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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

SYNGENTA SEEDS, INC.; a  
Delaware corporation;  
SYNGENTA HAWAII, LLC;  
PIONEER HI-BRED  
INTERNATIONAL, INC., an Iowa  
corporation; and  
AGRIGENETICS, INC., a  
Delaware corporation,

Plaintiffs,

vs.

COUNTY OF KAUA'I,

Defendant.

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

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF;  
EXHIBIT 1**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**PRELIMINARY STATEMENT**

Syngenta Seeds, Inc. and Syngenta Hawai'i, LLC  
(collectively "Syngenta"); Pioneer Hi-Bred International, Inc.  
("Pioneer"); and Agrigenetics, Inc. ("Agrigenetics") (all, collectively,  
"Plaintiffs") bring this action to prevent the County of Kaua'i from  
implementing Bill 2491, entitled "Pesticides and Genetically  
Modified Organisms," that is scheduled to take effect on August 16,

2014. See Exhibit "1".

Plaintiffs produce seeds for commercial agricultural products. For many years, genetically modified ("GM") crops have been grown on Kaua`i for this purpose, using pesticides authorized by both the State of Hawai`i and the federal government. Plaintiffs chose Kaua`i because its climate is uniquely conducive to Plaintiffs' business of developing innovative GM products for sale on the mainland and internationally to farmers working to increase food production and feed the world.

Plaintiffs' seed production activities could not have proceeded without the exhaustive review of potential health, safety and environmental risks by federal and state agencies, which have conclusively determined that (1) GM plants present no such risks, and (2) the pesticides Plaintiffs use present no unreasonable risks to the environment or public health. Thus, the ostensible purpose of Bill 2491, to protect the "health and natural environment" of Kaua'i and its people from the use of pesticides and GM crops, is already addressed by the comprehensive state and federal regulatory programs. Bill 2491, Sec. 22-22.2.

Bill 2491 irrationally prohibits Plaintiffs from growing

*any* crops, whether genetically modified or not, within arbitrarily drawn buffer zones inapplicable to other growers, and restricts Plaintiffs' pesticide use within those buffer zones. The Bill also imposes unwarranted and burdensome disclosure requirements relating to pesticide usage and GM crops that compromise Plaintiffs' confidential commercial information and unnecessarily expose Plaintiffs to risks of corporate espionage, vandalism, and environmental terrorism.

Bill 2491 is fatally flawed because:

- It impermissibly attempts to regulate in an area already occupied by state and federal law and the regulatory policies administered by federal and state agencies that oversee Plaintiffs' operations, or conflicts with such existing laws and regulations;
- It violates Plaintiffs' federal and state constitutional rights to equal protection and due process by arbitrarily targeting Plaintiffs—and exempting virtually all other users of pesticides, including the County itself;
- It also violates Plaintiff's federal and state

constitutional rights to equal protection and due process by imposing burdensome operational restrictions and civil and criminal penalties that have no legal or factual justification;

- It takes and damages Plaintiffs' property by forbidding them from planting any crops in arbitrary "buffer zones" without good cause or just compensation;
- It violates the Kaua`i County Charter; and,
- It was adopted—over a veto by Kaua`i Mayor Bernard Carvalho at the advice of his legal counsel—by a supermajority of the County Council that included a member who was selected in a manner that violated the Hawai`i Open Meeting Law (H.R.S. Chapter 92).

For all these reasons, Plaintiffs ask the Court to declare Bill 2491 invalid and enjoin the County from enforcing it.

### **THE PARTIES**

1. Plaintiffs promote sustainable agriculture through innovative research and technology. They combine technological

advances in seeds, seed care, and crop protection to help farmers grow crops using less land, water, energy and other resources.

2. Plaintiff Syngenta Seeds, Inc. is a Delaware corporation that researches, develops, produces and markets GM seed products, including GM corn and soybean seed for the national and international market. Its principal place of business is in Minnetonka, Minnesota.

3. Syngenta Hawai'i, LLC is a wholly owned subsidiary of Syngenta Seeds, Inc., its sole member. It leases all land currently farmed by Syngenta Seeds, Inc. on Kaua'i.

4. Plaintiff Pioneer Hi-Bred International, Inc. is an Iowa corporation with its principal place of business in Johnston, Iowa. It produces seeds for agriculture, including GM corn and soybean seeds. It operates worldwide, and has research and agricultural facilities on Kaua'i.

5. Plaintiff Agrigenetics Inc. is a Delaware corporation with its principal place of business in Indianapolis, Indiana. It conducts farming operations on Kaua'i.

6. Defendant County of Kaua'i is a political subdivision of the State of Hawai'i. Its powers are governed by

Article VII of the Constitution of the State of Hawai`i; by Hawai`i Revised Statutes ("H.R.S.") Chapter 46 and other state laws; and by the Kaua`i County Charter.

7. As a political subdivision of the State of Hawai`i, organized and operating under the laws of the State of Hawai`i, the County and its governing officials were acting, in all respects and at all relevant times, under color of law in adopting Bill 2491.

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1343(a)(3).

9. This Court also has subject matter jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1332(a)(1). This dispute is between citizens of different States. The amount in controversy exceeds \$75,000, exclusive of costs, for each Plaintiff because the cost of compliance with Bill 2491 for each Plaintiff will greatly exceed that amount.

10. This Court also has jurisdiction under 28 U.S.C. § 1367(a) because the claims that arise under Hawai`i law are so closely related to the claims which are otherwise within this Court's

jurisdiction that they form part of the same case or controversy.

11. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) & (e) because Bill 2491 was enacted in, and is to be implemented in, this District.

## **FACTS AND BACKGROUND INFORMATION**

### **Plaintiffs' Activities on Kaua`i**

#### **Syngenta's Operations**

12. Syngenta has operated on Kauai since 1965, producing hybrid corn and soybean seed, the majority of which today is GM seed. Syngenta employs approximately 235 people on Kaua`i.

13. Syngenta leases approximately 3,000 acres on Kaua`i. More than half of the land is leased from the State of Hawai`i under an agreement that expressly contemplates growing GM crops. Most of the land Syngenta leases has an irrigation and drainage infrastructure that dates back to earlier sugarcane farming days, with an extensive system of ditches.

14. Syngenta does not farm within 500 feet of any school, hospital or assisted living facility, although some of its farmable lands falls within such an area. Most of Syngenta's fields



are within one hundred feet of a public roadway, perennial waterway, irrigation ditch, or drainage canal.

15. Syngenta conducts its farming activities in accordance with conservation plans approved by the U.S. Natural Resources Conservation Service.

### **Pioneer's Operations**

16. Pioneer has operated on Kaua`i since 1968, currently producing corn, soybean, and sunflower seed. The majority of the corn and soybean seed is GM seed (none of the sunflower seed is GM). Pioneer employs approximately 220 people on Kaua`i.

17. Pioneer leases approximately 5,000 acres on Kaua`i, of which nearly 1,790 acres are owned by the State of Hawai`i. Most of the land Pioneer leases has an irrigation and drainage infrastructure that dates back to earlier sugarcane farming days, with an extensive system of ditches.

18. Pioneer does not farm within 500 feet of any school, hospital or assisted living facility, although some of its farmable lands falls within such an area. Pioneer farms within 500 feet of several dwellings and within 100 feet of roadways at many of its

locations.

19. Pioneer conducts its farming activities in accordance with a number of conservation plans approved by the U.S. National Resources Conservation Service.

### **Agrigenetics' Operations**

20. Agrigenetics has two farms on Kaua`i that produce GM corn seed. Agrigenetics employs approximately 190 people on Kaua`i.

21. Agrigenetics leases approximately 3,500 acres total for its two farms, which include many irrigation ditches.

22. Agrigenetics does not farm within 500 feet of any school, hospital or assisted living facility, although some of its potentially farmable lands falls within such an area. Agrigenetics farms within 500 feet of certain dwellings and within 100 feet of roadways at many of its locations.

23. Agrigenetics conducts its farming activities in accordance with a number of conservation plans approved by the U.S. National Resources Conservation Service.

### **Plaintiffs' Development of GM Crops on Kaua`i**

24. Plaintiffs grow a variety of GM seed crops on

Kaua`i, including corn, soybeans, canola and rice. These seed crops are components of Plaintiffs' research and development pipelines that produce a continuous stream of new seed varieties that produce high yields in widely divergent environmental conditions.

25. A commercially viable new seed variety is the product of multiple generations of seed production. The temperate Kaua`i climate provides Plaintiffs the invaluable opportunity to triple or quadruple the pace of development of GM crops by producing seed year-round. This advantage is crucial to Plaintiffs' success in the U.S. and international seed markets.

26. Virtually all of the seed Plaintiffs plant on Kaua`i is imported from the mainland or foreign sources; virtually all of the seed produced by Plaintiffs on Kaua`i is shipped back to the mainland and foreign countries to plant seed fields in those locations.

27. Plaintiffs' GM seed farming activities are authorized by the U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") in one of two ways. Seeds containing new GM traits that have not yet completed the federally

mandated health and safety risk assessment process are planted under specific authorizations from APHIS as “regulated articles”. These authorizations are field specific and contain enforceable conditions to maintain segregation of all plant material as well as such supplemental conditions as may be required by the Hawai`i Department of Agriculture. Seeds containing GM traits that have successfully completed the federal health and safety risk assessment process are authorized for planting by APHIS as “deregulated seed” in the same manner as their conventional seed counterparts.

28. GM seeds, such as those grown by Plaintiffs, have become the primary source of corn and soybeans products in the United States. In 2012, over 90% of the U.S. corn crop and 93% of the U.S. soybean crop were produced from GM seed. And, GM crops were grown on more than 425,000,000 acres in 28 countries around the world.

29. Both corn and soybeans are major agricultural commodities in the United States. Corn is the largest agricultural commodity produced in the U.S. for the U.S. and global market. Approximately 97,000,000 acres of corn were planted in the U.S. in

2012, with a value of over \$77 billion. Approximately 77,000,000 acres of soybeans were planted in the U.S. in 2012, with a value of over \$43 billion.

30. The U.S. Government, the National Academy of Sciences, the World Health Organization, the American Medical Association and more than 600 peer-reviewed scientific studies have concluded that GM foods are safe.

### **Plaintiffs' Use of Pesticides**

31. Consistent with generally accepted agricultural and management practices, Plaintiffs use various insecticides, herbicides, and fungicides (collectively, "pesticides") in their farming operations on Kaua`i. All of these pesticides are registered for use by the U.S. Environmental Protection Agency ("EPA") and the Hawai`i Department of Agriculture ("HDOA") under their respective statutory authorities.

32. The government approved registered labels of the products define the conditions under which the pesticides can be legally used. These directions include measures that are individually tailored in the registration process to control the specific risks associated with that pesticide. Depending upon the

nature of the risk, the label may require measures to control spray drift, buffer zones to protect aquatic resources, and worker protection requirements, including field re-entry intervals. All pesticides applied by Plaintiffs are applied consistent with these label directions. All fields are posted in compliance with worker re-entry protection requirements established by EPA.

