mortgage loans for native Hawaiians, averaging \$123,500 each, and totaling \$13,092,314, falling short of its original FHA-247 loan commitment by \$136,907,686.

**Equitable Tolling and Equitable Estoppel Should Apply To All Claims-
Statute of Limitations § 1983 Claim-**

229. In *Linville v. State of Haw.*, 874 F. Supp. 1095 (D. Haw. 1994), this honorable Court stated: “[i]n *Wilson v. Garcia*, the United States Supreme Court held that § 1983 claims are best characterized as personal injury claims. 471 U.S. 261, 280, 105 S.Ct. 1938, 1949, 85 L. Ed.2d 254 (1985). Thus, this Court should apply the two-year limit of Hawaii's general personal injury statute to Plaintiffs § 1983 claim.” *Id.*

230. The holding in *Linville*, as applied to Nā Po'e Kōkua's factual allegations, would suggest that the last action taken by DHHL Henderson, under color of State of Hawaii law, was on or about October 3, 2007, almost fifteen years ago, and that Hawaii's two year statute of limitations period to bring a 42 U.S.C. § 1983 claim against Defendant, BAC, lapsed on or about October 3, 2009, absent

Plaintiff's requests made below for application of equitable tolling and equitable estoppel, *infra*.

a. Notwithstanding, Nā Po'e Kōkua specifically reserves all rights to argue that the Ku Klux Act Claim is timely filed, and waives no rights or arguments related to statute of limitations or repose for Claim 2 whatsoever.

Statute of Limitations § 1962 Claim-

231. The statute of limitations for civil racketeering is four years and the Ninth Circuit follows the "injury discovery rule" that is, the limitations period for civil RICO actions begins to run when a plaintiff knows or should know of the injury which is the basis for the action. *Kurtz v. Goodyear Tire & Rubber Co.*, No. 19-16544 (9th CTA June 9, 2021), citing *Grimmett v. Brown*, 75 F. 3d 506, 511-12 (9th Cir. 1996).

"In rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, *see Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty, complementing Federal Rule of Civil Procedure 11(b)(3). *See ibid.*; *see generally Klehr*, 521 U.S., at 192-193 (noting distinctions between different equitable devices). The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."

Rotella v. Wood, 528 U.S. 549, 560-561 (2000).

232. Nā Po‘e Kōkua alleges that on or about May 16, 1994, BAC made an enforceable commitment to native Hawaiians to originate \$150 million dollars in FHA-247 mortgage loans on or before May 16, 1998.

233. Nā Po‘e Kōkua alleges that as of May 16, 1998, BAC had only originated about \$3 million worth of FHA-247 qualifying loans for native Hawaiians.

234. Nā Po‘e Kōkua alleges that following May 16, 1998, BAC continued to make re-commitments, and altered-commitments to native Hawaiians, to the OTS and the OCC, and an additional commitment to native Hawaiians for the payment of a late fee imposed for failure to timely fund the original commitment made.

235. Nā Po‘e Kōkua alleges that BAC’s commitment for funding of the Trust Res continued for several years, until such time as BAC felt that the statute of limitations for the original loan commitment had lapsed, then BAC began to foster the false and fraudulent narratives that are the *sine qua non* of the racketeering claim.²²

236. Na Po‘e Kokua alleges that BAC’s material misrepresentations regarding continued commitments during the 5 year period 1998 through 2003, and

²

² Nā Po‘e Kōkua alleges in Claim 3 that the Statute of Limitations for the Commitment Trust has not lapsed absent equitable tolling or equitable estoppel, because the Trust Res alleged is the Commitment itself, and the funding, therefore, still remains executory now.

upon which native Hawaiians detrimentally relied, caused native Hawaiians to miss the original § 1962 filing deadline, based on the original injury date of May 16, 1998, of on or about May 16, 2002.

a. Notwithstanding, Nā Po‘e Kōkua specifically reserves all rights to argue that the Racketeering Claim is timely filed, and waives no rights or arguments related to statute of limitations or repose for Claim 1 whatsoever.

237. Na Po‘e Kokua alleges that BAC’s material misrepresentations regarding its original \$150 Million loan commitment continued from on or about January 10, 2003 to the present date.

Statute of Limitations Constructive Trust Claim-

238. Section 657-1 of the Hawaii Revised Statutes provides, in pertinent part:

“The following actions shall be commenced within six years next after the cause of action accrued, and not after:

(1) Actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court; excepting further that actions for the recovery of any debt founded upon any *contract, obligation, or liability* made pursuant to chapter 577A shall be governed by chapter 577A.” *Id.* [Italics added]

239. Nā Po‘e Kōkua alleges that Defendant, BAC’s \$150 Million FHA mortgage loan origination commitment made on or about May 16, 1994, created a Commitment Trust for native Hawaiians, as recognized by Hawaii law as creating

legitimate property rights enduring to the benefit of native Hawaiians when made by Defendant, BAC.

240. Moreover, once that Commitment was made it vested into the Commitment Trust, and thereafter, could not be unilaterally revoked by Defendant, BAC, under Hawaii law.

241. In that regard, the State of Hawaii, as Trustee for the Hawaiian Homes Commission is still in charge of an executory Trust, in which Defendant's \$150 Million FHA-247 Commitment became the Res of the Trust, for the benefit of native Hawaiians when made, in 1994.

242. Nā Po'e Kōkua alleges that Trust is active and pending, and is within the parameters of Haw. Rev. Stat. § 557A Uniform Principal and Income Act, which is an express exclusion to the six (6) year statute of limitations delineated by Haw. Rev. Stat. § 657-1, *supra*.

a. Nā Po'e Kōkua alleges that Claim 3 is timely filed, however, notwithstanding, Nā Po'e Kōkua specifically reserves all rights to argue that equitable tolling and/or equitable estoppel should apply to Claim 3, and as such, waives no rights or arguments related to statute of limitations for the Constructive Trust Claim.

243. Nā Po'e Kōkua alleges that it is irrelevant for limitations purposes that Defendant, BAC, has not yet funded this Trust, through conveyance of property

title to the Trust Res, e.g. funding in bearer notes U.S. dollars, because the Trust was created irrespective of title conveyed. The Commitment created the Trust Res when made.

244. Nā Po‘e Kōkua alleges that native Hawaiians have a legitimate current claim for Constructive Trust against Defendant, BAC, under the laws of the State of Hawaii, in Claim 3, timely filed now.

245. In the alternative, Nā Po‘e Kōkua alleges that equitable tolling and equitable estoppel should also be applied to Claim 3, in consideration of Defendant, BAC’s misconduct alleged for all times material hereto.

