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IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT  
STATE OF HAWAI'I

JOHN DOE,  
Plaintiff,

vs.

COUNTY OF HAWAI'I,  
Defendant.

CIVIL NO. 14-1-0094  
(Hilo Division)

PLAINTIFF'S MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION;  
MEMORANDUM IN SUPPORT OF  
MOTION; DECLARATION OF ROSS R.  
SIBUCAO; DECLARATION OF  
MARGERY S. BRONSTER;  
DECLARATION OF REX Y.  
FUJICHAKU; DECLARATION OF JOHN  
DOE; EXHIBITS 1-10; PROPOSED  
TEMPORARY RESTRAINING ORDER;  
NOTICE OF HEARING MOTION AND  
CERTIFICATE OF SERVICE

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY INJUNCTION**

Because of the imminent threat of vandalism and other harm if confidential, private, and proprietary information is disclosed to the public, Plaintiff John Doe, by and through his counsel, moves this Court for a temporary restraining order and preliminary injunction staying the March 5, 2014 deadline for individuals who grow genetically-engineered ("GE") crops to register with

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THE THIRD CIRCUIT  
STATE OF HAWAII

the County of Hawai'i (the "County") pursuant to County Ordinance 13-121 ("Bill 113").

Plaintiff also requests that the orders enjoin the County from: (1) enforcing the registration provisions of Bill 113 against Plaintiff and any other individual who is required to register with the County pursuant to Bill 113 until the Court resolves Plaintiff's challenge to the disclosure provision of Bill 113; and (2) releasing any registration information to a third party that the County has already received from individuals who have registered with the County in accordance with Bill 113 until the Court resolves Plaintiff's challenge to the disclosure provision of Bill 113.

Bill 113 requires County residents who grow GE crops to register with the County by March 5, 2014 or face a fine of up to \$1,000 per day. As part of the registration process, these individuals must disclose to the County specific and detailed information about the location of their GE crops and their cultivation and development techniques. Plaintiff is one of these County GE crop growers who must register with the County by March 5, 2014.

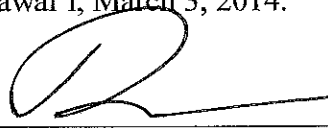
If Plaintiff registers with the County and the County discloses Plaintiff's information to a third party in response to a request submitted under the Uniform Information Practices Act, Plaintiff will be exposed to a heightened risk of vandalism, harassment, and misappropriation of his trade secrets. Despite these risks, Bill 113 inexplicably and impermissibly *limits* Plaintiff's rights under State law to protect this information from disclosure.

Plaintiff's Complaint alleges that the County's inadequate disclosure protections violate State law as well as the Constitution of Hawai'i. Plaintiff seeks a temporary restraining order and preliminary injunction to stay the March 5, 2014 registration deadline because, if Plaintiff is forced to register by March 5<sup>th</sup>, Plaintiff will not be able to claw back the information he submits to the County. Accordingly, this information will remain in the County's files and will be

subject to disclosure under the Uniform Information Practices Act. Thus, Plaintiff will suffer irreparable harm if he must submit this information to the County before the County has implemented protocols to ensure that his sensitive information will remain confidential. Plaintiff also requests that the temporary restraining order and preliminary injunction enjoin the County from disclosing any registration information that it has already received from any individual who has already registered.

This Motion is made pursuant to Rule 65 of the Hawai'i Rules of Civil Procedure, the Memorandum in Support, Declarations of Plaintiff John Doe, Ross Sibucan, and Margery S. Bronster, exhibits, and record herein.

DATED: Honolulu, Hawai'i, March 3, 2014.



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MARGERY S. BRONSTER  
REX Y. FUJICHAKU  
Attorneys for Plaintiff

## **TABLE OF CONTENTS**

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND.....	3
A. Background on Genetically Engineered Crops in the County .....	3
B. The County's Passage of Bill 113.....	4
C. The County's Implementation of Bill 113's Registration and Disclosure Provisions.....	6
III. LEGAL ANALYSIS.....	7
A. Standard For Temporary Restraining Order and Preliminary Injunction .....	7
B. Plaintiff Is Likely To Prevail On The Merits .....	7
1. Bill 113 Is Preempted by Hawai'i Uniform Information Practices Act and the Hawai'i Uniform Trade Secrets Act .....	8
a. Bill 113 is Preempted by the Uniform Information Practices Act.....	8
b. Bill 113 is Preempted by the Hawai'i Uniform Trade Secrets Act .....	10
2. Bill 113 Violates Plaintiff's Constitutional Right to Privacy Under Article I, Section 6 of the Hawai'i Constitution .....	13
3. Bill 113 Violates Plaintiff's Constitutional Right to Procedural Due Process Under Article I, Section 5 of the Constitution .....	14
a. The County's failure to protect Plaintiff's sensitive information is a deprivation of Plaintiff's property interest in his GE crops.....	14
b. The County's Failure To Provide For Any Procedures To Notify County GE Growers When A Third Party Requests Their Sensitive Information Or That The Information Is About To Be Disclosed Violates The Due Process Clause Of The Hawai'i Constitution .....	15

4.	The County's Implementation of the Registration Process for Bill 113 Violated the Hawai'i Administrative Procedure Act and the Small Business Regulatory Flexibility Act .....	16
C.	Irreparable Harm Will Result Without an Temporary Restraining Order .....	18
D.	The Public Interest In This Case Overwhelmingly Favors The Issuance Of A Temporary Restraining Order .....	19
IV.	CONCLUSION.....	19

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE NO.</u>
<i>Brown v. Thompson</i> , 91 Haw. 1, 979 P.2d 586 (1999) .....	14
<i>Center for Food Safety v. Johanns</i> , 310 Fed. Appx. 964 (9th Cir. 2009) .....	12
<i>Cf. Nakano v. Matayoshi</i> , 68 Haw. 140, 706 P.2d 814 (1985) .....	13
<i>Life of the Land v. Ariyoshi</i> , 59 Haw. 156, 577 P.2d 1116 (1978) .....	7
<i>Minton v. Quintal</i> , 317 P.3d 1 (Haw. 2013) .....	15
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)) .....	15
<i>Penn v. Transportation Lease Hawai'i Ltd.</i> , 2 Haw. App. 272, 630 P.2d 646 (1981) .....	8
<i>Richardson v. City &amp; County of Honolulu</i> , 76 Hawai'i 46, 868 P.2d 1193 (1994) .....	8
<i>State ex rel. Anzai v. Gannett Pac. Corp.</i> , 99 F. Supp. 2d 1241, 1248 (D. Haw. 1999) (citation omitted) .....	7
<i>State v. Bani</i> , 97 Haw. 285, 36 P.3d 1255 (2001) .....	15
<i>State v. Guidry</i> , 105 Haw. 222, 96 P.3d 242 (2004) .....	14
<i>State v. Mallan</i> , 86 Haw. 440, 950 P.2d 178, (1998) .....	13
<i>The 7's Enterprises, Inc., v. Del Rosario</i> , 111 Hawai'i 484, 143 P.3d 23 (2006) .....	18
<i>Wahba, LLC v. USRP (Don), LLC</i> , 106 Hawai'i 466, 106 P.3d 1109 (2005) .....	7

## **STATUTES**

H.R.S. § 91-3 .....	16, 17
H.R.S. § 91-1(4).....	16
H.R.S. § 201M-1 .....	17
H.R.S. § 201M-2.....	17
H.R.S. § 201M-2(b) .....	17
H.R.S. Chapter 92F.....	5
H.R.S. Chapter 92F-11.....	8
H.R.S. Chapter 92F-11(a) .....	8
H.R.S. Chapter 92F-13.....	8, 9, 10
H.R.S. Chapter 482B-2 .....	10
H.R.S. Chapter 482B-3 .....	10

## **RULES**

Haw. R. Civ. P. Rule 65 .....	7
-------------------------------	---

## **OTHERS**

Hawai'i Const. Art.I, § 5.....	14, 16
Hawai'i Const. Art.I, § 6.....	13, 19
Hawaii County Code §14-129 .....	5, 11
Hawaii County Code §14-130 .....	4
Hawaii County Code §14-131 .....	4
Hawaii County Code §14-133 .....	5, 11

Hawaii County Code §14-134 .....	6
OIP Op. Ltr. No. 92-08 .....	9
OIP Op. Ltr. No. 96-02 .....	8
OIP Op. Ltr. No. 01-02 .....	8
OIP Op. Ltr. No. 10-03 .....	13



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STATE OF HAWAI'I

JOHN DOE,

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vs.

COUNTY OF HAWAI'I,

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CIVIL NO. \_\_\_\_\_  
(Hilo Division)

MEMORANDUM IN SUPPORT OF  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

Genetically-engineered ("GE") crops have been grown widely throughout the United States for over 25 years. More than 90% of all soybeans, feed corn, and cotton crops planted in the United States in 2013 were GE varieties. No GE food crop reaches the market without first undergoing detailed federal review—by the U.S. Food and Drug Administration ("FDA"), the U.S. Department of Agriculture ("USDA") and the Environmental Protection Agency ("EPA"). Like many other farmers in this County, Plaintiff John Doe cultivates for commercial purposes a GE variety of papaya genetically engineered for resistance to the ringspot virus. Ringspot decimated the County's papaya industry in the 1990s, and this GE trait is now essential to papaya growers. Indeed, approximately 85% of papaya grown in the County is of a GE variety.

In recent years, a subset of Hawai'i County farmers—those who grow GE crops<sup>1</sup>—have been the target of a highly-disturbing pattern of vandalism, intimidation, and extremism. The perpetrators—none of whom have been apprehended—have destroyed hundreds of thousands of

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<sup>1</sup> GE crops are also often referred to as genetically modified organisms ("GMOs"). Because Bill 113 used the term "genetically engineered," Plaintiff shall use the term GE in this memorandum of law.

dollars of GE crops and engaged in a campaign of harassment that has included posting signs in the County labeling GE crop growers as “poisoners.” Plaintiff is one of these GE crop growers who have been the target of this campaign.

On December 5, 2013, the County of Hawai‘i (the “County”) capitulated to anti-GE sentiments by enacting Bill 113, a law that specifically targets GE crop growers.<sup>2</sup> Bill 113 prohibits County farmers from growing most varieties of GE crops. In addition, Bill 113 requires all County GE crop growers, including Plaintiff, to register with the County **by March 5, 2014** or face a penalty of up to \$1,000 a day. As part of this registration process, GE crop growers are required to disclose to the County specific and detailed information about the location of their GE crops and their growing methodology.

This registration information is highly personal and detailed; it provides a roadmap for extremists who wish to target GE growers, identifying exactly who to target and where to target them. Further, Bill 113 inexplicably and impermissibly limits GE crop growers’ rights under State law and the Hawai‘i Constitution to maintain the confidentiality of the highly-sensitive information that they are now required to disclose to the County. The County has also violated the Due Process Clause of the Hawai‘i Constitution by failing to implement any procedures to provide notice to growers before publicly releasing their information so that growers can attempt to stop the County or take precautionary measures to protect themselves and their businesses. And the County violated its obligations under the Hawai‘i Administrative Procedure Act and Small Business Regulatory Flexibility Act by failing to provide adequate notice of its implementing rules for Bill 113’s registration process and by failing to adequately examine how the requirements will affect small businesses.

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<sup>2</sup> Bill 113 as enacted is attached as Exhibit 8. *See* Declaration of Margery S. Bronster at ¶ 3. Bill 113 was enacted as Ordinance No. 13-121. Plaintiff shall refer to this ordinance as “Bill 113” in this memorandum of law.

In short, Bill 113 puts innocent County residents, including Plaintiff, directly in harm's way. And because of the looming March 5<sup>th</sup> deadline to register, this harm is imminent. Accordingly, Plaintiff seeks entry of a temporary restraining order and preliminary injunction immediately staying the registration requirements in Bill 113, enjoining the County from enforcing the March 5, 2014 registration deadline, and enjoining the County from releasing any information that it has already received from those individuals who have registered. Entry of these orders will ensure that the status quo remains in place until this Court can resolve the legal issues with the public disclosure provision of Bill 113, as set forth in Plaintiff's Complaint.

## **II. FACTUAL BACKGROUND**

### **A. Background on Genetically Engineered Crops in the County.**

The availability of GE crops has been vitally important to the County of Hawai'i. Indeed, the development of the Rainbow variety of GE papaya by researchers at the University of Hawai'i and Cornell University in the 1990s is credited with saving the County's papaya industry—one of the County's largest agricultural industries—after the industry was decimated by a particularly virulent strain of the aphid-transmitted papaya ringspot virus. Decl. of Ross Sibucan, ("Sibucan Decl.") ¶ 5. Today, the Rainbow variety of GE papaya accounts for approximately 85% of papaya grown in the County. County farmers also use GE crops, including GE corn, to increase their crop yields, control harmful weeds and insect pests, and minimize use of pesticide sprays and tillage practices. Sibucan Decl. ¶ 6.

In recent years, despite repeated findings by expert federal agencies demonstrating the safety of GE crops, anti-GE activism in Hawai'i (and throughout the United States) has crossed the line from spirited debate to extremism, vandalism, and criminality. Acts against GE farmers have been particularly acute in this County, where vandals have destroyed hundreds of thousands

of dollars worth of GE crops. For instance, in the spring and summer of 2010, GE papaya trees were vandalized on two separate occasions, including some 8,500 young papaya trees destroyed in Kapoho. Declaration of Plaintiff John Doe, (“Doe Decl.”) ¶ 8; Sibucac Decl. ¶ 15; Exhibit 1. No one was ever held responsible. Doe Decl. ¶ 8; Sibucac Decl. ¶ 15. Then in August 2011, thousands of additional GE papaya trees were chopped down under the cover of darkness on ten acres of County farmland. Again, no one was ever charged in connection with this incident. Doe Decl. ¶ 8; Sibucac Decl. ¶ 15; Exhibit 2. And several months ago, in September 2013, vandals destroyed about 100 GE papaya trees on a Kapoho farm. Doe Decl. ¶ 8; Sibucac Decl. ¶ 15; Exhibit 3. Plaintiff is also aware of several other incidents of vandalism. Doe Decl. ¶ 8. In addition to the vandalism, GE crop growers, including Plaintiff, have been the subject of harassment and intimidation by anti-GE extremists. Doe Decl. ¶ 9.

#### **B. The County’s Passage of Bill 113.**

On December 5, 2013, the County of Hawai‘i catapulted itself into the field of GE agriculture regulation with passage of Bill 113. Bill 113 bans the open-air cultivation, propagation, and development of most GE crops and imposes a complete ban on open-air testing of new GE crops in the County. Bill 113 §3; Haw. County Code §§ 14-130 & 14-131.

The Council enacted Bill 113 even though the Council’s hearings on Bill 113 were devoid of any credible testimony or evidence showing any negative scientific, health, or environmental impacts of GE crops. Indeed, the “findings” section of Bill 113 explains that the Hawai‘i County Council found no “definitive science” showing that GE crops pose any harm to human or environmental health. Bill 113 § 1. While the legislative history of Bill 113 contains no meaningful evidence or testimony demonstrating that GE crops pose any harmful effects, the legislative history of Bill 113 does contain testimony from proponents of Bill 113 offering to assist GE papaya growers “burn” their GE papaya trees and “grow something decent” instead.

