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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI‘I**

SYNGENTA SEEDS, *et al.*,

*Plaintiffs,*

v.

COUNTY OF KAUA‘I,

*Defendant,*

and

KA MAKANI HO‘OPONO, CENTER  
FOR FOOD SAFETY, PESTICIDE  
ACTION NETWORK NORTH  
AMERICA, and SURFRIDER  
FOUNDATION

*Proposed Intervenor-  
Defendants.*

Case No.: 14-cv-00014-BMK

**MEMORANDUM IN SUPPORT OF  
MOTION TO INTERVENE BY  
KA MAKANI HO‘OPONO,  
CENTER FOR FOOD SAFETY,  
PESTICIDE ACTION NETWORK  
NORTH AMERICA, AND  
SURFRIDER FOUNDATION**

(The Honorable Barry M. Kurren)

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| <i>Kootenai Tribe of Idaho v. Veneman</i> ,<br>313 F.3d 1094 (9th Cir. 2002) .....  | 33, 34         |
| <i>California ex rel. Lockyer v. United States</i> ,<br>450 F.3d 436 (9th Cir. 2006) .....  | 32             |
| <i>NISH v. Cohen</i> ,<br>191 F.R.D. 94 (E.D. Va. 2000).....  | 30             |
| <i>Northwest Forest Resource Council v. Glickman</i> ,<br>82 F.3d 825 (9th Cir. 1996) .....   | 16, 17, 18     |

PAGE(S)

FEDERAL CASES, CONT'D

*Perry v. Proposition 8 Official Proponents*,  
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*Sagebrush Rebellion v. Watt*,  
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*Sierra Club v. Glickman*,  
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*Southwest Center for Biological Diversity v. Berg*,  
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*United Food & Commercial Workers Union Local 751 v. Brown  
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*WildEarth Guardian v. United States Forest Service*,  
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*WildEarth Guardians v. National Park Service*,  
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*Wilderness Society v. United States Forest Service*,  
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**PAGE(S)**

**UNPUBLISHED FEDERAL CASES**

*National Association of Home Builders v. San Joaquin Valley Unified Air Pollution District*,  
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*Pickup v. Brown*,  
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*Tuscon Women’s Center v. Arizona Medical Board*,  
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**OTHER AUTHORITIES**

Andrew Pollack, *Unease in Hawaii’s Corn Fields*, N.Y. Times, Oct. 7, 2013, available at [http://www.nytimes.com/2013/10/08/business/fight-over-genetically-altered-crops-flares-in-hawaii.html?\\_r=0](http://www.nytimes.com/2013/10/08/business/fight-over-genetically-altered-crops-flares-in-hawaii.html?_r=0) .....4

Bohm *et al.*, *Glyphosate- and Imazethapyr-induced Effects on Yield, Nodule Mass and Biological Nitrogen Fixation in Field-grown Glyphosate-resistant Soybean*, 41 *Soil Biology & Biochemistry* 420-22 (2009).....6

Charles Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the U.S.—The First Sixteen Years*, 2012 *Envtl. Sci. Europe*, available at <http://www.enveurope.com/content/pdf/2190-4715-24-24.pdf>.....3

Charles Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the United States: The First Thirteen Years* (Nov. 2009), available at <http://www.organic-center.org/reportfiles/GE13YearsReport.pdf>.....3

Charles Duhigg, *Debating How Much Weed Killer Is Safe in Your Water Glass*, N.Y. Times, Aug. 23, 2001, available at <http://www.nytimes.com/2009/08/23/us/23water.html?pagewanted=all> .....5

Charles A. Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1913 (3d ed. 2005) .....33

Chris D’Angelo, *Pro Bono Defense Offered*, *The Garden Island*, Feb. 7, 2014, available at [http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article\\_83297e58-8fc1-11e3-acae-0019bb2963f4.html](http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article_83297e58-8fc1-11e3-acae-0019bb2963f4.html) .....30, 31

PAGE(S)

OTHER AUTHORITIES, CONT'D

Chris D'Angelo, *Pro Bono Defense Rejected*, The Garden Island, Feb. 12, 2014, *available at* [http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article\\_83297e58-8fc1-11e3-acae-0019bb2963f4.html](http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article_83297e58-8fc1-11e3-acae-0019bb2963f4.html).....31

Diane Leone, *Odor that Got Kids Sick Debated*, Honolulu Advertiser, Feb. 24, 2008, *available at* <http://the.honoluluadvertiser.com/article/2008/Feb/24/ln/hawaii802240350.html> .....8