Equitable Tolling Should Apply to Any Statute Of Limitations Defense-

246. Nā Po‘e Kōkua alleges that it has set forth sufficient factual allegations within the body of this Complaint, that equitable tolling for any relevant statute of limitations for any specific claim should apply in this case.

a. “Equitable tolling is generally applied in situations ‘where the *claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.*’” *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). [Italics added]

b. “Equitable tolling may be applied if, *despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim.*” *Santa Maria v.*

Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000). “If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.” ... *see also Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (“*Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant . . .*”). *Rosal v. First Federal Bank of California*, 671 F. Supp. 2d 1111 (N.D. Cal. 2009)[Italics added]

247. Nā Po‘e Kōkua alleges that Defendant, BAC has tricked or induced native Hawaiians, by Defendant’s misconduct into allowing filing deadlines to pass.

a. BAC held itself out to the public from 1998 through 2003, that it fully intended to honor its original \$150 Million FHA-247 Mortgage Loan Commitment, until such time as an initial five-year period lapsed, when BAC engaged in the false and fraudulent conduct with other Enterprise Members that is the *sine qua non* of this Complaint.

b. Nā Po‘e Kōkua also alleges that from 2012, through and including, 2021, that Nā Po‘e Kōkua continually engaged with the OCC by filing objection comment letters on fourteen (14) separate applications BAC made to the OCC in that same period. In each of these objection comment letters, Nā Po‘e Kōkua requested that OCC enforce its own order regarding BAC’s “commitment to the Office of Thrift Supervision (“OTS”) ‘to achieve \$150,000,000 of residential

loans on Department of Hawaiian Home Lands (DHHL) through the FHA-247 program.”

c. Nā Po‘e Kōkua further alleges that Defendant, BAC’s 2 page spreadsheet titled: Amounts Towards \$150 Million Hawaii Commitment [Exhibit 10] is vague, misleading, padded, as first described by Sandra Perez in May, 2022, was not the type of report that BAC would have generated to report fulfillment of a \$150 Million FHA-247 community commitment, and was prepared specifically by BAC to dupe and trick native Hawaiians *in toto*. [Exhibit 1, ¶¶ 39-42]

d. Nā Po‘e Kōkua further alleges that on February 11, 2021, Nā Po‘e Kōkua President Brandon Maka'awa'awa filed a whistleblower complaint against Bank of America with the U.S. Securities and Exchange Commission under the Dodd-Frank Act.

248. Nā Po‘e Kōkua alleges that native Hawaiians were *unable to obtain vital information*, including, but not limited to the “DRAFT Talking Points for Hawaii \$150 million commitment (8/1/07)” filed as Doc. 1-2, page 2, in Case No. 1:20-cv-00310-JMS-WRP, notwithstanding that it is dated 8/1/2007 [Exhibit 18, PDF pps. 4-5], and Sandra Perez’ Affidavit [Exhibit 1], both bearing on the existence of the claims raised in the Complaint *sub judice*, as well as due diligence required to file such claims, because Defendant, BAC has used meticulously

crafted cunning and clever devices to present subterfuge as the truth, that continues to this day regarding ALL loan commitment issues.

249. Nā Po‘e Kōkua alleges that native Hawaiians did file a defective pleading during the statutory period, also induced or tricked by Defendant, BAC’s misconduct into allowing the filing deadline to pass, in the case of *Momi Haili, et al, v. Alan Greenspan, et al*, Case No.: 04-cv-00089-DAE-LEK, where native Hawaiians attempted to seek FRB intervention to force the \$150 Million FHA-247 loan commitment, by filing a verified complaint for writ of mandamus, declaratory judgment, and injunction on February 6, 2004 in this District; dismissed by this Court on February 23, 2004.

250. Nā Po‘e Kōkua alternatively alleges that Plaintiff has established that subsequent and specific actions were taken by Defendant, BAC, separate from those that provide the factual basis for the underlying cause of action, and that those subsequent actions by Defendant hindered Plaintiff from timely bringing suit, at all times material hereto that continues to this day. *See Shoreham Hills, LLC v. Sagaponack Dream House, LLC*, 66 Misc. 3d 1231 (N.Y. Sup. Ct. 2020).

251. Nā Po‘e Kōkua alleges that separate and specific actions were taken by Defendant BAC, separate from those that provide the factual basis for Claims 1-3 alleged in the Complaint *sub judice*, including, but not limited to: a.) appearing at a 2019 Maui County Council vote hearing for appointment of special counsel to sue

Defendant, BAC; and b.) by filing a frivolous lawsuit against the County of Maui in 2020, immediately after a resolution was finally adopted to hire alternative special counsel to sue Defendant, BAC; both actions which hindered the instant Complaint, and other contemplated Complaints from being filed against Defendant, BAC for nearly three years as a result of said interferences.

Collateral Estoppel Should Apply To Any Statute of Limitations Defense-

252. Nā Po‘e Kōkua repeats and realleges the allegations made in ¶¶ 246-251, *supra*, for purposes of collateral estoppel allegations.

253. Nā Po‘e Kōkua further alleges that native Hawaiians have also set forth sufficient factual allegations within the body of this Complaint, that Defendant, BAC should be *equitably estopped* from raising a statute of limitations defense for any claim herein.

254. Nā Po‘e Kōkua alleges that the specific facts of this case, as alleged, should also implicate *the doctrine of collateral estoppel*, and that Defendant, BAC should likewise be collaterally estopped from claiming any statute of limitations defense to the instant claim, based upon its own wrongdoing from 1994 to the present date.

255. Nā Po‘e Kōkua alleges that Defendant, BAC should be equitably estopped from asserting a statute of limitations defense, since Defendant knew about the ongoing abuse and failed to notify or warn Plaintiff about it, that

continues to this day, that was not otherwise reasonably ascertainable through the exercise of due diligence, due to Defendant, BAC's subterfuge.

256. Nā Po'e Kōkua alleges that Defendant, BAC, had control and superior (if not exclusive) knowledge of the facts necessary for the plaintiff to assert a claim; and that Defendant, BAC, by subsequent affirmative actions or misrepresentations, concealed these essential facts from Plaintiff, that continues to this day. *See Simcuski v Saeli*, 44 NY2d 442 (1978); *See also General Stencils, Inc. v Chiappa*, 18 NY2d 125 (1966).

257. Nā Po'e Kōkua alleges that Defendant, BAC engaged in a cover-up of all of its schemes and artifices to defraud native Hawaiians that are the *sine qua non* of this Complaint, through further misrepresentations of material fact, together with arrogant bullying tactics, and continuing redlining practices, for all times material hereto, including through July, 2020, in the County of Maui lawsuit.

Separate Briefing Schedule Requested For Jurisdiction And Limitations Defenses-

258. Nā Po'e Kōkua requests that this Honorable Court establish a separate briefing schedule, discovery timetable, and an evidentiary hearing, regarding any jurisdictional and venue defenses raised by Defendant, BAC in response to the Complaint *sub judice*, including, but not limited to statute of limitations defenses, equitable tolling, equitable estoppel, and all related matters. As previously stated, Nā Po'e Kōkua waives no rights or arguments related to limitations or repose.