There are a variety of reasons that Bill 113 should be held invalid in its entirety. But this case concerns only Bill 113's registration/disclosure provision, which is of particularly pressing concern because of the imminent registration deadline. Bill 113 imposes an annual registration requirement on all commercial GE crop growers and anyone engaged in non-open-air testing of GE crops. As part of this registration process, the registrant must provide the County Department of Research and Development ("DRD") with the following information: (1) "the tax map key and the council district of the property or properties"; (2) "a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage"; (3) "the name of the owner of the property or properties"; (4) "the lessee or any other party in control of the genetically engineered plant or crop operation or usage"; (5) "the type of genetically modified organism or transgenic manipulation used"; (6) "the produce or products involved"; (7) "the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used"; (8) "a description of any containment procedures employed"; and (9) "relevant contact information." Bill 113 § 3, Haw. County Code § 14-129. Registrants are also required to pay an annual registration fee of \$100. *Id.*

The information submitted to the County as part of this registration process is subject to public disclosure under the Uniform Information Practices Act, Haw. Rev. Stat. Chapt. 92F. While Bill 113 provides that "information such as the name of the registrant and the exact location of the genetically engineered crops or plants *may* be withheld from the public," the DRD is authorized to do so under Bill 113 *only* "to the extent that disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information." Bill 113; Haw. County Code § 14-133 (emphasis added).

Any person who violates any provision of Bill 113 is guilty of a “violation,” and upon conviction thereof, is subject to a fine of up to \$1,000 for each “separate violation.” Bill 113 § 3, Haw. County Code § 14-134. Bill 113 defines a “separate violation” as “each and every day a violation of this article is committed, continued, or permitted for each location.” *Id.*

**C. The County’s Implementation of Bill 113’s Registration and Disclosure Provisions.**

The DRD announced its registration process for persons required to register with the County under Bill 113 on January 16, 2014 and posted that announcement on January 17, 2014. Exhibit 6. The County also released its registration form on January 17, 2014. Exhibit 7.

Neither the announcement nor the registration form make any mention of the County’s ability to shield personal, location, and other confidential information from public disclosure or provide any procedure by which a registrant could request such protection. Moreover, the County has failed to issue any formal regulations to implement the registration process. As a result, there is considerable confusion among the regulated community about the key aspects of the registration process, including how the County will protect GE crop growers’ confidential and sensitive information. Doe Decl. ¶ 14.

In light of this confusion, Plaintiff’s counsel contacted the counsel for the DRD to seek advice on the registration process. Declaration of Margery Bronster (“Bronster Decl.”) ¶ 3. The DRD’s counsel advised Plaintiff’s counsel that, if the DRD receives a request seeking a GE grower’s registration information, the DRD will attempt to withhold the information by asserting that its disclosure would frustrate the ability of the County to obtain accurate information. *Id.* ¶ 4. However, the DRD’s counsel further advised Plaintiff’s counsel that, if a requester appeals the DRD’s decision to withhold the information to a court or the State’s Office of Information Practices (“OIP”), the County cannot guarantee that a court or OIP would accept the DRD’s position. *Id.* ¶ 5. The DRD’s counsel also advised that the DRD cannot offer any guarantees

that it will notify individual GE crop growers, such as Plaintiff, if an individual requests records containing information about that grower. *Id.* ¶ 6. Finally, the County's counsel advised that, once Plaintiff submits his registration information to the County, Plaintiff will not have the opportunity to claw this information back from the County's files. *Id.* ¶ 7.

### **III. LEGAL ANALYSIS**

#### **A. Standard for Temporary Restraining Order and Preliminary Injunction.**

"A TRO is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction." *Wahba, LLC v. USRP (Don), LLC*, 106 Haw. 466, 472, 106 P.3d 1109, 1115 (2005) (brackets and citation omitted). Rule 65 of the Hawai'i Rules of Civil Procedure governs the issuance of temporary restraining orders and preliminary injunctions. H.R.C.P. 65(b). To obtain injunctive relief under Rule 65, a plaintiff must establish: (a) he is likely to prevail on the merits; (b) the balance between irreparable harm to the moving party and the hardship that the responding party may suffer favors issuance of the interlocutory judgment; and (c) to the extent that public interest is involved, the public interest supports injunction. *Life of the Land v. Ariyoshi*, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). The Court must determine whether and what action is appropriate to preserve a state of affairs such that the Court will be able to render "a meaningful decision on the merits." *Id.*

#### **B. Plaintiff Is Likely To Prevail On The Merits.**

The likelihood of prevailing on the merits is not an inherently demanding standard, but rather requires only that the plaintiff "demonstrate a fair chance of success on the merits or questions serious enough to require litigation." *State ex rel. Anzai v. Gannett Pac. Corp.*, 99 F. Supp. 2d 1241, 1248 (D. Haw. 1999) (citation omitted). Furthermore, "[t]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has

to show the likelihood of success on the merits.” *Penn v. Transp. Lease Haw. Ltd.*, 2 Haw. App. 272, 276, 630 P.2d 646, 650-51 (1981). Here, each of Plaintiff’s six claims will succeed.

**1. Bill 113 Is Preempted by the Hawai‘i Uniform Information Practices Act and the Hawai‘i Uniform Trade Secrets Act.**

Under Hawai‘i law, a county ordinance will be preempted by State law “if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) if it conflicts with state law.” *Richardson v. City & Cnty. of Honolulu*, 76 Haw. 46, 62, 868 P.2d 1193, 1209 (1994). Bill 113 is preempted by two State laws: (a) the Uniform Information Practices Act; and (b) the Uniform Trade Secrets Act.

**a. Bill 113 is Preempted by the Uniform Information Practices Act.**

The Uniform Information Practices Act (“UIPA”) was intended by the State legislature to establish uniform information practices for all State and county agencies. *See* OIP Op. Ltr. No. 96-2 (July 16, 1996) (“[T]he current confusion and conflict which surround existing records laws are plainly unacceptable.” (quoting H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 917 (1988))). For this reason, the Office of Information Practices (“OIP”) of the State of Hawai‘i—the agency tasked with implementing UIPA—has opined that counties may not enact ordinances that are inconsistent with the uniform information practices set forth in UIPA. *See* OIP Op. Ltr. No. 01-02 at 2 (Apr. 12, 2001) (opining that local “ordinance is only effective to the extent that it is consistent with the UIPA”).

Section 92F-11 of UIPA provides that, as a general matter, “[a]ll government records are open to public inspection unless access is restricted or closed by law.” Haw. Rev. Stat. § 92F-11(a). Section 92F-13 provides exceptions to this general rule. *Id.* § 92F-13. Specifically, under section 92F-13, an agency shall not be required to disclose public records that fall under any of



the five categories outlined in that section. *Id.* The five categories are (1) “records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy”; (2) “[r]ecords pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable”; (3) “records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function”; (4) “records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure”; and (5) “[i]nchoate and draft working papers of legislative committees . . .” *Id.*

As described above, Bill 113 requires GE crop growers to disclose to the County a significant amount of information about their activities. This information falls within the scope of UIPA and is therefore subject to public disclosure unless it falls within one of the exceptions set forth in section 92F-13.

Contrary to UIPA, Bill 113 provides that the *only* reason the DRD can withhold “information such as the name of the registrant and the exact location of the genetically engineered crops or plants” from public disclosure is if the “disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information.” Thus, Bill 113 precludes the County from withholding GE crop growers’ sensitive information on the basis of four of the five exceptions set forth in section 92F-13. This includes two exceptions that apply to this information. First, the exception for records that, if disclosed, “would constitute a clearly unwarranted invasion of personal privacy” applies because some of the registration information identifies the growers and the location of their crops. *See* OIP Op. Ltr. No. 92-08 at 5-6 (opining that disclosure of names and residential addresses of private individuals generally constitutes a clearly unwarranted invasion of personal privacy). Second,

the exception for “records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure” likely applies because, as explained below, much of the information is protected under another State law, the Uniform Trade Secrets Act.<sup>3</sup>

In addition, Bill 113 purports to give the County *discretion* to withhold records if it would frustrate a legitimate government function. This is inconsistent with UIPA, which *requires* agencies to withhold records that fall within the exceptions set forth in Section 92F-13.

**b. Bill 113 is Preempted by the Hawai‘i Uniform Trade Secrets Act.**

The Hawai‘i Uniform Trade Secrets Act (“UTSA”) creates a state statutory scheme that prohibits any “person”—which the statute defines to include government agencies—from misappropriating trade secrets. Haw. Rev. Stat. § 482B-2.

The UTSA defines a trade secret as “information, including a formula, pattern, compilation, program device, method, technique, or process that: (1) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” *Id.* The statute defines misappropriation to include the “[d]isclosure . . . of a trade secret of another without express or implied consent by a person who . . . [had] . . . a duty to maintain its secrecy or limit its use.” *Id.* And under the UTSA, a court may “[i]n appropriate circumstances,” issue an order compelling “affirmative acts to protect a trade secret” from “misappropriation,” including issuing an injunction. *Id.* § 482B-3.

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<sup>3</sup> As noted, Bill 113 provides that the County can withhold “information such as name of the registrant and the exact location of the genetically engineered crops.” This language suggests that the County may not withhold any other registration information. To the extent that the County interprets this language in that way, the County’s interpretation is inconsistent with—and in violation of—the Uniform Information Practices Act.

Bill 113 requires registrants to disclose to the County precise information about their cultivation and development practices, including: “a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage”; “the type of genetically modified organism or transgenic manipulation used”; “the produce or products involved”; “the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used”; and “a description of any containment procedures employed.” Bill 113 § 3, Haw. County Code §§ 14-129 & 14-133. This information is trade secret information under UTSA because Plaintiff derives independent economic value from his cultivation and development techniques—including his sources of seed and choices of pesticides—which are not generally known to, and not readily ascertainable by, other persons who can obtain economic value from disclosure or use of this information, including domestic and foreign competitors. Doe Decl. ¶¶ 11-12. Further, this information will enable Plaintiff’s competitors to understand important information about Plaintiff’s business strategies, such as when he is downsizing or expanding, which can be used to Plaintiff’s competitors’ advantage. Doe Decl. ¶ 13. The County’s public disclosure of Plaintiff’s trade secret information would constitute a misappropriation of Plaintiff’s trade secret information by agents of the County who have a duty to maintain the secrecy of this information.

If the County discloses Plaintiff’s registration information, Plaintiff will sustain significant and irreparable harm from this misappropriation. First, third parties, including competitors, will have the ability to discover Plaintiff’s cultivation and development techniques, which is valuable trade secret information. Doe Decl. ¶¶ 11-12. Second, the public disclosure of the type, location, amount, and methods of testing and production of Plaintiff’s GE crops will

increase the risk of vandalism. Doe Decl. ¶¶ 8-10. As described above, this is a serious threat in the County where there is a history of vandalism of GE crops and plants and threats and intimidation of those who grow them. Thus, the potential destruction of Plaintiff's crops—which contain important trade secret information—is a likely result of the County's potential failure to safeguard Plaintiff's registration information.

Plaintiff's concerns about the risks of vandalism and misappropriation of trade secret are validated by the fact that numerous authorities have recognized the risks associated with the public disclosure of information related to GE crops. These authorities include the Circuit Court for the First Circuit of Hawai'i, which issued an opinion in 2003 denying a third party's request for all records from the Hawai'i Department of Agriculture related to ongoing field tests of GE crops in Hawai'i. Ex. 10. The court held that there was a "plethora of evidence" that these records contain confidential business information and trade secret information. *Id.* at 6-7. These authorities also include APHIS, which issued a policy directive in 2000 allowing GE crop-permit applicants to prevent the public disclosure of information related to the location of field trials of GE crops (Ex.9, and the United States Court of Appeals for the Ninth Circuit, which issued an opinion in 2009 affirming a lower court's decision to seal the location of Hawai'i field trials of GE crops at issue in a lawsuit due to the risk of vandalism and possible theft of trade secrets. *See Center for Food Safety v. Johanns*, 310 Fed. Appx. 964 (9th Cir. 2009).

Despite the serious risks associated with the potential disclosure of Plaintiff's trade secret information and the fact that this information is protected under UTSA, Bill 113 gives the County complete discretion to publicly disclose Plaintiff's trade secret information. In other words, Bill 113 authorizes the County to disclose information that the County would be prohibited from disclosing under UTSA.

**2. Bill 113 Violates Plaintiff's Constitutional Right to Privacy under Article I, Section 6 of the Hawai'i Constitution.**

Article I, section 6 of the Hawai'i Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." This "right of privacy includes the right of an individual to tell the world to 'mind your own business.'" *State v. Mallan*, 86 Haw. 440, 485, 950 P.2d 178, 223 (1998) (quoting Constitutional Convention Cmte. on Bill of Rights, Suffrage and Elections Report No. 69 (1978) (hereinafter "Const. Cmte. Report No. 69")). One of the reasons that Hawai'i enshrined a right to privacy in its Constitution was to address concerns related to the government improperly disclosing information that it receives from the public "for illegitimate purposes or revealing it to the public when no legitimate public interest is involved." *Id.* (quoting Const. Cmte. Report No. 69)). For these reasons, OIP has recognized that county ordinances may not authorize the disclosure of records containing information implicating a person's constitutional right of privacy. *See* OIP Op. Ltr. No. 10-03 at 3 n.2 (Oct. 5, 2010) ("Charter provisions or county ordinances that require greater disclosure than is required by the UIPA may run afoul of the UIPA or the Constitution by requiring disclosure of records (or information contained therein) that fall within the constitutional right to privacy.").

The registration information that Plaintiff and other County GE growers are required to submit to the County implicates their constitutional right of privacy because this information, if publicly disclosed, will subject Plaintiff to violence, vandalism, public ridicule, and significant financial harm. *Cf. Nakano v. Matayoshi*, 68 Haw. 140, 148, 706 P.2d 814, 819 (1985) ("[T]he people of Hawaii have a legitimate expectation of privacy where their personal financial affairs are concerned."). Under the plain terms of Bill 113, however, the County cannot withhold registration information from public disclosure on the ground that such information implicates a

registrant's constitutional right of privacy. Instead, Bill 113 authorizes the County to withhold this information *only* if the "disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information."

**3. Bill 113 Violates Plaintiff's Constitutional Right to Procedural Due Process Under Article I, Section 5 of the Constitution.**

Under Article I, section 5 of the Constitution of Hawai'i, "[n]o person shall be deprived of life, liberty or property without due process of law." Plaintiff's Complaint asserts a "procedural due process" claim. Hawai'i courts conduct a two-step inquiry to analyze procedural due process claims under the Hawai'i Constitution. *State v. Guidry*, 105 Haw. 222, 227, 96 P.3d 242, 247 (2004). First, courts analyze whether the State has deprived the plaintiff of "a constitutionally protected 'liberty' or 'property' interest." *Id.* Second, courts "determine what specific procedures are required to satisfy due process." *Id.* (internal quotations marks and citation omitted).

As explained in part (a) below, Plaintiff is likely to prevail on the first prong—that he has suffered a deprivation of a property interest—because the County's failure to protect his confidential information will deprive him of his tangible property. And as explained in part (b) below, Plaintiff is likely to prevail on the second prong because the County has failed to provide the most "elementary and fundamental" requirements of due process: notice and an opportunity to present objections.

**a. The County's failure to protect Plaintiff's sensitive information is a deprivation of Plaintiff's property interest in his GE crops.**

Tangible property is "unquestionably 'property' pursuant to . . . article I, section 5 of the Hawai'i Constitution." *See Brown v. Thompson*, 91 Haw. 1, 979 P.2d 586, 595-96 (1999) (stating that a "vessel itself" is property). Thus, a governmental action that results in the deprivation of this property will satisfy the first prong of the Due Process Clause analysis.

