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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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7 *Attorney for Plaintiff*
8 **KALE KEPEKAIO GUMAPAC**

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 **KALE KEPEKAIO GUMAPAC,**
13 **and DIANNE DEE GUMAPAC,**

14 **Plaintiffs,**

15 **vs.**

16 **DEUTSCHE BANK NATIONAL**
17 **TRUST COMPANY, AS TRUSTEE**
18 **FOR THE BENEFIT OF THE**
19 **CERTIFICATE HOLDERS FOR**
20 **ARGENT SECURITIES INC.,**
21 **ASSET-BACKED PASS-THROUGH**
22 **CERTIFICATES, SERIES 2006-W2;**
23 **DEUTSCHE BANK NATIONAL**
24 **TRUST COMPANY, N.A., AS**
25 **TRUSTEE FOR THE BENEFIT OF**
26 **THE CERTIFICATE HOLDERS**
27 **FOR ARGENT SECURITIES INC.,**
28 **ASSET-BACKED PASS-THROUGH**

) **CASE NO. CV-2:11-10767** ODW (CWx)
) **(Breach of Contracts; Declaratory**
) **Declaratory Relief; Unfair**
) **and Deceptive Trade Practices)**
)
) **FIRST AMENDED COMPLAINT;**
) **EXHIBITS. "1"- "6"**

) **ACTION FILED: December 29, 2011**

1 CERTIFICATES, SERIES 2006-W2,)
 2 DEUTSCHE BANK NATIONAL)
 3 TRUST COMPANY, LLC, ARGENT)
 4 MORTGAGE COMPANY, LLC.,)
 5 ARGENT SECURITIES INC., JOHN)
 6 DOES 1-10;)
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Defendants.

FIRST AMENDED COMPLAINT

COMES NOW, PLAINTIFF KALE KEPEKAIIO GUMAPAC, and PLAINTIFF DIANNE DEE GUMPAC, by and through their counsel, the Law Office of JENNIFER S. SMITH, by Jennifer S. Smith, Esq. and aver and allege as amended and supplemented, against each of the above named Defendants as follows:

1. Plaintiff KALE KEPEKAIIO GUMAPAC and Plaintiff DIANNE DEE GUMAPAC (hereinafter referred to collectively as "Plaintiffs") at all times relevant herein were residents of the State of Hawaii, County of Hawaii.

2. Plaintiff KALE KEPEKAIIO GUMAPAC ("Plaintiff Gumapac") and or Plaintiff DIANNE DEE GUMAPAC ("Plaintiff Dianne") at all times relevant herein owned and or resided at the real property commonly described as 15-1716 Second Ave., Keaau, HI 96749, and whose legal description is:

All of that certain parcel of land situate at Keanu, District of Puna, Island and County of Hawaii, State of Hawaii:

1 Lot 2787, area 1.00 acre, more or less, Block 7, as shown on Map 58
2 filed in the Office of the Assistant Registrar of the Land Court of the
3 State of Hawaii with Land Court Application No. 1053 (amended) of
4 W.H. Shipman, Limited;

5 TOGETHER WITH AN undivided 1/5750 interest in Lots 60, 62,
6 8297, 8363, 8385, 8387 and 3115 in Block 7, and Lot 1 in Block 10;
7 as shown on Maps 10, 10, 55, 56, 56, 57, 58 and 65 respectively, of
8 said Land Court Application No. 1053 (amended); and Lot 4-b, as
9 shown on Map 2 of Land Court Application No. 1689 of W.H.
10 Shipman, Limited, to be used in common with others entitled
11 thereto, for roadway and utility purposed only;

12 Being all of the land described in Transfer Certificate of Title No.
13 637,651 issued to KALE KEPEKAIO GUMAPAC and DIANNE
14 DEE GUMAPAC, husband and wife, as Tenants by the Entirety.
15 (hereinafter referred to as "Subject Property").

16 3. Currently, Plaintiffs are no longer married, and Plaintiff Dianne has
17 assigned all her interest and rights relating to the claims brought in this action to
18 Plaintiff Gumapac.

19 4. Defendant DEUTSCHE BANK NATIONAL TRUST COMPANY, at
20 all times relevant herein was and is operating as an domestic for profit business
21 entity, whose principal business administration address is located at 1761 East St.
22 Andrew Place, Santa Ana, California 92705-4934, and is in the business of
23 providing financial services on deposits, trusts and expert custodial services to
24 leading global banks, investors and brokers. ("Defendant Deutsche Trust
25 Company")

26 5. Defendant DEUTSCHE BANK NATIONAL TRUST COMPANY is
27 sued in its capacity as TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE
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1 HOLDERS FOR ARGENT SECURITIES INC., ASSET-BACKED PASS-
2 THROUGH CERTIFICATES, SERIES 2006-W2. (hereinafter “Defendant
3 Deutsche Trustee Company”).

4 6. Defendant DEUTSCHE BANK NATIONAL TRUST COMPANY,
5 N.A., is a national banking association, existing and organized under the law of the
6 United States, located at 1761 East St. Andrew Place, Santa Ana, California 92705-
7 4934 and is successor in interest as Trustee to Deutsche Bank National Trust
8 Company, as Trustee for The Benefit Of The Certificate Holders For Argent
9 Securities Inc., Asset-Backed Pass-Through Certificates, Series 2006-W2
10 (hereinafter “Defendant Deutsche Bank Trustee”); and whose trust administration
11 address is identified as c/o American Home Mortgage Servicing Inc., at 6571 Irvine
12 Center Drive, Mail-Stop DA-AM, Irvine California 92618, which is a vacant empty
13 office.

14 7. The above identified Defendants: “Defendant Deutsche Trust Company
15 and “Defendant Deutsche Bank Trustee” are referred to collectively herein as
16 “Defendants Deutsche Trustee”).

17 8. Defendant ARGENT MORTGAGE COMPANY, LLC, at all times
18 relevant herein is and was a limited liability company organized and existing under
19 the laws of the State of Delaware, with its administrative and principal place of
20 business is located at 3 Park Place, 10th Floor, Irvine, California 92614 (hereinafter
21 referred to as “Defendant Argent Mortgage” and or “Lender”).

22 9. Defendant ARGENT SECURITIES INC., at all times relevant herein is
23 and was a securities corporation existing and organized under the laws of the State
24 of Delaware with its administrative offices and principal place of business at 1100
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1 Town & Country Road Orange, California 92868. (hereinafter “Defendant Argent
2 Securities” and/or “successor Lender” or “Depositor”).

3 10. Defendant Argent Securities is a successor in interest to
4 lender/mortgagee Defendant Argent Mortgage relating to Plaintiffs’ December 12,
5 2005 mortgage. Defendant Argent Mortgage and Defendant Argent Securities are
6 referred to collectively herein as “Defendants Argent”.

7 11. While the Defendants have engaged in business in the State of Hawai’i
8 relating to the Gumapac Mortgage, none of the Defendants have complied with the
9 law that requires that they registered to do business in the State of Hawai’i.

10 12. Defendants JOHN DOES 1-10; DOE PARTNERSHIPS 11-14; DOE
11 CORPORATIONS 15-20; and or OTHER ENTITIES 21-30 (collectively referred to
12 as “Doe Defendants”), are sued herein under fictitious names because their true
13 names and identities are presently unknown to Plaintiffs, except that they were
14 connected to the present lawsuit in some manner and/or are persons, corporations,
15 entities, agents, representatives, business entities, associations, employers, co-
16 conspirators, employees, banks or governmental entities or agencies responsible for
17 the conduct complained of herein or were in some other manner presently unknown
18 to Plaintiffs engaged in the activities alleged herein, and/or were in some manner
19 responsible for the damages to Plaintiffs. Plaintiffs will identify the true names and
20 capacities, activities and/or responsibilities when such information is ascertained.
21 Plaintiffs have made a diligent and good faith effort to ascertain the identities of
22 those responsible, including a review of material generated in the investigation of
23 the incident which forms the basis of this action. Plaintiffs will seek leave of this
24 Court to amend this first amended Complaint when the true names and capacities of
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1 the Doe Defendants have been ascertained and the extent of their involvement with
2 the acts and omissions alleged herein.

3 **JURISDICTION AND VENUE**

4 13. This Court has jurisdiction of the claims in this case due to diversity of
5 citizenship, pursuant to 28 U.S.C. §1332, between Plaintiffs and Defendants;
6 Plaintiffs being a resident of the State of Hawai'i and none of the Defendants being
7 incorporated in or having its principal place of business in the State of Hawai'i or
8 being registered to do business in the State of Hawai'i.

9 14. The amount in controversy exceeds the \$75,000.00 jurisdictional limit
10 of this Court, Plaintiffs seek damages in the sum of \$290,000.00 and additional
11 special, general and statutory damages as proven at trial.