**259. PREDICATE ACTS MATRIX:
PATTERN OF RACKETEERING ACTIVITY PREDICATE ACTS
\$150 MILLION FHA 247 MORTGAGE LOAN COMMITMENT**

1. May 16, 1994	Letter from BAC Patrick Antrim to FRB	Mail/Wire
2. October 30, 1998	Joint Press Release NPK/HFLC and BAC Cathy Bessant	Wire
3. January 10, 2003	Douglas Woodruff letter to Na Kupuna o Maui	Mail/Wire
4. December 15, 2003	Douglas B. Woodruff letter to Micah Kane	Mail/Wire
5. December 15, 2003	Micah Kane letter to A. Linwood Gill, III	Mail/Wire
6. December 23, 2003	Micah Kane letter to A. Linwood Gill, III	Mail/Wire
7. March 16, 2007	BAC James Feild letter to DHHL Ben Henderson	Mail/Wire
8. July 16, 2007	BAC Phillip A. Wertz letter to A. Linwood Gill, III	Mail/Wire
9. July 20, 2007	Amounts Towards \$150 Million Hawaii Commitment	Mail/Wire
10. October 3, 2007	Ben Henderson letter to BAC James W. Feild	Mail/Wire
11. October 1, 2012	BAC Rahdi Thayu letter to OCC	Mail/Wire
12. December 8, 2014	BAC Cathy Bessant phone call with Na Po'e Kokua	Mail/Wire
13. May 18, 2018	BAC Brian Putler letter to Governor David Ige	Mail/Wire
14. September 14, 2018	BAC Andrew Plepler letter to Hon. Robert Carroll	Mail/Wire
15. July 8, 2020	BAC Andrew Plepler letter to Hon. Alice Lee	Mail/Wire
16. July 10, 2020	BAC electronic filing 1:20-cv-00310 (Doc. 1-1)	Wire
17. July 10, 2020	BAC electronic filing 1:20-cv-00310 (Doc. 1-2)	Wire
18. July 10, 2020	BAC electronic filing 1:20-cv-00310 (Doc. 1-8)	Wire

CLAIM 1 – RACKETEERING

18 U.S.C. § 1962(c), 18 U.S.C. §§ 1964(a)(c), and 18 U.S.C. §§ 1341,1343

RE: \$150 MILLION LOAN COMMITMENT CLEANUP ENTERPRISE

260. Plaintiff, Nā Po‘e Kōkua, on behalf of native Hawaiians, adopts and realleges allegations made in paragraphs 1 through 259 above, including sub-parts, into Claim 1, as though fully set forth herein.

261. Plaintiff, Nā Po‘e Kōkua on behalf of native Hawaiians, adopts and realleges all Exhibits 1 through 19, and sub-parts, and incorporates them into Claim 1 by specific reference, as if fully set forth herein.

262. Plaintiff, Nā Po‘e Kōkua allegations are made in good faith and are fully corroborated by the Affidavit of Sandra Perez, former BANA Vice President of Community Investing related to BAC’s \$150 Million FHA-247 Commitment.

[Exhibit 1]

263. Defendant is employed by or associated with the \$150 Million Loan Commitment Cleanup Enterprise, an association-in-fact, although not a combined legal entity, composed of the BAC, FRB, by and through, A. Linwood Gill, III. (retired), individually, and Patricia Robinson (retired), individually, and DHHL Representatives, Micah Kane, individually, and Ben Henderson (deceased), individually, and others known and unknown.

264. The Loan Commitment Cleanup Enterprise is composed of the main entities utilized by Defendant related to the acts and omissions complained of as delineated in the Predicate Acts Matrix hereto.

265. The Loan Commitment Cleanup Enterprise is engaged in activities, or conducts activities which affect interstate or foreign commerce, *inter alia*, through frequent use of interstate wire communications, United States mail, and through electronic filings in Hawaii District Court, effecting multiple districts interstate regarding Defendant's loan commitment representations.

266. Defendant operated or managed the affairs of the Enterprise by meticulously, over a period of years, subtly altering its original loan commitment made to native Hawaiians to originate \$150 million dollars in FHA-247 mortgage loans from Defendant's Hawaiian branch locations before 1998.

267. Defendant unilaterally modified its original commitment by means of numerous meticulously crafted and successive, false or fraudulent communications and representations, filed with the FRB, the OCC and the DHHL, with key assistance from other Enterprise Members, from 2003 through 2007.

268. Defendant operated or managed the affairs of Enterprise Members by creating informational walls between operative parties involved with Defendant's original loan commitment processes, to present those same matters only later to

different Enterprise Members as foregone conclusions, in furtherance of Defendant's scheme to defraud native Hawaiians.

269. Nā Po'e Kōkua alleges that Defendant operated or managed the affairs of Enterprise Members by providing draft texts of letter content, findings, commitment orders, and proposed communications and other writings, to be made by different Enterprise Members, as draft text forwarded to those different Enterprise Members, while keeping the true parties in interest to those surreptitious communications in the dark.

270. Defendant provided draft text to Enterprise Members to increase the likelihood that Defendant's commitment manipulations could be achieved through exacting successive-subtle-word-modifications over time, thereby falsely and fraudulently portraying acquiescence to and license for, Defendant's modified terms, without exception.

271. The December 15, 2003 Micah Kane letter to A. Linwood Gill, III is one such example of text prepared by Defendant, not Kane, as it embraces alleged exacting hand-picked subtly modified terms without exception.

272. Defendant operated or managed the affairs of Enterprise Members by making affirmative false and fraudulent loan commitment fulfillment claims and representations to the FRB and/or OCC and/or OTS as foregone conclusions, while

those same matters were still under DHHL review, regarding Defendant's LaSalle Bank purchase approval processes in 2007.

273. Defendant operated or managed the FRB by utilizing A. Linwood Gill to authorize numerous bank purchases by Defendant, recognizing the legitimacy and enforceability of Defendant's original loan commitment made to native Hawaiians as a condition of those purchases, only to reverse course following multiple bank purchases made by Defendant.

274. Defendant operated or managed the OCC by causing it to approve Defendant's LaSalle Bank purchase without checking the veracity of Defendant's false and fraudulent claims made regarding loan fulfillment with representatives from the State of Hawaii first.

275. Defendant operated or managed the DHHL by and through Ben Henderson and Micah Kane, by causing those individuals to acquiesce to Defendant's scheme to alter loan commitment details over a period of years and to peripherally acknowledge Defendant's proffered financial schedules alleging \$151 million dollars of DHHL commitment credits taken by Defendant, without DHHL audit or detailed financial analysis.