GR Ames *et al.*, *Community Exposure to a Paraquat Drift*, 48 Archives of Env'tl. Health 47-52 (Jan-Feb 1993) .....7

Information System for Biotechnology, <http://www.isb.vt.edu/locations-by-years.aspx> .....4

Jennifer Beth Sass and Aaron Colangelo, *European Union Bans Atrazine, While the United States Negotiates Continued Use*, 12 International Journal of Occupational Environmental Health 260–267 (2006).....7

Kagan Owens and Jay Feldman, *Getting the Drift on Chemical Trespass, Pesticides and You* (Beyond Pesticides, Washington, D.C.), 2004, *available at* <http://www.beyondpesticides.org/infoservices/pesticidesandyou/Summer%2004/Getting%20the%20Drift%20on%20Chemical%20Trespass.pdf> (last visited Feb. 22, 2014).....5, 6

*Kauai, Hawaii*, N.Y. Times, Oct. 16, 2013, *available at* [http://www.nytimes.com/2013/10/17/business/limits-approved-for-genetically-modified-crops-in-kauai-hawaii.html?\\_r=0](http://www.nytimes.com/2013/10/17/business/limits-approved-for-genetically-modified-crops-in-kauai-hawaii.html?_r=0).....10

PAGE(S)

**OTHER AUTHORITIES, CONT'D**

Mae Wu *et al.*, Natural Resources Defense Council, *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States* (April 2010), available at <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> .....7

Meriel Watt, Pesticide Action Network Asia and the Pacific, *Paraquat* (Aug. 2010), available at <http://wssroc.agron.ntu.edu.tw/note/Paraquat.pdf> .....7

Pesticide Action Network North America, *Pesticides in Paradise, Kaua‘i Test Fields*, available at [http://media.wix.com/ugd/5f73cf\\_fc1c533848ac96cf3706d11fae60edc4.pdf](http://media.wix.com/ugd/5f73cf_fc1c533848ac96cf3706d11fae60edc4.pdf).....6, 7, 9

Philippe Grandjean and Philip J Landrigan, *Neurobehavioural Effects of Developmental Toxicity*, 13 *The Lancet Neurology* 330-38 (2014) .....8

Press Release, Office of the Mayor, County of Kaua‘i, *Mayor Vetos Bill 2491* (Oct. 31, 2013), available at <http://www.kauai.gov/LinkClick.aspx?fileticket=JtejVwp2fs4%3d&tabid=346&mid=1449> .....10

Press Release, *United States Geological Survey, USGS Releases Study on Toxic Rainfall in San Joaquin Valley* (Aug. 18, 2003), available at [http://www.usgs.gov/newsroom/article\\_pf.asp?ID=169](http://www.usgs.gov/newsroom/article_pf.asp?ID=169) .....5

Rosemarie Bernardo, *Kauai Council Overrides Mayor's Veto of Anti-Pesticide, GMO Bill*, *Star Advertiser*, Nov. 16, 2013, available at [http://www.staradvertiser.com/news/breaking/20131116\\_Kauai\\_Council\\_overrides\\_mayors\\_veto\\_of\\_antipesticide\\_GMO\\_bill.html](http://www.staradvertiser.com/news/breaking/20131116_Kauai_Council_overrides_mayors_veto_of_antipesticide_GMO_bill.html) .....11

Ross J. Jones *et al.*, *Effects of Herbicides Diuron and Atrazine on Corals of the Great Barrier Reef, Australia*, 251 *Marine Ecology Progress Series*153-167 (2003) .....7



PAGE(S)

**OTHER AUTHORITIES, CONT'D**

Rudolph P. Rull *et al.*, *Residential Proximity to Agricultural Pesticide Applications and Childhood Acute Lymphoblastic Leukemia*, 109(7) *Envtl. Research* 891-899 (Oct. 2010) .....6

Surfrider -Kaua‘i Chapter, *Pesticide Reporting*, <http://kauai.surfrider.org/what-we-do/pesticide-reporting/> .....12

Surfrider, *Mission*, <http://www.surfrider.org/pages/mission> .....12

Tyrone B. Hayes *et al.*, *Demasculinization and Feminization of Male Gonads by Atrazine: Consistent Effects across Vertebrate Classes*, 127 *Journal of Steroid Biochemistry and Molecular Biology* 64-73 (Oct. 2011).....7

## **INTRODUCTION**

Courts in the Ninth Circuit have long recognized the right of supporters of a law to intervene in legal challenges to the law. In the instant case, Plaintiff pesticide firms Syngenta Seeds, Inc.; Syngenta Hawai‘i, LLC; Pioneer Hi-Bred International, Inc.; Agrigenetics, Inc.; and BASF Plant Science LP (collectively Plaintiffs) seek to invalidate Kaua‘i County Ordinance 960 (formerly Bill 2491) (hereafter Ordinance 960 or the Ordinance). Ordinance 960 provides residents of Kaua‘i public access to information related to the application of pesticides used in experimental and commercial agricultural operations and the cultivation of genetically engineered crops within the County of Kaua‘i, and affords County residents and their environment greater protection from potential pesticide drift and contamination.