33. Some of the pesticides used by the Plaintiffs are restricted use pesticides, which can only be applied in accordance with the label instructions by applicators certified by the State of Hawai'i or competent persons under their direct supervision. All restricted use pesticides used by Plaintiffs are applied in conformance with these requirements. Some of the pesticides used by the Plaintiffs are not restricted use pesticides, meaning that they can be applied by any member of the public in accordance with the label instructions. Plaintiffs each purchase and use in excess of five pounds or fifteen gallons of one or more restricted use pesticides on an annual basis (which is the threshold set out in Bill 2491).

34. Plaintiffs utilize integrated pest management ("IPM") techniques, decisions, and controls to minimize pesticide usage in their seed production farming operations. IPM is an

effective and environmentally sensitive approach to pest management that relies on a combination of common-sense practices, including agricultural practices such as crop rotation, field-by-field scouting, accurate target pest identifications, population monitoring and application of pesticides only when necessary.

35. There are a number of options for each particular pesticide use. Deciding which pesticide to use and when to apply it is part of each Plaintiff's confidential proprietary production process. Information regarding use of specific pesticides in experimental GM seed production is closely-guarded confidential commercial information because a knowledgeable competitor can often determine from pesticide use patterns the nature of the new GM trait under development.

## **THE RELEVANT REGULATORY SCHEMES**

### **State Regulation of Pesticides and Pesticide Usage**

36. The Hawai'i Pesticides Law governs the licensing, sale, and use of pesticides in Hawai'i. H.R.S. Chapter 149A; H.A.R. Chapter 4-66. It contemplates cooperation and coordination with other State agencies and the Federal government for the purpose of

carrying out the Hawai`i Pesticides Law. H.R.S. § 149A-35.

37. Hawai`i law vests responsibility for pesticide registrations, experimental use permits, and authorization of use of restricted use pesticides, in the Hawai`i Board of Agriculture, or any officer or employee to whom authority has been duly delegated.

H.R.S. §§ 149A-19, 149A-22. No authority under the Hawai`i Pesticides Law has been delegated to the County of Kaua`i.

### **Federal Regulation of Pesticides**

#### **The Federal Insecticide, Fungicide and Rodenticide Act**

#### **(“FIFRA”)**

38. FIFRA governs the registration, labeling, use, and application of pesticides in the United States. 7 U.S.C. §§ 136, *et seq.* With few exceptions, FIFRA requires all pesticides used in the U.S. to be registered with the EPA. 7 U.S.C. § 136a.

39. The EPA will not register any pesticide or its specific use patterns unless it first determines that the pesticide and its label comply with FIFRA (7 U.S.C. §136a(c)(5)(B)), that it will perform its intended function without unreasonable adverse effects on the environment, and that “when used in accordance with widespread and commonly recognized practice it will not generally



cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5)(D).

40. FIFRA and EPA require submission of extensive and detailed scientific data on the potential effects of the pesticide on human health, the environment, and non-target species to support initial registration, continuing registration, registration review and re-registration of each pesticide and its use patterns. 7 U.S.C. § 136a(c)(2)(A).

41. As part of the registration process, EPA may classify a pesticide or any of its specific use patterns for “general use, restricted use, or both” depending on the characteristics of the pesticide and its intended use patterns. 7 U.S.C. § 136a(d)(1).

42. All pesticides, their use patterns, and their classifications are subject to periodic review and re-registration to account for advances in science and data collected in the pesticides’ use. 7 U.S.C. § 136a(g). Each registration and re-registration specifies the crops and sites where a pesticide may or may not be applied, the manner of application, and the precautions relating to its use, all as set forth on the product’s label. 40 C.F.R. §156.10.

43. Restricted use pesticides, and pesticides with a

specific use pattern classified as restricted use, can only be applied by a federal or state certified applicator trained in the EPA specified label requirements to permit use without unreasonable adverse effects to the environment. 7 U.S.C. § 136i. These label requirements include any buffer zone restrictions determined to be appropriate for the individual pesticide based on scientific data and risk assessment, crop-specific application rates, drift control measures, environmental fate, and field re-entry intervals. 40 C.F.R. §§ 156.10, 156.200-.212 (worker protection) and Part 158 (data requirements for registration).

44. In a November 2013 report to the state legislature pursuant to House Concurrent Resolution 129, the Hawai'i Department of Health recognized the existing federal and state regulation of pesticides:

Pesticide use is regulated by both the EPA and the State of Hawaii through existing authorities under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Hawaii Pesticide Law (Chapter 149A, H). Federal law requires that before selling or distributing a pesticide in the United States, a person or company must obtain registration or license, from EPA. Under federal law, EPA's Office of Pesticide Programs is responsible for evaluating the human health and environmental risk and ensuring the safety of pesticides when properly applied. To make such determinations, EPA requires more than a

100 different scientific studies and tests from the producer of the pesticide.

*Report To The Twenty-Seventh Legislature State Of Hawaii 2013; Pursuant to HCR 129, Requesting the Department of Health to Develop Partnerships to Address the Data Gap on Air, Surface Water, and Near Shore Effects of Atrazine*, November 2013, at 3.

### **Federal Regulation of GM Organisms**

#### **The Coordinated Framework**

45. The introduction of GM plant products into commerce has been closely regulated by the Federal Government since the mid-1980s under the provisions of the Coordinated Framework for Regulation of Biotechnology (“Coordinated Framework”), which the Government adopted “to develop a coherent and sensible regulatory process, one based on the best available scientific facts and intended to minimize uncertainties, delays, overlaps and inconsistencies,” and to encourage progress in biotechnology given “the tremendous potential of biotechnology to contribute to the nation’s economy in the near term, and to fulfill society’s needs and alleviate its problems in the longer term.” 49 Fed. Reg. 50,586 (Dec. 31, 1984). The implementation of the

Coordinated Framework is based in part on the conclusions of the National Research Council that “organisms that have been genetically modified are not per se of inherently greater risk than unmodified organisms.” 57 Fed. Reg. 6753, 6755 (Feb. 27, 1992).

46. Pursuant to the Coordinated Framework, three federal agencies—the Food and Drug Administration (“FDA”), EPA, and APHIS—conduct a science-based risk assessment review of new GM crop varieties prior to general introduction into commerce. FDA reviews the safety of food for humans and feed for animals under the Federal Food, Drug and Cosmetic Act (“FFDCA”), 21 U.S.C. §§ 301 *et seq.* EPA examines potential health and environmental impacts of associated pesticide use under the FFDCA and FIFRA. APHIS examines whether the crop presents any risk under the Plant Protection Act, (“PPA”), 7 U.S.C. §§ 7701 *et seq.*

47. The Coordinated Framework further requires federal agencies to comply with the applicable requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, in conducting their risk assessment reviews in accordance with their respective statutory authority.

### **The Plant Protection Act**

48. The PPA prohibits the movement in interstate commerce of any plant pest unless authorized under general or specific permits and in accordance with regulations issued by the Secretary of Agriculture. 7 U.S.C. § 7711(a). The Secretary has delegated authority to implement the PPA to APHIS, which must base its decisions “on sound science.” 7 U.S.C. § 7701(4).

49. Pursuant to its authority to regulate plant pests under the PPA, USDA has promulgated regulations that control the introduction into interstate commerce of certain organisms and products altered or produced through genetic engineering. 7 C.F.R. Part 340. Such genetically engineered organisms and products are deemed “regulated articles.”

50. The introduction of regulated articles into interstate commerce is prohibited under 7 C.F.R. Part 340 in the absence of authorization by APHIS. The regulations require authorization from APHIS for interstate movement and site-specific environmental release. 7 C.F.R. §§ 340.3, 340.4. The regulations also provide for APHIS to coordinate its authorizations for regulated articles with the applicable requirements of NEPA. 7 C.F.R. Part 372.

51. Public notice of authorizations is provided by posting information on APHIS's website. Specific field location information is not publicly disclosed in order to protect valuable trade secret information and to protect against the risk of vandalism and commercial espionage. *See Center for Food Safety v. Johanns*, No. 06-17319, 310 Fed. Appx. 964 (9th Cir. 2009). GM crops in Hawai'i have been vandalized, and Plaintiffs have received threats of vandalism related to their opposition to Bill 2491.

52. APHIS regulations also establish a petition process to facilitate commercialization of new GM plants and enable them to be planted, used and sold in the same manner as their conventional counterparts. In the past 20 years, following FDA and EPA reviews, APHIS has granted deregulated status to more than 83 GM plants.

### **The FFDCA**

53. The FFDCA prohibits the sale of food that is adulterated. 21 U.S.C. § 331. Pursuant to this authority, the FDA has established a food safety consultation process through which it reviews relevant food safety data respecting any new GM trait. When the FDA determines that a new GM trait presents no food safety concern (such as increased allergenicity), the trait can

proceed through the APHIS deregulation process.

### **Bill 2491**

54. Bill 2491 is designed to discriminate against GM seed farming operations on Kaua`i. Bill 2491 prohibits only Plaintiffs and two other non-local companies operating on Kaua`i (one of which is engaged in growing GM crops) from planting crops within extensive buffer zones, while excluding all other pesticide users from that ban. The Bill further requires frequent and burdensome reporting of pesticide use and of the existence, location, history, and description of GM crops being grown or developed.

55. Bill 2491 broadly defines a general class of “commercial agricultural entit[ies],” but the pesticide disclosure and the buffer zone requirements apply only to commercial agricultural entities that purchased or used a specified quantity of any single restricted use pesticide during the prior calendar year. Secs. 22-22.4(a), 22-22.5(a). The only entities covered by those provisions are Plaintiffs and two other non-Kaua`i-based companies (one of which grows GM crops) that utilize restricted use pesticides in quantities large enough to trigger Bill 2491. They are (1) BASF, a

mainland-based seed company engaged in developing GM products, and (2) Kaua`i Coffee Company, LLC (“Kaua`i Coffee”), which is owned by a Bologna, Italy-based conglomerate, Massimo Zanetti Beverage Group. Because Kaua`i Coffee does not grow GM crops, Bill 2491 was tailored to reduce its impact on Kaua`i Coffee, just as it was explicitly tailored to avoid impacting others who use pesticides on Kaua`i to grow non-GM crops and for other purposes.

56. With respect to genetically modified organisms (“GMOs”), Bill 2491 provides that every commercial agricultural entity that “intentionally or knowingly” possesses any GMO must disclose the growing of such GMOs in annual public reports to the HDOA and the County. The annual public reports must describe each GMO, identify the Tax Map Key and *ahupua`a* where it is being grown or developed, and state the dates the GMO was initially introduced to the land in question. The first such public reports are due on the date Bill 2491 takes effect, *i.e.*, on August 16, 2014. Thereafter, public reports are due no later than 60 days following the end of each calendar year. Sec. 22-22.4(b).

57. With respect to pesticides, Bill 2491 requires that every commercial agricultural entity that purchased or used more



than five (5) pounds or fifteen (15) gallons of any single restricted use pesticide in the preceding calendar year must make numerous and recurring disclosures regarding its use of all pesticides of any kind during each preceding calendar year. Sec. 22-22.4(a).