276. Defendant operated or managed the DHHL by and through Micah Kane, individually, and Ben Henderson (deceased), individually, by causing those individuals to engage in conduct that Defendant knew would not have been

authorized by other Hawaii representatives, agencies, commissions, or organizations, had those activities to be engaged in by Kane and/or Henderson been publicly known in advance, that were engaged without actual authority by those two DHHL representatives, and as acting outside of the scope of their official authorities, including breach of fiduciary duties owed to native Hawaiians, while allegedly representing the interests of the State of Hawaii, DHHL and native Hawaiians.

277. The fact that Kane and Henderson engaged in secretive activities with Defendant, including activities against the interests of the State of Hawaii, local governments, and native Hawaiians' interests, evidences the fact that both had no legal authority, actual or apparent, to do what they did, and their acts and omissions were outside the scope of their official capacities as representatives of the State of Hawaii, as *rogue actions* taken in their individual capacities under color of state law.

278. Defendant operated or managed Enterprise Members by making its original \$150 million dollar FHA-247 mortgage loan commitment to native Hawaiians, specifically for the purpose of seeking approval to purchase Liberty Bank's thirty-nine Hawaii branch locations in 1994, only to wind up seeking and obtaining approval from the FRB and/or OCC in 1997 to sell those same thirty

nine branch locations, without fulfilling its original commitment to native Hawaiians, that was an express condition of its original purchase approval.

279. Nā Po‘e Kōkua alleges that all these things spell out “a fix” that existed between Enterprise Members using subterfuge to take away legitimate business and property interest entitlements from native Hawaiians without due process of law, directly and proximately caused by Defendant’s and Enterprise Member’s acts and omissions as delineated in the Predicate Acts Matrix hereto.

280. Defendant conducted the affairs of the Enterprise through a pattern of racketeering activity as delineated in Nā Po‘e Kōkua’s Predicate Acts Matrix, as defined by 18 U.S.C. § 1962, 18 U.S.C. § 1964, and 18 U.S.C. §§ 1341, 1343.

281. Plaintiff, Nā Po‘e Kōkua alleges that Defendant has injured business and property interests of native Hawaiians, directly and proximately caused by reason of the racketeering activity delineated in the Predicate Acts Matrix hereto.

282. Nā Po‘e Kōkua alleges that Defendant’s unlawful activities have directly and proximately caused the taking of native Hawaiians legitimate property interests, in violation of their constitutional rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, under color of state law, using rogue letters secured by DHHL Ben Henderson and DHHL Micah Kane as a license to argue that those Enterprise Members possessed apparent authority, as alleged by Defendant.

283. Defendant's representations that Henderson and Kane possessed apparent authority to bind the State of Hawaii, belies that fact that Kane and Henderson were active participants in the Loan Commitment Cleanup Enterprise alleged by Nā Po'e Kōkua, and as instrumentalities both controlled, and knowingly used, by Defendant for implementation of Defendant's scheme or artifice to defraud native Hawaiians.

284. Nā Po'e Kōkua claims that the racketeering statutes should be liberally construed to effect their remedial purposes, specifically considering the nature and tone of Defendant's acts and omissions giving rise to injuries sustained by native Hawaiians in this matter.

285. Nā Po'e Kōkua alleges that native Hawaiians manifested reliance upon Defendant's \$150 million dollar FHA-247 mortgage loan commitment, 1998 late fee commitment, and renewed commitments, to their financial and economic detriments, that remain unsatisfied to this day.

286. Nā Po'e Kōkua alleges that the State of Hawaii, Office of the Governor, the Hawaii Legislature, the Hawaiian Homes Commission, the Hawaii Fair Lending Coalition, and all four Hawaii County Governments, recognize native Hawaiians' rights to collect upon property interests created by BAC; as all of those agencies and entities also manifested reliance upon Defendant's \$150 million dollar FHA-247 mortgage loan commitment, 1998 late fee commitment, and

renewed commitments, to the financial and economic detriments of native Hawaiians, as they occurred.

287. Nā Po‘e Kōkua alleges that BAC’s \$150 Million FHA-247 loan commitment was common knowledge among all Hawaiians, including the State of Hawaii Government when made, and that all Hawaiians manifested reliance upon the truthfulness and veracity of Defendant, BAC’s commitment when made.

288. Defendant and Enterprise Members all shared the common purpose of surreptitiously communicating with each other by letter and facsimile transmission, for the purpose of creating a falsely and fraudulently created paper trail for Defendant, including references to certain meetings, activities and DHHL sub-agreements related to pre-2004 DHHL loan commitment credits to be taken by Defendant, that were never officially agreed to by any State of Hawaii representative, as stated, and for which no official records exist.

289. Defendant and Enterprise Members all shared the common purposes of: (a) omitting material statements of fact in their written communications to each other; (b) by referencing several meetings and sub-agreements made as a result thereof, that never occurred; (c) by utilizing altered and modified words and terms of art, originally authored by Defendant, and as draft responses to be made; (d) by later using those same altered communications going forward as legal authority for changes, alterations, and modifications made; (e) by meticulously changing

commitment terms, several times, in these processes; (f) by creating walls in the chains of certain operative communications, by having one Enterprise Member reply to an operative letter, when that reply should have been made by a different Enterprise Member referenced in the letter as authority for claims made in the letter that never existed, as subterfuge, and in order to create plausible deniability for Enterprise Members signing bombshell letters at the time of those communications; and (g) by using selective self-serving written communications in advance, as foregone conclusions without legal authority, for claims filed with the FRB and OCC, to further erode Defendant's original loan commitment without actual or apparent authority to do so.

290. Nā Po'e Kōkua alleges that BAC's activities clearly evidence fraud from start to the present, especially considering the factual allegations contained in the Affidavit of Sandra Perez. [Exhibit 1]

291. Defendant's whittling down processes, evidenced by acts and omissions identified in the Predicate Acts Matrix for this claim caused Defendant's \$150 million dollar FHA 247 mortgage loan commitment in 1994 to be whittled away, turning into an alleged unenforceable aspirational goal, according to Defendant's representatives in 2020.

292. Defendant continues to regurgitate the same communications delineated in the Predicate Acts Matrix today that were used since 2007, that continue to be

renewed -- false and fraudulent representations made for the purpose of carrying out and covering up Defendant's scheme to defraud native Hawaiians to this day.

293. Defendant also uses other Enterprise Member's Agents and Attorneys, and as a result thereof, gain an appearance of legitimacy to perpetrate more, and less easily discoverable, racketeering violations than Defendant could perpetrate by their own means.

294. For instance, in Defendant's 2020 County of Maui Declaratory Judgement action filed in this District regarding loan commitment matters, Defendant retained the services of former Hawaii Attorney General and Lieutenant Governor, Douglas S.G. Chin ("Chin"), as a co-counsel of record, as referenced in the docket of Case No. 1:20-cv-00310-JMS-WRP.