Plaintiffs’ litigation seeks to invalidate Ordinance 960 and foreclose the transparency and increased protection the Ordinance affords to Kaua‘i residents. Proposed Intervenors Ka Makani Ho‘opono, Center for Food Safety (CFS), Pesticide Action Network North America (PANNA), and Surfrider Foundation (Surfrider) (collectively Proposed Intervenors), and each of them, seek to intervene to defend their organizations’ interests in the Ordinance, as well as the environmental, human health, cultural, and personal interests of their members. Proposed Intervenors and their members vigorously supported Ordinance 960, and

actively participated in the legislative process to ensure its passage. As citizens residing near fields where Plaintiffs apply pesticides on genetically engineered crops, Proposed Intervenor's members have unique personal interests in the transparency and protection guaranteed by Ordinance 960. As public interest organizations dedicated to protecting public health and the environment from the harmful impacts of pesticide use and genetically engineered crops, Proposed Intervenor's CFS, PANNA, and Surfrider also have substantive interests in ensuring Ordinance 960's implementation.

Defendant County of Kaua'i (hereafter Defendant or County) does not share, and will not adequately represent, Proposed Intervenor's particular interests. This is further demonstrated by the procedural history surrounding Ordinance 960's passage and recent events since Plaintiffs initiated this suit. The outcome of this litigation may impair Proposed Intervenor's substantial interests in ensuring the implementation of Ordinance 960, and failure to allow them to intervene will significantly undermine their ability to protect those interests.

Accordingly, the Court should grant Proposed Intervenor's timely Motion to Intervene under Rule 24 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24.

## **BACKGROUND**

### **I. FACTUAL BACKGROUND**

#### ***Pesticide Use and Genetically Engineered Crops in Kaua‘i***

Pesticide firms such as Plaintiffs genetically engineer crops to withstand the direct application of herbicides that are often manufactured and sold by the very same entities. Today, more than ninety percent of corn and soy planted in the continental United States is genetically engineered to withstand the direct application of herbicides. *See* Compl. ¶¶ 28-29. The cultivation of these genetically engineered, herbicide-resistant crops marks a significant change from conventional or organic farming by massively increasing the amount, timing, and frequency of pesticide<sup>1</sup> applications.<sup>2</sup>

The tremendous increase in pesticide use associated with the cultivation of genetically engineered crops in the past few decades has also altered agricultural

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<sup>1</sup> The term “pesticides” is broadly defined to include “(1) [a]ny substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; and (2) [a]ny substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.” H.R.S. § 149A-2.

<sup>2</sup> Charles Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the United States: The First Thirteen Years* (Nov. 2009), available at <http://www.organic-center.org/reportfiles/GE13YearsReport.pdf> (last visited Feb. 22, 2014); Charles Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the U.S.—The First Sixteen Years*, 2012 *Envtl. Sci. Europe*, available at <http://www.enveurope.com/content/pdf/2190-4715-24-24.pdf>. (last visited Feb. 22, 2014).

production in Hawai‘i, where the year-round warm climate allows for continuous production of genetically engineered seeds, and experimental testing of new genetically engineered crops, both destined for commercial production on the mainland.<sup>3</sup> The state has hosted more open-air, experimental field trials of genetically engineered crops than any other state in the nation.<sup>4</sup> In 2013 alone, 178 different field tests of genetically engineered crops were conducted on over 1124 sites in Hawai‘i.<sup>5</sup>

Similarly, the County of Kaua‘i is host to increasing commercial production of genetically engineered crops and seeds, and is the epicenter of field testing of new varieties of genetically engineered crops. Plaintiffs lease and operate much of the farmland used for the cultivation and field testing of genetically engineered crops. First Amended Compl. ¶¶ 13, 16, 20, 26, ECF No. 17. As Plaintiffs admit, Kaua‘i’s moderate weather enables them to continuously cultivate and test new herbicide-resistant genetically engineered crops—and to continuously apply

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<sup>3</sup> Andrew Pollack, *Unease in Hawaii’s Corn Fields*, N.Y. Times, Oct. 7, 2013, available at [http://www.nytimes.com/2013/10/08/business/fight-over-genetically-altered-crops-flares-in-hawaii.html?\\_r=0](http://www.nytimes.com/2013/10/08/business/fight-over-genetically-altered-crops-flares-in-hawaii.html?_r=0) (last visited Feb. 17, 2014).