12 15. Jurisdiction for the declaratory relief action is also allowed under the
13 law and facts of this case as there is a justiciable controversy between the parties, a
14 definite, concrete and substantial controversy, touching the legal relations of parties
15 who have adverse legal interests, admitting of specific relief through a decree of a
16 conclusive character. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct.
17 461, 81 L.Ed. 617 (1937).

18 16. The venue of the Western Division of the United States District Court,
19 Central District Court, is appropriate for the litigation of this case, pursuant to 28
20 U.S.C. §1391, as Defendants perform substantially all of their work, including
21 execution and performance of their contracts within the jurisdiction of the Central
22 District, designate their principal places of business/administrative offices within
23 the Central District Court and are subject to the personal jurisdiction of the U.S.
24 District Court for the Central District of California, Western Division.

1 17. Plaintiffs and Defendant Argent Mortgage agreed under the Mortgage
2 of December 12, 2005, that the mortgage security instrument "shall be governed by
3 federal law and the law of the place where the real property is situated" which is the
4 State Hawai'i, County of Hawai'i.

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6 **BACKGROUND STATEMENT OF FACTS**

7 18. Plaintiff Gumapac was married to Plaintiff Diane Gumapac in Hawai'i
8 and they purchased the fee simple Subject Property for their home on April 17th,
9 2002 from Linda Vivian Little and Alice Evelyn Little ("Grantors Little") as
10 Tenants by the Entirety.

11 19. On February 11, 2003, the Subject Property was mortgaged to
12 "MERS" Inc. as nominee for Fremont Investment & Loan, Inc., a California
13 corporation,

14 20. On February 24, 2003, Plaintiffs, as part of escrow, paid for owner's
15 title insurance policy from Ticor Title (No. T76-000020391) on the Subject
16 Property.

17 21. The Warranty Deed from Grantors Little to Plaintiffs was registered in
18 the Office of Assistant Registrar on February 24, 2003 as Documents No. 2895104
19 on Cert. 505.052, Issuance of Cert. 637.651. (EXHIBIT "1" *Enclosure "1"*, Exhibit
20 "C" "Warranty Deed").

21 22. On December 12th 2005, Plaintiffs re-mortgaged the Subject Property
22 with lender Defendant Argent Mortgage for \$290,000.00 (Two Hundred Ninety
23 Thousand Dollars) to secure the loan evidenced by their promissory note.
24 (hereinafter the said Mortgage is referred to as "Gumapac Mortgage"). EX "1",
25 *Enclosure "1"*, Exhibit "D").

1 23. Defendant Argent Mortgagee was the financial lender for Plaintiffs'
2 loan relating to the December 12, 2005 mortgage on the Subject Property.

3 24. Defendant Argent Mortgage, unbeknownst and undisclosed to Plaintiff,
4 as a condition of agreeing to provide the Gumapac Mortgage security for the loan
5 on the Subject Property, required Plaintiffs to buy and obtain property title
6 insurance on the Subject Property, to insure against any defect in title, for the
7 benefit of Lender Defendant Argent Mortgage, in the amount of \$290,000.00. (Two
8 Hundred Ninety Thousand Dollars).

9 25. Plaintiffs paid a premium of \$1,050.00 in escrow to Title Guaranty &
10 Escrow for Argent Mortgage's Lender's title insurance policy, dated December 12,
11 2005, issued by Stewart Title Guaranty, Policy No. M-9994-8370850. (EXHIBIT
12 "1" *Enclosure "1"*, Exhibit "E", "Stewart Title Policy").

13 26. Plaintiffs were beneficiaries of the Title Guaranty Policy.

14 27. The Stewart Title Policy provides coverage for defect in title for
15 insured Lender Defendant Argent Mortgage and at (i)(A) the Stewart Title Policy
16 states that the term "Insured" under the policy is the owner and successor owners
17 "whether the indebtedness for its own account or as a trustee."

18 28. The Stewart Title Policy requires that claims of defects in title be
19 provided by the insured Defendants to the insurer:

20 SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE
21 EXCEPTIONS FROM COVERAGE CONTAINED IN
22 SCHEDULE B, AND THE CONDITIONS, STEWART TITLE
23 GUARANTY COMPANY, a Texas corporation (the "Company")
24 insures as of Date of Policy and, to the extent stated in Covered
25 Risks 11, 13, and 14, after Date of Policy, against loss or damage,
26 not exceeding the Amount of Insurance, sustained or incurred by the
27 Insured [the Lender] by reason of:

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- 1. Title being vested other than as stated in Schedule A.
- 2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
 - a. A defect in the Title caused by
 - i. **forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;**
 - ii. failure of any person or Entity to have authorized a transfer or conveyance;
 - iii. **a document affecting Title not properly** created, executed, witnessed, sealed, acknowledged, **notarized**, or delivered.
 - iv. failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. **a document executed under a falsified, expired, or otherwise invalid power of attorney;**
 - vi. **a document not properly filed, recorded, or indexed in the Public Records** including failure to perform those acts by electronic means authorized by law; or
 - vii. **a defective judicial or administrative proceeding.** (*Id.* Emphasis added).

29. After Plaintiff purchased the insurance policy issued by Stewart Title for Defendant Agent Mortgage, escrow closed and the Gumapac Mortgage was recorded in the Office of the Assistant Registrar, State of Hawai'i on December 19, 2005 as Land Court Document No. 3368985 and Certificate No. 637651, filed with the Registrar of the Bureau of Conveyances.

30. Under the Gumapac Mortgage of December 19, 2005, Defendant Argent Mortgage was the Lender and the servicer of the loan (Gumapac Mortgage, Exhibit "D". Sections 2 and 3).

1 31. The Gumapac Mortgage requires that Argent Mortgage give the
2 Plaintiffs written notice of the change in identity of any new loan servicer and the
3 address of the new loan servicer. (*Id.* Section 20, para. 2).

4 32. Upon information and belief, Argent Mortgage, after December 19,
5 2005, and on date unknown, transferred and sold its interest in the Gumapac
6 Mortgage to successor lender/owner Defendant Argent Securities without providing
7 the required notice to Plaintiffs.

8 **The February 1, 2006, Pooling Agreement**

9 33. The Pooling Agreement between Defendant Argent Securities
10 (“Depositor”), Ameriquest Mortgage (“Master Servicer”) and Defendant Deutsche
11 Trustee Company (“Trustee”), relates to and controls “Argent Securities Inc., Asset-
12 Backed Pass-Through Certificates, Series 2006-W2” (hereinafter “Pooling
13 Agreement”); and includes the Gumapac Mortgage and Subject Property as part of
14 the Series 2006-W2 Certificates (hereinafter “2006 W2-Certificates”). (“Pooling
15 Agreement”).

16 34. Defendant Deutsche Trustee Company agreed under the Pooling
17 Agreement to be the appointed and designated Trustee of Defendant Argent
18 Securities Series 2006-W2 Certificates, which included the Gumapac Mortgage.

19 35. Under the Pooling Agreement, Defendant Deutsche Trustee Company
20 is not only the Trustee, but may purchase and own certificates included in the 2006-
21 W-2 Certificates (*Id.* Section 8.04).

22 36. Ameriquest was designated as the Master Loan Servicer for the 2006
23 W-2 Certificates, but notice was never provided to Plaintiffs of the designation of
24 the Master Loan Servicer for the Gumapac Mortgage.

1 37. The Pooling Agreement has provisions that require the Defendants to
2 take affirmative action when there is notice of any defect of title relating to
3 mortgage instruments which comprise the 2006 W2 Certificates, which includes the
4 Gumapac Mortgage:

5 SECTION 2.03. Repurchase or Substitution of Mortgage Loans by
6 the Seller or the Depositor; Payment of Prepayment Charge Payment
7 Amounts.

8 Upon discovery or receipt of notice (including notice under Section
9 2.02) of any materially defective document in, or that a document is
10 missing from, the Mortgage File or of the breach by the Seller of any
11 representation, warranty or covenant under the Mortgage Loan
12 Purchase Agreement in respect of any Mortgage Loan which
13 materially adversely affects the value of such Mortgage Loan or the
14 interest therein of the Certificate holders, the Trustee shall promptly
15 notify the Seller, the NIMS Insurer and the Master Servicer of such
16 defect, missing document or breach and request that the Seller
17 deliver such missing document or cure such defect or breach within
18 90 days from the date the Seller had knowledge or was notified of
19 such missing document, defect or breach, and if the Seller does not
20 deliver such missing document or cure such defect or breach in all
21 material respects during such period, the Master Servicer (or, in
22 accordance with Section 6.06(b), the Trustee shall enforce the
23 obligations of the Seller under the Mortgage Loan Purchase
24 Agreement to repurchase such Mortgage Loan from REMIC I at the
25 Purchase Price within 90 days after the date on which the Seller was
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1 notified (subject to Section 2.03(d)) of such missing document,
2 defect or breach, if and to the extent that the Seller is obligated to do
3 so under the Mortgage Loan Purchase Agreement.