58. The required disclosures include:

(a) "Worker Protection": Each covered commercial agricultural entity must post warning signs no sooner than 24 hours before the scheduled application of any pesticide. Warning signs must conform to EPA and State of Hawai'i requirements;

(b) Pre-Application "Good Neighbor Courtesy Notices": Each covered commercial agricultural entity must send pesticide pre-application "good neighbor" notices to (1) the following requesting persons within 1,500 feet from the property line of the commercial agricultural entity where any pesticide is to be applied: registered beekeepers, property owners, lessees, or any persons otherwise occupying property within 1,500 feet, and (2) any revocable permit holder authorized to enter the commercial agricultural entity's property.

(c) Each covered commercial agricultural entity must maintain a mass notification list that includes a map showing all

field numbers and “any key, legend, or other necessary map description.” Mass notification must be made by phone, text message, or email. Each commercial agricultural entity must also provide an alternative means of notice for those without phones or computers. The “good neighbor” notices must include information regarding the pesticide to be used, the active ingredient, the date, the time, and the field number.

(d) Each covered commercial agricultural entity must send weekly mass notices summarizing the anticipated pesticide applications during the upcoming seven days. Moreover, each affected commercial agricultural entity must provide a notice of unforeseen "pest threat" applications within 24 hours after the fact.

(e) Post Application Weekly Disclosure: Each covered commercial agricultural entity must submit weekly public disclosure reports to the Office of Economic Development (“OED”) compiling all actual pesticide applications during the prior week. The public reports must include: the date; time; field number; total acreage; pesticide trade name; EPA registration number; active ingredient(s), gallons or pounds used; and temperature, wind speed and direction at the time of pesticide application.

(f) Post Application Urgent/Emergency Care

Disclosure: Each covered commercial agricultural entity must have an emergency response hotline and must respond within six hours to any request from any licensed physician or nurse practitioner who "provides a documented medical need" for information about "actual pesticide applications related to the alleged incident."

59. In an attempt to ban use of pesticides registered and approved by the federal and state governments, Sec. 22-22.5(a) also provides that the affected entities may not grow any crop (except ground cover to which no pesticide is applied) within the following buffer zones (none of which is consistent with, or authorized by, any federal or state regulatory agency):

a. within 500 feet of any adult family boarding home, adult family group living home, day care center, family care home, family child care home, medical facility, nursing home, residential care home, or school;

b. within 250 feet of any park, unless the commercial agricultural entity has a "mature" orchard of plants grown "in a hedge-like" manner and the spraying is done no more than two feet

above ground level and only for weed suppression, in which case the buffer zone is reduced to 75 feet;

c. within 500 feet of any dwelling, unless (1) there is an approved Soil and Water Conservation Plan that explicitly demonstrates no pesticide drift on the dwelling (in which case the buffer zone is 100 feet of the dwelling); (2) the dwelling is owned by the landowner, is occupied by the landowner or a family member of the landowner, and there are no other dwellings occupied by third parties within 500 feet of the landowner dwelling (in which case there is no buffer zone); or (3) the commercial agricultural entity has a "mature" orchard of plants grown "in a hedge-like" manner and the spraying is done no more than two feet above ground level and only for weed suppression (in which case the buffer zone is 75 feet of the dwelling);

d. within 100 feet of any public roadway, except that pesticides may be used within the buffer zone if the commercial agricultural entity posts notification signage on land that is adjacent to the public roadway at least 24 hours before a scheduled application; or

e. within 100 feet of any shoreline or perennial waterway that flows into the ocean.

60. Section 22-22.6 of Bill 2491 directs the County to prepare an Environmental and Public Health Impact Study (“EPHIS”), which targets large scale commercial agricultural entities that utilize pesticides and grow GM crops.

61. Bill 2491 subjects all persons, firms, and corporations involved in violating, causing, or permitting any violation of any provision of Bill 2491--whether as principals, agents, employees, or otherwise-- to fines and possible incarceration and authorizes civil fines of \$10,000-\$25,000 per day, per violation. Section 22-22.7(a).

62. In addition to any civil penalty, Section 22-22.7(b) provides that all persons, firms, or corporations violating, causing, or permitting the violation of any provision of Bill 2491--whether as principals, agents, employees, or otherwise-- shall be guilty of a misdemeanor that upon conviction shall be punished by a fine of not more than \$2,000, or imprisonment not more than one year, or both, for each offense.

63. Bill 2491 was explicitly drafted for the purpose of

harming Plaintiffs' ongoing farming activities. Bill 2491 applies to entities like Plaintiffs which, due to the size of their fields, necessarily use a greater net amount of pesticides than a small farmer using the identical pesticides in larger quantities per acre.

64. The restrictions imposed by Bill 2491 are not rational. For example, one of the stated "findings" of Bill 2491 is the Kaua'i County Council's assumption that "[g]enetically modified plants could potentially disperse into the environment of the County of Kaua'i through pollen drift, seed commingling, and inadvertent transfer of seeds by humans, animals, weather events, and other means." Sec. 22-22.1(f). In fact, none of the Plaintiffs' crops creates any of these risks. Similarly, the Council assumed the planting of GM plants could have detrimental "environmental and economic impacts" on Kaua'i. In truth, there are no such negative impacts. Further, the Council assumed that "residents live, work and commute" in close proximity to areas in which pesticides are being used, but Bill 2491 does not apply to all those who use pesticides in close proximity to people, although it applies to all of Plaintiffs' farming operations, including those which are nowhere near where people live, work or commute.

65. The Council passed Bill 2491 on October 15, 2013. On October 31, 2013, Mayor Carvalho vetoed Bill 2491. In his veto message to the Kaua`i County Council, the Mayor explained that he vetoed Bill 2491 because the County does not have the legal authority to enact the provisions of Bill 2491, and that enacting Bill 2491 into law was not the correct and legal path to protect the health and safety of the community. He reached this conclusion based on a comprehensive legal analysis by the Office of County Attorney, County of Kaua`i.

66. In his veto message, Mayor Carvalho summarized the legal points that he found to be most troubling about Bill 2491. First, he admitted that existing federal and state law appears to preempt the County from enacting its own pesticide laws and conceded that the HDOA had been given authority by the federal government to regulate pesticides. He explained that the County Attorney's Office opined that the Hawai`i Pesticides Law creates a complex and comprehensive regulatory framework that indicates a purpose to occupy an entire field of regulation and preempts the County of Kaua`i from enacting laws to regulate pesticides.

67. Second, Mayor Carvalho said that Bill 2491 is

subject to challenge as an invalid exercise of the County's police power, an invalid exercise of the County's ability to regulate public nuisances, and/or a violation of the Hawai'i Right to Farm Act's prohibition against any public official declaring farming operations a nuisance.

68. Third, Mayor Carvalho said that Bill 2491 violates the separation of powers provisions of the Kaua'i County Charter by assigning new functions to the OED, which is an agency of the executive branch that is ill-equipped to implement Bill 2491.

69. After the Kaua'i Mayor vetoed Bill 2491, the Kaua'i County Council convened to override the veto. When it became apparent that there were not sufficient votes on the Council, as then-constituted with six members, to override the veto, the Council recessed to appoint a new member who would vote to override the veto.

70. The next day, the Council met again to choose the replacement councilmember. In doing so, the Council met in secret to consider applications received from 18 potential replacements. The Council never identified those applicants, disregarding whether the law required disclosure or whether the public interest in



identifying the applicants overrode any applicant's alleged privacy interests.

71. With a handpicked replacement councilmember who was chosen based upon the majority's desire to override the Mayor's veto, the newly constituted Council successfully overrode the veto on November 16, 2013.

72. The effective date of Bill 2491 is nine months after its approval, *i.e.*, on or about August 16, 2014.

#### **Injuries to Plaintiffs from Application of Bill 2491**

73. Applying Bill 2491 to Plaintiffs' seed production activities will violate Plaintiffs' constitutional rights, privileges and immunities as alleged below.

74. Mandatory disclosure of the location of pesticide use and the production of GM crops increases the risk of commercial espionage, vandalism, and misappropriation of Plaintiffs' valuable confidential business information, which constitute trade secrets. By its nature, such harm would be difficult to quantify in monetary terms.

75. The required pesticide disclosures will inflict harm on Plaintiffs' operations and ability to compete.

76. Bill 2491 will cause Plaintiffs economic damage because the buffer zones will prevent Plaintiffs from using a portion of their agricultural lands. Such a permanent loss of useable lands will damage Plaintiffs' Kaua'i operations. Plaintiffs will suffer significant lost research and production time as a result.

77. Bill 2491 will also cause damage to Plaintiffs' goodwill and reputation.

### **CLAIMS FOR RELIEF**

#### **PREEMPTION UNDER STATE AND FEDERAL LAW (Claims One through Three)**

78. The doctrine of preemption holds that a county ordinance is invalid when it conflicts with either federal or state law. State preemption occurs when a county ordinance either (1) covers the same subject matter covered by a comprehensive state statutory scheme that reflects an express or implicit intent to be exclusive and uniform throughout the state, or (2) conflicts with state law, either expressly or by legislative implication. Federal preemption occurs when federal law, either explicitly or implicitly, overrides a challenged state or local law, including (1) where the challenged law conflicts with federal law, (2) where the challenged

law stands as an obstacle to achieving the objectives of federal law, and (3) where the challenged law seeks to regulate in a field completely occupied by federal law.

**FIRST CLAIM: *Lack of Authority and Preemption of the Pesticide Provisions of Bill 2491 Under State Law***

79. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

80. The authority of Kaua'i County to regulate pesticides is limited by the supremacy provisions of the state Constitution. Article VIII, section 1 of the Hawai'i Constitution gives the state legislature the power to create political subdivisions, and limits the political subdivisions to the exercise of such powers that are conferred under general laws. Conversely, Article VIII, section 6 of the Hawai'i Constitution does not limit the power of the state legislature to enact laws of statewide concern.

81. Moreover, Article XI, section 3 of the state Constitution directs the State (but not the counties) to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." The state Constitution also directs

the state legislature (but not the municipal governments) to provide “standards and criteria” to effectuate this mandate through laws of statewide application. These state statutes include the Hawai`i Pesticides Law, the Right to Farm Act, the State Planning Act and the Agribusiness Development Corporation statute.

82. The legislature codified the constitutional supremacy principles in H.R.S. § 50-15, which states,

Notwithstanding the provisions of this chapter, **there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest** and laws relating to the fiscal powers of the counties, and **neither a charter nor ordinances adopted under a charter shall be in conflict therewith.** [Emphasis added].

83. The County does not have the authority under the Hawai`i Constitution and applicable state statutes to enact or enforce Bill 2491. Bill 2491 is invalid because it covers a subject or matter of statewide concern expressly reserved to the State of Hawai`i.

84. Bill 2491 is preempted by the Hawai`i Pesticides Law, (H.R.S. Chapter 149A), which embodies a comprehensive statutory regime for the registration, licensing, and use of all

pesticides sold and used in the State. In pertinent part, the statute provides that “[a]ll authority vested in the [B]oard [of Agriculture] or chairperson . . . may with like force and effect be exercised by those employees of the [D]epartment [of Agriculture] as the board or chairperson may from time to time designate for the purpose.”