<sup>4</sup> Information System for Biotechnology, <http://www.isb.vt.edu/locations-by-years.aspx> (select “1987” through “2014” and “locations”) (last visited Feb. 22, 2014)

<sup>5</sup> Information System for Biotechnology, <http://www.isb.vt.edu/locations-by-years.aspx> (select “2013” and “locations” and “sites”) (last visited Feb. 22, 2014)

pesticides—throughout the year. *See id.* ¶ 25.

The constant application of pesticides, which has become a necessary component of genetically engineered crop production and testing, have detrimentally affected human health and the environment on Kaua‘i. Pesticides drift beyond fields of application to pollute neighboring lands, harming plants, wildlife, and people. Some of the pesticides used on Kaua‘i can volatilize and drift for days or months after application.<sup>6</sup> They can also be carried in the wind by pesticide-laden dust.<sup>7</sup> Many of the pesticides used on Kaua‘i are also known to persist in the environment and contaminate water sources.<sup>8</sup> Residents who come in contact with these toxic chemicals often suffer from immediate symptoms, including headaches, respiratory distress, nausea, vomiting, dizziness, eye pain,

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<sup>6</sup> Kagan Owens and Jay Feldman, *Getting the Drift on Chemical Trespass, Pesticides and You* (Beyond Pesticides, Washington, D.C.), 2004, *available at* <http://www.beyondpesticides.org/infoservices/pesticidesandyou/Summer%2004/Getting%20the%20Drift%20on%20Chemical%20Trespass.pdf> (last visited Feb. 22, 2014).

<sup>7</sup> Press Release, *United States Geological Survey, USGS Releases Study on Toxic Rainfall in San Joaquin Valley* (Aug. 18, 2003), *available at* [http://www.usgs.gov/newsroom/article\\_pf.asp?ID=169](http://www.usgs.gov/newsroom/article_pf.asp?ID=169) (last visited Feb. 22, 2014).

<sup>8</sup> For example, atrazine, one of the restricted use pesticides most used on Kaua‘i, is a known water contaminant. *See* Charles Duhigg, *Debating How Much Weed Killer Is Safe in Your Water Glass*, N.Y. Times, Aug. 23, 2001, *available at* <http://www.nytimes.com/2009/08/23/us/23water.html?pagewanted=all> (last accessed Feb. 21, 2014).

chest pain, and fatigue, among others.<sup>9</sup> Long-term exposure to these pesticides may also increase the risks of various serious diseases, including cancer, autism, Parkinson's disease, and childhood leukemia.<sup>10</sup> Further, these constant pesticide applications increase the prevalence of weeds immune to herbicides, alter soil ecology, eliminate beneficial insects, and kill or contaminate native plants.<sup>11</sup>

Alarming, many of the pesticides tested and applied by Plaintiffs and other pesticide companies on Kaua'i are chemicals that the United States Environmental Protection Agency has designated as "restricted use" pesticides due to their harmful impacts on human health and the environment. According to records from the Hawai'i State Department of Agriculture, nearly 5500 pounds of twenty-two different kinds of restricted-use pesticides were applied in the County in 2012.<sup>12</sup> Indeed, the three most widely-used restricted use pesticides on Kaua'i—atrazine, chlorpyrifos, and paraquat—have all been linked to serious health impacts even at

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<sup>9</sup> See Owens and Feldman, *supra* note 5.

<sup>10</sup> Rudolph P. Rull *et al.*, *Residential Proximity to Agricultural Pesticide Applications and Childhood Acute Lymphoblastic Leukemia*, 109(7) *Envtl. Research* 891-899 (Oct. 2010).

<sup>11</sup> See Bohm *et al.*, *Glyphosate- and Imazethapyr-induced Effects on Yield, Nodule Mass and Biological Nitrogen Fixation in Field-grown Glyphosate-resistant Soybean*, 41 *Soil Biology & Biochemistry* 420-22 (2009).