Accordingly, the County's disclosure of Plaintiff's registration information would likely result in the deprivation—indeed, the complete destruction—of Plaintiff's tangible property, namely his GE crops. As set forth above, given the recent history of GE crop vandalism in the County, it is apparent that the release of Plaintiff's confidential business information will result in the destruction of his GE crops. Therefore, the County's failure to safeguard this highly-sensitive information constitutes a deprivation of Plaintiff's protected property interest.

**b. The County's failure to provide for any procedures to notify County GE growers when a third party requests their sensitive information or that the information is about to be disclosed violates the Due Process Clause of the Hawai'i Constitution.**

“Once it is determined that due process applies, the question remains what process is due.” *Minton*, 317 P.3d 1, 22 (2013) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). “At its core, procedural due process of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant liberty interest.” *State v. Bani*, 97 Haw. 285, 293, 36 P.3d 1255, 1263 (2001). Thus, the Hawai'i Supreme Court “has held that an ‘elementary and fundamental requirement of due process’ is ‘notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Minton*, 317 at 23 (quoting *In re Herrick*, 82 Haw. 329, 343, 922 P.2d 942, 956 (1996)).

Bill 113's procedures for notifying GE crop growers of third-party requests for registration information submitted by those growers does not satisfy the most “elementary and fundamental requirement of due process” because *there are no procedures*. Indeed, as described above, the County has advised Plaintiff's counsel that it has no protocol in place to ensure that a GE crop grower, such as Plaintiff, receives notice when a third party seeks a GE crop grower's registration information, let alone “notice reasonably calculated . . . to afford [him] an

opportunity to present [his] objections.” Moreover, there is no procedure to provide Plaintiff with notice of, and an opportunity to challenge, the County’s disclosure.

In short, if Plaintiff submits his registration information to the County, the County may well disclose Plaintiff’s sensitive and proprietary information to third parties, which could result in the destruction of Plaintiff’s property. The County will inflict this harm on Plaintiff without providing Plaintiff with notice or an opportunity to object to the County’s decision. Because the County has failed to enact any protocols to provide even the most “elementary and fundamental” requirements of due process in Bill 113 itself or as part of its implementation of Bill 113, the County is in violation of Article I, section 5 of the Hawai‘i Constitution.

**4. The County’s Implementation of the Registration Process for Bill 113 Violated the Hawai‘i Administrative Procedure Act and the Small Business Regulatory Flexibility Act.**

Plaintiff’s fifth and sixth causes of action allege that the DRD—the agency tasked with implementing the registration requirements of Bill 113—violated its procedural requirements under the Hawai‘i Administrative Procedure Act (“APA”) and the Hawai‘i Small Business Regulatory Flexibility Act (“SBREFA”). Plaintiff is also likely to prevail on the merits of these claims.

Under the Hawai‘i APA, all agencies—including county agencies such as the DRD—must provide notice to the public of any proposed “rules” at least thirty days before adopting the rule. Haw. Rev. Stat. § 91-3. A “rule” is defined as “each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.” *Id.* § 91-1(4). When an agency proposes a new “rule,” the agency’s notice must, among other things, describe the proposed rule and provide all interested parties with instructions on how to submit their



views on the proposed rule. *Id.* § 91-3. In addition, before adopting the rule, the agency must “fully consider” all comments from the public that it receives. *Id.*

On January 16, 2014, the DRD announced its rules for administering the registration process under Bill 113. On January 17, 2014, the DRD released its registration form. *See* Exhibit 7. These actions constitute a “rule” because these actions “implement . . . law or policy,” and “describe[] procedure[] or practice requirements” of the DRD. Accordingly, the DRD was required to comply with the notice-and-comment rulemaking procedures described above. The DRD, however, failed to comply with any of its obligations, including issuing the requisite notice, providing for a 30-day comment period, or taking commenters’ views into consideration.

Similarly, the DRD’s implementation of Bill 113 violated the Hawai‘i SBREFA. The Hawai‘i SBREFA requires that, as part of the notice-and-comment rulemaking process, agencies must study the impact of their proposed “rules” on small businesses. Haw. Rev. Stat. § 201M-2. If an agency makes an initial determination that its rule will affect small businesses, the agency must then prepare a small business impact statement analyzing the affects of its proposed rules on small businesses, *Id.* § 201M-2(b). The DRD did not comply with any of its obligations under Hawai‘i SBREFA. Indeed, the DRD did not even undertake the requisite initial study to determine whether its implementation of Bill 113’s registration requirements would affect small businesses despite the fact that Bill 113’s registration requirements apply exclusively to GE farmers, all of whom run “small businesses,” as defined under the statute. *See* Haw. Rev. Stat. § 201M-1 (defining “small business” as a “for-profit enterprise consisting of fewer than one hundred full-time or part-time employees”).

### **C. Irreparable Harm Will Result Without a Temporary Restraining Order.**

An injury is irreparable where “it is of such a character that a fair and reasonable redress may not be had in a court of law.” *The 7’s Enterprises, Inc., v. Del Rosario*, 111 Haw. 484, 496, 143 P.3d 23, 35 (2006) (internal quotation marks omitted).

If an injunction does not issue, Plaintiff and other County GE crop growers will sustain irreparable harm in several ways. First, Plaintiff will be required to disclose highly-sensitive information to the County or risk fines of up to \$1,000 per day. Once Plaintiff discloses this information, Plaintiff cannot claw it back from the County. Bronster Decl. ¶ 7. In other words, this information is permanently in the County’s possession, subject to possible disclosure, and thus constitutes irreparable harm.

Second, on March 5, 2014 or shortly thereafter, third parties will likely submit requests to obtain the registration information of all GE crop growers, including Plaintiff. Some of these third parties will likely seek this sensitive and valuable information for nefarious purposes, such as to vandalize Plaintiff’s property or to compromise his trade secrets. Because of Bill 113’s flawed disclosure provision, any County decision to disclose Plaintiff’s sensitive information will be done without providing Plaintiff any notice. This means Plaintiff will have no opportunity to protect his rights or take other precautionary measures to protect his property. Once the County discloses this information, Plaintiff cannot claw it back: it is forever on the public record and forever accessible to individuals who want to harm Plaintiff. As such, this harm is irreparable.

In contrast to the hardship that Plaintiff will sustain if an injunction does not issue, the County will suffer no harm from a temporary delay in the registration deadline. Indeed, there is nothing in Bill 113 itself—or anywhere else—explaining why the County needs this information

by that particular date. Accordingly, the balance of irreparable harm to Plaintiff far outweighs the harm that the County may sustain.

**D. The Public Interest In This Case Overwhelmingly Favors The Issuance Of A Temporary Restraining Order.**

The public interest in this case overwhelmingly favors the issuance of a temporary restraining order that effectively places a temporary stay on the March 5, 2014 registration deadline until this Court can resolve the fundamental flaws with the disclosure provision of Bill 113.

First, there is a significant public interest in protecting Plaintiff and other innocent County GE growers from the type of extremism and violence that has plagued this County in recent years. In addition, there is a significant public interest in preventing the unnecessary and unwarranted public disclosure of valuable and sensitive information from public disclosure. Indeed, as explained above, the State of Hawai‘i has recognized the importance of preventing such disclosures in two separate statutes—UIPA and UTSA—and in Article I, section 6 of its Constitution.

On the other hand, there is no public interest in requiring Plaintiff to register by March 5, 2014. As noted above, there is nothing in Bill 113 itself explaining why the County needs this information by that particular date. Accordingly, there would be little, if any, harm to the public interest of temporarily staying this deadline. For these reasons, the public interest in staying the deadline far outweighs the public interest in enforcing the deadline.

**IV. CONCLUSION**

Based on the foregoing, the Court should issue a temporary restraining order and preliminary injunction: (1) staying the registration requirements, including the March 5, 2014 deadline to register, as set forth in Bill 113; (2) enjoining the County from enforcing the

registration requirements, including the March 5, 2014 registration deadline, against Plaintiff or any other individual who fails to register with the County by that date until this Court resolves Plaintiff's challenge to the disclosure provision of Bill 113; and (3) enjoining the County from releasing any information that it has already received from those individuals who have registered until this Court resolves Plaintiff's challenge to the disclosure provision of Bill 113.

DATED: Honolulu, Hawai'i, March 3, 2014.

A handwritten signature in black ink, appearing to be 'R' followed by a long horizontal stroke.

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MARGERY S. BRONSTER  
REX Y. FUJICHAKU  
Attorneys for Plaintiff JOHN DOE

IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT

STATE OF HAWAI'I

JOHN DOE,

Plaintiff,

vs.

COUNTY OF HAWAI'I,

Defendant.

Case No. \_\_\_\_\_

DECLARATION OF ROSS R. SIBUCAO

I, Ross R. Sibucan, do hereby declare under penalty of perjury that:

1. I submit this Declaration in support of the Motion for Temporary Restraining Order and the associated requests for declaratory and injunctive relief in the Complaint filed by Plaintiff in this case. The facts set forth in this Declaration are true as of my own personal knowledge, or where stated upon information and belief, and if called as a witness in this matter, I could and would competently testify to each of the facts set forth below.

2. I am a third-generation Hawai'i born farmer, resident of the County of Hawai'i, and President of the Hawai'i Papaya Industry Association ("HPIA") and am authorized to make this affidavit on behalf of HPIA and its members.

3. HPIA is a non-profit organization incorporated in the state of Hawai'i in 1978 to represent the interests of the Hawai'i papaya industry, including producers, handlers, wholesalers, brokers and shippers. HPIA members include farmers who grow GE papaya and non-GE papaya. I am also HPIA's representative to Hawai'i Farmers and Ranchers United, a group representing organizations whose members grow and raise 93% of the agricultural products in the County at an annual value of some \$194 million.

4. In 2010, the most recent year for which data are available, there were some 30.1 million pounds of papaya harvested in the state, almost all of which was grown on the Big Island, according to the Hawai'i Department of Agriculture ("HDOA"). The vast majority of papayas grown on the farms in the County of Hawai'i have been improved through the scientific techniques of modern biotechnology. Crops and plants developed through biotechnology are often referred to as "genetically-engineered" ("GE"), "transgenic" or "genetically-modified organisms" ("GMO's"). I will use the term "GE" in my declaration.

5. As a papaya grower, I am familiar with the development and production of GE crops. The availability of GE papaya and other GE crops and plants has been vitally important to the County of Hawai'i. Indeed, the development of a virus-resistant GE papaya by researchers at the University of Hawai'i and Cornell University is credited with saving the County's papaya

industry—one of the County's largest agricultural enterprises—after the industry was decimated by a particularly virulent strain of the aphid-transmitted papaya ringspot virus in the 1990s. The U.S. Department of Agriculture (“USDA”) cleared the virus-resistant GE papaya trait for commercialization in September of 1996, licenses to commercialize the GE papaya were obtained in April of 1998 and free seeds of the Rainbow variety were distributed to complying growers in May of 1998. Based on this recent and very personal history, my fellow growers and I are depending on the continued research, development and approval of new GE products to help them survive the next plant disease or pest outbreak that could devastate their livelihoods.

6. County farmers also use GE plants, including GE corn grown in the County, to increase their crop yields, control harmful weeds and insect pests, and minimize use of pesticide sprays and tillage practices, which, in turn, mitigates negative environmental impacts of their farming activities.

7. The testing and commercialization of GE plants have been regulated by the federal government since 1986 under a “Coordinated Framework” that involves review by up to three separate regulatory agencies: the USDA’s Animal and Plant Health Inspection Service (“APHIS”), the U.S. Environmental Protection Agency (“EPA”), and the U.S. Food and Drug Administration (“FDA”). In addition, the HDOA is given an opportunity to review and comment to APHIS on

pending GE field trials within the state.

8. I am very concerned about both the immediate and the longer-term negative impacts of Hawai'i County Bill 113. The Bill takes effect on March 5, 2014.

#### Immediate Adverse Impacts

9. As a child, I watched as my family was devastated by a virulent strain of the papaya ringspot virus. I have grown GE papaya since 2001 in order to protect my crops from that strain. I also grow a small amount of non-GE papaya for certain specialty markets. Growing in the field, healthy GE and non-GE papaya are indistinguishable.

10. Bill 113 bans the open-air cultivation, propagation and development of most GE plants and imposes a complete ban on open-air testing of new GE plants in the County. Bill 113 § 3, Haw. County Code § 14-130. This general prohibition is subject to three exemptions.

11. First, Bill 113 exempts persons already engaged in open-air cultivation, propagation, and development of GE crops or plants, "but only in those specific locations where GE crops or plants have been customarily open air cultivated, propagated, or developed by that person prior to the effective date of [Bill 113]." Bill 113 § 3, Haw. County Code § 14-131(1).

Second, Bill 113 exempts "any person engaged in the open air cultivation,



propagation, or development of GE papaya, whether prior to or subsequent to the effective date of [Bill 113].” Bill 113 § 3, Haw. County Code § 14-131(2). As a current and intended future papaya grower, I believe that I am eligible for this exemption along with several other HPIA members.

Third, Bill 113 allows any person engaged in the cultivation, propagation, or development of a non-GE crop or plant that is being harmed by a “plant pestilence” to apply to the County Council for an “emergency exemption” to use a “genetically engineered remedy” subject to such restrictions and conditions as the County deems necessary. Bill 113 § 3, Haw. County Code § 14-132. To issue the emergency exemption, the Council must first issue a resolution containing affirmative findings that: (1) “[t]he cited plant pestilence is causing substantial harm to that person’s crop or plant;” (2) “[t]here is no other available alternative solution”; and (3) “[a]ll available measures will be undertaken to insure that non-genetically engineered crops and plants, as well as neighboring properties and any water sources, will be protected from contamination or any other potentially adverse effects that may be caused by the genetically engineered organism or associated pesticides.”

12. For me and the other growers who may qualify for one of the three exemptions from the ban on cultivation, propagation and development of GE plants, Bill 113 requires a burdensome and invasive annual registration process

with the County's Department of Research and Development. As part of that process, growers must pay an annual fee of \$100 per location and disclose the specific locations and identity of their GE plants and other valuable commercial information that constitutes trade secrets and confidential business information that is competitively sensitive. Disclosure of this information will likely subject growers of GE plants to vandalism, threats of violence and theft of trade secrets and other proprietary and confidential information.

13. The Bill 113 registration process requires disclosure of the following specific information: (1) "the tax map key and the council district of the property or properties"; (2) "a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage"; (3) "the name of the owner of the property or properties; the lessee or any other party in control of the genetically engineered plant or crop operation or usage"; (4) "the type of genetically modified organism or transgenic manipulation used"; (5) "the produce or products involved; (6) "the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used"; (7) "a description of any containment procedures employed"; and (8) "relevant contact information." Bill 113 § 3, Haw. County Code § 14-129.

14. Mandatory disclosure of the type, location, amount, and methods of

production of GE crops, including the type and source of seeds and pesticides used, as required by Bill 113, increases the risk of commercial espionage, vandalism, and misappropriation of the valuable trade secrets and other confidential business information for me and other growers who choose to plant GE crops—crops that have been reviewed and found to be safe to grow and safe to eat by federal regulators, academic researchers, the National Academy of Sciences and other independent scientific bodies in the United States, the European Union and other nations.

15. The registration and disclosure process under Bill 113 poses a particularly serious risk to anyone in the County who grows a GE plant because there is a history of vandalism of GE crops and plants and threats and intimidation of those who grow them. Indeed, County farmers have suffered hundreds of thousands of dollars of GE crop damage due to vandalism. In the spring and summer of 2010, GE papaya trees were vandalized on two separate occasions, including some 8,500 young papaya trees destroyed in Kapoho and others in Mililani (App. 1). Although the motivation for these incidents was the subject of considerable speculation, no one was ever held responsible. Then in August of 2011, thousands of additional GE papaya trees were chopped down under cover of darkness on 10 acres of Big Island farmland (App. 2). And several months ago, in September 2013, vandals struck at night destroying about 100 GE papaya trees on

the same Kapoho farm vandalized in 2010 (App. 3). Even when crops are not destroyed, anti-GE signs and slogans have been placed on farmers' property. Again, there has been considerable speculation, but no one has ever been charged in any of these incidents.