H.R.S. § 149A-3.

85. The legislature also vested exclusively in the Board the power to enact rules to implement the purposes, objectives, and functions of the Hawai`i Pesticides Law, including the “establish[ment] of a system of control over the . . . use of certain pesticides purchased by the consuming public.” Entitled “Determination; rules; uniformity,” H.R.S. § 149A-19, the statute provides:

(a) The board, after having afforded interested and affected parties an opportunity to be heard and, in instances in which human health is affected, after consultation with the director of health, shall adopt rules to:

(1) Determine the pesticides that are highly toxic to humans, designate pesticides as restricted use or nonrestricted use, and establish a system of control over the distribution and use of certain pesticides and devices purchased by the consuming public;

H.R.S. § 149A-19(a)(1). *See also* H.R.S. § 149A-33 (“The department shall have the authority to carry out and effectuate the purpose of this chapter by rules.”).

86. The legislature’s intent to vest the Board of Agriculture with exclusive authority to regulate or restrict the use of State-licensed pesticides is further evidenced by the legislative declaration in H.R.S. § 149A-32.5 that the Board’s authority supersedes and displaces any conflicting laws or rules:

Notwithstanding any law, rule, or executive order to the contrary, the chairperson of the board of agriculture, in consultation with the advisory committee on pesticides and also with the approval of the director of health, shall suspend, cancel, or restrict the use of certain pesticides or specific uses of certain pesticides when the usage is determined to have unreasonable adverse effects on the environment."

87. The Hawai`i Pesticides Law was amended in 2013 to also require the Hawai`i Department of Agriculture to publish on its website the public information contained in all restricted use pesticide records, reports, or forms submitted to the department.

88. Because the Hawai`i Pesticides Law exclusively and uniformly governs the use of pesticides throughout the State, the pesticide provisions of Bill 2491 are preempted by the Hawai`i

Pesticides Law.

89. Bill 2491 is also preempted by the Hawai'i Right to Farm Act (H.R.S. Chapter 165), which forbids court officials, public servants, and public employees from declaring any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.

90. H.R.S. § 165-4 provides that "[n]o court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices." Members of the Kaua'i County Council are "officials," "public servants," and public employees."

91. The County seeks to regulate pesticides and GMOs by improperly characterizing Plaintiffs' farming operations as public nuisances pursuant to H.R.S. § 46-17. However, the Hawai'i Right to Farm Act prohibits the County from enacting and enforcing Bill 2491 to limit Plaintiffs' farming activities (all of which are conducted in a manner consistent with generally accepted agricultural and

management practices) on the premise that such operations are a public nuisance. Therefore Bill 2491 is preempted by Hawai'i state law.

***SECOND CLAIM: Federal Preemption of Disclosure of Use of Restricted Use Pesticides and Worker Protection Standard Under the Supremacy Clause***

92. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

93. Bill 2491 is preempted in part by FIFRA because the ordinance requires the disclosure of information about use of restricted use pesticides that states and their political subdivisions are barred by FIFRA from publicly disclosing.

94. FIFRA requires certified applicators of restricted use pesticides to maintain records of pesticide applications that shall be made available to any Federal or State agency that deals with pesticide use or related health and environmental issues. 7 U.S.C. § 136i-1(a) & (b). FIFRA further provides that "in no case may a government agency release data, including the location from which the data was derived, that would directly or indirectly reveal the identity of individual producers." 7 U.S.C. § 136i-1(b). FIFRA thus protects from disclosure the locations where restricted use



pesticides are applied and the identity of producers of crops to which restricted use pesticides are applied.

95. Section 22-22.4(a) of Bill 2491 requires commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single restricted use pesticide during the prior calendar year to disclose where restricted use pesticides are applied and the identity of the producers of the crops to which those pesticides are applied.

96. Bill 2491 requires disclosure of pesticide usage information that is protected from disclosure under the regulatory program for pesticide use created by FIFRA. Bill 2491's disclosure provisions are impliedly preempted because they hinder the Federal program for regulation of pesticide usage and therefore stand as an obstacle to achieving the objectives of the Federal regulatory program.

97. In addition, Section 22-22.4(a)(1) requires Plaintiffs to provide warnings to workers about pesticide applications that conform to the Worker Protection Standard established by the EPA under FIFRA and enforced by the State of Hawai'i. Bill 2491 authorizes the County to enforce Section 22-22.4(a)(1) through the

imposition of civil and criminal penalties. The County's assertion of authority to enforce and penalize alleged violations of the provision of Bill 2491 that mimics the provisions of a Federal requirement creates the potential for conflicting enforcement. Thus, Section 22-22.4(a)(1) conflicts with the Federal program for regulating pesticide usage and stands as an obstacle to achieving the objectives of the Federal regulatory scheme. Section 22-22.4(a)(1) is therefore impliedly preempted under the Supremacy Clause.

98. Bill 2491 is preempted by Federal law to the extent it requires disclosure of information that is protected from disclosure by Federal law and to the extent Bill 2491 authorizes enforcement by the County of the EPA Worker Protection Standard.

***THIRD CLAIM: Federal Preemption of the Provisions of Bill 2491 Relating to GMOs Under the Supremacy Clause***

99. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

100. Through the Coordinated Framework and federal regulatory authority under the PPA, the FFDCA, and FIFRA, the Federal government comprehensively regulates the introduction of GMOs to address safety, health, and environmental impacts.

101. With respect to GM plants that are treated as regulated articles under the PPA and the Part 340 regulations, APHIS evaluates whether the GM plant will injure or damage other plants and plant products.

102. With respect to GM plants for which APHIS has granted deregulation petitions, APHIS's decision to grant deregulation is a determination that use of a GM plant presents no different or greater plant pest risk than use of the conventional version of the same plant.

103. In addition, at the time of deregulation, FDA also determines that the GM plant presents no food safety risk. EPA also sets restrictions to address the environmental risks of associated pesticide use under FIFRA.

104. The comprehensive regulatory program under the Coordinated Framework occupies the field of regulation of the introduction of GMOs to the exclusion of state and local governments. If enforcement of Bill 2491 is not enjoined, the County will enter the regulatory field already fully occupied by the Federal government by regulating the introduction of GMOs in Kaua'i. Therefore, Sections 22-22.4(b) and 22-22.5 of Bill 2491 are

impliedly preempted under the Supremacy Cause.

105. Alternatively, Sections 22-22.4(b) and 22-22.5 of Bill 2491 are impliedly preempted because they conflict with, frustrate the purposes of, and are an obstacle to the accomplishment of the purposes of the Federal regulatory scheme. With respect to all of Plaintiffs' regulated article field trial releases that are occurring on Kaua'i, APHIS has authorized these releases pursuant to 7 C.F.R. §§ 340.3, 340.4. These authorizations are Federal licenses to transport, grow, cultivate and otherwise use regulated articles at the locations specified in the authorizations and under the conditions set out in the authorizations. APHIS's determination of nonregulated status is also a Federal license to use a deregulated plant in the same manner as, and as freely as, the conventional version. These authorizations and determinations permit Plaintiffs to plant and cultivate GM plants on Kaua'i without disclosure of the specific locations.

106. The buffer zone provisions of Section 22-22.5 prohibit activities that are permitted under the APHIS authorizations and determinations and thereby negate the Federal licenses. Bill 2491 prevents Plaintiffs from carrying out the

activities authorized by Federal law. Therefore, Section 22-22.5 is impliedly preempted because it is in direct conflict with the Federal licenses.

107. In addition, the required disclosure under Section 22-22.4(b) of the locations where GM crops are being grown or developed on Kaua`i increases the risk of commercial espionage, vandalism and misappropriation of Plaintiffs' valuable trade secrets. The disclosure provision is impliedly preempted because it hinders the federally permitted program for conducting research and development of GMOs and therefore stands as an obstacle to achieving the objectives of the Federal regulatory scheme.

108. Alternatively, the regulation of GMOs is expressly preempted by the PPA. The PPA provides in pertinent part that "no State or political subdivision of a State may regulate the movement in interstate commerce of" any plant pest as defined by the PPA, or material or object that could harbor a plant pest, or plant, or plant product, in order to control, eradicate or prevent dissemination of a plant pest if APHIS has issued a regulation or order to prevent the dissemination of the plant pest. 7 U.S.C. § 7756(b)(1). The term "interstate commerce" is defined in relevant part to mean "trade,

traffic, or other commerce . . . between a place in a State and a point in another State, or between points within the same State but through any place outside that State . . . .” 7 U.S.C. § 7702(7). Congress specifically found that all pests and plants capable of harboring plant pests are “in or affect interstate commerce or foreign commerce.” 7 U.S.C. § 7701(9). The term “movement” is defined in pertinent part to mean “to carry, enter, import, mail, ship, or transport,” or “to release into the environment,” or “to allow” any of those activities. 7 U.S.C. § 7702(9).

109. The PPA further provides that a political subdivision of a State may issue regulatory restrictions that are consistent with, and do not extend beyond, the requirements of APHIS’s regulations and orders. 7 U.S.C. § 7756(b)(2)(A). The PPA also provides that a political subdivision of a State may only impose additional restrictions if the political subdivision makes a demonstration of a “special need . . . based on sound scientific data and a thorough risk assessment.” 7 U.S.C. § 7756(b)(2)(B).

110. Defendant County of Kaua`i has not made a special local need request to APHIS pursuant to 7 U.S.C. § 7756(b)(2)(B) to regulate the use of GMOs on Kaua`i. Defendant County of Kaua`i.

has not attempted to show that additional prohibitions or restrictions are based on sound scientific data or a thorough risk assessment. APHIS has not granted Defendant County of Kaua'i authorization to impose additional prohibitions and restrictions pursuant to 7 U.S.C. § 7756(b)(2)(B).

111. By prohibiting growing of GM crops in the buffer zones (Section 22-22.5), and by requiring disclosure of use of GMOs (Section 22-22.4(b)), Bill 2491 regulates movement in interstate commerce, including release into the environment, of presumptive plant pests in order to control a plant pest, eradicate a plant pest, or prevent the introduction or dissemination of a plant pest where APHIS has issued regulations and orders to prevent the dissemination of the presumptive plant pests. Further, these provisions of Bill 2491 impose prohibitions and restrictions that are not consistent with, and that exceed, the terms of the APHIS authorizations and determinations. Therefore, Sections 22-22.4(b) and 22-22.5 of Bill 2491 are expressly preempted by 7 U.S.C. § 7756(b)(1).

112. The PPA further provides in pertinent part that “no State or political subdivision of a State may regulate in foreign

commerce” any plant pest as defined by the PPA, or material or object that could harbor a plant pest, or plant, or plant product, in order to control, eradicate or prevent dissemination of a plant pest. 7 U.S.C. § 7756(a).

113. By prohibiting the growing of GM crops in the buffer zones (Section 22-22.5), and by requiring disclosure of use of GMOs (Section 22-22.4(b)), Bill 2491 regulates foreign commerce in presumptive plant pests in order to control a plant pest, eradicate a plant pest, or prevent the introduction or dissemination of a plant pest. Therefore, Sections 22-22.4(b) and 22-22.5 of Bill 2491 are expressly preempted by 7 U.S.C. § 7756(a).