295. Nā Po'e Kōkua alleges that while serving as Attorney General, and then as Lieutenant Governor for Hawaii, Chin and his Senior Staff were briefed by Ian Chan Hodges, HFLC, regarding the \$150 Million FHA-247 Loan Commitment and Defendant's continued failure to fund it, yet Chin was retained by Defendant anyway, ignoring the obvious conflict of interest attendant thereto.

296. Although Chin's substantive filing(s) in that case were largely meaningless, the fact that Chin was retained by BAC also shows the reach, power, and control of BAC over otherwise legitimate entities, organizations, and individuals, without exception.

297. Defendant conducted and/or participated directly or indirectly in the conduct of the interstate affairs of the \$150 Million FHA-247 Loan Commitment Cleanup Enterprise, to obtain money or property from various third parties, though a pattern of racketeering activity, as defined by 18 U.S.C. § 1962, 18 U.S.C. § 1964, and 18 U.S.C. §§ 1341, 1343, to wit:

a. By fostering the false narrative in 1994, before native Hawaiians as the true party in interest, the Federal Reserve Board, and the Office of the Comptroller of the Currency, and as a scheme or artifice to defraud native Hawaiians, that Defendant was committed to originate and fund \$150 million dollars in FHA-247 mortgage loans for native Hawaiians before 1998.

b. By selling its Hawaiian branches purchased from Liberty Bank in 1997, because its investor's dollars could be better invested elsewhere, as publicly stated by a BAC representative following BAC's disgorgement of Hawaiian bank branches.

c. By again fostering modified false narratives in 1998 through on or about December 15, 2003, before native Hawaiians, the Federal Reserve Board, and the Office of the Comptroller of the Currency, as a continued scheme or artifice to defraud native Hawaiians, that Defendant was still committed to originate \$150 million dollars in FHA-247 mortgage loans,

notwithstanding that Defendant sold its Hawaiian branch locations in 1997, intentionally sabotaging its ability to originate loans as a result thereof.

d. By creating legitimate business and property interests for native Hawaiians, under Hawaii state law, that Defendant had no intention of fulfilling, while engaging in a systematic and ongoing scheme to defraud native Hawaiians of those legitimate interests created.

e. By engaging DHHL Representatives Micah Kane and Ben Henderson into its scheme to defraud native Hawaiians, as a separate violation of native Hawaiians' rights to due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, under color of State law, as part of The Loan Commitment Enterprise's secretive and unauthorized conduct.

f. By pivoting Defendant's \$150 million FHA-247 mortgage loan funding commitment, to a generalized loan funding or investment goal, through systematic and subtle word changes and *ex parte* modifications made to its original commitment, from December 15, 2003 through 2007, changing commitment terms to a generalized "lending or investment" goal.

g. By making these changes and alterations without the knowledge, consent or comment of native Hawaiians, the true party in interest from Defendant's original FHA-247 commitments, as a violation of the Fair

Housing Act 42 U.S.C. § 3604, and unconstitutional deprivation of vested property rights, under color of Hawaii state law.

h. By continuing to foster substantially similar false narratives, as a continuing scheme or artifice to defraud native Hawaiians, through threats and intimidations intended to hinder native Hawaiians' access to courts, general bullying tactics, through its 2019 appearance at the Maui County Council meeting to hire special counsel to sue Defendant, BAC, and through its widely publicized July 10, 2020 Complaint filed against the County of Maui in this District.

i. Defendant's actions were, and continue to be, arrogant, open and notorious, with an air that Defendant is above reproach regarding its original loan commitment to native Hawaiians.

298. Defendants used false pretenses to obtain money or property from multiple third parties, and used or caused to be used the United States mail and wire to disseminate materially false and fraudulent statements of fact and representations in furtherance of its scheme or artifice to defraud native Hawaiians, unleashed through a chain of false and fraudulent communications commencing on May 16, 1994 and continuing through July 10, 2020 all related to its Hawaiian loan commitment pitches, pivots, and dumps.

299. Defendant's pattern of racketeering activity includes at least two (2) racketeering acts, also called predicate acts, as described more fully as Predicate Acts Matrix hereto, *supra*.

300. All injuries to native Hawaiians were directly and proximately caused by the same types of substantive racketeering violations as delineated in the Predicate Acts Matrix hereto.

301. There is a direct relation between BAC's Predicate Acts and the injuries to native Hawaiians alleged.

302. Nā Po'e Kōkua, on behalf of native Hawaiians, has averred fraud involving omissions of material facts, as well as fraud involving affirmative false and fraudulent facts represented by Defendant, all for financial gain, while furthering its overall scheme to defraud native Hawaiians.

303. The Loan Commitment Cleanup Enterprise members all shared the common purpose of fostering false narratives presented by Defendant and helping Defendant to avoid Defendant's \$150 million dollar FHA-247 mortgage loan origination commitment made to native Hawaiians, that violated native Hawaiians' rights pursuant to the Fair Housing Act, also resulting in the taking of legitimate property rights from native Hawaiians without due process of law.

304. The Loan Commitment Cleanup Enterprise had longevity to achieve its intended common purposes, that continue to be rehashed today, because actions

originally taken by Enterprise Members, including letters and alleged authorities, continue to be regurgitated by Defendant, adding insult to injury for native Hawaiians.

305. Regurgitation of original actions taken by Enterprise Members, including use of DHHL Ben Henderson's October 3, 2007 letter as of July 10, 2020, portrayed by Defendant as an official license to engage in a continued scheme to defraud native Hawaiians, including violation of new predicate acts alleged, ensures that the original common purpose of Enterprise Members will achieve its common purpose into perpetuity, absent Court intervention now.

306. The Loan Commitment Cleanup Enterprise remains an ongoing association-in-fact enterprise, because all the acts and omissions complained of are now relegated to paper documents that continue to be waved around as an official license justifying Defendant's behaviors to this day.

307. In that regard, all Enterprise Members acted as a continuing unit long enough to achieve their common purpose that continues to be on public display today, because historical Enterprise Member written communications continue to be used by Defendant, BAC, as a license to deny native Hawaiians to this day.

308. The Loan Commitment Cleanup Enterprise provided the means for Defendant, through unauthorized, and secretive acts undertaken by Enterprise Members Micah Kane, and Ben Henderson, and by FRB Representatives, A.

Linwood Gill, III., and Patricia Robinson, at critical moments in time within Defendant's ongoing scheme, for Defendant's immediate financial gains.

309. The Loan Commitment Cleanup Enterprise provided safe harbor for BAC, using the color of state law pretense, from which the racketeering activities delineated in the Predicate Acts Matrix hereto, on and after December 15, 2003, took flight.

310. For instance, the July 16, 2007 BAC Phillip A. Wertz letter to A. Linwood Gill, III. stating as fact, that BAC made loans exceeding \$151 million and fulfilled its Hawaiian loan commitment, was mailed some seven (7) weeks before Ben Henderson's October 7, 2007 letter to BAC stating that the 2-page summary totals appeared in order.