16. Theft of trade secrets and other proprietary and confidential information is also a very real concern. Indeed, in December of 2013, six Chinese nationals were indicted in Iowa on charges of plotting to steal GE seeds worth tens of millions of dollars (App. 4). The indictment filed in federal court charged the individuals with intending to convert a trade secret for economic benefit. Also in December 2013, two Chinese nationals were charged with conspiracy to steal trade secrets after they allegedly attempted to steal GE rice samples from a research facility in Colorado (App. 5).

17. While Bill 113 provides a very limited offer of protection for certain information disclosed as part of the registration process, it leaves the question of disclosure entirely up to the discretion of the County, at least in the first instance. Specifically the Bill provides that "information such as the name of the registrant and the exact location of the genetically engineered crops or plants *may* be withheld from the public", but only to the extent that disclosure "would otherwise frustrate the ability of the County to obtain accurate information." Bill 113 § 3, Haw. County Code § 14-133(c) (emphasis added).

18. On information and belief, neither the County nor for that matter any other governmental body can guarantee that information required for registration under Bill 113 will not be disclosed by the County, the State Office of Information Practices or a reviewing court once it has been submitted to the County's Department of Research and Development.

19. Any person who violates any provision of Bill 113 is guilty of a violation, and upon conviction, is to be sentenced to a fine of up to \$1,000 for each separate violation. The person is deemed to be guilty of a separate offense for each and every day a violation is committed, continued, or permitted for each location. Bill 113 § 3, Haw. County Code § 14-134.

20. The County's Department of Research and Development announced its registration process for Bill 113 on January 16, 2014, and posted that announcement and a registration form on January 17, 2014 (App. 6). The Department's announcement invites all commercial farmers in the County who grow and sell agricultural products, including conventional and GE crops and plants, to register with the County.

21. However, the County's announcement does *not* note that, while registration is voluntary for conventional crop growers and farmers, it remains *mandatory* for growers of GE crops and plants. Nor does the announcement make any mention of the County's ability to shield personal and location information

from public disclosure or provide any procedure or guidance by which a registrant could request such protection. Similarly, the registration form itself makes no reference to the County's ability to protect any or all of the information to be submitted or how a registrant might attempt to request that his information be protected (App. 7). The Department's January 16<sup>th</sup> announcement also states that the Department is currently waiving the \$100 registration fee that is required under Bill 113.

22. As a result of the above facts, I am faced with an impossible choice. Do I submit the required information, attempt to assert a claim of confidentiality and hope that my private information as well as my trade secret and other confidential and proprietary business information will not be disclosed, with the attendant risks of vandalism, eco-terrorism and commercial espionage through theft of trade secrets and other valuable commercial information? Or do I protect my privacy and my trade secret and other confidential and proprietary business information by failing to register and submit the required information and put myself and my family at risk of being charged with a violation of Bill 113, having to pay crippling fines of \$1,000 a day and being found ineligible to continue planting, growing, and harvesting my papaya crop? Many of my fellow growers in the County face the same impossible choice.

### Longer-Term Adverse Impacts

23. My single biggest concern is the negative impact that Bill 113 is having and will continue to have on the vital research that is being conducted and otherwise would continue to be conducted here. The University of Hawai'i and the Pacific Basin Agricultural Research Center, a unit of the U.S. Department of Agriculture, are the major public sponsors of GE research in the County. In many cases, this research is conducted with the active cooperation of growers who have a direct interest in its continuation.

24. Current research efforts are focused on developing new GE varieties that can resist attack by harmful plant diseases and pests that are already known to exist. Examples include the Taiwan strain of the papaya ringspot virus, the banana bunchy top virus, and diseases and insect pests that threaten pineapple, lettuce, and tomato crops as well as anthurium and orchid plants.

25. Once a new plant variety shows promise in an enclosed setting such as a growth chamber or a greenhouse, the next step is testing in the open. The open-air testing of GE plants is regulated by APHIS. Bill 113 imposes an absolute ban on all such open-air testing. But our competitors outside the County, including within the United States and internationally, will continue to benefit from open-air testing of new GE crop varieties.

26. I am also concerned about the negative publicity that Bill 113 has

generated and the baseless and unscientific allegations that have been made regarding the safety of GE plants. Demonizing and criminalizing our local farmers and ranchers because they want to grow crops that have been reviewed and found to be as safe to grow and as safe to eat as any other crop is unacceptable.

27. Bill 113 has falsely and unfairly stigmatized and will continue to stigmatize, all County farmers who grow GE crops and plants. This stigmatization is directly harming their goodwill and reputation among the agricultural community in the County and throughout the United States by falsely conveying a message that GE crops have negative societal effects, including harming health and the environment. I am also concerned about adverse effects of Bill 113 on the County's export markets such as Canada and Japan. Japan is a major importer of papaya, but only allowed imports of the Rainbow papaya in December 2011.

28. Bill 113 has created significant uncertainty regarding the ability of farmers to continue to grow and deliver GE plants and crops to existing and new customers. The stigmatization of GE papaya and corn currently being grown on the island has forced existing growers to halt their plans of expansion into new markets and chilled the receptivity of their existing customers both domestic and foreign. In addition, growers who had considered planting GE varieties for the first time are now precluded from doing so or, in the case of papaya, forced to comply with Bill 113's registration and disclosure requirements in order to plant



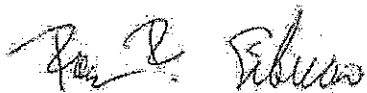
GE varieties.

29. Finally, Bill 113 has harmed GE growers by causing them to divert their resources to combat Bill 113 and its negative effects. Money is lost because a majority of GE farmers are self-employed, small-business men and women.

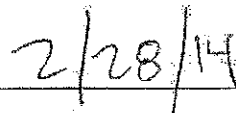
Whenever they are not on the farm, there are basically no workers to run their businesses.

30. I support diversity in agriculture—giving farmers the freedom to choose the technology and other tools that work best for them. Taking away our freedom to farm and promoting divisiveness are not good for me, my neighbors or Hawai'i.

I declare, under penalty of perjury, that the foregoing is true and correct.



Ross R. Sibucan



Date

IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT

STATE OF HAWAI'I

JOHN DOE,

Plaintiff,

vs.

COUNTY OF HAWAI'I,

Defendant.

CIVIL NO. \_\_\_\_\_  
(Hilo Division)

DECLARATION OF MARGERY S.  
BRONSTER

**DECLARATION OF MARGERY S. BRONSTER**

I, Margery S. Bronster, being first duly sworn, on oath or affirmation, declare as follows:

1. I am one of the attorneys for Plaintiff in this action.
2. I make the following statements based on my personal knowledge and am competent to testify as to the matters set forth in support of *Plaintiff's Motion For Temporary Restraining Order and Plaintiff's Motion For Preliminary Injunction*.
3. On February 20, 2014, I talked with Joseph K. Kamelamela and William V. Brilhante, Jr., attorneys with the Office of Corporation Counsel for the County of Hawai'i ("County Counsel"), in connect with Bill 113. A true and correct copy of Bill 113 as enacted is attached to Plaintiff's motions as Exhibit 8.
4. During this call, County Counsel advised me that, if the County Department of Research & Development (the "Department") receives a Uniform Information Practices Act ("UIPA") request seeking the registration information submitted by a genetically engineered

("GE") crop or plant grower pursuant to Bill 113, the County will attempt to withhold the information from disclosure by asserting that its disclosure would frustrate the ability of the County to obtain accurate information, as provided under Bill 113. The Bill does not refer to any other basis to withhold disclosure of information submitted by registrants.

5. However, the County Counsel further advised me that, if a requester appeals the County's decision to withhold the information to a court or the State's Office of Information Practices ("OIP"), the County cannot guarantee that a court or OIP would accept the County's position.

6. The County Counsel also advised me that the County cannot offer any guarantees that individual GE crop growers would be notified if an individual requests, under UPIA, records containing information about that grower. The Bill does not afford such notice and the County has not adopted any rules to allow such notice.

7. Finally, the County Counsel advised me that once a GE crop grower submits information to the Department, there is no mechanism for the submitter to claw this information back from the Department's files. Thus, the information will remain subject to public disclosure on a permanent basis.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: Honolulu, Hawai'i, February 28, 2014.

  
MARGERY S. BRONSTER

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JOHN DOE,	)	CIVIL NO. _____
	)	(Hilo Division)
Plaintiff,	)	
	)	DECLARATION OF REX Y. FUJICHAKU
v.	)	
	)	
COUNTY OF HAWAII.	)	
	)	
Defendant.	)	
_____	)	

**DECLARATION OF REX Y. FUJICHAKU**

I, Rex Y. Fujichaku, under penalty of law attest as follows:

1. I am a partner at Bronster Hoshibata and one of the attorneys representing Plaintiff John Doe in this matter.
2. Except where indicated that a statement is made on information and belief, I make the following statements based on my personal knowledge and am competent to testify as to the matters set forth herein.
3. Attached as Exhibit "9" is a true and correct copy of the Declaration of Michael J. Phillips, Ph.D., dated May 28, 2004, and Exhibit A thereto, which was submitted in *Center for Food Safety v. Veneman*, Civ. No. 03-621 DAE BMK (D. Haw.). Exhibit A to Dr. Phillips's declaration is a copy of a letter by John Payne, Ph.D., Animal and Plant Health Inspection Service, U.S. Department of Agriculture, re: Vandalism of Facilities and Release Sites Containing Genetically Modified Organisms (GMO), dated March 9, 2000.
4. Attached as Exhibit "10" is a true and correct copy of the Order Denying Plaintiff's Motion for Summary Judgment, filed August 19, 2003, Without Prejudice filed

October 20, 2003 in Center for Food Safety v. Department of Agriculture, State of Hawai'i, Civil No. 03-1-1509-07 (RWP).

5. Attached is a true and correct copy of the Declaration of Plaintiff John Doe dated March 2, 2014, in support of *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction*. The original signed Declaration will be filed with the Court upon receipt.

I declare under penalty of law that the foregoing is true and correct.

Executed in Honolulu, Hawai'i, on March 3, 2014.

A handwritten signature in black ink, consisting of a large, stylized capital 'R' followed by a horizontal line extending to the right.

---

REX Y. FUJICHAKU

IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT

STATE OF HAWAI'I

JOHN DOE,

Plaintiff,

vs.

COUNTY OF HAWAI'I,

Defendant.

Case No. \_\_\_\_\_

**DECLARATION OF JOHN DOE**

I, John Doe, do hereby declare under penalty of perjury that:

1. I submit this Declaration in support of the Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and the associated requests for declaratory and injunctive relief in my Complaint filed in this case. The facts set forth in this Declaration are true as of my own personal knowledge, or where stated upon information and belief, and if called as a witness in this matter, I could and would competently testify to each of the facts set forth below.

2. For the reasons set forth in this declaration, I am fearful that I will be

subjected to vandalism, harassment, and intimidation if my real name is used in connection with this Complaint. For this reason, I have filed this Complaint using a fictitious name.

3. I am a resident of the County of Hawai'i (the "County"), and a commercial papaya grower and small businessman in the County. I exclusively grow genetically-engineered ("GE") papaya on my farm. I employ several individuals on my farm.

4. Like many GE papaya growers in the County, as a child, I watched as my family's papaya crops were devastated by a virulent strain of the papaya ringspot virus during the early 1990s. I have grown GE papaya since 2004 in order to protect my crops from that virus.

5. Under the terms of the recently-enacted Bill 113 (Ordinance 13-121), I am required to register with the County's Department of Research and Development by March 5, 2014 because I grow GE papaya. If I do not register by March 5, 2014, it is my understanding that I will be subject to a fine of \$1,000 per day if I continue growing GE papaya.

6. I am extremely concerned about Bill 113's registration requirement. Specifically, Bill 113 requires me to disclose to the County very specific and detailed information about the location of my GE crops and my cultivation and development techniques. This information includes: a detailed description of the



location of GE crops on my farm, “which description shall include the size, location and scope of usage”; “the type of genetically modified organism or transgenic manipulation used”; “the produce or products involved”; “the type, frequency, and customary amount of pesticides, inclusive or herbicides and insecticides, used”; “a description of any containment procedures employed”; and my contact information.

7. If the information that I must disclose to the County is publicly released, I am concerned that I will be subjected to vandalism, harassment, intimidation, and that my trade secret information will be compromised.

8. Specifically, I am concerned that I will be subjected to vandalism because there is a history of vandalism of GE crops and plants, and threats and intimidation of those who grow them in the County. Indeed, County farmers have suffered hundreds of thousands of dollars of GE crop damage due to vandalism. In the spring and summer of 2010, GE papaya trees were vandalized on two separate occasions, including some 8,500 young papaya trees destroyed in Kapoho and others in Mililani (Exhibit 1 attached to Motion). Although the motivation for these incidents was the subject of considerable speculation, no one was ever held responsible. Then in August of 2011, thousands of additional GE papaya trees were chopped down under cover of darkness on 10 acres of Big Island farmland (Exhibit 2). And several months ago, in September 2013, vandals struck at night

destroying about 100 GE papaya trees on the same Kapoho farm vandalized in 2010 (Exhibit 3). I am also aware of two other incidents of vandalism within the last two years where vandals destroyed GE papaya.

9. Even when crops are not destroyed, anti-GE signs and slogans have been placed on or near farmers' farms. I have personally been affected by this campaign of intimidation and harassment as anti-GE activists have left insulting and degrading signs on or near my farm. I also closely followed the political debate in the lead-up to the County Council's passage of Bill 113 and saw how anti-GE activists ostracized GE farmers.

10. If the County were to release my name and the exact location of my GE crops, I am fearful that I would not be able to continue growing GE papaya in the face of threats of such vandalism and harassment. If I am not able to continue growing GE papaya, it will be difficult, if not impossible, for me to continue working in my chosen profession of papaya farming. While I could theoretically switch to growing conventional papaya, in reality, this is not a feasible or rational option for two reasons. First, the financial losses that would be sustained by having to destroy thousands of papaya trees would be devastating, not to mention the time and cost necessary to replace those papaya trees with non-GE trees. Second, even if I am able to switch to non-GE papaya, conventional papaya grown in the County is highly susceptible to crop viruses, as evidenced by the ringspot

virus that decimated the County's papaya industry in the 1990s.

11. Beyond these vandalism concerns, I am concerned that the registration process will harm my business because there is absolutely no guarantee in Bill 113 that the sensitive business information and trade secrets that I must disclose to the County will remain confidential. For example, each papaya grower employs different cultivation and development techniques on their farm. Like any other business, some techniques in the papaya growing industry work better than others and, as a result, some papaya growers are more successful than others. For example, over the years, I have developed certain techniques, or tricks, for fertilization and pesticide usage on my farm that give me what I believe to be a competitive advantage over other papaya growers.

12. I ordinarily would not share information about these practices with third parties, including other papaya growers, because I want to maintain a competitive advantage over my competitors. However, under Bill 113, I am required to disclose to the County specific and detailed information about my growing methods, including my pesticide usage on my farm. If publicly disclosed, any third party—including my competitors—could use this information to their advantage. This, in turn, will harm my business.