**INVALIDITY UNDER FEDERAL AND STATE  
CONSTITUTIONAL PROVISIONS  
(Claims Four through Eight)**

**FOURTH CLAIM: *Violation of Equal Protection***

114. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

115. Under the Fourteenth Amendment of the United States Constitution and Article I, section 5 of the Hawai'i Constitution, all persons similarly situated must be treated alike. Local ordinances that make irrational and arbitrary classifications



violate the equal protection clauses of the United States and Hawai'i Constitutions.

116. Bill 2491 purports to protect the people of Kaua'i from alleged dangers from pesticides. However, Bill 2491 unreasonably imposes unnecessary and scientifically unjustified disclosure requirements and buffer zone restrictions in an arbitrary manner. For example, the threshold use of five (5) pounds or fifteen (15) gallons of any single restricted use pesticide—regardless of method of application, dilution, or quantity of active ingredient—in the prior calendar year provided in Bill 2491 is unfounded and arbitrary. It arbitrarily targets Plaintiffs while exempting virtually all other uses of pesticides on Kaua'i, including the County. Thus, for instance, Bill 2491 imposes no restrictions on the application of restricted use pesticides by the County within County parks, while prohibiting Plaintiffs' application of all pesticides within 250 feet of any such park.

117. The imposition of differing obligations based on the usage of a single restricted use pesticide—without regard to method of application, dilution or quantity of active ingredients—has no rational or scientific-based relation to the objective of protecting the

health and safety of the people of Kaua`i.

118. Further, the requirement in Section 22-22.4(b) to make disclosures with respect to GM crops that are not required for non-GM crops is irrational and arbitrary.

119. Bill 2491 denies Plaintiffs the equal protection of the laws guaranteed by the United States and Hawai`i Constitutions.

**FIFTH CLAIM: *Violation of Due Process***

120. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

121. The Fourteenth Amendment of the United States Constitution and Article I, section 5 of the Hawai`i Constitution provides that no person shall be deprived of life, liberty or property without due process of law. A municipality's police power is not absolute and is subject to constitutional limitations. Under the guarantee of due process, state and local regulation of liberty and property interests must be imposed consistent with adequate procedural process to provide fair notice of the requirements and must be rationally related to a legitimate governmental interest.

122. Moreover, state and local regulation of liberty and

property interests may not impose strict criminal liability for violations unless the regulation is genuinely intended to protect public welfare, the standards imposed are reasonable and adherence reasonably expected, and the penalties are relatively small and would not place an onerous stigma on an offender's reputation.

123. Bill 2491 is an unconstitutional exercise of police powers by the County since there is no reasonable relationship between Bill 2491's stated purposes and the means to accomplish those purposes.

124. The vague and ambiguous terms of Bill 2491 fail to provide fair warning as to what conduct will subject a person to liability, and therefore is void for vagueness.

125. In particular, Section 22-22.5(a)(5) of Bill 2491 is unconstitutionally vague because it fails to give fair notice of the scope of the prescribed buffer zone protecting a "perennial waterway that flows into the ocean." The term "perennial waterway" is defined in part as "a natural waterway," which seems to exclude irrigation ditches and drainage canals. However, Section 22-22.5(a)(5) goes on to state that the provision does not apply to any

irrigation ditch or drainage canal “that does not directly flow to the ocean.” Given this ambiguity, this provision fails to give fair notice for determining whether or when an irrigation ditch or drainage canal is exempt from the buffer zone requirement.

126. Bill 2491 fails to contain explicit and ascertainable standards for those who enforce them so as to prevent arbitrary and discriminatory enforcement, and therefore is void for vagueness.

127. In addition, Section 22-22.7(b) imposes criminal penalties for violations on a strict liability basis. Because the penalties are substantial and no rational basis exists to single out large agricultural enterprises and their employees for criminal punishment, the failure to include an element of scienter in the criminal penalty provisions of Bill 241 violates the guarantee of the due process.

128. Bill 2491 violates Plaintiffs' rights to due process under the United States and Hawai'i Constitutions.

***SIXTH CLAIM: Violation of Hawai'i Constitutional Ban on Taking or Damaging Private Property Without Compensation***

129. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

130. Article 1, Section 20 of the Hawai'i Constitution provides that private property shall not be taken or damaged for public use without just compensation.

131. Bill 2491 creates buffer zones that prohibit Plaintiffs from growing any crops, except for ground cover, within 500 feet of any dwelling (with certain limited exceptions), care home, medical facility, nursing facility, or school; within 250 feet of any park; within 100 feet of any public roadway; or within 100 feet of any shoreline or perennial waterway that flows into the ocean. The ban on planting applies irrespective of pesticide use.

132. The buffer zones will restrict the farmable acreage leased by Plaintiffs to conduct agricultural operations and will disrupt Plaintiffs' integrated process for developing new seed varieties. Many of Plaintiffs' fields, in whole or in part, appear to be within the buffer zones established by Bill 2491. Bill 2491 damages Plaintiffs' business and property.

133. Bill 2491 defeats Plaintiffs' distinct investment-backed expectations to use all of the lands they are leasing on Kaua'i for agricultural purposes. Plaintiffs' express primary expectation when they leased their lands was to use land for

growing GM crops for production and research. The buffer zones eliminate any ability to grow any crops, except for ground cover, within the affected areas.

134. Moreover, the buffer zone requirements in Bill 2491 lack any scientific legitimacy or rationale, and thus are arbitrary. Indeed, at a hearing on October 15, 2013, Councilmember Bynum said that the buffer zones were “not based on science, but just on commonsense.” Bill 2491 is based on unfounded anxiety and fear, and arbitrarily targets Plaintiffs, which are out-of-state entities.

135. The County has not offered to, and is not willing to, compensate Plaintiffs for taking and damaging of Plaintiffs’ property.

136. The buffer zones imposed by Bill 2491, without compensation, violate the Takings Clause of the Hawai‘i Constitution.

**SEVENTH CLAIM: *Violation of the Dormant Commerce Clause***

137. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

138. The Interstate Commerce Clause gives Congress the power “to regulate Commerce . . . among the several States.”

U.S. Const. art. I, § 8, cl. 3. The Commerce Clause includes a “negative” or “dormant” aspect that bars States and local governments from regulating interstate commerce in an unjustifiably discriminatory manner or from unreasonably burdening the interstate flow of articles of commerce.

139. Among the categories of local laws that violate the Commerce Clause are local ordinances that appear to be neutral on their face, but bear more heavily on interstate commerce than on local commerce by disproportionately impacting out-of-state entities.

140. Bill 2491 violates the Commerce Clause because it has a disproportionate impact on out-of-state entities that are engaged in interstate and foreign commerce, without burdening local entities with Bill 2491’s requirements. In fact, the County targeted Plaintiffs in drafting the Bill. This is reflected by testimony of the Bill’s sponsors and opponents.

141. For example, on June 26, 2013, Councilmember Hooser (the principal sponsor of Bill 2491) testified that, for the targeted conduct, it is “only five companies doing all of this – the vast majority, 99% ... They are multi-billion dollar international

companies and they can pay a little bit of money for county employees to enforce this.” On August 5, 2013, Councilmember Bynum (the other sponsor) testified that “we are kicking agricultural producers, *kama`aina* agriculture producers off the land in favor of the seed companies who are not producing anything for us to eat and they are not even paying appropriate taxes so our taxpayers are subsidizing.” On October 15, 2013, Councilmember Rapozo testified, in opposition to Bill 2491, that it “does not affect anybody else that uses pesticides like resorts and golf courses. ... If you look at the Bill, it is not. It is simply targeted for the seed companies.” Many other statements of Bill 2491’s discriminatory hostile intent permeate the hours and days of testimony and commentary by Councilmembers in favor of Bill 2491.

142. Alternatively, by imposing a permanent ban on growing GM crops and using pesticides in the buffer zones, Section 22-22.5 of Bill 2491 directly regulates and discriminates against interstate commerce in GM seeds because it disrupts the flow of commerce in GM seeds into and out of the State of Hawai`i, and thereby disrupts an integral and necessary step in seed production. Plaintiffs’ ability to produce GM seeds on the land they occupy on



Kaua`i is dependent on the ability to use pesticides regulated by EPA under FIFRA and by HDOA under the Hawai`i Pesticides Law.

143. Alternatively, by imposing a permanent ban on growing GM crops and using pesticides in the buffer zones (Section 22-22.5), and by requiring disclosure of use of GMOs (Section 22-22.4(b)), Bill 2491 unreasonably burdens interstate commerce because the adverse effects on Plaintiffs' integrated interstate seed production operations outweigh the putative benefits claimed by Defendant County and because the local interests of the County can be promoted by less restrictive measures.

144. Bill 2491 violates Plaintiffs' rights under the Commerce Clause.

**EIGHTH CLAIM: *Unconstitutional Interference with the Conduct of Foreign Affairs***

145. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

146. Under the U.S. Constitution, the Federal government is given the exclusive power to conduct economic and political relations with foreign countries. U.S. Const. art. II, § 2, cl. 2; § 3. Under this provision and under the Supremacy Clause,

state and local governments may not interfere with the conduct of foreign affairs. Local regulations violate these constitutional limits if they compromise the federal government's ability to speak with "one voice" in economic and political relations with foreign countries.

147. The United States Office of the Trade Representative ("USTR") has consistently opposed anti-biotechnology measures in foreign nations. These include GM planting bans based on societal concerns rather than a science-based risk assessment or safety concerns. The USTR views such bans as unwarranted non-tariff trade barriers to international trade in agricultural products.

148. The United States has taken a clear international position in negotiations with other countries and the World Trade Organization ("WTO") that local bans on the cultivation of GM crops violate the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"). The USTR has explicitly targeted local GM cultivation bans in Europe as "significant unwarranted SPS-related trade barriers" banned by the SPS Agreement. SPS Agreement art. 1, para. 1; art. 2 & art. 5.

149. Bill 2491 prevents the Federal government's ability to speak with one voice because it imposes on Kaua'i a permanent ban on production of GM seeds in the buffer zones without a scientific basis, while the Federal government opposes similar regulations elsewhere.

**INVALIDITY UNDER STATE LAW  
(Claims Nine through Thirteen)**

**NINTH CLAIM: *Pesticide and GMO Disclosure Requirements  
Violate the Hawai'i Uniform Trade Secrets Act  
(H.R.S. Chapter 482b)***

150. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

151. The nature of the particular traits being developed by Plaintiffs in their seed trials constitutes valuable trade secret information protected from misappropriation and disclosure under the Hawai'i Uniform Trade Secrets Act, H.R.S. § 482b-1, *et seq.*

152. The requirement in Section 22-22.4(b) to disclose the locations where GM crops are being grown or developed increases the risk of vandalism and misappropriation of Plaintiffs' valuable trade secrets without any offsetting public benefit.

153. The requirement in Section 22-22.4(a) to disclose

pesticide use increases the risk of misappropriation of Plaintiffs' valuable trade secrets.