311. In the interim on September 14, 2007 A. Linwood Gill, III. approved BAC's merger with LaSalle Bank, accepting BAC's July 16, 2007 letter of commitment fulfillment as true.

312. This one example is representative of the Enterprise fix in place between BAC, Gill and Henderson in that operative time period, and is representative of how BAC conducted the affairs of the Enterprise through a pattern of racketeering activity.

313. As explained in *Freddy Nobriga Enters., Inc. v. State*, 295 P.3d 993, 1002 (Haw. Ct. App. 2013):

“The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). In determining the specific procedures necessary to satisfy due process, we must balance several factors: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Id.*

314. Federal racketeering laws were designed, at least in part, to prevent a defendant from increasing power to do wrong by taking over otherwise apparently legitimate entities, as Defendant has effectively accomplished with DHHL Representatives Micah Kane and Ben Henderson, whereby DHHL is an agency of the State of Hawaii.

315. In this process, BAC used DHHL Micah Kane and Ben Henderson, as instrumentalities, and as a result thereof, gained an appearance of legitimacy to perpetrate more, and less easily discoverable, racketeering violations than Defendant could have perpetrated by its own means.

316. On information and belief, DHHL Micah Kane’s December 15, 2003 letter to A. Linwood Gill, III., for immediate acceptance or approval by Gill, was drafted by BAC and not by Kane, being the operative letter in Defendant’s pivoted

scheme or artifice to defraud native Hawaiians of FHA- 247 mortgage loans, also evidencing BAC's continuing discriminatory business policies and practices that continue to redline native Hawaiians to this day.

CLAIM 1 REQUEST FOR DAMAGES AND EQUITABLE RELIEF

317. Nā Po'e Kōkua claims that native Hawaiians are entitled to treble damages for injuries sustained as a result of Defendant's violations of the Racketeer Influence Corrupt Organizations Act, as delineated in the Predicate Acts Matrix hereto, directly and proximately caused by Defendant's affirmative acts and material omissions engaging its scheme or artifice to defraud native Hawaiians, pursuant to 18 U.S.C. § 1964(c).

318. Nā Po'e Kōkua is also requesting exemplary damages or punitive damages from Defendant.

319. Nā Po'e Kōkua, on behalf of native Hawaiians, is also requesting all other equitable relief permitted by law, and as this Court deems proper and just, both during the pendency of this litigation and at the conclusion of this litigation, pursuant to this Court's inherent authority to provide equitable relief requested.

320. Nā Po'e Kōkua requests that this Honorable Court establish a briefing schedule, separate discovery timetable, and evidentiary hearing, specifically for and regarding any jurisdictional or venue defenses raised by Defendant, BAC in

response to the Complaint *sub judice*, including, but not limited to, statute of limitations defenses, or any matters related thereto.

321. Nā Po‘e Kōkua is also requesting immediate equitable relief pursuant to 18 U.S.C. § 1964 (a), to wit:

a. To prevent and restrain further violations of 18 U.S.C. § 1962(c) by issuing appropriate Orders to BAC;

b. Ordering Defendants to divest themselves of any interest, direct or indirect, in the Loan Commitment Enterprise immediately;

c. Imposing reasonable restrictions on BAC’s future associations with the Loan Commitment Enterprise members and activities, including prohibiting further use of BAC’s false and fraudulent representations, letters, and writings, regarding its loan commitment made;

d. Prohibiting BAC from engaging in the same types of unlawful conduct that the Enterprise engaged in, the activities of which affect interstate or foreign commerce;

e. Ordering dissolution of the Loan Commitment Enterprise; making due provisions for the rights of innocent persons; and

f. Ordering a full disclosure statement be made to native Hawaiians regarding the same, including, but not limited to a public acknowledgment of wrongdoing.

322. Nā Po‘e Kōkua, on behalf of native Hawaiians, is also requesting reasonable attorneys’ fees, litigation costs and expenses, pursuant to 18 U.S.C. § 1964(c), and 42 U.S.C. § 3613(c)(2).

CLAIM 2

DEPRIVATION OF CIVIL RIGHTS UNDER COLOR OF STATE LAW

THE KU KLUX KLAN ACT CLAIM

42 U.S.C. § 1983

323. Nā Po‘e Kōkua adopts and realleges the allegations made in paragraphs 1 through 259 above, including sub-parts, as though fully set forth herein.

324. Nā Po‘e Kōkua adopts and realleges all Exhibits 1 through 19, and sub-parts, and incorporates them into Claim 2 by specific reference, as though fully set forth herein.

325. Claim 2 is a deprivation of civil rights under color of state law claim made against BAC, pursuant to the Ku Klux Klan Act, 42 U.S.C. § 1983, also known as the deprivation of civil rights under color of state law.

326. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed.2d 40 (1988).

327. Nā Po‘e Kōkua alleges that native Hawaiians’ constitutional rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, were violated by Defendant, BAC, under color of State of Hawaii law, by and through unauthorized individual assistance gleaned from DHHL Micah Kane and Ben Henderson, who were employed by the Department of Hawaiian Home Lands, but who acted without any legal authority from either the Hawaiian Homes Commission, or the State of Hawaii.

328. Nā Po‘e Kōkua alleges that DHHL Micah Kane’s and Ben Henderson’s acts and omissions were *individual rogue acts and omissions*, meddling with the previously vested property interests of native Hawaiians, and representing a deprivation of native Hawaiians constitutional rights, *per se*, without due process of law for native Hawaiians.

329. Nā Po‘e Kōkua alleges that Defendant, BAC’s acts and omissions, under color of State of Hawaii law, directly and proximately caused the damages claimed by native Hawaiians.

330. Nā Po‘e Kōkua realleges that DHHL Kane and Henderson were part of a racketeering Enterprise controlled by Defendant, BAC, notwithstanding that those actors are not sued in this Complaint, and specially noting that Ben Henderson is now deceased.

331. Nā Po‘e Kōkua alleges that native Hawaiians’ Fourth and Fourteenth

Amendment rights to \$150 Million FHA-247 mortgage loans, as a recognized legitimate property interest under Hawaii law, vested when made by Defendant, BAC.

332. Nā Po‘e Kōkua further alleges that the later denial of that vested property interest by native Hawaiians is tantamount to a taking of property prohibited by the Fourth Amendment as an unlawful seizure of property under color of State of Hawaii law.

333. Nā Po‘e Kōkua further alleges that BAC’s unilateral failure to fund the Commitment that constitutes a Trust Res, as alleged in Claim 3 hereto, is also tantamount to a taking of property prohibited by the Fourth Amendment under the color of State of Hawaii law, as the Trust was vested with the unfunded Commitment, recognized as property under Hawaii state law, when made by BAC.