4 38. The Pooling Agreement also requires the Depositor/Trustee to report
5 "Material breaches of pool asset representations or warranties or transaction
6 covenants" after written notice thereof, on the periodic report (Form 10-D report);
7 the Trustee having primarily responsible for obtaining the information. (Pooling
8 Agreement, Exhibit N Form 10-D, Form 8-K And Form 10-K Reporting
9 Responsibility, Item (12)).

10 39. The Pooling Agreement provides and allows for assignment of the
11 Mortgages if sufficient under the law of where the Mortgaged Property is located:

12 "Assignment": An assignment of Mortgage, notice of transfer or
13 equivalent instrument, in recordable form (excepting therefrom if
14 applicable, the mortgage recordation information which has not been
15 returned by the applicable recorder's office and/or the assignee's
16 name), which is sufficient under the laws of the jurisdiction wherein
17 the related Mortgaged Property is located to reflect of record the sale
18 of the Mortgage. (Id.)(emphasis added).

19 40. At all time relevant herein, Plaintiffs were third party beneficiaries of
20 the Pooling Agreement.

21 **The Gumapac Mortgage and Title Insurance**

22 41. The Gumapac Mortgage provides at Uniform Covenants, Section 5,
23 "Property insurance" responsibilities of the Plaintiffs and Defendants, and their
24 respective rights and duties regarding property insurance.

1 42. "Property insurance" is defined under the Hawai'i Revised Statutes and
2 includes insurance for damage to any interest in real property:

3 **§431:1-206 Property insurance defined.** Property insurance is
4 insurance against loss of or damage to real or personal property of
5 every kind and any interest therein, from any or all hazard or cause
6 and against loss consequential upon such loss of or damage. An
7 inclusion within other defined classes of insurance of the right to
8 insure against certain designated perils to real or personal property
9 shall not be deemed a diminution of the definition of property
10 insurance. [L 1987, c 347, pt of §2] (emphasis added).

11 43. The Gumapac Mortgage provides at Uniform Covenants, Section 5,
12 Property Insurance, that for insurance required by Lender, any loss shall promptly
13 be made to the insurance carrier:

14 All insurance policies required by Lender and renewals of such
15 policies shall be subject to Lender's right to disapprove such
16 policies, shall include a standard mortgage clause, and shall name
17 Lender as mortgagee and/or as an additional loss payee.

18 In the event of loss, Borrower shall give prompt notice to the
19 insurance carrier and Lender. Lender may make proof of loss if not
20 made promptly by Borrower. (*Id.*).

21 44. As in the Pooling Agreement, the Gumapac Mortgage
22 provides for action to be taken when the parties, in particular, the
23 Defendant Trustees, have written notice of loss or defect in title interest to
24 the Subject Property; the insurance then to be applied to the sums secured
25 by the security instrument:

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1 If...Lender's security would be lessened, the insurance proceeds
2 shall be applied to the sums secured by the security instrument,
3 whether or not then due, with the excess, if any, paid to the
4 Borrower." (EXHIBIT "1", *Enclosure "I"*, Exhibit "D")

5 45. The Stewart Title insurance required by Lender Defendant Ardent
6 Mortgage to be obtained and paid for by Plaintiffs, required that notice of defect of
7 title be provided to Stewart Title by the Defendant Trustee Company (on behalf of
8 Ardent Securities), after it received notice that there was a claim of defect in title
9 and or loss regarding the Subject Property.

10 46. On March 9, 2009, First Assignment of Mortgage was recorded and
11 indicates that the Gumapac Mortgage was Assigned from Citi Residential Lending
12 Inc., as Attorney-In-Fact for Defendant Argent Mortgage Company, LLC, as
13 Assignor, to Defendant Deutsche Bank National Trust Company, as Trustee for
14 Argent Securities Inc. Asset Backed Pass-Through Certificates, Series 2006-W2
15 Under the Pooling and Servicing Agreement Dated February 1, 2006, as Assignee;
16 recorded in the State of Hawaii Office of the Assistant Registrar as Document No.
17 3836124 on Transfer Certificate of Title No. 637-651. The Assignment effective
18 February 11, 2011. (EXHIBIT "2" "First Assignment of the Gumapac Mortgage").

19 47. Plaintiffs have no knowledge of any endorsement of the Promissory
20 Note of December 12, 2005 at anytime, and no notice of endorsement of the
21 Promissory Note has ever been provided to Plaintiffs.

22 48. The Gumapac Mortgage was not assigned to the Certificate Holders of
23 the Series 2006 W-2 Certificates until more than three years after the "cut-off" date
24 for transfer of the Mortgages to the Trust, which was February 1, 2006, under the
25 Pooling Agreement. (*Id.* Exhibit "D")

1 49. The Gumapac Mortgage requires that Plaintiffs “will be given written
2 notice of the change” of the identity of any new loan servicer and the address of the
3 new loan servicer. (Exhibit “D” *Id.* Uniform Covenants, Section 20, para. 2).

4 50. Plaintiffs were not provided written notice when the identity and
5 address of the loan servicer of the Gumapac Mortgage was changed to Amerquest
6 Mortgage, as Master Loan Servicer of the 2006 W-2 Certificates and or when
7 Defendant Trustee Bank, Trustee, became the purchaser/loan servicer.

8 51. Even after recordation of the First Assignment of the Gumapac
9 Mortgagee, Plaintiffs were not notified in writing that there had been a change in the
10 identity/address of the loan servicer.

11 52. Under the law, Hawaii Revised Statute. **§501-174 Power of attorney;**
12 **registration necessary**, letters of attorney in dealing with registered land, “shall be
13 acknowledged and filed or recorded” with the State of Hawai’i assistant registrar
14 and registered”

15 53. The First Assignment of Mortgagee does not indicate that there is a
16 recorded power of attorney for Citi Residential Lending Inc., as Attorney-In-Fact
17 for Defendant Argent Mortgage Company, LLC under the First Assignment, and to
18 deal with land on behalf of Defendant Argent Mortgagee, in non-compliance of the
19 recording requirements of Hawaii Revised Statute§501-174 “Power of attorney;
20 registration necessary.”

21 54. On September 9, 2009, by second Assignment of Mortgage, Defendant
22 Deutsche Trustee Company for Argent Securities Inc. Asset Backed Pass-Through
23 Certificates, Series 2006-W2 Under the Pooling and Servicing Agreement Dated
24 February 1, 2006, transferred all its interest to Defendant Deutsche Bank Trustee, as
25 Assignee, which included the Gumapac Mortgage. The Assignment Second was
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1 recorded in State of Hawaii Office of the Assistant Registrar as Land Court
2 Document No. 3368985, c/o American Home Mortgage Servicing. (EXHIBIT “3”
3 Assignment of Mortgage, Second)(emphasis added).

4 55. Plaintiffs were not provided any timely written notice that the
5 Gumapac Mortgage was now subject to a new loan servicer, Defendant Deutsche
6 Trustee, or its address or that American Home Mortgage Servicing was a sub-
7 servicer of Plaintiffs Gumapac’s Mortgage.

8 **TITLE INVESTIGATION AND NON-JUDICIAL FORECLOSURE**

9 56. By August 3, 2010, Plaintiffs were late in their payments under the
10 Gumapac Mortgage, therefore, Trustee, Defendant Deutsche Bank Trustee provided
11 a written “Notice of Mortgagees Intention to Foreclose Under Power of Sale”
12 (“Notice”) to Plaintiffs and thereafter, recorded the Notice at the Bureau of
13 Conveyances, State of Hawaii, Document Number 2010- 110595.

14 57. Due to the confusion of various entities claiming rights and
15 responsibilities to the Subject Property under the Gumapac Mortgage, the Pooling
16 Agreement, insurance obligations (owner’s Ticor Title, Policy No. T76-000020391)
17 and possibly other legal documents and or unknown transfers, Plaintiffs retained
18 Hawaiian Alliance to performed an investigation of the title on the Subject Property
19 to determine what entities had rights to mortgage payments, foreclosure and
20 determine if there were any title defects.

21 58. On January 13, 2011, Defendant Deutsche Bank Trustee purchased the
22 Subject Property at auction as a result of the non-judicial foreclosure.