13. Similarly, I ordinarily do not share information about the size of my papaya fields with third parties because I do not want my competitors, buyers, or

anyone else to know confidential information about my business strategies, such as whether I am in the midst of an expansion or downsizing. However, under Bill 113, I am required to disclose to the County specific and detailed information about the volume of GE crops that I grow, which could reveal my business strategies to third parties. If publicly disclosed, any third party—including my competitors or buyers—could obtain this information and use it to their advantage, and to my disadvantage.

14. For the reasons provided above, there are serious risks associated with the public disclosure of the information that I must submit to the County. But Bill 113 provides only vague guidance on whether the County will disclose this information in response to a third party's request for records under the Uniform Information Practices Act. Similarly, the County's registration notice that it issued on January 16, 2014 does not even mention the possibility that a grower might want to claim some or all of his information as confidential. In addition, the County's registration notice was issued without any opportunity for interested parties to comment. The lack of clear guidance in Bill 113 has caused confusion among the GE farming community in the County.

15. In addition, I understand that counsel for the County Department of Research and Development—the agency tasked with administering the registration requirement of Bill 113—has advised that the County cannot guarantee that GE

farmers' registration information will remain confidential. Bill 113 does not provide that I will be notified in the event any member of the public seeks my confidential information. Nor can I withdraw my information submitted to the County before the County discloses it to third parties. Accordingly, if I were to register on March 5, 2014, I have no certainty whatsoever that the sensitive and proprietary information that I must disclose to the County will remain confidential.

16. The lack of certainty regarding the County's registration and disclosure process leaves me with an impossible choice. Do I submit the required information and hope that my private information as well as my trade secret and other confidential and proprietary business information will not be disclosed, with the attendant risks of vandalism, eco-terrorism and commercial espionage through theft of trade secrets and other valuable commercial information? Or do I protect my privacy and my trade secret and other confidential and proprietary business information by failing to register and submit the required information and put myself and my family at risk of being charged with a violation of Bill 113, having to pay crippling fines of \$1,000 a day, and being found ineligible to continue planting, growing, and harvesting my papaya crop?

17. It is unfair for the County to require hard-working papaya farmers—who are key contributors to our County's economy and upstanding members of the community—to choose between subjecting themselves to financial, reputational,

and physical harm and paying \$1,000 a day in fines. Yet, if the registration and disclosure requirements of Bill 113 are not fixed, I and other GE papaya farmers will be left with this impossible choice.

I declare, under penalty of perjury, that the foregoing is true and correct.

*John Doe*

March 2, 2014

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John Doe

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Date

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## Eco-Terrorism Suspected At Papaya Farm

### 8,500 Trees Destroyed On Big Island Farm

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KAPOHO, Hawaii — Laureto Julian said in his 30 years of papaya farming he's never had something like this happen to him before. About 8,500 young papaya trees were chopped in half sometime Wednesday, the fruit left on the ground. It's a loss of about \$100,000 for Julian.

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"I cry when I seen that place," said Julian. "I don't understand why they do that to me."

One nonprofit bio-tech organization speculated eco-terrorists are behind the destruction — those who are against genetically-modified crops.

The vandalism is eerily similar to the destruction at a papaya farm in Mililani back in May. The bio-tech companies said the damage was too calculated to be simply malicious youth.

Julian doesn't know who would do this to him, but he believes it's an act of a jealous farmer, not eco-terrorism.

The president of the Papaya Industry Association agrees, especially since Julian's farm is in a very isolated area of Kapoho.

"Why would anyone go through that much work just to cut someone's papaya trees down and not have the publicity? I don't understand that," said Kamiya.

Kamiya said nearly all papaya farmers in Hawaii are growing genetically modified Rainbow papayas, developed in 1998 to resist the devastating ring spot virus.

"Since 1998, we've been selling papayas in the marketplace, millions and millions of pounds, and not one bad thing, no complaint about it," said Kamiya. "It's completely safe and it's delicious."

Jerry Punzal thinks two young men are behind the vandalism on his Mililani farm, but police have not yet made an arrest in the case.

Julian said he hopes someone will come forward with information at his farm that will put whoever did this behind bars.

Anyone with information is asked to call Crimestoppers at 808-961-8300 in Hilo and 808-329-8181 in Kona.

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## NewsRoom

8/21/11 San Jose Mercury News 11A  
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August 21, 2011

Section: Front

### HAWAII VANDALS HIT PAPAYA TREES WAS ECO-TERRORISM BEHIND DESTRUCTION OF MODIFIED FRUITS?

Jennifer Sinco Kelleher, Associated Press

Was eco-terrorism behind destruction of modified fruits?

HONOLULU -- Thousands of papaya trees were chopped down on 10 acres of Big Island farmland under the cover of night last month. Hawaii County police said the destruction appeared to be done with a machete, but there are no leads and few clues beyond the tree stumps and all the fruit left to rot.

"It's hard to imagine anybody putting that much effort into doing something like that," said Delan Perry, vice president of the Hawaii Papaya Industry Association. "It means somebody has to have passionate reason."

A growing theory among farmers is that the attack was an act of eco-terrorism, a violent protest against the biotechnology used in growing papayas here. Police did not respond to calls seeking comment.

The majority of papayas grown on 170 farms on Oahu and the Big Island are genetically modified.

University of Hawaii scientists developed the genetically modified fruit that's resistant to a ring spot virus that wiped out production on Oahu in the 1950s and was detected in the Puna district on the Big Island in the 1990s. Genetically modified organisms, or GMOs, are crops whose genetic makeup has been altered to give the plant a desirable trait. The genetically modified fruit is credited with saving Hawaii's \$11 million papaya production industry.

"We wouldn't have a papaya industry today if it weren't for the transgenic papaya," said Alicia Maluafiti, executive director of the Hawaii Crop Improvement Association, which represents the seed industry and protects biotech crop growers. "Without a transgenic papaya restricting the expansion of the virus, that virus would be prevalent today."

One of the affected farmers, Erlinda Bernardo, said fellow papaya growers often worry about retaliation from those who are against GMOs. "Most of the product on the island is genetically modified," she said. "If not, most of the farmers would suffer, there would be more unemployment." Bernardo, her husband and four children are preparing to plant again in another area after 3,000 trees worth \$15,000 on five leased acres were destroyed.



--- Index References ---

Industry: (Agriculture (1AG63); Biotechnology (1BI78); Agriculture, Food & Beverage Regulatory (1AG56); Biopharmaceuticals (1BI13); Genetically Modified Foods (1GE75); Food Safety & Testing (1FO17); Food Technology (1FO81); Pharmaceuticals & Biotechnology (1PH13); Agricultural Biotechnology (1AG65); Agriculture Machinery & Technology (1AG37); Genetic Engineering (1GE23); Molecular & Cellular Biology (1MO84); Biomedical Engineering (1BI75); Agriculture, Food & Beverage (1AG53))

Region: (North America (1NO39); Hawaii (1HA58); USA (1US73); U.S. West Region (1WE46); Americas (1AM92))

Language: EN

Other Indexing: (Delan Perry; Alicia Maluafiti; Erlinda Bernardo)

Edition: Valley Final

Word Count: 332

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End of Document

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## Papaya trees vandalized in Kapoho

September 28, 2013 - 12:05am

By JOHN BURNETT

Tribune-Herald staff writer

A family whose Kapoho papaya farm was vandalized two years ago has been struck again.

Police said on Friday that about 100 papaya trees were cut down overnight Thursday at a farm off Highway 132 near the 4-mile marker. The victim, according to papaya grower and Hawaii Papaya Industry Association board member Peter Houle, is J.R. Bernardo. Bernardo is the son of Jimmy and Erlinda Bernardo of J and L Papaya Farm, who lost five acres to machete-wielding vandals in July 2011.

"He was very, very teary-eyed, his head down all day," Houle said of J.R. Bernardo, who's also a college student. Houle said that the young Bernardo has about three acres in production.

The trees were 3- to 4-feet tall and police put the damage estimate at \$3,000.

"I think the real loss is inside that young man," Houle said.

Houle, who said he leases the land from Lyman Estate and sublets it to the Bernardos and other farmers, stated that it looks like five individuals were involved in the vandalism.

"One was probably keeping watch, and they cut four lines. And they stopped at a certain point," Houle said. "They were systematically cut down, four in a row. It looks like four people going right down the row, because it was done evenly."

In June 2010, vandals cut down about 8,500 papaya trees grown by Laureto Julian, who has since died.

When his crop was destroyed, and when the Bernardo family's five acres were cut down in 2011, speculation about who might have done it centered on rival papaya growers and anti-GMO activists.

"Farmers wouldn't do that, especially at night," Houle said. "They go to bed; they're tired. Other people would probably come out at night to do this. I can't prove it, but somebody asked Jimmy Bernardo what was growing in those fields. Was it GMO? And the Bernardos' field was cut down shortly thereafter. Coincidence? I don't know."

Houle said the vandalized papayas are SunUps, a GMO papaya developed to be resistant to papaya ringspot virus. He blamed anti-GMO legislation and the debate over the bills before the county council for creating "a rift in the community."

"Was it activists? I don't know," he said. "But we're fighting these three bills and the community's divided — organic people or non-GMO vs. GMO."

Houle said the "ripple effect" of the debate over the measures have caused Hawaii papaya farmers to lose markets in Canada.

"That I can verify, because I've called the brokers," he said.

Asked if a \$30,000 reward announced in December 2011 for information leading to the arrest and charges against the person or persons responsible for the crop destruction is still in effect, Houle replied: "I think so."

"I'd the governor's help and the Department of Agriculture's help," he said. "Then, I'd like some help in stopping some of these GMO bills that are harming our farmers."

Anyone with information is asked to call Officer Cala Arnold at 965-2716 or the police non-emergency line at 935-3311.

Those who prefer to anonymity may call Crime Stoppers at 961-8300 and may be eligible for a reward of up to \$1,000.

# Bloomberg

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## Six Chinese Accused of Stealing Genetically Modified Corn

By Margaret Cronin Fisk - Dec 19, 2013

Six Chinese nationals were indicted in Iowa on charges of plotting to steal genetically modified seeds worth tens of millions of dollars to Monsanto Co. (MON) and DuPont Co. (DD)

The indictments follow the arrest last week of Mo Hailong, director of international business at Beijing Dabeinong Technology Group Co. (002385), part of the Beijing-based DBN Group, who was accused of stealing trade secrets after he was found digging in a Iowa cornfield. The indictment of Mo and five others connected to DBN, filed on Dec. 17, was unsealed today in federal court in Des Moines.

The U.S. alleges Mo and the other defendants stole inbred corn seed from production fields in Iowa and Illinois to benefit Kings Nower Seed, DBN's corn seed unit. Inbred lines, developed by scientists to have a particular trait such as resistance to herbicides, are crossbred with other lines to develop hybrid seeds, the U.S. said.

Prosecutors charge that the defendants stole from DuPont's Pioneer seed unit, Monsanto and AgReliant Genetics LLC's LG Seeds subsidiary. They "intended to convert a trade secret" for the economic benefit of someone other than the U.S. seed companies, prosecutors said.

### Zip-Lock Bags

In May 2012, Mo and two other defendants "attempted to ship approximately 250 pounds of corn seed, packaged in 42, five-gallon zip-lock bags contained in five separate boxes," from Illinois to Hong Kong, according to the indictment.

Mo's attorney, Valentin Rodriguez Jr., didn't immediately return a call seeking comment on the indictment.

Last week he said Mo had "no intention to commit any crime" and that the government hadn't been able to prove that any of the seeds were proprietary to Monsanto or DuPont.

### EXHIBIT 4

Kings Nower Seed didn't immediately respond to an e-mail sent before regular business hours in Beijing.

Mo, also known as Robert Mo, was arrested in Miami last week. The other defendants are still at large, said Kevin VanderSchel, spokesman for Nicholas Klinefeldt, the U.S. attorney in Des Moines.

The others indicted are Li Shaoming, Wang Lei, Wang Hongwei, Ye Jian and Lin Yong.

The investigation started when DuPont's Pioneer seed unit detected suspicious activity, according to a statement by Klinefeldt's office.

## Storage Lockers

Mo and others visited farms, and bought seed and individual ears of corn, stashing the items in storage lockers to be shipped back to China, according to an affidavit by FBI special agent Mark Betten filed with the initial complaint. In China, scientists would use the seed and corn to develop their own products, the U.S. said in court papers.

Mo and Wang Lei, the vice chairman of Kings Nower Seed, approached a grower of a Pioneer test field near Tama, Iowa, on May 2, 2011, and "asked what he was planting in his field," the FBI agent said in his affidavit. "The grower replied seed corn."

The next day, "a Pioneer field manager saw Mo on his knees in the same grower's field, which had just been planted within the previous two days, and another Asian male sitting in a nearby car," Betten said.

Four months later, Mo, Wang Lei and another scientist were stopped by a deputy from the Polk County's Sheriff's Office, responding to a report of "Asian males acting suspiciously near a farm field in Bondurant, Iowa," Betten said. Mo told the deputy they were driving across the Midwest looking at crops, he said.

## 'Inbred Line'

"An individual wishing to steal an inbred line of seed can either obtain the seed in seed form, i.e. either straight from the bag or shortly after it's been planted and before germination (such as digging in the field as Mo was doing), or the seed can be obtained from grown ears during the harvest season when grown by contract growers," Betten said.

Companies such as Monsanto require dealers to sell seed only to farms that have signed agreements promising not to use these methods to develop their own seeds, Betten said. Mo wasn't authorized to buy the seeds, according to the affidavit.

"Pioneer executives estimated that the loss of an inbred line of seed would result in losing approximately 5-8 years of research and a minimum of \$30-40 million," Betten said in the filing.

The defendants were aware that they risked prosecution in the U.S., according to the indictment, citing taped conversations during the investigation.

"Nowadays, the U.S. is very hostile to China on this matter," Lin said to Ye in September 2012, according to the indictment. "If they max the punishment, then we are done."

In another exchange between the two, according to the U.S., Lin asked how to respond if they were stopped by the police. Ye replied, "depends on where. The only thing to say, if in the fields, would be that we are students ... working on surveys."

The case is U.S. v. Li, 13-cr-00147, U.S. District Court, Southern District of Iowa (Des Moines).

To contact the reporter on this story: Margaret Cronin Fisk in Detroit at [mcfisk@bloomberg.net](mailto:mcfisk@bloomberg.net)

To contact the editor responsible for this story: Michael Hytha at [mhytha@bloomberg.net](mailto:mhytha@bloomberg.net)

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Agriculture

9:05 AM FRI DECEMBER 13, 2013

## Two Chinese Scientists Try To Steal Rice From KS Research Facility

By [BRYAN THOMPSON](#) [MISC LEAD BY BRYAN THOMPSON](#)



Credit: iStockphoto

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3:45

Two crop scientists from China are accused of trying to steal rice seed samples from a biopharmaceutical research facility in Kansas. Federal charges have been filed against the two men in U.S. District Court, in Kansas City, Kansas.

47-year-old Weiqiang Zhang and 63-year-old Wengui Yan are charged with conspiracy to steal trade secrets. The target was a research facility in Junction City operated by Ventria Bioscience, based in Fort Collins, Colorado. According to U.S. Attorney Barry Grissom, U.S. Customs and Border Protection agents found stolen seeds in the luggage of a Chinese delegation preparing to board a plane for China last August.

The two suspects had arranged visits to several Midwestern agricultural facilities and universities, according to the complaint. A search of Zhang's residence in Manhattan, Kansas, this Wednesday turned up more rice seeds similar to those the visiting delegation was attempting to take home. Ventria President and CEO Scott Deeter confirms that Zhang was a Ventria employee.

"We're cooperating with this," says Deeter. "We need to let the facts come to light, and see what the facts are before we make any decisions on our side."