334. Nā Po‘e Kōkua alleges that native Hawaiians’ Fifth and Fourteenth Amendment rights to both procedural and substantive due process of law were violated by Defendant, BAC, under color of State of Hawaii law, because all of the individualized and aberrant acts and omissions committed by DHHL Henderson, Kane, Defendant, BAC, and other Enterprise Members, related to acts and omissions under color of state law, as alleged, violated native Hawaiians rights to due process.

335. Nā Po‘e Kōkua further alleges that to the extent DHHL Kane and

Henderson *gave away vested property interests of native Hawaiians* regarding Defendant, BAC's FHA-247 mortgage loan commitment, that Kane and Henderson had no legal, equitable or humane right to do so, without seeking approval with knowledge and authority, from the Hawaiian Homes Commission, the State of Hawaii, Plaintiff, and others.

336. Nā Po'e Kōkua alleges that State of Hawaii, Department of Hawaiian Home Lands Representatives, Micah Kane and Ben Henderson, were knowingly used and controlled by Defendant, BAC, for the purpose of creating an air of legitimacy to BAC's acts and omissions that are the *sine qua non* of this Complaint, including for the racketeering activities alleged in Claim 1, hereto.

337. Nā Po'e Kōkua alleges that the \$150 Million FHA-247 loan commitment made by Defendant BAC was simply stolen by Defendant BAC, under color of State of Hawaii law, through subterfuge and a series of well planned, orchestrated, and carried out, subtle word prose changes documented in letters between Enterprise Members, made, with connectivity from on or about, calendar years 1994 through and including, October, 2007.

338. Nā Po'e Kōkua alleges that to the extent Defendant, BAC again, falsely claims that the acts and omissions by DHHL Micah Kane and Ben Henderson were done with apparent authority, upon which Defendant, BAC relied, those claims are belied by the secretive nature of these activities ongoing for years, with specific

knowledge that Kane and Henderson had no legal, or actual authority.

339. Defendant should not be permitted to claim ignorance, because Defendant has shown cunning and clever devices over many years to evade its \$150 Million Commitment, that is specifically the opposite of ignorance.

340. Nā Po‘e Kōkua alleges that while Defendant, BAC may claim that the statute of limitations for the instant civil rights claim lapsed many years ago, that the instant claim is not barred by the statute of limitations, and regardless if it were, that equitable tolling and equitable estoppel should apply to the instant civil rights claim.

341. BAC, continued to regurgitate and propagate that same October 3, 2007 DHHL Ben Henderson letter as the truth, in the case of: *Bank of America Corporation, and Bank of America, N.A. v. County of Maui*, Case 1:20-cv-00310-JMS-WRP, as an Appendix Doc. 1-2 to its filed Complaint on July 10, 2020.

342. In so doing, Defendant, BAC, has reestablished its claimed denial of the original \$150 Million FHA-247 loan commitment denial under color of State of Hawaii law, as of July 10, 2020.

343. Nā Po‘e Kōkua alleges that Defendant BAC’s Doc. 1-2 filing in Case 1:20-cv-00310-JMS -WRP on July 10, 2020, created a brand new two year statute of limitations period for the instant civil rights claim raised against Defendant, due to Defendant’s own false and fraudulent re-portrayal of acts and omissions that are

the *sine qua non* of the instant Complaint, and continued acts and omissions under color of State of Hawaii law, as proffered by Defendant on July 10, 2020.

344. Additionally, the second page of Doc. 1-2 filed in Case 1:20-cv-00310-JMS-WRP on July 10, 2020, titled: “DRAFT Talking Points for Hawaii \$150 million commitment (8/1/07)”, falsely and fraudulently represents to this Court, that page 2 thereof, was an original attachment to the October 3, 2007, DHHL Ben Henderson letter.

345. The document titled “DRAFT Talking Points for Hawaii \$150 million commitment (8/1/07)” is not an official document of the DHHL, or the State of Hawaii, and was certainly not appended to the October 3, 2007, DHHL Ben Henderson letter comprised within Doc. 1-2, as originally drafted or mailed by Ben Henderson.

346. Doc. 1-2 was also cited as an act in furtherance of Defendant, BAC’s racketeering scheme alleged in Claim 1, hereto.

347. Nā Po‘e Kōkua alleges that DE 1-2, page 2, represents a brand new denial of native Hawaiians constitutional rights, as hereinabove claimed, under color of State of Hawaii law, on July 10, 2020.

**CLAIM 2 REQUEST FOR DAMAGES,
INJUNCTIVE AND EQUITABLE RELIEF**

348. Nā Po‘e Kōkua is requesting compensatory damages, for all financial damages, directly and proximately caused from Defendant’s affirmative acts and material omissions giving rise to Plaintiff’s damages in Claim 2.

349. Nā Po‘e Kōkua is also requesting exemplary damages in the form of punitive damages from Defendant, BAC, based upon actual malice evidenced from its many cunning and clever devices used as described in the body of the instant Complaint.

350. Nā Po‘e Kōkua, on behalf of native Hawaiians, is also requesting all other equitable relief permitted by law, and as this Court deems proper and just, both during the pendency of this litigation and at the conclusion of this litigation, pursuant to this Court’s inherent authority to provide equitable relief requested.

351. Nā Po‘e Kōkua requests that this Honorable Court establish a briefing schedule, separate discovery timetable, and evidentiary hearing, specifically for and regarding any jurisdictional, or venue defenses raised by Defendant, BAC, including, but not limited to, statute of limitations, or any matters related thereto, in response to the Complaint *sub judice*.

352. Nā Po‘e Kōkua is also requesting immediate equitable relief, to wit:

- a. To prevent and restrain further violations of 42 U.S.C. § 1983 by issuing appropriate Orders to Defendant, regarding the \$150 Million FHA-247 loan commitment;

- b. Prohibiting Defendants from ever engaging in the same types of unlawful conduct giving rise to the instant Claim in the State of Hawaii; and
- c. For other equitable relief that this Court deems fair and just.

CLAIM 3

ESTABLISHMENT OF CONSTRUCTIVE TRUST

TITLED:

“NATIVE HAWAIIAN \$150 MILLION FHA-247 COMMITMENT TRUST”

PENDENT PARTY – STATE OF HAWAII LAW CLAIM

28 U.S.C. § 1367, SUPPLEMENTAL JURISDICTION

353. Nā Po‘e Kōkua adopts and realleges the allegations made in paragraphs 1 through 259 above, including sub-parts, as though fully set forth herein.

354. Nā Po‘e Kōkua adopts and realleges all Exhibits 1 through 19, and sub-parts, and incorporates them into Claim 3 by specific reference, as though fully set forth herein.