23 59. On January 21, 2011, Momilani Glushenko, Vice President of
24 Operations for Hawaiian Alliance issued a Title Claim Report, that states in
25 pertinent part that based on Hawai’i Alliance’s title search of the Subject Property,
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1 there was a defect of title “by virtue of an executive agreement entered into between
2 President Grover Cleveland of the United States and Queen Lili’uokalani of the
3 Hawaiian Kingdom whereby the President and his successors in office were and
4 continue to be bound to faithfully execute Hawaiian Kingdom law by assignment of
5 the Queen’s [powers/interests] under threat of war on January 17th 1893.

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7 “The notaries public in the Hawaiian Islands and the registrar of the
8 Bureau of Conveyances were not lawful since January 17th 1893,
9 and therefore title to estate in fee-simple described as Lot 2787, area
10 1.00 acre, more or less, Block 7, as shown on Map 58 filed in the
11 Office of the Assistant Registrar of the Land Court of the State of
12 Hawai’i with Land Court Application no. 1053 (amended) of W.H.
13 Shipman, Limited, under document no. 2895104 & certificate no.
14 505052, filed with the Registrar of the Bureau of Conveyances on
15 February 24th 2003, is vested other than Kale Kepekaio Gumapac
16 and Dianne Dee Gumapac, now divorced, because the
17 aforementioned deed of conveyance was not lawfully executed in
18 compliance with Hawaiian Kingdom law.” (EXHIBIT “1” Title
19 Claim Report).

20 60. The Hawaiian Alliance Claim Report, No. 2011-2, dated January 21,
21 2011 is EXHIBIT “1” hereto, with supporting proof of defect by expert Dr. Keanu
22 Sai stated in *Enclosure “1”*: “Expert Memorandum Regarding the Legal Continuity
23 of the Hawaiian Kingdom and the Fee-simple Title being Vested Other than Kale
24 Kepekaio Gumapac and Dianne Dee Gumapac”, dated January 21, 2011; and with
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1 Exhibits "A"-“F” attached thereto. (hereinafter referred to in total as “Title Claim
2 Report”).

3 61. On February 3, 2011, Defendant Deutsche Bank Trustee Quitclaimed
4 the Subject Property to itself, as recorded in the Office of the Assistant Registrar,
5 Land Court, State of Hawaii, Document No. 4046266, Certificate 637,651, Issuance
6 Certificate 1,012,360. (EXHIBIT “4” “Mortgagee Quitclaim Deed”).

7 62. The Mortgagee Quitclaim Deed is invalid and void, due to several
8 reasons, including, but not limited to, continuing defect of title as indicated by the
9 Title Claim Report.

10 63. The Mortgagee Quitclaim Deed is invalid and void, as the Mortgagee’s
11 notarization is defective on the Quitclaim Deed, as the Mortgagee/grantor does not
12 state what is the executing person’s printed name, or that the executing person is
13 executing as “attorney-in-fact” nor is there an attached “Attorney-In-Fact”, that
14 supports the authority of the person executing the Quitclaim Deed or statement of
15 the status or title of the signatory on behalf of “American Home Mortgage.

16 64. The Mortgagee Quitclaim Deed is also invalid as the notary seal does
17 not include any Notary License No. for the claimed notary “M.Wong.”

18 65. Thereafter, on February 9, 2011, Defendant Deutsche Trustee
19 Company filed a Complaint for Ejectment in the District Court of the Third Circuit,
20 Puna Division (Civil No. 3RC 11-1-150)(“Ejectment Action”), to eject Dianne
21 Gumapac from the home and the Subject Property and moved for summary
22 judgment.

23 66. On February 9, 2011, when Defendant Deutsche Trustee Company
24 filed the Ejectment Action, it did not have any interest in the Gumapac Mortgage or
25 the Subject Property, as Defendant Deutsche Trustee Company had transferred all
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1 its interest in the Gumapac Mortgage to Defendant Deutsche Bank Trustee in 2009,
2 and then on February 3, 2011, Defendant Deutsche Bank Trustee Quitclaimed the
3 Subject Property to itself.

4 67. Defendant Deutsche Trustee Company filed for ejectment of Plaintiffs
5 from the Subject Property, when it had no interest in the Subject Property is illegal,
6 an abuse of process and deceptive trade practice.

7 68. Dianne Gumapac, filed a Motion to Dismiss the ejectment action, on
8 April 29, 2011, including the fact that Kale Gumapac had not been served and that
9 there was an issue of defect in title, based on the title investigation undertaken and
10 reported in the Title Claim Report; said Title Claim Report was filed with the Court
11 and provided to the moving party (Defendants in this case), as an exhibit to the
12 Dianne Gumapac's Motion to Dismiss.

13 69. Thereafter, the Court agreed with Dianne Gumapac that there was an
14 issue of "defect of title" regarding the Subject Property, and thus, on that basis the
15 District Court did not have jurisdiction of the matter and dismissed the action. (In
16 addition, Plaintiff Kale Gumapac was not even provided notice of the Ejection
17 Action.). The Order Granting Defendant Dianne Gumapac's Motion to Dismiss for
18 Lack of Jurisdiction, with prejudice, was filed August 24, 2011).

19 70. The lower court confirmed its previous order of dismissal with
20 prejudice by also denying Deutsche Trustee Bank's motion for reconsideration re:
21 (1) Order Granting Defendant Dianne Gumapac's Motion to Dismiss Plaintiff's
22 Verified Complaint for Ejectment Filed February 9, 2011, Filed April 29, 2011 and
23 (2) Denying [Deutsche Trustee Banks'] ...Motion for Summary Judgment Filed
24 April 14, 2011. (EXHIBIT "5" "Order")

1 71. The Gumapac Mortgage Uniform Covenant, Section 5, mandates that
2 prompt notice of a loss, relating to the Subject Property, be provided by the
3 Borrower to the insurance carrier and Lender.

4 72. That the Gumapac Mortgage further states that regarding the loss or
5 defect that “if the restoration or repair is not economically feasible or Lender’s
6 security would be lessened, the insurance proceeds shall be applied to the sums
7 secured by the security instrument, whether or not then due, if the excess, if any
8 paid to the Borrower.” (emphasis added). (EXHIBIT “1” *Enclosure “1”*, Exhibit
9 “D” Gumapac Mortgage, pg. 7, Section 5. para. 4).

10 73. Defendants Deutsche Bank National Trustees, as the very least, were
11 provided notice of the defect in the Subject Property in the Ejectment Action, not
12 later than mid April 2011, as the Title Claim Report was a court exhibit.

13 74. On November 22, 2011, Plaintiffs concerned about the Title Claim
14 Report evidencing the title defect in the Subject Property, would impact Defendants
15 and Plaintiffs interest in the Subject Property, provided additional notice of the
16 defect in title regarding the Subject Property to Defendants and requesting that the
17 claim of defect of title be filed with Stewart Title, pursuant to section 3 of the
18 Stewart Title insurance policy that specifically states:

19 The Insured shall notify the Company promptly in writing...in case
20 Knowledge shall come to an insured of any claim of title or interest
21 that is adverse to the Title or the lien of the insured Mortgage, as
22 insured, and that might cause loss or damage for which the Company
23 may be liable by virtue of this policy... If the Company is prejudiced
24 by the failure of the Insured Claimant to provide prompt notice, the
25 Company’s liability to the Insured Claimant under the policy shall be

1 reduced to the extent of the prejudice. (See EXHIBIT "6" ,
2 Plaintiffs' Letter Re Notice of Title Claim to Deutsche Bank, dated
3 November 22, 2011, "Notice of Title Defect" attached hereto
4 without exhibits).

5 75. Defendants Deutsche Bank National Trustees after being provided
6 notice of the claim of defect of title relating to the Subject Property by receipt of the
7 Title Claim from Plaintiff Dianne in the Ejectment Action by April 2011, and by
8 formal written notice on November 22, 2011, did not provide any notice of claimed
9 title defect to insurance carrier, Stewart Title or as required under the Pooling
10 Agreement.

11
12 76. Defendant Deutsche Bank National Trust Company continues to claim
13 superior title to Plaintiffs in the Subject Property when it has no interest in the
14 Subject Property at all.

15 77. Defendants Deutsche Bank National Trustees continue to claim
16 superior title to Plaintiffs in the Subject Property, and will not comply with
17 Defendants contractual obligations to provide notice of defect in title to Stewart
18 Title, or provide notice of defect of title as required under the Pooling Agreement.

19 78. Plaintiff Gumapac continues to have an issue of a defect of title relating
20 to the Gumapac Mortgage, loss of value in the interest in the Subject Property
21 secured by the Gumapac Mortgage and to illegally be subject to ejectment.

22 **COUNT I**

23 **BREACH OF CONTRACTS**

24 79. The Plaintiffs hereby reinstate each and every allegation contained in
25 paragraphs 1-78 above by reference, as though fully set forth herein.