<sup>12</sup> PANNA, *Pesticides in Paradise, Kaua'i Test Fields*, available at [http://media.wix.com/ugd/5f73cf\\_fc1c533848ac96cf3706d11fae60edc4.pdf](http://media.wix.com/ugd/5f73cf_fc1c533848ac96cf3706d11fae60edc4.pdf) (last visited Feb. 22, 2014).

low levels of exposure.<sup>13</sup> Atrazine, a common water contaminant, is associated with various serious human health defects and harm to aquatic species.<sup>14</sup> The chemical has been banned in the European Union due to demonstrated negative health effects.<sup>15</sup> Paraquat, which has also been banned in thirty-two countries, including those of the European Union, is a lethal pesticide that can drift for many miles. Ingestion of as little as a teaspoon of concentrate of paraquat is fatal; the chemical is a thousand times more toxic when inhaled.<sup>16</sup> Long-term exposure to paraquat has been linked to numerous health impacts, in particular Parkinson's disease and several cancers.<sup>17</sup> Chlorpyrifos also has known detrimental health

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<sup>13</sup> *Id.*

<sup>14</sup> Mae Wu *et al.*, Natural Res. Defense Council, *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States* (April 2010), available at <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (last visited Feb. 22, 2014); Tyrone B. Hayes *et al.*, *Demasculinization and Feminization of Male Gonads by Atrazine: Consistent Effects across Vertebrate Classes*, 127 *J. of Steroid Biochemistry & Molecular Biology* 64-73 (Oct. 2011); Ross J. Jones *et al.*, *Effects of Herbicides Diuron and Atrazine on Corals of the Great Barrier Reef, Australia*, 251 *Marine Ecology Progress Series* 153-167 (2003).

<sup>15</sup> See Jennifer Beth Sass and Aaron Colangelo, *European Union Bans Atrazine, While the United States Negotiates Continued Use*, 12 *Int'l J. Occupational Envtl. Health* 260–267 (2006).

<sup>16</sup> GR Ames *et al.*, *Community Exposure to a Paraquat Drift*, 48 *Archives of Envtl. Health* 47-52 (Jan-Feb 1993).



effects. A developmental neurotoxicant, maternal exposure to chlorpyrifos results in lowered brain growth in utero, and with neurobehavioural deficits that have persisted to at least seven years of age.<sup>18</sup>

These toxic pesticides may drift easily on the wind, and the warm climate that makes the island convenient for genetically engineered seed production and crop testing increases the chance of exposure to pesticides through vapor drift.<sup>19</sup> On a number of occasions since 2006, schoolchildren and residents on Kaua‘i’s west side, where the majority of genetically engineered crop cultivation and testing takes place, have reportedly been sickened due to pesticide drift from nearby genetically engineered crop fields.<sup>20</sup> Yet, despite known risks to human health and the surrounding environment, Plaintiffs continuously apply these restricted use pesticides and other toxic chemicals on fields that border residential

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<sup>17</sup> Meriel Watt, Pesticide Action Network Asia and the Pacific, *Paraquat* (Aug. 2010), available at <http://wssroc.agron.ntu.edu.tw/note/Paraquat.pdf> (last visited Feb. 22, 2014).

<sup>18</sup> Philippe Grandjean and Philip J Landrigan, *Neurobehavioural Effects of Developmental Toxicity*, 13 *Lancet Neurol* 330-38 (2014).

<sup>19</sup> See Owens and Feldman, *supra* note 5.

<sup>20</sup> See, e.g., Diane Leone, *Odor that Got Kids Sick Debated*, Honolulu Advertiser, Feb. 24, 2008, available at <http://the.honoluluadvertiser.com/article/2008/Feb/24/In/hawaii802240350.html>.

neighborhoods, schools, and hospitals.<sup>21</sup>

## II. LEGISLATIVE BACKGROUND

The bill that became Ordinance 960 was introduced against this backdrop of Plaintiffs' year-round applications of toxic pesticides to the detriment of Kaua'i's residents, school children, and the natural environment. The Ordinance seeks to protect public health and natural resources by requiring public disclosure of pesticide applications and genetically engineered crop cultivation, and by imposing pesticide buffer zones around sensitive areas. *See* Ex. 1 to First Amended Compl. (Text of Ordinance 960), ECF No. 17-1. Specifically, Ordinance 960 requires:

- reporting regarding pesticide use to the County of Kaua'i's Office of Economic Development, *see* § 22-22.4;
- prior notice of pesticide application to the public and neighbors;
- disclosure of related pesticide application to requesting licensed physicians or nurse practitioners upon demonstration of a medical need, *see* § 22-22.4;
- reporting regarding the cultivation of genetically engineered crops, *see* § 22-22.4;
- pesticide buffer zones near (1) facilities hosting sensitive populations, such as nursing homes, medical facilities, and day care centers, (2) residential dwellings, (3) public roadways, and (4) vital water resources including

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<sup>21</sup> PANNA, *supra* note 12.

shoreline and perennial waterways flowing into the ocean, *see* § 22-22.5;

and

- completion of an Environmental and Public Health Impact Study by the County assessing the numerous environmental and public health impacts of pesticide use and genetically engineered crop cultivation, *see* § 22-22.6.