355. Nā Po‘e Kōkua specially repeats and realleges all allegations made above related to Sandra Perez’ Affidavit [Exhibit 1], regarding Defendant’s \$150 Million FHA-247 Commitment to native Hawaiians made, and the fact that the Commitment made remains substantially unfunded to this day.

356. Claim 3 is for Constructive Trust against Defendant BAC, pled in the alternative, as a claim in equity, and for equitable relief, to establish a constructive

trust, to be titled: “Native Hawaiian’s \$150 Million FHA-247 Commitment Trust”, established on or about May 16, 1994, by Defendant BAC, and vested as a legitimate property right of native Hawaiians, by the State of Hawaii at that same time.

357. In *States v. Kealoha*, 18-cr-00068 JMS-WRP, Hon. Wes Reber Porter *Findings and Recommendation*, (D. Haw. Mar. 17, 2021), this Court described the necessary elements to properly plead a claim for constructive trust under Hawaii law and has found additional elements that this Court deems necessary in order to properly plead this claim. *Id.* (The instant claim is based upon the pleading requirements delineated in *Kealoha, supra*).

358. Nā Po‘e Kōkua alleges that Defendant, BAC’s \$150 Million FHA-247 mortgage loan origination Commitment made to native Hawaiians on or about May 16, 1994, vested to native Hawaiians when made under Hawaii state law, as a legitimate property interest.

359. Nā Po‘e Kōkua alleges that Defendant’s Commitment created a Trust administered by the State of Hawaii as Trustee for the benefit of native Hawaiians, with the Commitment being the Trust Res.

360. Nā Po‘e Kōkua alleges that said Trust is active and executory at this time.

361. Nā Po‘e Kōkua alleges that Defendant, BAC, has and is, wrongfully retaining title to property, being the actual funding for its Commitment, and that BAC’s failure to comply with its equitable duty to fund that Commitment has caused Defendant to be unjustly enriched to the continued financial detriment of native Hawaiians.

362. Nā Po‘e Kōkua alleges that native Hawaiians are the beneficial owners of the right to have the title to the property, e.g. \$150 Million FHA-247 mortgage origination funding, transferred to the Trust established from BAC’s 1994 Commitment.

363. Nā Po‘e Kōkua alleges that Hawaii law provides great discretion to establish a constructive trust, especially in this situation regarding Defendant, BAC’s Commitment to native Hawaiians.

364. In that regard, native Hawaiians and Defendant, BAC, had a fiduciary or confidential relationship at the time of Defendant’s original Commitment, the parameters of which, are lessened for determination of the actual relationship that existed between Defendant, BAC, and native Hawaiians, sufficient to meet this element.

365. Nā Po‘e Kōkua alleges that the existence of a fiduciary or confidential relationship is normally a question of fact reserved for jury determination.

366. Defendant, BAC violated its fiduciary or confidential relationship with native Hawaiians, through its willful refusal to fund the Commitment, that remains pending and executory, notwithstanding that the initial time frame for actual funding was on or before May 16, 1998, because the Trust Res was and remains the Commitment that was made, creating property rights to native Hawaiians under Hawaii law.

367. Nā Po‘e Kōkua alleges that Defendant BAC’s refusal to fund the Commitment with \$150 million FHA-247 originated mortgage loans to fulfil its Commitment, has created a financial windfall for Defendant BAC, to the financial detriment of native Hawaiians, the true parties of interest to Defendant’s 1994 Commitment, and that Defendant BAC has been and continues to be unjustly enriched as a result thereof.

368. Nā Po‘e Kōkua alleges, in the alternative, that there is no adequate remedy at law to force Defendant BAC to fund its 1994 Commitment that remains pending and executory to this day, other than for establishment of a Constructive Trust.

369. Nā Po‘e Kōkua alleges that the State of Hawaii formally assumes the duties of a trustee for native Hawaiian homestead beneficiaries through its oversight of Hawaiian Home Lands, and therefore, that the State is held to the

highest order toward Hawaiian Home Lands beneficiaries and is judged according to the same strict standards as those set for a trustee for a private trust.

370. Nā Po‘e Kōkua alleges that the State’s trust duties include: (1) the obligation to administer the Trust solely in the interest of the beneficiary; and (2) the use of reasonable skill and care to make the Trust property productive.

371. To make this Commitment Trust productive it must be funded by Defendant BAC, for FHA-247 mortgage originated loans made to native Hawaiians, regardless of whether Defendant originates those loans, or purchases a like amount of FHA-247 loans originated by others that were initially originated by others from short term funding from third parties for that specific purpose.

372. Although Nā Po‘e Kōkua alleges that Claim 3 is timely filed, Plaintiff waives no rights to argue that equitable tolling and/or equitable estoppel should apply to Claim 3, and therefore, reserves all rights related thereto.

373. In 2016, according to the DHHL statistics, approximately 8,000 households resided on the Hawaiian Home Lands, but nearly three times as many, roughly 22,000, were on the waiting list for a residential mortgage.

374. Establishment of a Constructive Trust in Claim 3, will enable an estimated 1,000 wait listed native Hawaiians to own a residence on Hawaiian Home Lands directly from funding wrongfully withheld by Defendant, BAC from 1994 to the present date.

375. Nā Po‘e Kōkua alleges that native Hawaiians are entitled to establishment of a constructive trust and to other equitable relief related to forced funding of the original Commitment Trust that remains pending and executory at this time.

**CLAIM 3 REQUEST FOR
ESTABLISHMENT OF CONSTRUCTIVE TRUST
AND OTHER EQUITABLE RELIEF**

376. Nā Po‘e Kōkua, on behalf of native Hawaiians, is requesting establishment of a Constructive Trust for Defendant, BAC, regarding its unfunded \$150 Million FHA-247 mortgage loan origination Commitment, to be titled: “Native Hawaiian’s \$150 Million FHA-247 Commitment Trust”, and an Order from this Court to Defendant, BAC, to Fund the Trust immediately.

377. Nā Po‘e Kōkua is also requesting all other equitable relief permitted by law, and as this Court deems proper and just, both during the pendency of this litigation and at the conclusion of this litigation, pursuant to this Court’s inherent authority to provide equitable relief requested.

378. Nā Po‘e Kōkua requests that this Honorable Court establish a briefing schedule, separate discovery timetable, and evidentiary hearing, specifically for and regarding any jurisdictional, or venue defenses, raised by Defendant, BAC, including, but not limited to, statute of limitations defenses, equitable tolling,

equitable estoppel, or other related matters, in response to the Complaint *sub judice*.

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DATED: Honolulu, Hawaii, May 31, 2022.

/s/ Frederick J. Arensmeyer

FREDERICK J. ARENSMEYER

/s/ Bruce Jacobs

BRUCE JACOBS
(Pro Hac Vice Application Pending)

Attorneys for Plaintiff
Nā Po‘e Kōkua

APPENDICES EXHIBITS 1-19 INCLUSIVE