1 80. Defendants and Plaintiffs entered into the Gumapac Mortgage
2 concerning the Subject Property and Argent Mortgage covenanted that it would
3 submit claims and or notice of defective title in the Subject Property to the title
4 insurer for the lender.

5 81. As part of the consideration for the covenant that Argent Mortgage
6 (and its original designated Defendant Deutsche Trustee Company) would submit
7 notice of defect claims to its title insurer, Plaintiff was required to purchase title
8 insurance from Stewart Title for the lender Argent Mortgage on the Subject
9 Property.

10 82. Plaintiffs paid a premium of \$1,050.00 (One Thousand Fifty Dollars)
11 in escrow and obtained a lenders title insurance policy regarding the Subject
12 Property for the benefit of lender Argent Mortgage and Plaintiffs, dated December
13 12, 2005 issued by Stewart Title. (Exhibit "C" "Stewart Title Policy").

14 83. Despite Defendants, including Trustee Defendants, being fully aware
15 that there was a claimed defect of title, due the Title Claim Report as an exhibit to
16 Plaintiff Dianne's Motion to Dismiss in April 2011, in the Ejection Action.
17 Defendants did not provide any notice to Stewart Title of a claim of a defect of title
18 relating to the Subject Property as required by Defendants' pursuant to the Gumapac
19 Mortgage, Section 5, of the Uniform Covenants.

20 84. Plaintiff Gumapac also provided written notice of a claim of defect in
21 title to Defendant Deutsche Trustee Company, on November 22, 2011, including the
22 Title Claim Report of January 21, 2011.

23 85. In addition, the Gumapac Mortgage provides that for proceeds of any
24 insurance, "if Lender's interest would be lessened, the insurance proceeds shall be
25 applied to the sum secured by this security instrument" (Gumapac Mortgage,
26
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1 Section 5, para. 4). Thus, as a result of Defendants breach of the Gumapac
2 Mortgage, Section 5, by not providing notice to Stewart Title re the Subject
3 Property/Gumapac mortgage defect, Plaintiffs have been injured and denied the
4 benefit that any insurance proceeds that might be recovered, would be applied to the
5 sum secured by the Gumapac Mortgage.

6 86. Defendants Deutsche Bank Trustee's failure to provide notice of a
7 claim of title defect to Stewart Title is a breach of its Covenant and agreement with
8 Plaintiffs under the Gumapac Mortgage, Section 5.

9 87. Defendants Deutsche Bank Trustees have also breached their duty
10 under Section 2.03 of the Pooling Agreement by not providing notice of defect of
11 title regarding a 2006 W-2 Certificate, the Gumapac Mortgage, to seller and
12 entitling Plaintiffs to stated curative action and or remedies, therefore, Plaintiffs
13 have been damaged and are entitled to all resulting compensatory damages.

14 **COUNT II**

15 **DECLARATORY RELIEF**

16
17 88. The Plaintiffs hereby reinstate each and every allegation contained in
18 paragraphs 1-87 above, and incorporate the paragraphs by reference as though fully
19 set forth in full herein.

20 89. As part of the consideration for the covenant that Defendant Argent
21 Mortgage and or its successors would submit notice of defect claims to its title
22 insurer, Plaintiffs were required to purchase the title insurance from Security Title
23 for the lender Defendant Argent Mortgage on the Subject Property.

24 90. It is undisputed that Plaintiffs paid a premium of \$1,050.00 (One
25 Thousand Fifty Dollars) in escrow and obtained a lenders title insurance policy
26 regarding the Subject Property for the benefit of lender Argent Mortgage and
27

1 Plaintiff dated December 12, 2005 issued by Stewart Title and thereafter, Plaintiffs
2 obtained the Gumapac Mortgage from Lender Defendant Argent Mortgage.

3 91. It is undisputed that Defendants received written notice of claimed
4 defects in the Subject Property relating to title and the Gumapac Mortgage,
5 including written notice of the Title Claim Report in the ejectment action.

6 92. It is undisputed that Defendants again received written notice of the
7 claim of defect of title on November 22, 2011 from Plaintiffs. (EXHIBIT“4”).

8 93. It is undisputed that Defendants did not provide any claim of title
9 defect to Stewart Title or as required under the Pooling Agreement after
10 Defendants’ received notice of a claim of defect in the Ejectment Action or at any
11 time, relating to the Gumapac Mortgage.

12 94. It is undisputed that Defendants did not make any claim of title defect
13 and did not pursue any of the remedies stated in the Pooling Agreement for
14 defective documents relating to the Gumapac Mortgage, as a Certificates of the
15 Trust.

16 95. A real and actual controversy has arisen and now exists between
17 Plaintiff and Defendants as to whether: 1) there is a claim for defect of title on the
18 Subject Property as indicated in the Title Claims Report; 2) whether Defendants
19 must forward the claim of defect of title to Defendants title insurer for the Subject
20 Property, Stewart Title, 3) whether Defendants must provide notice as required
21 under Section 2.03 of the Pooling Agreement to seller Defendant Argent Mortgage,
22 regarding title defect and document defects relating to the Gumapac Mortgage, as
23 part of the 2006 W-2 Certificates.

1 96. Plaintiffs request a declaration that the Title Claims Report provided
2 notice to Defendants that there is a claim for a defect of title on the Subject Property
3 relating to the Gumapac Mortgage.

4 97. Plaintiffs request a declaration that the Defendants must forward the
5 notice of claim to the Defendant's title insurer for the Gumapac Mortgage, Stewart
6 Title or otherwise provide written notice of the claim to the insurer.

7 98. Plaintiffs request a declaration that the Defendants must provide notice
8 as required under Section 2.03 of the Pooling Agreement, to seller Defendant
9 Argent Mortgage and or its successor(s), regarding title defect and document defects
10 relating to Gumapac Mortgage.

11 **COUNT III**

12 **DECEPTIVE TRADE PRACTICE**

13 99. The Plaintiffs hereby reinstate each and every allegation contained in
14 paragraphs 1-98 above by reference, as though fully set forth herein.

15 100. Defendants business practices as indicated in the paragraphs above,
16 constitute unfair and deceptive trade practice under Hawaii Revised Statutes, 480 et
17 seq. and therefore, Plaintiffs are entitled to all damages and equitable relief,
18 including, voiding of the non-judicial foreclosure and the Mortgage Quitclaim Deed
19 and enjoining Defendants from further action to foreclosure and or to eject
20 Plaintiff's from the Subject Property.

21 101. As part of the consideration for the covenant that Defendant Argent
22 Mortgage would submit notice of defect claims to its title insurer in the Gumapac
23 Mortgage, Plaintiff was required to purchase the title insurance from Security Title
24 for the lender Argent Mortgage on the Subject Property.

1 102. Plaintiffs paid a premium of \$1,050.00 (One Thousand Fifty Dollars)
2 in escrow and obtained a lenders title insurance policy regarding the Subject
3 Property for the benefit of lender Argent Mortgage dated December 12, 2005 issued
4 by Stewart Title Guaranty (Exhibit "C"; " hereinafter Stewart Title Policy").

5 103. Thereafter, Defendants and Plaintiffs entered into the Gumapac
6 Mortgage concerning the Subject Property and lender Argent Mortgage covenanted
7 that it would submit claims and or notice of defective title in the Subject Property to
8 the title insurer for the lender.

9 104. Despite Defendants Deutsche Bank Trustees being fully aware of a title
10 defect claim due to the filings in the Ejectment Action and Plaintiffs providing a
11 formal notice of claim of defect in title to Defendants Deutsche Bank Trustees,
12 notice of a claim of a title defect was not submitted to Stewart Title for
13 consideration of payment coverage and Defendants did not provide any notice of
14 defect of title in accordance with the Pooling Agreement to Defendant Argent
15 Mortgage and or its successor(s).

16 105. Despite Defendants being fully aware of a title defect due to the filings
17 in the Ejectment Action and Plaintiffs providing a formal notice of claim of defect
18 in title to Defendants Deutsche Bank Trustees, notice of the title defect was not
19 provided to the parties to the Pooling Agreement, as required.

20 106. Defendants Argent Mortgage and its Trustees Defendants Deutsche
21 Bank Trustees have engaged in unfair and deceptive business practice where they
22 require potential borrowers to purchase title insurance through a title company
23 (herein Security Title), who obtains a title insurance policy for the lender (Stewart
24 Title) and then, despite notice of claimed defects in title, including Court Order
25 dismissing Ejectment Action for lack of subject matter jurisdiction due to defect in
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1 title, Defendants did not make any claim for title insurance coverage against the
2 lender's title insurer, to the detriment, loss, and damage of Plaintiffs.