154. Bill 2491 therefore violates the Hawai'i Uniform Trade Secrets Act.

***TENTH CLAIM: Violation of Limits on Power to Regulate Use of Hawai'i State Lands and Enact Special Legislation***

155. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

156. Some of the property Plaintiffs use on Kaua'i for seed production is owned by the State of Hawai'i. Under Article XI, §5 of the Hawai'i Constitution, all legislative power over lands owned by or under the control of the State and its political subdivisions can be exercised only by general laws. Bill 2491 is prohibited special legislation targeted at the Plaintiffs.

157. By leasing its lands for the purpose of raising GM crops and by regulating the use of pesticides on its lands in accordance with both state and Federal law, the State of Hawai'i has authorized Plaintiffs' operations. Bill 2491 effectively prohibits what the State has determined to allow on its lands, which the County, as a subdivision of the State with limited powers, has no

power to do under Hawai`i law.

158. Bill 2491 is invalid insofar as it purports to regulate Plaintiffs' lawful activities on State lands and constitutes special legislation prohibited under Article XI, §5 of the Hawai`i Constitution.

**ELEVENTH CLAIM: *Violations of the Kaua`i County Charter***

159. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

160. Under Section 4.02(C) of the County of Kaua`i Charter, every ordinance "shall embrace but one subject, which shall be expressed in its title."

161. Bill 2491 is entitled, "A Bill For An Ordinance To Amend The Kaua`i County Code 1987, As Amended, By Adding A New Article 22 To Chapter 22, Relating To Pesticides And Genetically Modified Organisms." Thus, Bill 2491—by its title and/or substance—improperly embraces multiple subjects: (1) pesticides, (2) genetically modified organisms, and (3) an Environmental and Public Health Impact Study (EPHIS) to analyze questions relating to the operations of "large scale commercial agricultural entities" [*i.e.*, Plaintiffs].

162. Section 6.01 of the County of Kaua`i Charter vests the executive power of the County in the executive branch headed by the Mayor. Section 6.02 of the Charter provides that changes in the plan of administrative organization of the executive agencies of the county government can only be made upon the recommendation of the Mayor and approval by a vote of five members of the County Council. Section 6.02 further provides that the Mayor may assign new functions to existing agencies.

163. Section 3.01 of the Charter vests the legislative power of the County in the County Council. Section 3.18 of the Charter provides that the County Council provides that the “council and its members shall not interfere with the administrative processes delegated to the mayor.”

164. The Kaua`i Office of Economic Development (“OED”) is an executive branch agency of the county government charged with promoting the economic development of Kaua`i County. By law, the OED has no responsibilities for regulating pesticide usage or GM crops, and the County Council has no authority to impose such obligations on the OED.

165. Section 22-22.4 requires the OED to develop a

standardized form for making required disclosure reports of pesticide usage. Section 22-22.4 requires the OED to receive required disclosure reports of both pesticide usage and GM crops. Section 22-22.8 authorizes the OED to engage in rulemaking "[i]n order to effectuate all provisions of the" Ordinance. However, the County Council has no authority to impose such obligations on the OED to create disclosure reports, to study questions relating to "commercial agricultural entities", or to undertake rulemaking related to any of these matters.

166. In passing Bill 2491, the County Council, without the Mayor's concurrence, assigned all necessary administrative functions for implementation of Bill 2491 to the OED in violation of Sections 3.18 and 6.02 of the County Charter and the separation of powers required by the County Charter.

**TWELFTH CLAIM: *Violation of Hawai`i State Law Requirements for Imposition of Civil Fines***

167. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

168. H.R.S. § 46-1.5(24)(A) provides each county authority to "impose civil fines, in addition to criminal

penalties, for any violation of county ordinances or rules after reasonable notice and requests to correct or cease the violation have been made upon the violator.”

169. Section 22-22.7(a) of Bill 2491 violates H.R.S. § 46-1.5(24)(A) because it imposes a civil fine of \$10,000-\$25,000 per day for any violation of Bill 2491 without requiring any prior notice, hearing, or opportunity to correct or cease the violation be given to the alleged violator, or providing any appeals.

170. Section 22-22.7(a) of Bill 2491 is therefore invalid under H.R.S. § 46-1.5(24)(A).

**THIRTEENTH CLAIM: *Violation of H.R.S. Chapter 92***

171. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

172. On November 15, 2014, the County Council of Kaua`i chose Mason Chock to replace Councilmember Nadine Nakamura.

173. In the course of choosing the replacement councilmember, the sitting members of the Council received applications from numerous residents of the Island.

174. The Council kept the applications secret.



175. The Council met in executive session to review and evaluate the applicants.

176. In secret, the Council winnowed the number of applicants down to two. Then, it revealed the identity of only those two applicants. In doing so, the Council deprived the public of any opportunity to know the identity of everyone on the list of applicants and, thus, the identity of the people the councilmembers chose not to put on the "short list" for public discussion. As a result, the public was deprived of any opportunity to know whether, and to what extent, political affiliation, political favoritism, personal bias, campaign contributions (or the lack thereof), education, employment, or other factors may have influenced the selection process. The applicants had no privacy interest in maintaining anonymity or, if they did, their privacy interests were outweighed by the public interest in knowing the credentials and experience of the applicants who the council passed over in the members' rush to choose a replacement councilmember who would support overriding the Mayor's veto of Bill 2491.

177. H.R.S. §§ 92-4 & -5 did not authorize the Council to winnow the list of applicants in secret.

178. Under H.R.S. § 92-11, the Council's action was voidable upon proof of a violation, in any action brought within 90 days after the challenged meeting. This action was filed within that time period; the Council's appointment of the replacement member must be voided. All actions taken in reliance on the vote of the improperly selected replacement member—including but not limited to the override of Mayor Carvalho's veto of Bill 2491—is likewise void.

**REMEDY: *Declaratory Relief***

179. Plaintiffs reallege and incorporate by reference herein all relevant preceding paragraphs in this Complaint.

180. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201, and for further necessary and proper relief pursuant to 28 U.S.C. § 2202.

181. There is a real, present and genuine dispute between Plaintiffs and the Defendant regarding Plaintiffs' rights and remedies under Bill 2491, and under the Constitutions and laws of the United States and the State of Hawai'i, as alleged above of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. There is uncertainty about the legality of Bill

2491 and the Plaintiffs' alleged obligations thereunder. The uncertainty is disrupting the Plaintiffs' operations and causing them substantial expense.

182. Plaintiffs are entitled to a declaratory ruling establishing that Bill 2491 is illegal and invalid, as alleged herein.

**REMEDY: *Injunctive Relief***

183. Plaintiffs seek preliminary and permanent injunctive relief pursuant to this Court's general jurisdiction and the applicable portions of Title 28, United States Code.

184. Bill 2491 violates the Constitutions and applicable laws of the United States and the State of Hawai'i, as alleged herein.

185. The County's actions will deprive Plaintiffs of rights and interests protected under the Constitutions and laws of the United States and the State of Hawai'i as previously alleged.

186. Plaintiffs wish to continue engaging in agricultural operations that are protected under the Constitutions of the United States and the State of Hawai'i, and under applicable federal and state law.

187. Plaintiffs are likely to prevail on their constitutional

and statutory claims against the County since Plaintiffs have a legal right to conduct their agricultural operations on Kaua`i as long as they are consistent with comprehensive federal and state regulations that already apply to the use of pesticides and the growth of GM crops.

188. Plaintiffs will suffer irreparable injury since the buffer zones created by Bill 2491 will prevent Plaintiffs from using a significant portion of their agricultural lands. Such a permanent loss of useable lands will damage Plaintiffs' Kaua`i operations. Plaintiffs will suffer significant lost research and production time as a result. It would be extremely difficult to ascertain and prove the full amount of money damages that Plaintiffs would suffer. The balance of harms and the public interest favor granting injunctive relief.

189. Likewise, Bill 2491's provisions which require mandatory disclosure of the location of pesticide use and the production of GM crops increase the risk of commercial espionage, vandalism, and misappropriation of Plaintiffs' valuable confidential business information, which constitute trade secrets. By its nature, such harm is difficult to quantify in monetary terms.

190. Plaintiffs will suffer a continuing violation of their rights and interests as a result of Bill 2491 should an injunction not issue.

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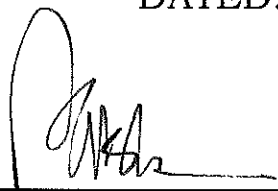
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WHEREFORE, Plaintiffs pray that this Court:

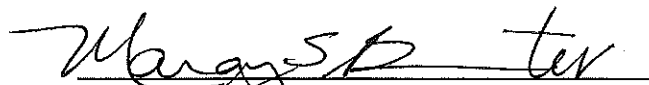
- A. Take jurisdiction over the parties and this cause;
- B. Enter a judgment declaring Bill 2491 to be invalid under the Constitutions and laws of the United States and the State of Hawai'i, and the Charter of the County of Kaua'i;
- C. Enter a preliminary and permanent injunction enjoining the County and its various agents and employees from enforcing Bill 2491 against Plaintiffs or any other commercial agricultural company or similarly situated business;
- D. Award Plaintiffs their reasonable attorneys' fees and costs; and
- E. Grant Plaintiffs all other relief in law and in equity to which they may be entitled.

DATED: Honolulu, Hawai'i, January 10, 2014.



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Jay Furfaro, Chair  
Nadine K. Nakamura, Vice Chair  
Tim Bynum  
Gary L. Hooser  
Ross Kagawa  
Mel Rapozo  
JoAnn A. Yukimura



**OFFICE OF THE COUNTY CLERK**

Ricky Watanabe, County Clerk  
Jade K. Fountain-Tanigawa, Deputy County Clerk

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**Council Services Division**  
4396 Rice Street, Suite 209  
Līhu'e, Kaua'i, Hawai'i 96766

October 17, 2013

Attached hereto is Bill No. 2491, Draft 2, which was adopted on second and final reading by the Council of the County of Kaua'i at its meeting held on October 15, 2013 and transmitted to the Mayor on October 17, 2013.

**EXHIBIT A**

ORDINANCE NO. \_\_\_\_\_

BILL NO. 2491, Draft 2

**A BILL FOR AN ORDINANCE TO AMEND  
THE KAUA'I COUNTY CODE 1987, AS AMENDED,  
BY ADDING A NEW ARTICLE 22 TO CHAPTER 22,  
RELATING TO PESTICIDES AND  
GENETICALLY MODIFIED ORGANISMS**

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BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUA'I, STATE OF HAWAII:

SECTION 1. Chapter 22 of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Article 22 to read as follows:

**“ARTICLE 22. PESTICIDES AND GENETICALLY MODIFIED ORGANISMS**

**Sec. 22-22.1 Findings.**

In order to establish provisions governing the use of pesticides and genetically modified organisms (GMOs) by large-scale commercial agricultural entities on Kaua'i, the Council finds that:

(a) Section 1, Article XI of the State Constitution states: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”

(b) The growth of commercial agricultural entities engaged in the use and development of genetically modified organisms and the widespread use of pesticides in the County of Kaua'i has created a situation where residents live, work, and commute daily in close proximity to areas where there is regular application of restricted use pesticides and general use pesticides.