The Council of the County of Kaua‘i (hereafter Council or County Council) adopted the final language of Ordinance 960 on October 16, 2013 by a six-to-one vote that took place at a hearing session that lasted more than eighteen hours.<sup>22</sup> Days later, on October 31, 2013, Kaua‘i County Mayor Bernard P. Carvalho, Jr. vetoed its passage.<sup>23</sup> Concurrent with public announcement of his veto, the County Mayor also released a confidential legal memorandum detailing the County Attorney’s legal opinion regarding Ordinance 960, despite the existence of an attorney-client privilege between the County Attorney and the County Council, and the latter’s objection to the memorandum’s release. After an additional public

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<sup>22</sup> Andrew Pollack, *Limits Approved for Genetically Modified Crops in Kauai, Hawaii*, N.Y. Times, Oct. 16, 2013, *available at* [http://www.nytimes.com/2013/10/17/business/limits-approved-for-genetically-modified-crops-in-kauai-hawaii.html?\\_r=0](http://www.nytimes.com/2013/10/17/business/limits-approved-for-genetically-modified-crops-in-kauai-hawaii.html?_r=0) (last viewed Feb. 17, 2014).

<sup>23</sup> Press Release, Office of the Mayor, County of Kaua‘i, *Mayor Vetos Bill 2491* (Oct. 31, 2013), *available at* <http://www.kauai.gov/LinkClick.aspx?fileticket=JtejVwp2fs4%3d&tabid=346&mid=1449> (last visited Feb. 22, 2014). For the Court’s convenience, Proposed Intervenors have attached the Mayor’s veto message and the released memorandum as Exhibits 3 and 4 to the Declaration of Paul H. Achitoff.

hearing and a new appointment to fill an empty seat on the Council, the Council voted to override the mayoral veto on November 16, 2013.<sup>24</sup>

### **III. PROPOSED INTERVENORS' INTERESTS IN THE ENACTMENT OF KAUA'I ORDINANCE 960**

Proposed Intervenors possess significant interests in the implementation of Ordinance 960, whose provisions ensuring transparency and buffers from the harms of pesticide applications in genetically engineered crop production are critical to protecting the health of Proposed Intervenors' members, and go to the core of Proposed Intervenors' organizational interests.

Proposed Intervenor CFS is a nationwide, public-interest organization with more than 400,000 members nationwide, including hundreds of Kaua'i residents. *See* Decl. of Andrew Kimbrell ¶ 2 (filed concurrently). CFS's fundamental mission is ameliorating the adverse impacts of industrial farming and food production systems—such as pesticide use and genetically engineered crop production—on human health, animal welfare, and the environment. *Id.* ¶ 3-4. The measures requiring disclosure and buffer zones imposed by Ordinance 960 go to the heart of CFS's mission.

Proposed Intervenor PANNA is the regional center of Pesticide Action

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<sup>24</sup> Rosemarie Bernardo, *Kauai Council Overrides Mayor's Veto of Anti-Pesticide, GMO Bill*, Star Advertiser, Nov. 16, 2013, available at [http://www.staradvertiser.com/news/breaking/20131116\\_Kauai\\_Council\\_overrides\\_mayors\\_veto\\_of\\_antipesticide\\_GMO\\_bill.html](http://www.staradvertiser.com/news/breaking/20131116_Kauai_Council_overrides_mayors_veto_of_antipesticide_GMO_bill.html) (last visited Feb. 22, 2014).

Network International, a coalition of public interest organizations in more than ninety countries. *See* Decl. of Paul Towers ¶ 1 (filed concurrently). For more than thirty years, PANNA has worked to replace the use of hazardous pesticides with healthier, ecologically-sound pest management methods. *Id.* ¶ 1. PANNA has been dedicated to tracking and addressing excessive pesticide use on Kaua‘i. *Id.* ¶¶ 1-2.

Proposed Intervenor Surfrider is a nonprofit, environmental organization whose core mission is the protection and enjoyment of oceans, waves, beaches, and our natural water resources.<sup>25</sup> As part of its mission, Surfrider promotes agricultural and gardening practices that reduce runoff of toxic pesticides into our ocean. *See* Decl. of Gordon LeBadz, M.D. ¶ 2 (filed concurrently). Surfrider engages in public education to protect water resources, including on Kaua‘i. *Id.* ¶¶ 2-3, 5-6. For example, the Kaua‘i Chapter published a brochure regarding the polluting effects of pesticides on the island, and has been collecting reports of incidents of pesticide exposure through its chapter website.<sup>26</sup>

Each of these organizations has been dedicated to the protection human

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<sup>25</sup> Surfrider, *Mission*, <http://www.surfrider.org/pages/mission> (last visited Feb. 24, 2014).