3 107. Defendants business practice of requiring borrowers, including
4 Plaintiffs to purchase lender title insurance in order to receive a mortgage, and then
5 Defendants not making a claim to the title insurer or as required under the Pooling
6 Agreement, is an unfair and deceptive trade practice under Hawaii Revised Statutes,
7 480 et seq. and therefore, Plaintiffs are entitled to treble damages for any loss and or
8 damages as a result of Defendants' unfair and deceptive trade practices, and all
9 equitable relief allowed by the Court.

10 WHEREFORE, Plaintiffs are entitled to judgment in their favor and to the
11 following award on the above Counts:

- 12 1. For breach of contract, Count I, all resulting general, special and
13 compensatory damages
- 14 2. For entry of a Declaratory Judgment in accordance with the declaratory
15 relief declarations sought above in Count II, including the following
16 declarations:
 - 17 a. That the Title Claims Report provided Defendants notice that
18 there is a claim for a defect of title on the Subject Property
19 relating to the Gumapac Mortgage.
 - 20 b. That the Defendants must forward a notice of claim of defect
21 of title to the Defendants title insurer Stewart Title relating to
22 the defect identified by the Title Claim Report.
 - 23 c. That the Defendants must forward a notice of claim of defect
24 of title to seller Defendant Argent Mortgage, and or its
25 successors, as required under Section 2.03 of the Pooling
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Agreement, regarding title defect and document defects relating to Gumapac Mortgage, as part of the 2006 W-2 Certificates.

- 3. For unfair and deceptive trade practices:
 - a. Voiding of Defendants' security interest and the referenced Promissory Note (Gumapac Mortgage), and Gumapac Mortgage, Mortgagee Quitclaim Deed on the Subject Property.
 - b. Denial of any equitable interest in the Subject Property to Defendants.
 - c. Defendants enjoined from further ejectment actions against Plaintiffs or any enforcement of the Gumapac Mortgage or Note.
 - d. Treble damages for unfair and deceptive trade practices.
 - e. Disgorgement of any benefits, interest or fees received by Defendants relating to the Gumapac Mortgage, to be held in equitable trust for Plaintiffs.
- 4. Attorney's fees and costs.
- 5. Pre and post judgment interest.

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6. Such other relief as the Court deems equitable.

DATED: Honolulu, Hawaii, March 10, 2011.

LAW OFFICE OF JENNIFER S. SMITH

/S/
JENNIFER S. SMITH
Attorney for Plaintiff
KALE KEPEKAIO GUMPAC

EXHIBIT 1

[Type text]

Hawaiian Alliance, LLC HC2 Box 9607 Kea'au, HI 96749 Phone no. (808) 982-9020 Email: kgumapac@gmail.com Re: Kale Kepekaio Gumapac and Dianne Dee Gumapac	Claim Report		
	Report Date	Claim no.	Investigator
	January 21, 2011	2011-2	Dr. Keanu Sai
	Policy no.	Policy issued	
T76-000020391	February 24, 2003		
Assigned	Investigated		
January 18, 2011	January 21, 2011		

Policy: Owner's (Ticor Title Insurance)	Coverage: Fee-simple Title	Amount: \$ 178,000.00
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Description of Property:

Lot 2787, area 1.00 acre, more or less, Block 7, as shown on Map 58 filed in the Office of the Assistant Registrar of the Land Court of the State of Hawai'i with Land Court Application no. 1053 (amended) of W.H. Shipman, Limited, under document no. 2895104 & certificate no. 505052, filed with the Registrar of the Bureau of Conveyances on February 24th 2003.

Defect in Title Summary:

Owner's deed was not lawfully executed according to Hawaiian Kingdom law.

Total Claim:

\$ 178,000.00

Enclosures: Proof of Defect

Kale Kepekaio Gumapac and Dianne Dee Gumapac, now divorced, the insured, retained Hawaiian Alliance, LLC, to do an investigation of their fee-simple title situated at Keaau, District of Puna, Island of Hawai'i. This claim involves a defect of title by virtue of an executive agreement entered into between President Grover Cleveland of the United States and Queen Lili'uokalani of the Hawaiian Kingdom, whereby the President and his successors in office were and continue to be bound to faithfully execute Hawaiian Kingdom law by assignment of the Queen under threat of war on January 17th 1893. The notaries public in the Hawaiian Islands and the registrar of the Bureau of Conveyances were not lawful since January 17th 1893, and therefore title to the

estate in fee-simple described as Lot 2787, area 1.00 acre, more or less, Block 7, as shown on Map 58 filed in the Office of the Assistant Registrar of the Land Court of the State of Hawai'i with Land Court Application no. 1053 (amended) of W.H. Shipman, Limited, under document no. 2895104 & certificate no. 505052, filed with the Registrar of the Bureau of Conveyances on February 24th 2003, is vested other than Kale Kepekaio Gumapac and Dianne Dee Gumapac, now divorced, because the aforementioned deed of conveyance was not lawfully executed in compliance with Hawaiian Kingdom law.

Sincerely,

Momilani Glushenko
Vice President Operations
Hawaiian Alliance, LLC

Enclosure "1"

Dr. Keanu Sai

47-605 Puapou`o Place • Kane`ohe, HI 96744 • Phone: 808-388-6100
E-Mail: keanu.sai@gmail.com Web: www2.hawaii.edu/~anu

Expert Memorandum Regarding the Legal Continuity of the Hawaiian Kingdom and the Fee-simple Title being Vested Other than Kale Kepekaio Gumapac and Dianne Dee Gumapac

January 21st 2011

According to article I, Montevideo Convention (1933), "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."¹

Synopsis

The Hawaiian Kingdom had these attributes when Great Britain and France entered into a joint proclamation acknowledging and recognizing Hawai'i as an independent and sovereign State on November 28th 1843, and on July 6th 1844, United States Secretary of State John C. Calhoun notified the Hawaiian government of the United States formal recognition of the Hawaiian Kingdom as an independent and sovereign state since December 19th 1842 by President John Tyler.² As a result of the United States' recognition, the Hawaiian Kingdom entered into a Treaty of Friendship, Commerce and Navigation, Dec. 20th 1849;³ Treaty of Commercial Reciprocity, Jan. 13th 1875;⁴ Postal Convention Concerning Money Orders, Sep. 11th 1883;⁵ and a Supplementary Convention to the 1875 Treaty of Commercial Reciprocity, Dec. 6th 1884.⁶ The Hawaiian Kingdom also entered into treaties with Austria-Hungary, June 18th 1875; Belgium, Oct. 4th 1862; Bremen, March 27th 1854; Denmark, Oct. 19th 1846; France,

¹ 49 U.S. Stat. 3097, 3100.

² DAVID KEANU SAI, AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM: BEGINNING THE TRANSITION FROM OCCUPIED TO RESTORED STATE, Doctoral Dissertation, University of Hawai'i, Political Science (December 2008), 72; see also David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity*, 10 Journal of Law and Social Challenges 74 (Fall 2008).

³ 9 U.S. Stat. 977.

⁴ 19 U.S. Stat. 625.

⁵ 23 U.S. Stat. 736.

⁶ 25 U.S. Stat. 1399.



July 17th 1839, March 26th 1846, Sep. 8th 1858; French Tahiti, Nov. 24th 1853; Germany, March 25th 1879; Great Britain, Nov. 13th 1836 and March 26th 1846; Great Britain's New South Wales, March 10th 1874; Hamburg, Jan. 8th 1848); Italy, July 22nd 1863; Japan, Aug. 19th 1871, Jan. 28th 1886; Netherlands, Oct. 16th 1862; Portugal, May 5th 1882; Russia, June 19th 1869; Samoa, March 20th 1887; Spain, Oct. 9th 1863; Sweden-Norway, April 5th 1855; and Switzerland, July 20th 1864.

In the 21st century, an international tribunal and the Ninth Circuit Court of Appeals acknowledged the Hawaiian Kingdom's status as an internationally recognized state in the 19th century. In *Larsen v. Hawaiian Kingdom* (2001), the Permanent Court of Arbitration in The Hague stated, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States."⁷ The 9th Circuit Court, in *Kahawaiola`a v. Norton* (2004), also acknowledged the Hawaiian Kingdom's status as "a co-equal sovereign alongside the United States;"⁸ and in *Doe v. Kamehameha* (2005), the Court stated that, "in 1866, the Hawaiian Islands were still a sovereign kingdom."⁹

Having established the Hawaiian Kingdom's internationally recognized status as an independent state in the 19th century, the next question is whether or not the Hawaiian Kingdom status as a state was extinguished after its government was overthrown by U.S. troops on January 17th 1893. As a subject of international law, statehood of the Hawaiian Kingdom can only be measured and determined by the rules of international law and not the domestic laws of any State to include the United States and the Hawaiian Kingdom. According to Professor Crawford, "A State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three."¹⁰ In particular, military "occupation does not extinguish the State pending a final settlement of the conflict. And, generally, the presumption—in practice a strong presumption—favours the continuity and disfavors the extinction of a an established State."¹¹ Professor Wright, a renowned scholar in U.S. foreign relations law, states that, "international law distinguishes between a government and

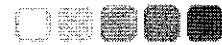
⁷ *Larsen v. Hawaiian Kingdom*, 119 ILR 566, 581 (2001).