Zhang was hired by Ventria as a rice breeder in 2008. What's so special about the rice developed by Ventria? Deeter says it's genetically modified to grow proteins for medical and pharmaceutical uses—and to do it very efficiently.

"It's a really important technology," according to Deeter. "It's foundational. I would say between \$1 and \$2 billion has been invested in the ability of plants to become a factory for these types of products."

One of the proteins grown by the rice, albumin, is already being produced and marketed commercially, under the trade name Cellastin. It's advertised as an animal-free supplement to help cell cultures—stem cells, for example—grow better. The other protein is a recombinant version of a key component of mother's milk, called lactoferrin. It's still in clinical trials. In a 2006 interview for the KPR series, "Kansas Health: A Prescription for Change", Deeter said this product could reduce the death toll from diarrhea—which he describes as the second-leading killer of children around the world.

"The product that we're developing will not only rehydrate the child, but also, we believe, help them recover from their illness sooner than they would just by being rehydrated," Deeter says. "And we need to make that affordable, so that we can distribute it to the world's population."

Deeter hopes to start marketing the recombinant lactoferrin as soon as 2017. Farmers in the Junction City area have been growing the rice for the processing plant since 2007. Deeter won't say how many acres are planted, or how many bushels harvested, but it's enough to meet his company's needs. He's relieved that the federal agents were able to intercept the patented seeds before researchers in China could get their hands on them.

"The investment that researchers and inventors put into these types of technologies need to be respected," says Deeter. "We have a patent system; and we have a process of maintaining the secrecy of some of these trade secrets in order that they may be turned into valuable products down the road. I understand the attraction of short-cutting that process, but then you essentially devalue innovation."

If found guilty of conspiracy to steal trade secrets, Zhang and Yan could face a maximum penalty of 10 years in federal prison and a fine up to \$250,000. Meanwhile, six other men from China, including the CEO of a seed corn subsidiary of a Chinese conglomerate, were charged yesterday with conspiring to steal patented seed corn from two of the nation's leading seed developers, according to The Associated Press. Deeter says he's not aware of any connection between the two cases.

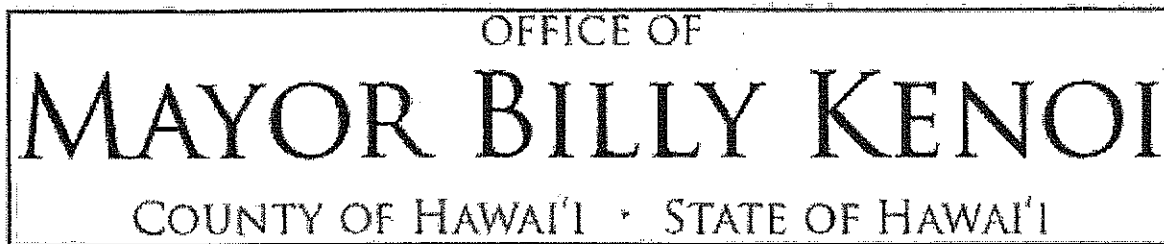
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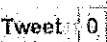
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## **Agricultural Registration Process Established for All Commercial Crops in Hawai'i County**

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The Hawai'i County Department of Research & Development is inviting all commercial farmers who grow and sell agricultural products including organic, conventional and genetically modified crops to complete a new county agricultural registration form.

"This new registration system will allow the county to identify and better support commercial agricultural activities across the island," said Laverne Omori, director of the Research & Development department.

The department plans to use the new registration program to identify the crops being grown, the locations of those farming activities, and the owners of the lands that are being farmed. It will help the county to accurately inventory all commercial farming activities to help assess the strengths and needs of the agricultural community, and to identify areas where additional federal, state or county investment may be necessary to assist farmers.

The registration form meets the requirements of the newly adopted Chapter 14, Article 22, Section 14-133 of the Hawai'i County Code, which requires registration of genetically modified crops by March 5, 2014.

### **EXHIBIT 6**

There is no cost for registration. The new ordinance establishes a \$100 registration fee for genetically modified crops, but the county is waiving all fees for all farmers who register.

The registration form with instructions is available online at [hawaiicounty.gov/online-services](http://hawaiicounty.gov/online-services), or at the Department of Research & Development's offices in the Hawai'i County Building in Hilo or the West Hawai'i Civic Center in Kona.

For more information or assistance with the registration process, call the Department of Research & Development at (808) 961-8366.

## Office Of The Mayor

Hilo: Hawai'i County Building  
25 Aupuni St., Hilo, Hawai'i 96720  
Tel: (808) 961-8211  
Fax: (808) 961-6553  
TDD: (808) 961-8521

Kona: West Hawai'i Civic Center  
74-5044 Ane Keohokālole Hwy., Kailua-Kona, Hawai'i 96740  
Tel: (808) 323-4444  
Fax: (808) 323-4440  
TDD: (808) 327-6003

Email: [cohmayor@co.hawaii.hi.us](mailto:cohmayor@co.hawaii.hi.us)  
Facebook: [MayorKenoi](#)  
Twitter: [@MayorKenoi](#)

Designed by [Elegant Themes](#) | Powered by [WordPress](#)

■



## County of Hawai'i Commercial Agricultural Production Registration

To better support commercial agricultural activities across the island, the Hawai'i County Department of Research and Development is inviting all commercial farmers who grow and sell agricultural products including organic, conventional and genetically modified crops to complete this county agricultural production registration form. This registration form meets the requirements of the newly adopted Chapter 14, Article 22, Section 14-133 of the Hawai'i County Code of (2005 Edition, as amended), which requires registration of genetically modified crops by March 5.

Submit completed forms to the Department of Research and Development via fax at (808) 935-1205 or mail to 25 Aupuni Street, Room 1301, Hilo, HI 96720.

**Form Reset**

### 1. Crop Type

☐ GMO

☐ Organic

☐ Conventional

### 2. Type of Registration

☐ New Registration

☐ Annual Renewal

☐ Updated Information

### 3. Registration Contact Information

Contact Name

Contact Mailing Address (Street/PO Box, City, State, Postal Code)

Contact Telephone Number

Contact E-Mail Address - optional

Contact's preferred time and method of contact - optional

4. Name of Property Owner

5. Council District in which property is located

For district descriptions, please go to <http://www.hawaiicounty.gov/council/>.

- ☐ District 1 - Portion of South Hilo, North Hilo, Hāmākua, Portion of Waimea
- ☐ District 2 - Portion of South Hilo
- ☐ District 3 - Portion of South Hilo, Portion of Kea'au
- ☐ District 4 - Portion of Puna (Eastern)
- ☐ District 5 - Portion of Puna (Western)
- ☐ District 6 - Portion of North Kona, South Kona, Ka'ū, and Greater Volcano Area
- ☐ District 7 - Portion of South Kona, Portion of North Kona
- ☐ District 8 - North Kona
- ☐ District 9 - North and South Kohala

6. Tax Map Key Number(s)

Multiple contiguous parcels are treated as a single registered location.

Please use this format for reporting tax map key numbers: Zone Number (one digit)-Section Number (one digit)-Plat Number (three digits)-Parcel Number (three digits)—and CPR or Condominium Number if appropriate (four digits). Go to [http://qpublic9.qpublic.net/hi\\_hawaii\\_search.php](http://qpublic9.qpublic.net/hi_hawaii_search.php) to verify tax map key numbers or call 961-8201 if you need assistance.

7. Lessee(s)

If applicable, list the name(s) of the lessee(s) or any other party or parties in control of the crops, operations or usage.

8. Property description

Provide a description of the size and location of agricultural production at this location.

9. Crops description

List the types of crops and plants (conventional, organic and genetically modified) that are being cultivated, propagated, developed or tested at this location.

10. FOR GENETICALLY MODIFIED CROPS ONLY

Genetic modification technology

Describe the type of genetically modified organism or transgenic manipulation used at this location.

11. FOR GENETICALLY MODIFIED CROPS ONLY

Pesticides use

List the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides that are used at this location.

*For example, "Goal 2XL 2 pints/broadcast acre, four times/year."*

12. FOR GENETICALLY MODIFIED CROPS ONLY

Containment

If any, describe the containment procedures employed at this location.

COUNTY OF HAWAI'I



STATE OF HAWAI'I

BILL NO. 113  
(DRAFT 3)

ORDINANCE NO. 13 121

AN ORDINANCE AMENDING CHAPTER 14 OF THE HAWAI'I COUNTY CODE 1983 (2005 EDITION, AS AMENDED), BY ADDING A NEW ARTICLE RELATING TO GENETICALLY ENGINEERED CROPS AND PLANTS.

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF HAWAI'I:

**SECTION 1. Findings.**

- (1) The public trust doctrine is memorialized in the Hawai'i State Constitution, Article XI, Section 1 "Conservation and Development of Resources," and in the Charter of the County of Hawai'i, Article XIII, Section 13-29 "Conservation of Natural and Cultural Resources." Pursuant to the public trust doctrine, our natural resources, including land and water, are entrusted to our care for the benefit of both current and future generations. The county government in its trustee capacity is subject to the precautionary principle and therefore must exercise a higher level of scrutiny in establishing reasonable measures and making appropriate assessments in order to avoid harmful impacts to our public trust resources. The Council therefore recognizes the right of the people and their government to guard against the intrusion of potential contaminants and prevent the contamination of non-genetically engineered crops, plants and lands by genetically engineered crops and plants without having to first wait for definitive science. As the United States Supreme Court made clear in *Maine vs. Taylor* (1986), the government is not required "to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." In this context the precautionary principle requires that if a new technology poses threats of harm to human or environmental health, the burden of proof is on the promoter of the technology to demonstrate that the technology is safe, not on the public or governments to demonstrate that the technology is unsafe;
- (2) The Council finds that policies relating to agricultural practices are most appropriate to be determined by each county of the State of Hawai'i given the island-by-island variation in customary and generally accepted agricultural practices and opportunities, the variation in topography and land ownership patterns, and in light of the natural geographic ocean barriers that allow for these distinctions.
- (3) The Council finds that optimizing a local agricultural policy that promotes non-genetically engineered crops and seeds along with eco-friendly agricultural practices affords the County of Hawai'i a unique economic opportunity to capture a niche market for non-genetically engineered produce, seeds, and meats. Optimizing this opportunity is consistent with the Hawai'i County General Plan (Economic policies 2.2(h)): "Promote and develop the island of Hawai'i into a unique scientific and cultural model, where economic gains are in balance with social and physical amenities. Development should

be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.”

- (4) The Council finds it is important to protect the rights of farmers engaged in non-genetically engineered crop cultivation from the uncontrolled spread of genetically engineered organisms and associated pesticides.
- (5) The Council finds that an expanded exemption for genetically engineered papaya is reasonable and appropriate because the genetic modification of papaya over the past decade has become so pervasive across this island that restricting cultivation of genetically engineered papaya would be near impossible at this time, the likelihood of genetically engineered cross pollination of papaya is reduced given the customary controlled manner of propagation, and in light of the substantial investment in controlled testing of this one crop over the past decade as the means of choice to address certain papaya diseases.

**SECTION 2. Authority.** The Council finds that its authority to impose restrictions on the cultivation, propagation, development, and testing of genetically engineered crops and plants to protect public and private property as well as surface waters, vulnerable watersheds, and our Island’s coastal waters, is granted to it by:

- (1) The Hawai‘i Revised Statutes, Section 46-1.5(13), which states: “Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.”;
- (2) The Hawai‘i State Constitution, Article XI, Section 9 “Environmental Rights,” which states: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”

**SECTION 3.** Chapter 14 of the Hawai‘i County Code 1983 (2005 Edition, as amended) is amended by adding a new article to be appropriately designated and to read as follows:

**“Article \_\_. Restriction of Genetically Engineered Crops and Plants.**

**Section 14-\_\_. Purpose.**

The purpose of this article is to protect Hawai‘i Island’s non-genetically modified agricultural crops and plants from genetically modified organism cross pollination and to preserve Hawai‘i Island’s unique and vulnerable ecosystem while promoting the cultural heritage of indigenous agricultural practices. The prohibition of open air cultivation, propagation, development, or testing of genetically engineered crops and plants is intended to prevent the transfer and uncontrolled spread of genetically engineered organisms on to private property, public lands, and waterways.



**Section 14-\_\_\_. Definitions.**

As used in this article, unless otherwise specified:

"Genetically engineered" means an organism that has been modified at the molecular or cellular level by means that are not possible under natural conditions or processes. Such means include recombinant DNA and RNA techniques, cell fusion, microencapsulation, macroencapsulation gene deletion and doubling, introducing a foreign gene, and changing the position of genes. Such organisms are sometimes referred to as "genetically modified organisms" or "transgenic organisms." Genetically engineered or genetically modified crops and plants include crops and plants for human consumption or for any other purpose. Genetic engineering does not include modification that consists exclusively of breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

"Open air" means a location or facility that is not enclosed in a greenhouse or in another completely enclosed structure so as to prevent the uncontrolled spread of genetically engineered organisms.

"Person" includes natural persons, partnerships, joint ventures, societies, associations, clubs, trustees, trusts, or corporations or any officer, agent, employee, or any other personal representative thereof, in any capacity, acting either for himself, his heirs, or for any other person under personal appointment pursuant to law.

"Plant pestilence" means a virulent plant disease or infestation that is causing substantial harm to one or more crops or plants.

"Register" or "Registration" means registration by persons engaged in the cultivation, propagation, development, or indoor testing of genetically engineered crops or plants. Registration shall include: the tax map key and the council district of the property or properties; a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage; the name of the owner of the property or properties; the lessee or any other party in control of the genetically engineered plant or crop operation or usage; the type of genetically modified organism or transgenic manipulation used; the produce or products involved; the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used; a description of any containment procedures employed; and relevant contact information.

**Section 14-\_\_\_. Prohibition.**

No person shall knowingly engage in the open air cultivation, propagation, development, or testing of genetically engineered crops or plants.

**Section 14-\_\_\_. Exemptions.**

The following persons shall be exempt from the provisions of this article:

- (1) Persons engaged in the open air cultivation, propagation, or development of genetically engineered crops or plants, other than genetically engineered papaya, but only in those specific locations where genetically engineered crops or plants have been customarily open air cultivated, propagated, or developed by that person prior to the effective date of this article, provided

that those specific locations or facilities are registered within ninety days of the effective date of this article; and

- (2) Any person engaged in the open air cultivation, propagation, or development of genetically engineered papaya, whether prior or subsequent to the effective date of this article, provided that each location or facility wherein open air cultivation, propagation, or development of genetically engineered papaya occurs or will occur is registered as provided in this article.

Notwithstanding any other provision of law, these exemptions shall not allow for open air testing of genetically engineered organisms of any kind.

**Section 14-\_\_\_. Emergency exemption.**

- (a) A person who is engaged in the cultivation, propagation, or development of a non-genetically engineered crop or plant that is being harmed by a plant pestilence as defined in this article may apply to the council for an emergency exemption from the provisions of this article to use a genetically engineered remedy. The council may grant an emergency exemption by way of resolution, provided the council makes an affirmative finding that:
  - 1) The cited plant pestilence is causing substantial harm to that person's crop or plant;
  - 2) There is no other available alternative solution; and
  - 3) All available measures will be undertaken to insure that non-genetically engineered crops and plants, as well as neighboring properties and any water sources, will be protected from contamination or any other potentially adverse effects that may be caused by the genetically engineered organism or associated pesticides.
- (b) Any exemption granted pursuant to subsection (a) shall include reasonable restrictions and conditions, including, but not limited to, full compliance with the registration requirements of this article and that the exemption shall expire on a certain day occurring within five years from the date of its issuance. Prior to expiration of the exemption, the council may adopt a resolution to extend the exemption for a specified period of time.