(c) There are increasing concerns about the direct and long-term impacts of the large-scale use of pesticides, and the impacts that the intense agricultural cultivation is having on the land, on the natural environment, and on human health.

(d) Hawaii Revised Statutes Section 46-1.5(13) 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.”



(e) The County of Kaua'i has become a location of increasing commercial agriculture operations that utilize genetically modified organisms for the production of crop seed and field testing of new genetically modified organisms.

(f) Genetically modified plants could potentially disperse into the environment of the County of Kaua'i through pollen drift, seed commingling, and inadvertent transfer of seeds by humans, animals, weather events, and other means. This could have environmental and economic impacts.

(g) Records obtained from the State of Hawai'i Department of Agriculture indicate that twenty-two (22) different restricted use pesticides, comprising approximately 5,477 pounds, and 5,885 gallons, were used during 2012 on Kaua'i by five (5) commercial agricultural entities, which constituted approximately 99% of the restricted use pesticides utilized by agricultural operations on Kaua'i.

(h) In 2012, restricted use pesticides were used on Kaua'i by agricultural operations (7,727 pounds and 5,892 gallons, or 13%), county government operations (28,350 pounds and zero (0) gallons of Chlorine Liquefied Gas for water and wastewater treatment, or 49%), and non-government operations for structural pest control termite treatment (25,828 pounds and 20 gallons, or 38%).

(i) Pesticides have the ability to contaminate groundwater, and are often toxic to humans, animals, bees, and other insects. Some restricted use pesticides are banned by the entire European Union.

(j) Dust and drift from both restricted use pesticides and general use pesticides sometimes travel beyond commercial agricultural operations. Dust, pesticide drift, and long-term exposure to toxic chemicals are potential sources of pollution endangering human health and the natural environment.

(k) Hawai'i Revised Statutes Section 46-17 states: "Any provision of law to the contrary notwithstanding, the council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply . . . ."

(l) The impacts on the County of Kaua'i of large-scale intensive cultivation and associated agricultural practices should be further evaluated.

(m) Information pertaining to the intensive use of pesticides within the County of Kaua'i, and the experimentation and growing of genetically modified organisms, is currently withheld from the public. Thus, the public is unable to evaluate the full extent of the impacts on the residents and environment of the County of Kaua'i.

(n) In the interest of protecting the health of the people and fragile natural environment of the County of Kaua'i, the people of the County of Kaua'i have the right to know what pesticides are being used on a significant

scale, and what genetically modified organisms are being grown within the jurisdiction of the County of Kaua'i. The people of the County of Kaua'i have the right to know the likely potential impacts on their human health, and the health of their environment.

(o) It is the intent of the County to collaborate with the State of Hawai'i Department of Agriculture to support the implementation and enforcement of this Article.

**Sec. 22-22.2 Purpose.**

The purpose of this Article is to establish provisions to inform the public, and protect the public from any direct, indirect, or cumulative negative impacts on the health and the natural environment of the people and place of the County of Kaua'i, by governing the use of pesticides and genetically modified organisms, and the penalties associated with any violation of this Article, or the laws, rules, or any other requirement that may be authorized by this Article.

**Sec. 22-22.3 Definitions.**

When used in this Article, the following words or phrases shall have the meaning given in this Section unless it shall be apparent from the context that another meaning is intended:

“Active ingredient” means:

(a) In the case of a pesticide other than a plant regulator, defoliant, or desiccant, an ingredient which will prevent, destroy, repel, or mitigate any pest;

(b) In the case of a plant regulator, an ingredient which, through physiological action, will accelerate or retard the rate of growth or maturation or otherwise alter the behavior of ornamental or crop plants or the produce thereof;

(c) In the case of a defoliant, an ingredient which will cause the leaves or foliage to drop from a plant; and

(d) In the case of a desiccant, an ingredient which will artificially accelerate the drying of plant tissues.

“Adult family boarding home” means any family home providing for a fee, twenty-four (24) hour living accommodations to no more than five (5) adults, unrelated to the family, who are in need of minimal protective oversight care in their daily living activities, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

“Adult family group living home” means any family home providing twenty-four (24) hour living accommodations for a fee to five (5) to eight (8) elderly, handicapped, developmentally disabled, or totally disabled adults, unrelated to the family, who are in need of long-term minimal assistance and supervision in the adult's daily living activities, health care, and behavior management, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

“Agriculture” means the breeding, planting, nourishing, caring for, gathering and processing of any animal or plant organism for the purpose of nourishing people or any other plant or animal organism; or for the purpose of providing the raw material for non-food products. For the purposes of this Article, “agriculture” shall include the growing of flowers and other ornamental crops and the commercial breeding and caring for animals as pets.

“*Ahupua‘a*” means a land division usually extending from the uplands to the sea.

“Certified pesticide applicator” means any individual who is certified under Hawai‘i Revised Statutes Section 149A-33(1) as authorized to use or supervise the use of any pesticide which is classified for restricted use.

“Commercial agricultural entity” means a firm, corporation, association, partnership, or any organized group of persons, whether incorporated or not, that is engaged in growing, developing, cultivating, or producing agricultural products.

“County” means the County of Kaua‘i.

“Crop” means a plant or product thereof that can be grown and harvested for subsistence, profit, or research.

“Day care center” means any facility where seven (7) or more children under the age of eighteen (18) are cared for without overnight accommodations at any location other than their normal place of residence, in compliance with State of Hawai‘i or County of Kaua‘i licensing requirements, or both. This term includes child care services and other similar uses and facilities consistent with this definition, and not covered by the “Family child care home” definition.

“DOA” means the State of Hawai‘i Department of Agriculture.

“Dwelling” means a building or portion thereof designed or used exclusively for residential occupancy and having all necessary facilities for permanent residency such as living, sleeping, cooking, eating, and sanitation.

“Environment” includes water, air, land, and all plants and humans and other animals living therein, and the interrelationships which exist among these.

“EPA” means the United States Environmental Protection Agency.

“Experimental genetically modified organisms” means organisms that have not received final approval by the Federal Food & Drug Administration, United States Department of Agriculture, United States Environmental Protection Agency, or the appropriate federal regulatory body, for human consumption, release into the environment, or both.

“Family care home” means any care home occupied by not more than five (5) care home residents, in compliance with State of Hawai‘i or County of Kaua‘i licensing requirements, or both.

“Family child care home” means providing child care services and other similar uses consistent with this definition where six (6) or fewer children under the age of eighteen (18) are cared for in a private dwelling unit without overnight

accommodations at any location other than the children's normal place of residence, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"FDA" means the Federal Food & Drug Administration.

"General use pesticide" means a pesticide other than one designated as a restricted use pesticide.

"Genetically modified" means produced from an organism or organisms in which the genetic material has been genetically engineered through the application of:

(a) In vitro nucleic acid techniques, which include, but are not limited to: recombinant deoxyribonucleic acid (DNA) techniques; direct injection of nucleic acid into cells or organelles; encapsulation; gene deletion; and doubling; or

(b) Methods of fusing cells beyond the taxonomic family that overcome natural physiological reproductive or recombinant barriers, and that are not techniques used in traditional breeding and selection such as conjugation, transduction, and hybridization.

For purposes of this definition:

(c) "In vitro nucleic acid techniques" include, but are not limited to, recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as micro-injection, macro-injection, chemoporation, electroporation, micro-encapsulation, and liposomefusion.

(d) An animal that has not itself been genetically modified, regardless of whether such animal has been fed or injected with any food or any drug that has been produced through means of genetic modification, shall not be considered "genetically modified" for purposes of this Article.

"Genetically modified organism" means an organism or organisms whose genetic material has been genetically modified.

"Ground cover" means small plants such as salal, ivy, ferns, mosses, grasses, or other types of vegetation that normally cover the ground and includes trees and shrubs less than six (6) inches in diameter.

"Medical facility" means a facility licensed by the State of Hawai'i to provide medical services.

"Nurse practitioner" means a person licensed as an advanced practice registered nurse under Hawai'i Revised Statutes Chapter 457.

"Nursing home" means a facility established for profit or nonprofit, which provides nursing care and related medical services on a twenty-four (24) hour per day basis to two (2) or more individuals because of illness, disease, or physical or mental infirmity, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

“OED” means the County of Kaua‘i Office of Economic Development.

“Orchard” means the establishment, care, and harvesting of over twenty-five (25) fruit-bearing trees, including, but not limited to, banana, coffee, guava, papaya, or persimmon, for the purpose of selling the fruit to others.

“Organism” means any biological entity capable of replication, reproduction, or transferring genetic material.

“Park” means any park, park roadway, playground, beach right-of-way, or other recreational areas under the control, management, and operation of the County of Kaua‘i or State of Hawai‘i.

“Perennial waterway” means a natural waterway that has continuous flow in parts of its waterway bed year round during years of normal rainfall.

“Pest” means any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacterium, or any other microorganism, except viruses, bacterium, or any other microorganisms on or in living humans or other living animals, which the Administrator of the United States Environmental Protection Agency determines to be a pest.

“Pesticide” means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as an attractant, plant regulator, defoliant, or desiccant. A product shall be deemed to be a pesticide regardless of whether it is intended for use as packaged, or as a dilution or mixture with substances such as carriers or baits. Products not considered pesticides include:

- (a) Deodorants, bleaching agents, and cleaning agents for which no pesticidal claims are made or implied;
- (b) Embalming fluids;
- (c) Building materials which have been treated to protect the material itself against any pest and bear no claims for protection of other surfaces or objects;
- (d) Fabrics which have been treated to protect the fabric itself from insects, fungi, or any other pests;
- (e) Fertilizer and other plant nutrients; and
- (f) Products intended only for use after further processing or manufacturing such as grinding to dust or other operations.

“Physician” means an individual authorized to practice medicine or osteopathy under Hawai‘i Revised Statutes Chapter 453.

“Public roadway” means a roadway on which the public is allowed to generally travel in a vehicle without obtaining special permission, or providing advance notice.

“Registered beekeeper” means a person registered with the Hawai‘i Apiary Program, through the State of Hawai‘i Department of Agriculture.

“Residential care home” means any care home facility occupied by more than five (5) care home residents, in compliance with State of Hawai‘i or County of Kaua‘i licensing requirements, or both.

“Restricted-entry interval” means the time after the end of a pesticide application during which entry into the treated area is restricted, as contained within the Worker Protection Standard for Agricultural Pesticides regulation established by the Environmental Protection Agency, and specified on all agricultural plant pesticide product labels.

“Restricted use pesticide” means:

(a) A pesticide or pesticide use classified by the Administrator of the United States Environmental Protection Agency for use by certified applicators or competent persons under their direct supervision and so designated on the label of the pesticide; or

(b) A pesticide or pesticide use classified by the Hawai‘i Board of Agriculture for use by certified applicators or competent persons under their direct supervision.

“School” means an institution with an organized curriculum offering instruction.

“Shoreline” means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

“Significant effect” means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.

“USDA” means the United States Department of Agriculture.