⁸ *Kahawaiola`a v. Norton*, 386 F.3d 1271 (2004).

⁹ *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (2005).

¹⁰ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 700 (2nd ed., 2006).

¹¹ *Id.*, 701.



the state it governs.”¹² And according to §201, Restatement (Third) Foreign Relations Law of the United States, “A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time;”¹³ and “Military occupation, whether during war or after an armistice, does not terminate statehood.”¹⁴ Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003. The former has been a recognized sovereign State since 1919,¹⁵ and the latter since 1932.¹⁶ Professor Dixon explains:

If an entity ceases to possess any of the qualities of statehood...this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Afghanistan and Iraq following the intervention of the USA did not mean that there were no such states, and the same is true of Sudan where there still appears to be no entity governing the country effectively. Likewise, if a state is allegedly ‘extinguished’ through the illegal action of another state, it will remain a state in international law.¹⁷

After the Hawaiian Kingdom government was illegally overthrown, two executive agreements were entered into between President Cleveland of the United States and Queen Lili‘uokalani of the Hawaiian Kingdom in 1893. The President entered into these executive agreements under his sole constitutional authority to represent the United States in foreign relations and the Congress cannot intervene without violating the separation of powers doctrine being an encroachment upon the executive power. The first agreement, called the *Lili‘uokalani assignment*, (Exhibit A), assigned executive power to the United States President to administer Hawaiian Kingdom law and to investigate the overthrow of the Hawaiian government. The second agreement, called the *Restoration agreement*, (Exhibit B), obligated the President of the United States to restore the Hawaiian government as it was prior to the landing of U.S. troops on

¹² Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) American Journal of International Law 299-308, 307 (April 1952).

¹³ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Reporter’s Note 2, §201.

¹⁴ *Id.*, Reporter’s Note 3.

¹⁵ Manley O. Hudson, *Afghanistan, Ecuador, and the Soviet Union in the League of Nations*, 29 American Journal of International Law 109-116, 110 (1935).

¹⁶ Manley O. Hudson, *The Admission of Iraq to Membership in the League of Nations*, 27 American Journal of International Law 133-138, 133 (1933).

¹⁷ MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 119 (6th ed., 2007).



January 16th 1893, and for the Queen, after the government was restored and the executive power returned to grant full amnesty to those members and supporters of the provisional government who committed treason.

First Executive Agreement—Lili`uokalani assignment

On January 17th 1893, Queen Lili`uokalani, by explicit grant, “yielded” her executive power to the President of the U.S. to do an investigation of their diplomat and military troops who illegally landed on Hawaiian territory in violation of Hawai`i’s sovereignty. The Queen specifically stated, “That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government. Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.”¹⁸ The quintessential question is what “authority” did the Queen yield as the “constitutional sovereign”? This authority is specifically stated in the Hawaiian constitution, which declares, “To the King [Queen] belongs the Executive power.” In *Grieve v. Gulick* (1883),¹⁹ Justice Austin of the Hawaiian Supreme Court stated that, “the Constitution declares [His Majesty] as the executive power of the Government,” which, according to the Indiana Supreme Court, “is the power to ‘execute’ the laws, that is, carry them into effect, as distinguished from the power to make the laws and the power to judge them.”²⁰

President Cleveland acknowledged receipt of this conditional grant in March when he received the protest from the Queen through her attorney in fact, Paul Neumann, in Washington, D.C. This acceptance of the conditional grant of Hawaiian executive power to investigate is called the *Lili`uokalani Agreement*. In a report to the President after the investigation was completed, Secretary of State Gresham acknowledged the temporary transfer of the Queen’s executive power by stating, “The Government of Hawaii surrendered its authority under a threat

¹⁸ Exhibit A, 461.

¹⁹ 5 Hawai`i 73, 76 (1883)

²⁰ *Tucker v. State of Indiana*, 218 Ind. 614, 35 N.E. 2d 270, 291 (1941).



of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign.”²¹ The President, in his message to Congress, also acknowledged the temporary transfer of executive power. Cleveland stated, the Queen “surrendered not to the provisional government, but to the United States. She surrendered not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States.”²² This was the first of two international agreements to have taken place through an exchange of diplomatic notes committing the President to the administration of Hawaiian Kingdom law while he investigated the overthrow of the Hawaiian government. The investigation concluded that U.S. Minister John Stevens with the illegal presence of U.S. troops bore the responsibility for the overthrow of the Hawaiian government. As a result, negotiations would ensue whereby a second agreement was sought by the United States to restore the Hawaiian Kingdom government. On the responsibility of State actors, Oppenheim states that “according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages.”²³ Therefore, on October 18th 1893, U.S. Secretary of State Walter Gresham directed U.S. Minister Plenipotentiary Albert Willis to initiate negotiations with Queen Lili’uokalani for settlement and restoration of the Hawaiian Kingdom government. He stated to Willis,

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of...the President’s sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course by granting full amnesty to all who participated in the movement against her, including persons who are, or have been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should

²¹ Exhibit A, 462.

²² *Id.*, 457.

²³ Lassa Oppenheim, *International Law: A Treatise*, 3rd ed., ed. Ronald F. Roxburgh, Vol. II (London: Longmans Green and Co., 1921), 252.



be assumed.

Having secured the Queen's agreement to pursue this wise and humane policy, which it is believed you will speedily obtain, you will then advise the executive of the Provisional Government and his ministers of the President's determination of the question which their action and that of the Queen devolved upon him, and that they are expected to promptly relinquish to her constitutional authority.²⁴

On November 13th 1893, Willis met with the Queen at the U.S. Legation in Honolulu, "who was informed that the President of the United States had important communications to make to her."²⁵ Willis explained to the Queen of the "President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."²⁶ In his message to the Congress, the President concluded that the "members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government...by the indefensible encouragement and assistance of our diplomatic representative."²⁷ According to Wright, "statements of a decision on fact or policy, authorized by the President, must be accepted by foreign nations as the will of the United States."²⁸ Therefore, the Queen saw these conclusions by the President as representing the "will of the United States," and according Oppenheim, Willis, who was the U.S. envoy accredited to the Hawaiian Kingdom, represented "his home State in the totality of its international relations," and that he was "the mouthpiece of the head of his home State and its Foreign Secretary, as regards communications to be made to the State to which he is accredited."²⁹

The President's investigation also concluded that members of the provisional government and their supporters committed the crime of treason and therefore subject to the pains and penalties of treason under Hawaiian law. On this note, the Queen was then asked by Willis, "[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have

²⁴ Exhibit A, 464.

²⁵ Exhibit B, 1242.

²⁶ *Id.*

²⁷ *Id.*, 457.

²⁸ Quincy Wright, *The Control of American Foreign Relations* (New York: The Macmillan Company, 1922), 22.

²⁹ Oppenheim, *International Law* (3rd ed), 556.



been instrumental in the overthrow of your government?”³⁰ The Queen refused to grant amnesty and referenced Chapter VI, section 9 of the Penal Code, which states, “[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.” When asked again if she would reconsider, she responded, “[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”³¹ In the government transcripts of this meeting, it states that the Queen called for beheading as punishment, but the Queen adamantly denied making such a statement. She later explained that beheading “is a form of punishment which has never been used in the Hawaiian Islands, either before or since the coming of foreigners.”³²

In a follow-up dispatch to Willis, Gresham adamantly stated, “You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration.”³³ In another communication on December 3rd 1893, Gresham directed Willis to continue to negotiate with the Queen, and should she “refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf.”³⁴ Gresham acknowledged that the President had a duty to restore the constitutional government of the Islands, but it was dependent upon an unqualified agreement of the Queen to assume all administrative obligations incurred by the Provisional Government, and to grant full amnesty to those individuals instrumental in setting up or supporting the Provisional Government. He stated “The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other.”³⁵ Gresham also stated “Should the Queen ask whether, if she accedes to conditions, active steps will be taken by the United States to effect her restoration, or to maintain her authority thereafter, you will say that the President can not use force without the authority of Congress.”³⁶

³⁰ Executive Documents, 1242.

³¹ *Id.*

³² Lili'uokalani, *Hawai'i's Story by Hawai'i's Queen* (Rutland: Charles E. Tuttle Co., Inc., 1964), 247.

³³ Senate Executive Document no. 13, Fifty-third Congress, second session, *Message from the President of the United States on the Hawaiian Question* (December 18th 1893), 1191.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*, 1192.