**Section 14-\_\_\_. Registration.**

- (a) All persons engaged in any form of cultivation, propagation, development, or indoor testing of genetically engineered crops or plants of any kind shall register annually beginning within ninety days of the effective date of this article, and shall pay an annual registration fee of \$100 per location, payable to the director of finance. All contiguous land shall be treated as a single location. The director of the department of research and development, or the director's authorized representative(s), shall administer the registration provision of this section.
- (b) All persons engaged in non-commercial cultivation or propagation of genetically engineered papaya, in any stage or form, shall be exempt from this section. This registration exemption does not exempt persons engaged in research, development, or testing of genetically engineered papaya.

- (c) Pursuant to section 92F-13 of the Hawai'i Revised Statutes, information such as the name of the registrant and the exact location of the genetically engineered crops or plants may be withheld from the public to the extent that disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information.

**Section 14-\_\_ . Penalties.**

Any person who violates any provision of this article shall be guilty of a violation, and upon conviction thereof, shall be sentenced to a fine of up to \$1,000 for each separate violation. The person shall be deemed to be guilty of a separate offense for each and every day a violation of this article is committed, continued, or permitted for each location. To the extent permitted by law, the person found in violation of this article shall also be responsible for all costs of investigation and testing, as well as for court costs, including but not limited to witness fees and witness expenses.

**Section 14\_\_ . Declaratory and injunctive relief.**

A court of competent jurisdiction may hear proceedings for declaratory relief or injunctive relief, or both, for violations or potential violations of this article. To the extent permitted by law, the person found in violation of this article shall be responsible for all costs of investigation and testing, as well as for court costs, including, but not limited to, attorney's fees, witness fees, and witness expenses.


**Section 14\_\_ . Cumulative remedies.**

The provisions of this article are cumulative. Nothing in this article shall affect any other remedy or relief that may be available to any adversely affected person or to the County or other governmental entity.

**SECTION 4.** If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are declared to be severable.

**SECTION 5.** This ordinance shall take effect upon approval.

INTRODUCED BY:

  
\_\_\_\_\_  
COUNCIL MEMBER, COUNTY OF HAWAII

Kona, Hawai'i  
Date of Introduction: October 15, 2013  
Date of 1st Reading: October 16, 2013  
Date of 2nd Reading: November 19, 2013  
Effective Date: December 5, 2013

OFFICE OF THE COUNTY CLERK  
County of Hawai'i  
Kona, Hawai'i

COUNTY CLERK  
COUNTY OF HAWAII

2013 DEC -5 PM 2:16

(Draft 3)

Introduced By: Margaret Wille  
Date Introduced: October 15, 2013  
First Reading: October 16, 2013  
Published: October 26, 2013

REMARKS:

October 15, 2013 - Meeting Recessed  
October 16, 2013 - Meeting Reconvened

Second Reading: November 19, 2013  
To Mayor: November 21, 2013  
Returned: December 5, 2013  
Effective: December 5, 2013  
Published: December 12, 2013


REMARKS:


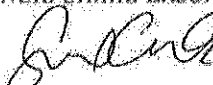
November 5, 2013 - Meeting Recessed  
November 19, 2013 - Meeting Reconvened

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Eoff	X			
Ford	X			
Ilagan		X		
Kanuha	X			
Kern			X	
Onishi		X		
Poindexter	X			
Wille	X			
Yoshimoto	X			
	6	2	1	0

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Eoff	X			
Ford	X			
Ilagan		X		
Kanuha	X			
Kern	X			
Onishi		X		
Poindexter	X			
Wille	X			
Yoshimoto		X		
	6	3	0	0

I DO HEREBY CERTIFY that the foregoing BILL was adopted by the County Council published as indicated above.

Approved/Disapproved this 5<sup>th</sup> day  
of December, 2013  
  
MAYOR, COUNTY OF HAWAII

  
COUNCIL CHAIRPERSON  
  
COUNTY CLERK

Bill No.: 113 (Draft 3)  
Reference: C-393.70/PSMTC-16  
Ord No.: **13 121**

**Article 22. Restriction of Genetically Engineered Crops and Plants.****Section 14-128. Purpose.**

The purpose of this article is to protect Hawai'i Island's non-genetically modified agricultural crops and plants from genetically modified organism cross pollination and to preserve Hawai'i Island's unique and vulnerable ecosystem while promoting the cultural heritage of indigenous agricultural practices. The prohibition of open air cultivation, propagation, development, or testing of genetically engineered crops and plants is intended to prevent the transfer and uncontrolled spread of genetically engineered organisms on to private property, public lands, and waterways.  
(2013, Ord. No. 13-121, sec. 3.)

**Section 14-129. Definitions.**

As used in this article, unless otherwise specified:

"Genetically engineered" means an organism that has been modified at the molecular or cellular level by means that are not possible under natural conditions or processes. Such means include recombinant DNA and RNA techniques, cell fusion, microencapsulation, macroencapsulation gene deletion and doubling, introducing a foreign gene, and changing the position of genes. Such organisms are sometimes referred to as "genetically modified organisms" or "transgenic organisms." Genetically engineered or genetically modified crops and plants include crops and plants for human consumption or for any other purpose. Genetic engineering does not include modification that consists exclusively of breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

"Open air" means a location or facility that is not enclosed in a greenhouse or in another completely enclosed structure so as to prevent the uncontrolled spread of genetically engineered organisms.

"Person" includes natural persons, partnerships, joint ventures, societies, associations, clubs, trustees, trusts, or corporations or any officer, agent, employee, or any other personal representative thereof, in any capacity, acting either for himself, his heirs, or for any other person under personal appointment pursuant to law.

"Plant pestilence" means a virulent plant disease or infestation that is causing substantial harm to one or more crops or plants.

"Register" or "Registration" means registration by persons engaged in the cultivation, propagation, development, or indoor testing of genetically engineered crops or plants. Registration shall include: the tax map key and the council district of the property or properties; a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage; the name of the owner of the property or properties; the lessee or any other party in control of the genetically engineered plant or crop operation or usage; the type of genetically modified organism or transgenic manipulation used; the produce or products involved; the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used; a description of any containment procedures employed; and relevant contact information.  
(2013, Ord. No. 13-121, sec. 3.)

**Section 14-130. Prohibition.**

No person shall knowingly engage in the open air cultivation, propagation, development, or testing of genetically engineered crops or plants.  
(2013, Ord. No. 13-121, sec. 3.)

**Section 14-131. Exemptions.**

The following persons shall be exempt from the provisions of this article:

- (1) Persons engaged in the open air cultivation, propagation, or development of genetically engineered crops or plants, other than genetically engineered papaya, but only in those specific locations where genetically engineered crops or plants have been customarily open air cultivated, propagated, or developed by that person prior to the effective date of this article, provided that those specific locations or facilities are registered within ninety days of the effective date of this article; and

- (2) Any person engaged in the open air cultivation, propagation, or development of genetically engineered papaya, whether prior or subsequent to the effective date of this article, provided that each location or facility wherein open air cultivation, propagation, or development of genetically engineered papaya occurs or will occur is registered as provided in this article.

Notwithstanding any other provision of law, these exemptions shall not allow for open air testing of genetically engineered organisms of any kind.

(2013, Ord. No. 13-121, sec. 3.)

**Section 14-132. Emergency exemption.**

- (a) A person who is engaged in the cultivation, propagation, or development of a non-genetically engineered crop or plant that is being harmed by a plant pestilence as defined in this article may apply to the council for an emergency exemption from the provisions of this article to use a genetically engineered remedy. The council may grant an emergency exemption by way of resolution, provided the council makes an affirmative finding that:

- (1) The cited plant pestilence is causing substantial harm to that person's crop or plant;
- (2) There is no other available alternative solution; and
- (3) All available measures will be undertaken to insure that non-genetically engineered crops and plants, as well as neighboring properties and any water sources, will be protected from contamination or any other potentially adverse effects that may be caused by the genetically engineered organism or associated pesticides.

- (b) Any exemption granted pursuant to subsection (a) shall include reasonable restrictions and conditions, including, but not limited to, full compliance with the registration requirements of this article and that the exemption shall expire on a certain day occurring within five years from the date of its issuance. Prior to expiration of the exemption, the council may adopt a resolution to extend the exemption for a specified period of time.

(2013, Ord. No. 13-121, sec. 3.)

**Section 14-133. Registration.**

- (a) All persons engaged in any form of cultivation, propagation, development, or indoor testing of genetically engineered crops or plants of any kind shall register annually beginning within ninety days of the effective date of this article, and shall pay an annual registration fee of \$100 per location, payable to the director of finance. All contiguous land shall be treated as a single location. The director of the department of research and development, or the director's authorized representative(s), shall administer the registration provision of this section.
- (b) All persons engaged in non-commercial cultivation or propagation of genetically engineered papaya, in any stage or form, shall be exempt from this section. This registration exemption does not exempt persons engaged in research, development, or testing of genetically engineered papaya.
- (c) Pursuant to section 92F-13 of the Hawai'i Revised Statutes, information such as the name of the registrant and the exact location of the genetically engineered crops or plants may be withheld from the public to the extent that disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information.

(2013, Ord. No. 13-121, sec. 3.)

**Section 14-134. Penalties.**

Any person who violates any provision of this article shall be guilty of a violation, and upon conviction thereof, shall be sentenced to a fine of up to \$1,000 for each separate violation. The person shall be deemed to be guilty of a separate offense for each and every day a violation of this article is committed, continued, or permitted for each location. To the extent permitted by law, the person found in violation of this article shall also be responsible for all costs of investigation and testing, as well as for court costs, including but not limited to witness fees and witness expenses.

(2013, Ord. No. 13-121, sec. 3.)

**Section 14-135. Declaratory and injunctive relief.**

A court of competent jurisdiction may hear proceedings for declaratory relief or injunctive relief, or both, for violations or potential violations of this article. To the extent permitted by law, the person found in violation of this article shall be responsible for all costs of investigation and testing, as well as for court costs, including, but not limited to, attorney's fees, witness fees, and witness expenses.  
(2013, Ord. No. 13-121, sec. 3.)

**Section 14-136. Cumulative remedies.**

The provisions of this article are cumulative. Nothing in this article shall affect any other remedy or relief that may be available to any adversely affected person or to the County or other governmental entity.  
(2013, Ord. No. 13-121, sec. 3.)

**CENTER FOR FOOD SAFETY:  
KAHEA; FRIENDS OF THE  
EARTH, INC., and PESTICIDE  
ACTION NETWORK NORTH  
AMERICA,**

**VS.**

**Defendants.**

DECLARATION OF MICHAEL J.  
PHILLIPS

## EXHIBIT 9



1. I serve as Vice President of Food and Agriculture Science and Regulatory Policy for the Biotechnology Industry Organization ("BIO") in Washington D.C. and have been employed by BIO since 1999. I am authorized to make this declaration on behalf of BIO.

2. I am a resident of the State of Virginia and over the age of 18 years. I hold a Ph.D. in food and Agricultural Policy/Agricultural Economics from Purdue University. I have personal knowledge of the matters stated herein and I am competent to make this declaration.

3. The confidentiality of field trial location information is a vital aspect to operations of biotechnology companies. Disclosure of field trial location information may allow business competitors to gain access to confidential business information, trade secrets, and research. If made public, this information could also be used to promote the type of crop destruction that has become widespread in Europe, and has regularly occurred in the United States.

4. Like any other highly competitive industry, biotechnology companies involved must protect their intellectual property, their investment, and the proprietary methods they have put in place to provide them with business advantages relative to their

competitors, both foreign and domestic. For each biotechnology company, its trade secrets and other confidential information are worth tens of millions of dollars, and represent years of research by doctors, agronomists, and other researchers.

5. The precise location of biotechnology-derived crops, including plants producing pharmaceutical proteins, is of interest both to business competitors and to those seeking to vandalize and harm these trials. For these reasons, the companies conducting these field trials provide this information to the USDA-APHIS as part of the field trial permitting process on a confidential basis, and expect the information to be maintained as confidential.

6. As a general matter, a competitor who knows the location of a field trial can visit it to observe its size. Because a critical mass of pharmaceutical protein is needed to commercialize products, the size of the trial -- the number of plants in the field producing the protein -- can provide an indication of the position of the test product along the road to commercialization, a well recognized business advantage. Similarly, a competitor could visit the field trial to observe the health and yield of the plants, which would also provide information regarding the commercialization timetable. If

the plants are not healthy or fail to produce adequate yield, additional time may be needed to improve the quality of the tested plant strain prior to commercialization.

7. A competitor could steal a permittee's plants, seeds, or pollen in order to analyze these experimental materials, and discover gene identity information or protein expression levels. This information could be used to reverse engineer a competing product, and is well-accepted as the type of intellectual property subject to trade secret protection. Finally, of course, an unscrupulous competitor could use location information to simply destroy a permittee's plants.

8. Plant destruction by those who may be opposed to agricultural biotechnology is also a very real possibility. The USDA recognized this potential for property damage in a March 9, 2000 memorandum from Dr. John Payne, Assistant Director, USDA-APHIS, to state regulatory officials and permit and notification applicants. Attached hereto as Exhibit "A" is a true and correct copy of Dr. Payne's memorandum, in which he wrote that several groups opposed to agricultural biotechnology research have targeted university, government, and private industry facilities conducting

research of this type for acts of vandalism, and have claimed "victory" in destroying research plots and laboratories containing genetically engineered organisms.

9. For example, a BIO member suffered the attack and destruction of two field trials of bioengineered corn plants during the summer of 2003 in southern France, where field trial locations are more publicly available than in the U.S. Attached as Exhibit "B" is a true and correct copy of an article from Reuters News Service concerning the crop destruction.

10. BIO members are aware that they are targets of crop destruction and vandalism, and have discussed the threats of vandalism that have occurred here and abroad. Attached hereto as Exhibits "C" and "D" are true and correct copies of media articles concerning past incidents of property destruction and vandalism in the U.S. directed towards biotechnology companies. Exhibit "C" specifically mentions separate incidents involving BIO members whose corn was destroyed in 1999. Incidents like those mentioned in the articles and experienced first hand by BIO members are of significant concern to BIO and all of its members.

11. Also attached hereto as Exhibit "E" is a true and correct copy of testimony downloaded from the U.S. Senate Committee on the Judiciary. William Green, Senior Vice President and General Counsel of Chiron Corporation, a biotechnology company and a member of BIO, testified before the Judiciary Committee on May 18, 2004. According to his testimony, Chiron Corporation and its employees were targeted by extremist animal rights activists beginning in 2003. His testimony details the tactics used by extremists, including bombing Chiron's offices and threatening and harassing Chiron employees at home. The testimony was downloaded from the U.S. Senate Judiciary Committee's website at [www.judiciary.senate.gov](http://www.judiciary.senate.gov).

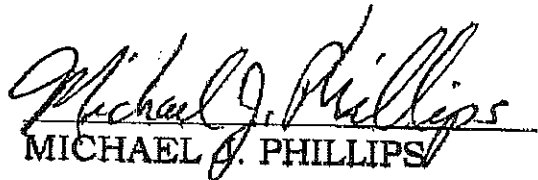
12. In order to protect the safety of their field trials, employees and contractors from such destructive acts, and to shield their trade secrets and confidential commercial and proprietary information from unauthorized disclosure, biotechnology companies take great care in keeping the precise location of field trials confidential. Many of the security measures that the biotechnology companies take to protect the location information are in and of themselves proprietary. As a general matter, however,

biotechnology companies reveal crop location information only to a limited number of employees and contractors on a need to know basis.