“Worker protection standard” means the Worker Protection Standard for Agricultural Pesticides regulation established by the Environmental Protection Agency, which is aimed at reducing the risk of pesticide poisonings and injuries among agricultural workers and pesticide handlers, and contains requirements for pesticide safety training, notification of pesticide applications, use of personal protective equipment, restricted-entry intervals after pesticide application, decontamination supplies, and emergency medical assistance.

**Sec. 22-22.4 Mandatory Disclosure of Pesticides, and Genetically Modified Organisms.**

(a) It shall be mandatory for all commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single



restricted use pesticide during the prior calendar year to disclose the use of all pesticides of any kind during the following calendar year. Disclosure requirements include:

(1) Worker Protection Standard. Posting of warning signs in the area in which pesticides are to be applied no sooner than twenty-four (24) hours before the scheduled application of any pesticide. Posting of warning signs during and after the application of any pesticide shall conform to the official label of the pesticide. Posting of warning signs at the time of application shall conform to the worker protection standard established by the Environmental Protection Agency (EPA), and shall remain posted until expiration of the applicable restricted-entry interval established by the EPA. The size of all signs, and the symbols and wording on all signs, shall conform to the worker protection standard established by the EPA. A posting notification area shall be provided daily for workers, and shall conform to the worker protection standard established by the EPA, and the State of Hawai'i.

(2) Pesticide Pre-Application "Good Neighbor Courtesy Notices." Pesticide pre-application notification must be provided to any of the following requesting persons within 1,500 feet from the property line of the commercial agricultural entity where any pesticide is anticipated to be applied: registered beekeeper, property owner, lessee, or person otherwise occupying property within 1,500 feet. Pre-application notification must also be provided to any revocable permit holder authorized to enter the property of the commercial agricultural entity. A mass notification list shall be established and maintained by each commercial agricultural entity, and shall include access to a legible map showing all field numbers and any key, legend, or other necessary map descriptions. Any interested person as described in this Section 22-22.4(a)(2) shall submit contact information to the relevant commercial agricultural entity. These interested persons may submit up to three (3) local telephone numbers, and two (2) e-mail addresses. All mass notification messages shall be sent via telephone, text message, or e-mail, with the method or methods of transmittal to be determined by each commercial agricultural entity. Each commercial agricultural entity shall provide an alternative method of transmittal for any recipient who does not have access to the technology necessary for the method or methods of transmittal selected by the commercial agricultural entity. Requests to be included on, or removed from, the mass notification list must be processed within three (3) business days. These "good neighbor courtesy notices" shall contain the following information regarding all anticipated pesticide applications: pesticide to be used, active ingredient of pesticide to be used, date, time, and field number.

(A) Scheduled Weekly Applications. Each commercial agricultural entity shall send regular mass notification messages at least once during every seven (7) day week period summarizing the anticipated application of any pesticide for the upcoming seven (7) day week.

(B) Unforeseen Pest Threat Necessary Applications. Whenever a pesticide application that was unforeseen and therefore not contained in the weekly "good neighbor courtesy notice" is deemed by the commercial agricultural entity to be necessary to alleviate a pest threat, an additional "good neighbor courtesy notice" shall be

generated to all recipients of the mass notification list within twenty-four (24) hours after the application.

(3) Pesticide Post-Application Weekly Public Disclosure. Each commercial agricultural entity shall submit regular public disclosure reports once during every seven (7) day week period compiling the actual application of all pesticides during the prior week. These weekly public disclosure reports shall contain the following information regarding all actual pesticide applications: date; time; field number; total acreage; trade name of pesticide used; EPA registration number; active ingredient of pesticide used; gallons or pounds of pesticide used; and temperature, wind direction, and wind speed at time of pesticide application. Each commercial agricultural entity shall submit all public disclosure reports to the County of Kaua'i Office of Economic Development (OED), and shall include online access to a legible map showing all field numbers and any key, legend, or other necessary map descriptions for all applicable commercial agricultural entities. All public disclosure reports shall be posted online, and available for viewing and download by any interested persons. OED shall develop a standardized reporting form.

(4) Pesticide Post-Application Urgent/Emergency Care Disclosure. Each commercial agricultural entity shall establish an emergency response hotline to be made available to any licensed physician or nurse practitioner practicing in association with a clinic, medical facility, or emergency center. Within six (6) hours of a request from any such licensed physician or nurse practitioner who provides a documented medical need, the commercial agricultural entity must provide the following information regarding all actual pesticide applications related to the alleged incident: date; time; field number; total acreage; trade name of pesticide used; EPA registration number; active ingredient of pesticide used; gallons or pounds of pesticide used; and temperature, wind direction, and wind speed at time of pesticide application.

(b) It shall be mandatory for all commercial agricultural entities that intentionally or knowingly possess any genetically modified organism to disclose the growing of said genetically modified organism.

(1) Annual public reports shall be provided to the Office of Economic Development and the State of Hawai'i Department of Agriculture (DOA), and shall be posted online on the County website. Direct notification to OED and DOA documenting such disclosure shall occur no later than sixty (60) days following the end of each calendar year, except that the first reports shall be due on the date this ordinance shall take effect.

(2) Annual public reports shall include a general description of each genetically modified organism (e.g., "GMO Corn" or "GMO Soy"), a general description of the geographic location including at minimum the Tax Map Key and *ahupua'a* where each genetically modified organism is being grown or developed, and dates that each genetically modified organism was initially introduced to the land in question.



**Sec. 22-22.5 Pesticide Buffer Zones.**

(a) It shall be mandatory for all commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single restricted use pesticide during the prior calendar year to restrict the growing of crops, except ground cover to which no pesticide is applied, and thereby restrict the application of all pesticides in the following areas:

(1) No crops may be grown within 500 feet of any adult family boarding home, adult family group living home, day care center, family care home, family child care home, medical facility, nursing home, residential care home, or school.

(2) No crops may be grown within 250 feet of any park, except that, regarding a mature orchard, the crops of which grow in a hedge-like manner creating a windbreak effect, if pesticide application occurs between crop rows from a source no higher than two (2) feet from the ground, for the purpose of eliminating weeds in the ground, then no crops may be grown within 75 feet of any park.

(3) No crops may be grown within 500 feet of any dwelling, unless:

(A) The commercial agricultural entity has an approved Soil and Water Conservation Plan that explicitly demonstrates no pesticide drift on the dwelling, then no crops may be grown within 100 feet of any dwelling; or

(B) The dwelling is owned by the landowner, and occupied by the landowner or a family member of the landowner, and there are no other dwellings occupied by third-parties within 500 feet of the landowner dwelling, then there shall be no pesticide buffer zone restricting growing of crops in proximity to the landowner dwelling; or

(C) Regarding a mature orchard, the crops of which grow in a hedge-like manner creating a windbreak effect, if pesticide application occurs between crop rows from a source no higher than two (2) feet from the ground, for the purpose of eliminating weeds in the ground, then no crops may be grown within 75 feet of any dwelling.

(4) No crops may be grown within 100 feet of any public roadway, except that pesticides may be used within 100 feet of any public roadway if the commercial agricultural entity posts notification signage on land that is adjacent to the public roadway no sooner than twenty-four (24) hours before the scheduled application. Roadway signs shall be located at the start and end of the field along the public roadway where application will occur, shall be of a size that is legible from vehicles traveling at the posted speed limit, and shall comply with all State of Hawai'i Department of Transportation requirements.

(5) No crops may be grown within 100 feet of any shoreline or perennial waterway that flows into the ocean. This provision shall not apply to any irrigation ditch or drainage canal that does not directly flow to the ocean.

(b) The provisions in Section 22-22.5(a) shall not apply to any specific instance where any County, State, or Federal government agency has authorized such pesticide use for public health or safety purposes.

(c) If this Section, or any part thereof, is determined to conflict with any pesticide labeling information, the more restrictive and environmentally protective provisions shall apply.

**Sec. 22-22.6 Environmental and Public Health Impacts Study (EPHIS).**

The County of Kaua'i shall complete an Environmental and Public Health Impact Study (EPHIS) through a two-part community-based process to address key environmental and public health questions related to large-scale commercial agricultural entities utilizing pesticides and genetically modified organisms. As determined by Council Resolution, the first part shall utilize a Joint Fact Finding Group (JFFG) convened and facilitated by a professional consultant to determine the scope and design of the EPHIS within twelve (12) months of the Notice to Proceed. In the second part of the process, the EPHIS shall be conducted by a professional consultant with oversight by the JFFG and shall be completed within eighteen (18) months of the relevant Notice to Proceed. The EPHIS may make recommendations that include, but are not limited to, possible actions the County may take in order to address any significant effects, public health impacts, or both.

**Sec. 22-22.7 Penalties.**

(a) Any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating, causing, or permitting the violation of any of the provisions of this Article, shall be assessed a civil fine of \$10,000-\$25,000 per day, per violation.

(b) In addition to any penalty described in Subsection 22-22.7(a), any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of this Article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars (\$2,000.00), or imprisoned not more than one (1) year, or both, for each offense. The continuance of any violation after conviction shall be deemed a new criminal offense for each day that the violation or violations continue.

**Sec. 22-22.8 Rulemaking.**

In order to effectuate all provisions of this Article, the Office of Economic Development may engage in any rulemaking it deems necessary or proper, utilizing the provisions of Hawai'i Revised Statutes Chapter 91. In so doing, OED is authorized to collaborate with the State of Hawai'i Department of Agriculture."

**SECTION 2. Severability Clause.** If any provision of this ordinance or the application thereof to any person, commercial agricultural entity, or circumstance is held invalid, the invalidity does 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 severable.

SECTION 3. New material is underscored. In printing this ordinance, the brackets, bracketed material, and underscoring need not be included.

SECTION 4. This ordinance shall take effect nine (9) months after its approval.

Introduced by: /s/ GARY L. HOOSER

/s/ TIM BYNUM

DATE OF INTRODUCTION:

**June 26, 2013**

Līhu'e, Kaua'i, Hawai'i


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CERTIFICATE OF THE COUNTY CLERK

I hereby certify that heretofore attached is a true and correct copy of Bill No. 2491, Draft 2, which was adopted on second and final reading by the Council of the County of Kauai at its meeting held on October 15, 2013, by the following vote:

FOR ADOPTION:	Bynum, Hooser, Kagawa, Nakamura, Yukimura, Furfaro	TOTAL - 6*
AGAINST ADOPTION:	Rapozo	TOTAL - 1,
EXCUSED & NOT VOTING:	None	TOTAL - 0,
RECUSED & NOT VOTING:	None	TOTAL - 0.

Līhu'e, Hawai'i  
October 17, 2013



Ricky Watanabe  
County Clerk, County of Kaua'i

\*Pursuant to Rule No. 5(b) of the Rules of the Council of the County of Kaua'i, Councilmember Nakamura is noted as voting silent but shall be recorded as an affirmative vote for the motion.

ATTEST:



Jay Furfaro  
Chairman & Presiding Officer

DATE OF TRANSMITTAL TO MAYOR:

October 17, 2013

Approved this \_\_\_\_ day of

\_\_\_\_\_, 2013.

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Bernard P. Carvalho Jr.  
Mayor  
County of Kaua'i