Second Executive Agreement—Agreement of restoration

On December 18th 1893, Willis was notified by the Queen's assistant, Joseph Carter, that she was willing to spare their lives, not, however, their property, which, "should be confiscated to the Government, and they should not be permitted to remain in the Kingdom."³⁷ But later that day, the Queen sent a communication to Willis. She stated,

Since I had the interview with you this morning I have given the most careful and conscientious thought as to my duty, and I now of my own free will give my conclusions.

I must not feel vengeful to any of my people. If I am restored by the United States I must forget myself and remember only my dear people and my country. I must forgive and forget the past, permitting no proscription or punishment of anyone, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.

Asking you to bear to the President and the Government he represents a message of gratitude from me and from my people, and promising, with God's grace, to prove worthy of the confidence and friendship of your people."³⁸

An agreement between the two Heads of State had finally been made for settlement of the international dispute called the *Restoration Agreement*. Coincident with the agreement was the temporary and conditional assignment of executive power by the Queen to the President of the United States, and that the assignment and agreement to restore the Hawaiian government "did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate."³⁹ Attached to the communication was the following pledge that was dispatched by Willis to Gresham on December 20th 1893.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the

³⁷ Exhibit B, 1267.

³⁸ *Id.*, 1269.

³⁹ *U.S. v. Belmont*, 301 U.S. 324, 330 (1937).



constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.⁴⁰

On the same day the Queen accepted the President's conditions of restoration on December 18th 1893, the President delivered a message to Congress apprising them of the conclusion of his investigation and the pursuit of settlement with the Queen. He was not aware that the Queen accepted the conditions. This was clarified in a correspondence with Willis from Gresham on January 12th 1894, whereby the Queen's acceptance of the President's offer was acknowledged, and on the following day, these diplomatic correspondences were forwarded to the Congress by message of the President on January 13th 1893. Gresham stated,

On the 18th ultimo the President sent a special message to Congress communicating copies of the Mr. Blount's reports and the instructions given to him and you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens' No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her, and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.

⁴⁰ *Id.*



Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President's decision.

The matter now being in the hands of Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will, until further notice, consider your special instructions upon this subject have been fully complied with.⁴¹

Supremacy Clause, U.S. Constitution

Since the United States is a Federal government, States within the Federal Union are subject to the supremacy of Federal laws and treaties, in particular, executive agreements. Article VI, clause 2, of the U.S. constitution, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." This provision of the U.S. constitution is known as the *Supremacy clause* that binds every State of the federal union to faithfully observe. In *United States v. Belmont* (1937),⁴² the U.S. Supreme Court affirmed that executive agreements entered into between the President and a sovereign nation does not require ratification from the U.S. Senate to have the force and effect of a treaty; and executive agreements bind successor Presidents for their faithful execution. Other landmark cases on executive agreements are *United States v. Pink* (1942)⁴³ and *American Insurance Association v. Garamendi* (2003).⁴⁴ In *Garamendi*, the Court stated, "Specifically, the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress."⁴⁵ According to Justice Douglas, *U.S. v. Pink* (1942), executive agreements "must be read not as self-contained

⁴¹ Exhibit B, 1283-1284.

⁴² *United States v. Belmont*, 301 U. S. 324 (1937).

⁴³ *United States v. Pink*, 315 U.S. 203 (1942).

⁴⁴ *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

⁴⁵ *Id.*, 397.



technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy.”⁴⁶

The U.S. Supreme Court has held that under no circumstances could state law be found to legally supersede an agreement between the national government and a foreign country. The external powers of the federal government could be exercised without regard to the laws of any state within the union. In *Belmont*, the Court also stated, “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies,”⁴⁷ and “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”⁴⁸ In *United States v. Pink* (1942), the Court reiterated, “It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.”⁴⁹ Both *Belmont* and *Pink* were reinforced by *American Insurance Association v. Garamendi* (2003), where the Court reiterated, that “valid executive agreements are fit to preempt state law, just as treaties are,”⁵⁰ and that the preemptive power of an executive agreement derives from “the Constitution’s allocation of the foreign relations power to the National Government.”⁵¹ All three cases affirm that the *Lili`uokalani assignment* preempts all laws and policies of the State of Hawai`i. In *Edgar v. Mite Corporation* (1982), Justice White ruled, “A state statute is void to the extent that it actually conflicts with a valid federal statute; and “[a] conflict will be found ‘where compliance with both federal and state regulations is a physical impossibility.’”⁵²

⁴⁶ *U.S. v. Pink*, 315 U.S. 203, 241 (1942).

⁴⁷ *United States v. Belmont*, 301 U. S. 324, 330 (1937).

⁴⁸ *Id.*

⁴⁹ *United States v. Pink*, 315 U.S. 203, 230 (1942).

⁵⁰ *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

⁵¹ *Id.*

⁵² *Edgar v. Mite Corporation*, 457 U.S. 624, 631 (1982).



United States' Violation of the Executive Agreements

Since 1893, the United States government has violated the terms of its obligations under these executive agreements and in 1898 unilaterally annexed the Hawaiian Kingdom by enacting a congressional joint resolution justified as a military necessity during the Spanish-American War, and thereafter occupied Hawai'i. According to Professor Marek, "the legal order of the occupant is...strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness [e.g. no government]. ...[Occupation] is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned."⁵³ Referring to the United States' occupation of the Hawaiian Kingdom in his law journal article, Professor Dumberry states:

the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.⁵⁴

By virtue of the temporary and conditional grant of Hawaiian executive power, the U.S. was obligated to restore the Hawaiian Kingdom government, but instead illegally occupied the Hawaiian Kingdom for military purposes, and has remained in the Hawaiian Islands ever since. The failure to administer Hawaiian Kingdom law under the *Lili'uokalani Assignment* and then to reinstate the Hawaiian government under the *Restoration agreement* constitutes a breach of an international obligation, as defined by the *Responsibility of States for Internationally Wrongful Acts*,⁵⁵ and the breach of this international obligation by the U.S. has "a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation."⁵⁶ The extended lapse of time has not affected in the least the international obligation of the U.S. under the both executive agreements; despite over a century of non-compliance and prolonged occupation, and according to Wright, the

⁵³ KRZYSTYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* (1968), 102.

⁵⁴ Patrick Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law*, 2(1) *Chinese Journal of International Law* 655-684 (2002).

⁵⁵ United Nations, "Responsibility of States for International Wrongful Acts" (2001), Article 12.

⁵⁶ *Id.*, Article 14(2).



President binds “himself and his successors in office by executive agreements.”⁵⁷ More importantly, the U.S. “may not rely on the provisions of its internal law as justification for failure to comply with its obligation.”⁵⁸

Since 1900, the United States Congress has enacted additional legislation establishing a government for the Territory of Hawai‘i,⁵⁹ and in 1959 transformed the Territory of Hawai‘i into the State of Hawai‘i.⁶⁰ According to Born, “American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction.”⁶¹ In *Rose v. Himely* (1807), the Court illustrated this view by asserting, “that the legislation of every country is territorial.”⁶² In *The Apollon* (1824), the Court stated that the “laws of no nation can justly extend beyond its own territory”⁶³ for it would be “at variance with the independence and sovereignty of foreign nations,”⁶⁴ and in *U.S. v. Belmont* (1937), Justice Sutherland resounded, “our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens.”⁶⁵ Consistent with this view of non-extraterritoriality of legislation, *acting* Assistant Attorney General Douglas Kmiec opined “It is...unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”⁶⁶

Because U.S. legislation has no extraterritorial force and effect, except over U.S. citizens, it cannot be considered to have extinguished the Hawaiian Kingdom as a state, and the executive agreements remain binding on the United States under both international law and Federal law. §207(a), Restatement (Third) Foreign Relations Law of the United States, provides that “A state acts through its government, but the state is responsible for carrying out its obligation under international law regardless of the manner in which its constitution and laws allocate the responsibilities and functions of government, or of any constitutional or other internal rules or

⁵⁷ QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 235 (1922).

⁵⁸ Responsibility of States, Article 31(1).

⁵⁹ 31 U.S. Stat. 141 (1900).

⁶⁰ 73 U.S. Stat. 4 (1959).

⁶¹ GARY BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 493 (3rd ed. 1996).

⁶² *Rose v. Himely*, 8 U.S. 241, 279 (1807).

⁶³ *The Apollon*, 22 U.S. 362, 370 (1824).

⁶⁴ *Id.*

⁶⁵ *U.S. v. Belmont*, 301 U.S. 324, 332 (1937).

⁶⁶ Douglas Kmiec, *Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, 12 Op. Off. Legal Counsel 238-263, 252 (1988).