13. The bottom line is that the destruction of research plots of plants producing pharmaceutical proteins and the disclosure of trade secrets or other confidential information to competitors could cost BIO members hundreds of millions of dollars in plant-made pharmaceutical research and development costs, and present a threat to the continued broader presence of these companies in Hawaii as well. Even for permits that no longer have plants in the ground, disclosure of field trial location information would likely force developers to relocate future field trials in order to avoid vandalism and industrial espionage, since these sites are carefully chosen and are generally used for repeat plantings.

I declare under penalty of perjury that the foregoing statements are true and correct.

Executed at Washington D.C., May 28, 2004.

  
MICHAEL J. PHILLIPS



United States  
Department of  
Agriculture

Animal and  
Plant Health  
Inspection Service

4700 River Road  
Riverdale, MD 20737



MAR 9 2000

Subject: Vandalism of Facilities and Release Sites Containing Genetically Modified Organisms (GMO)

To: State Regulatory Officials and Permit and Notification Applicants

Several groups have targeted universities, government, and private industry facilities and have claimed "victory" in destroying research plots and laboratories containing genetically engineered organisms. These incidents have been reported by the media and posted on the websites of these Anti-GMO groups.

Biotechnology staff members have received telephone calls and E-mail messages from concerned scientists and responsible applicants expressing fears about their personal safety and that of their facilities and release sites. They expressed concerns about their names being listed on our website where all permits and notifications received within a 90 day period are posted, and the availability of gratis copies of permits and notifications. Some asked if they could claim the name and address of the destination and responsible persons or collaborators as 'confidential business information' (CBI).

Because of these acts of vandalism and expressed concerns of the biotechnology community, Permits and Risk Assessments, Plant Protection and Quarantine has initiated the following actions:

1. Applicants can claim as CBI the address of the destination of transgenic material and the name of collaborators and responsible person. The non-CBI copy must still have the county name and the state listed. The applicant is responsible for providing the State Regulatory official with the CBI information. The justification statement for claiming information as CBI must state that due to threats of vandalism they are claiming the addresses and names of collaborators and responsible person as CBI.

2. The names of all responsible persons have been deleted from our permits and notification website and will not be listed, which will alleviate some of the fear of personal safety that has been expressed.



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EXHIBIT A

3. The names of all responsible persons will be deleted off the Search the USDA Field Release Database Online a service provided by Virginia Tech's "Information Systems for Biotechnology (ISB)".

4. All requests for copies of notifications and permits will be forwarded to our Freedom of Information Office for handling. Gratis copies will not be processed by our Biotechnology Permit Unit at this time.

Should you have any questions regarding these actions, please contact Dianne Hatmaker, at Area Code 301-734-5787.



John Payne, Ph.D  
Assistant Director  
Permits and Risk Assessments  
Plant Protection and Quarantine

cc:  
SPHD  
Regional Program Managers (Biotechnology)



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Attorneys for Defendant Department  
of Agriculture, State of Hawai'i

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

**FILE COPY**

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B. TERAOKA  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CENTER FOR FOOD SAFETY,	)	Civil No. 03-1-1509-07 (RWP)
	)	
Plaintiff,	)	(Other Civil Action)
	)	
v.	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT,
DEPARTMENT OF AGRICULTURE,	)	FILED AUGUST 19, 2003,
STATE OF HAWAII,	)	WITHOUT PREJUDICE
	)	
Defendant.	)	DATE: <u>September 29, 2003</u>
	)	TIME: <u>10:30 A.M.</u>
	)	JUDGE: <u>Richard W. Pollack</u>

ORDER DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT, FILED AUGUST 19, 2003, WITHOUT PREJUDICE

This matter came on for hearing before the Honorable  
Richard W. Pollack, Judge of the above-entitled court, on  
September 29, 2003 at 10:30 A.M., on Plaintiff's Motion For  
Summary Judgment, filed August 19, 2003. Moving party,

I do hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

EXHIBIT 10 Clerk, Circuit Court, First Circuit

Plaintiff Center for Food Safety ("CFS"), appeared by Isaac H. Moriwake, Esq., and Paul H. Achitoff, Esq., and Defendant Department of Agriculture, State of Hawai'i appeared by Deputy Attorneys General David A. Webber, Esq., and Haunani Burns, Esq.

The Court has considered the record and file herein, including the supporting and opposing memoranda and exhibits, and has heard argument of counsel. The Court is in all respects fully informed, and has expressed on the record its findings and conclusions with respect to the issues presented by Plaintiff's Motion for Summary Judgment and Defendant's opposition.

In 1992 the Office of Information Practices ("OIP"), issued an opinion regarding whether the Uniform Information Practices Act ("UIPA") requires the disclosure of information in applications for permission to release genetically modified organisms into the environment that would constitute confidential business information ("CBI").

Based upon, first, federal case law interpreting exemption 4 of the federal Freedom of Information Act ("FOIA"), which permits federal agencies to withhold access to trade secrets and commercial and financial information obtained from a person and that is privileged or confidential; and second, Senate Standing Committee report number 2580 of the 1988 Hawai'i Legislature, which specifically included "trade secrets or confidential commercial and financial information" as an example of

government records that could be withheld under the UIPA exception if disclosure of the records would result in the frustration of a legitimate government function, the OIP concluded that CBI protected under the FOIA's exemption 4 would generally be protected under the UIPA exception set forth in Hawai'i Revised Statutes ("HRS") 92F-13(3) and therefore, the UIPA's frustration of a legitimate government function exception would generally protect CBI to the same extent as exemption 4 of the FOIA

Additionally, the OIP found that because the Department of Health's ("DOH") receipt of CBI contained in applications is contingent upon the DOH's compliance with U.S. Department of Agriculture's policy statement, the CBI, in the applications, would not be required to be publicly disclosed in order to avoid the frustration of the DOH's legitimate function of receiving this information for its review.

HRS § 92F-15 provides that opinions and rulings of the OIP shall be admissible in UIPA enforcement actions. Moreover, courts accord deference and persuasive weight to statutory interpretations advanced by agencies charged with implementing a statute. OIP was created by HRS § 92F-41 and was provided with wide-ranging responsibilities, including to take action to oversee compliance with part I of HRS Chapter 92, and to advise all government boards and the public about compliance with

Chapter 92. Thus, this court will accord due weight to the 1992 opinion.

CFS sent a request, dated May 23, 2003, to access government records, to the Department of Agriculture ("DOA"), seeking "[a]ll documents, records, and files in the possession of the Department of Agriculture of the State of Hawai'i relating to any and all ongoing field tests of genetically engineered pharmaceutical-producing plant varieties in the State of Hawai'i, including but not limited to field tests conducted under United States Department of Agriculture (USDA) Permits No. 01-306-01R issued to Hawaii Agriculture Research Center, and No. 01-257-01R, issued to Monsanto."

On the response form, the Department of Agriculture indicated that the request for access to the identified records is denied in its entirety or will be granted only to certain part(s) of this government record. The grounds stated were HRS § 92F-13, subsection three and four, and the records identified were "Permits and Interagency correspondence that are records of United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS), Biotechnology Regulatory Services."

In the section of the response form entitled "Method and Date of Disclosure," the following is inserted, "We are unable

to address method and date of disclosure until USDA APHIS FOIA makes a determination regarding disclosure."

Approximately six weeks after the response was forwarded, this action was filed in Circuit Court and the instant motion for summary judgment was filed less than a month after the complaint was filed. In its motion for summary judgment, the Center for Food Safety requests the court to compel the DOA to disclose the documents requested by CFS under UIPA.

The DOA responds that the CFS document request includes documents that contain CBI, protected from disclosure by federal and State law, and that disclosure of such information would frustrate a legitimate government function pursuant to HRS § 92F-13. This response parallels the OIP opinion issued more than ten years ago.

The DOA has submitted the declaration of Carol Okada, an employee of the DOA Plant Quarantine Branch. According to Ms. Okada, she receives and processes correspondence and documents provided to DOA by APHIS in connection with permits issued by APHIS. Some of the documents DOA received from APHIS contain CBI or trade secrets of the applicants for permits issued by APHIS.

In connection with developing DOA's input to the APHIS permitting process as to specific permits application, Ms. Okada also receives information from permit applicants that includes

CBI or trade secrets of the applicant. Biopharm permits are issued under a federal regulatory scheme controlled by APHIS. Federal law, however, does not explicitly require APHIS to seek comments regarding biopharm applications from the State, but the applicable law authorizes the USDA to cooperate with the states.

According to Ms. Okada, in the past, it has been the experience of the DOA that APHIS does take the DOA's comments and suggestions into account when considering an application. Therefore, Ms. Okada states, in order to assure that DOA has an effective voice in the permit-issuing process controlled by APHIS, it is necessary that DOA honors APHIS's requests and instructions that any request for disclosure of information concerning confidential business information received by State agencies from APHIS, be directed to APHIS for a response under the FOIA

At this stage of the proceedings, the court, in a motion for summary judgment, is required to look at the evidence and every inference therefrom in the light most favorable to the non-moving party. Here, Plaintiff has requested all documents, records, and files in the possession of the DOA relating to any and all ongoing field tests of genetically engineered pharmaceutical producing plant varieties in the State of Hawai'i.

This request, construed in the light most favorable to the State, may include trade secrets or confidential information. Additionally, the declaration of Ms. Okada indicates that historically, some of the documents received by the Department of Agriculture do contain confidential information or trade secrets. In lights of the breadth of the Plaintiff's request, again, looking at the evidence in the light most favorable to the State, the documents requested may contain CBI and/or trade secrets.

Further, Ms. Okada's declaration indicates that when there is a request for disclosure of information concerning CBI received by State agencies, that request is to be directed to APHIS for response. This is what was done in this case and again, applying the evidentiary standard that a court must employ, the information requested by Plaintiff may contain CBI and/or trade secrets.

Finally, Exhibit C to Plaintiff's motion indicates that the records requested by Plaintiff contain CBI. With respect to permit number 01-257-01R, information regarding the gene donor is classified as CBI. Thus, Plaintiff's Exhibit C itself raises a disputed fact as to whether the requested record disclosure contains CBI. And, according to the OIP, release of CBI and trade secrets would frustrate a legitimate government function and thus they are excluded from disclosure.

Despite the plethora of evidence indicating that the requested records may contain CBI or trade secrets, Plaintiff has elected to put no evidence before the court to demonstrate that the requested records contain no CBI or no trade secrets. Plaintiff misapprehends its burden of proof on the motion for summary judgment. Once evidence is before the court that there is a genuine issue of material fact, Plaintiff cannot sustain its burden to show that there is no disputed fact by producing no evidence in response.

The agency's ultimate burden of proof at the time of trial is an entirely different issue than the agency's evidentiary burden at a summary judgment proceeding. As indicated, Plaintiff has failed to place any evidence before the court that would indicate that the records being sought do not contain CBI or trade secrets. Instead, Plaintiff asks this court, which is ignorant of the contents of the records, to simply order wholesale disclosure because Plaintiff is dissatisfied with the time frame the State has proposed to review and respond to Plaintiff's request.

In light of the record before this court and for the reasons set forth herein, Plaintiff's request is without an adequate factual basis. Accordingly, the motion for summary judgment is denied without prejudice.



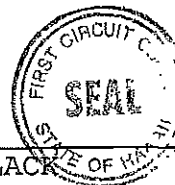
The court also notes that the State has indicated that it will take DOA 60 days to determine which documents contain CBI or trade secrets and to consult with permit applicants. The court anticipates that every effort will be made to comply with this deadline.

For the reasons stated on the record, the Court concludes that Plaintiff is not entitled to summary judgment and therefore makes the following Order:

IT IS HEREBY ORDERED that Plaintiff's Motion For Summary Judgment, filed August 19, 2003, be and it is hereby DENIED, without prejudice.

DATED: Honolulu, Hawai'i, OCT 20 2003

RICHARD W. POLLACK



RICHARD W. POLLACK  
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

Isaac H. Moriwake, Esq.  
Paul H. Achitoff, Esq.  
Attorneys for Plaintiff

[CENTER FOR FOOD SAFETY v. DEPARTMENT OF AGRICULTURE, STATE OF HAWAII, Civil No. 03-1-1509-07 (RWP); ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED AUGUST 19, 2003, WITHOUT PREJUDICE]

IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT

STATE OF HAWAI'I

JOHN DOE,

Plaintiff,

vs.

COUNTY OF HAWAI'I

Defendant.

CIVIL NO. \_\_\_\_\_  
(Hilo Division)

PROPOSED TEMPORARY  
RESTRAINING ORDER

**PROPOSED TEMPORARY RESTRAINING ORDER**

Upon consideration of Plaintiff John Doe's Motion for Temporary Restraining Order and Preliminary Injunction and the entire record, it is this \_\_\_\_\_ day of \_\_\_\_\_ 2014, HEREBY

ORDERED that Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction is GRANTED; and it is further

ORDERED that all registration requirements set forth in County of Hawai'i Ordinance No. 13-121, Haw. County Code § 14-133 (hereinafter "Bill 113"), including the March 5, 2014 registration deadline, are STAYED for Plaintiff John Doe and all other individuals required to register in accordance with Bill 113; and it is further

ORDERED that the County of Hawai'i and its various agents are ENJOINED from enforcing the registration provisions of Bill 113, including through the issuance of fines, against Plaintiff or any other individual required to register in accordance with Bill 113; and it is further

ORDERED that the County of Hawai'i and its various agents are ENJOINED from releasing any registration information to a third party that the County has already received in accordance with Bill 113; and it is further

ORDERED that this Temporary Restraining Order shall remain in effect until this Court holds a hearing and resolves Plaintiff's Motion for Preliminary Injunction.

**SO ORDERED.**

[Proposed Temporary Restraining Order]\_\_\_\_\_  
JUDGE OF THE ABOVE ENTITLED COURT

IN THE CIRCUIT COURT FOR THE THIRD CIRCUIT

STATE OF HAWAI'I

JOHN DOE,

Plaintiff,

vs.

COUNTY OF HAWAI'I,

Defendant.

CIVIL NO. \_\_\_\_\_

(Hilo Division)

NOTICE OF HEARING MOTION AND  
CERTIFICATE OF SERVICE

**NOTICE OF HEARING MOTION**

TO: LINCOLN S.T. ASHIDA, ESQ.  
Office of Corporation Counsel  
333 Kilauea Avenue  
Hilo, Hawaii 96720

Attorney for Defendant  
COUNTY OF HAWAI'I

NOTICE IS HEREBY GIVEN that **PLAINTIFF'S MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION** shall come for hearing  
before the Honorable GREG K. NAKAMURA <sup>3E</sup>, in his/her courtroom located at the above-entitled  
Court, **Hale Kaulike, 777 Kilauea Avenue, Hilo, Hawaii 96720**, on the ~~\_\_\_\_~~<sup>3E</sup>th day of  
MAR - 7 2014, ~~2014~~ at 10:30 a.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai'i, March 3, 2014.



MARGERY S. BRONSTER  
REX Y. FUJICHAKU  
Attorneys for Plaintiff JOHN DOE

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document will be  
duly served upon filing on the following parties at their last known addresses in the manner  
specified below:

LINCOLN S.T. ASHIDA, ESQ.  
Office of Corporation Counsel  
333 Kilauea Avenue  
Hilo, Hawaii 96720

Attorney for Defendant  
COUNTY OF HAWAI'I

DATED: Honolulu, Hawai'i, March 3, 2014.



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MARGERY S. BRONSTER  
REX Y. FUJICHAKU  
Attorneys for Plaintiff JOHN DOE