<sup>26</sup> *See* Surfrider -Kaua‘i Chapter, *Pesticide Reporting*, <http://kauai.surfrider.org/what-we-do/pesticide-reporting/> (last visited Feb. 22, 2014).

health and the environment from pesticide pollution and the harmful impacts of genetically engineered crop production. As a result of their organizational missions, Proposed Intervenor organizations and their members vigorously supported the passage of Ordinance 960. For example, Proposed Intervenor CFS provided independent legal analysis and suggested language prior to the introduction of Ordinance 960. Decl. of Andrew Kimbrell ¶ 10. Proposed Intervenor and their members submitted comment and testimonies in support of Ordinance 960's passage to the County Council. *Id.* ¶¶ 10-11; Decl. of Paul Towers ¶ 2. Counsel for Proposed Intervenor further offered independent legal analysis, explaining why Ordinance 960 is lawful, to the County Attorney's Office and Council members. *See* Decl. of Paul H. Achitoff, Exs. 1-2 (filed concurrently).

In addition to their organizational interests, Proposed Intervenor's members' health, environmental, and personal interests are directly related to the passage of Ordinance 960. Many members of CFS, PANNA and Surfrider reside on Kaua'i, near Plaintiffs' fields where pesticides are regularly applied and genetically engineered crops are cultivated. *See, e.g.*, Decl. of Howard Hurst ¶ 5-15 (filed concurrently). Proposed Intervenor Ka Makani Ho'opono (The Wind that Makes Right) is composed of residents of from the west side of the island of Kaua'i—where most of the pesticide applications and genetically engineered seed production and testing take place—who have been personally affected by the

practices the Ordinance seeks to address. Members of Ka Makani Ho‘opono and their families have experienced firsthand the negative health impacts stemming from inadequate protection from pesticide drift and lack of information on pesticide applications in nearby fields. Proposed Intervenors’ members would be personally harmed by any court action depriving them of the transparency and increased protection to come with Ordinance 960’s implementation.

### **ARGUMENT**

Proposed Intervenors are entitled to intervene in this case. As set forth below, Proposed Intervenors have met all four requirements warranting intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24(a). Proposed Intervenors’ significant protectable interests in the enactment of Ordinance 960 and in protecting the public health and natural resources of Kaua‘i will be impaired by a ruling in Plaintiffs’ favor, and yet their interests are not adequately represented by the County. Alternatively, Proposed Intervenors also meet the requirements for permissive intervention under Rule 24(b). *See* Fed. R. Civ. P. 24(b). This Court should grant Proposed Intervenors’ timely Motion to Intervene.

#### **IV. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT**

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Proposed Intervenors are entitled to intervene as of right. Rule 24(a) provides:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Ninth Circuit “construe[s] the Rule broadly in favor of proposed intervenors” in an analysis that is guided by “practical and equitable considerations.” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc). According to the Ninth Circuit, its “liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts.” *Id.*

The Ninth Circuit utilizes a four-part test to determine whether intervention as a matter of right is warranted:

(1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties in the lawsuit.

*Id.* at 1177 (internal quotations omitted); *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (internal quotations omitted). “The requirements are broadly interpreted in favor of intervention.” *Prete*, 438 F.3d at 954. As the Ninth Circuit instructs, “allowing parties with a practical interest in the outcome of [the case] to intervene” reduces and eliminates “future litigation involving related issues,” and enables “an



additional interested party to express its views before the court.” *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). Proposed Intervenors satisfy each of the four requirements for intervention as of right under Rule 24(a).

**A. Proposed Intervenors’ Motion Is Timely.**

The Ninth Circuit evaluates the timeliness of a motion to intervene under three criteria: (1) the stage of the proceeding; (2) potential prejudice to other parties; and (3) the reason for any delay in moving to intervene. *See, e.g., Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996). Proposed Intervenors’ Motion satisfies all three criteria for timely intervention. This case is still in its initial stage: Plaintiffs filed their First Amended Complaint, which reset all relevant deadlines in this case around two weeks ago, on February 7, 2014, *see* First Amended Compl., ECF No. 17; Defendant Kaua‘i County has yet to respond to Plaintiffs’ First Amended Complaint, and had not even responded the original Complaint. No substantive brief has been filed, nor has a briefing schedule or hearing date been set for the case. The parties have yet to agree to having the case heard by a Magistrate Judge, so it remains to be determined who will ultimately hear the case. To further eliminate any potential delay or prejudice to existing parties, Proposed Intervenors are submitting a Proposed Answer concurrently with their Motion. Thus, no prejudice, delay, or inefficiency will result from allowing Proposed Intervenors to intervene at this time. *See, e.g., Idaho Farm Bureau*

*Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (motion filed “four months after [plaintiff initiated] action” and “before any hearings or rulings on substantive matters” was timely); *Sierra Club v. U.S. Env'tl. Prot. Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993) (intervention motion timely when filed “before the EPA had even filed its answer”), *overruled in part on other grounds*, *Wilderness Soc'y*, 630 F.3d 1173 (9th Cir. 2011).

**B. Proposed Intervenors Have “Significantly Protectable Interests” in Confirmation of Ordinance 960’s Lawfulness.**

According to the Ninth Circuit, the requirement that a party seeking intervention as of right have an “interest” in the subject of the lawsuit is ““primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process”” *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *Cnty of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). A court’s assessment of an applicant’s interest in the case is a ““practical, threshold inquiry.”” *Nw. Forest Res. Council*, 82 F.3d at 837 (9th Cir. 1996) (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (same). A party has a sufficient interest for intervention as of right if ““it will suffer a practical impairment of its interests as a result of the pending litigation.”” *Id.* at 1180 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). No specific legal or equitable interest is required;

an interest is “significantly protectable” so long as it is “protectable under some law” and “there is a relationship between the legally protected interest and the [plaintiffs’] claims.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir.1998)). As set forth below, Proposed Intervenor have significantly protectable interests relating to the subject of the present litigation.

First, as public interest groups that vigorously supported the challenged Kaua‘i Ordinance 960, Intervenor organizations CFS, Surfrider, and PANNA have significantly protectable interests in the subject matter of this case. Directly on point, the Ninth Circuit has held that “[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.” *Idaho Farm Bureau Fed’n*, 58 F.3d at 1397-98 (upholding intervention as of right and finding that a conservation group that had participated in the administrative process prior to the decision to list an endangered species had significant interest in suit seeking to remove the listing); *Nw. Forest Res. Council*, 82 F.3d at 837-38 (public interest groups permitted to intervene as of right when groups “were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose”); *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (holding that national wildlife organization had a significant interest in suit challenging the Department of Interior’s decision to

develop a bird conservation area where the organization had participated in the administrative process prior to the development); *Jackson v. Abercrombie*, 282 F.R.D. 507, 514-15 (D. Haw. 2012) (holding that nonprofit organization that actively supported the ratification of a constitutional amendment reserving the right of marriage to opposite-sex couples had demonstrated a significantly protectable interest warranting intervention as of right).

In *Jackson*, this Court held that an applicant public interest group's prior actions supporting the passage of a constitutional amendment demonstrated a "significantly protectable interest" under Rule 24(a). 282 F.R.D. at 516. The plaintiffs in that case challenged a constitutional amendment that limited the right to marriage to opposite-sex couples, and applicant public interest group moved to intervene as a defendant. *Id.* at 510-511. The applicant group had devoted time and energy to public outreach and education regarding the challenged marriage amendment, encouraged voters to vote in support of it, and distributed literature highlighting the success after the amendment was passed. *Id.* at 516. The court in *Jackson* granted intervention as of right, finding that "[the applicant] through its actions aimed at getting the marriage amendment ratified and ensuring that the definition of marriage . . . is not changed, has 'actively supported' Hawaii's marriage laws such that it has a significant protectable interest in this case." *Id.* at 517.

Here, Proposed Intervenor's organizational missions and active support of Ordinance 960's passage go beyond the applicant group's efforts in *Jackson*, and are more than sufficient to satisfy the "significantly protectable interest" prong for intervention as of right. As stated above, Proposed Intervenor CFS, PANNA, and Surfrider are public interest environmental groups dedicated to eliminating the hazardous use of pesticides in agriculture and toxic pollution of our water sources. *See supra* pp. 11-14. All three organizations actively work to address and reduce the adverse impacts of pesticide use and genetically engineered crop production, both nationally and in Kaua'i. *See id.*; *see, e.g., WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) (holding that "a prospective intervenor's environmental concern is a legally protectable interest." (internal citations omitted)). All of the Proposed Intervenor's actively participated in support of Ordinance 960 during the legislative process. *See supra* pp. 11-14. Representatives of Proposed Intervenor's submitted testimonies to the Kaua'i County Council, stating their support of the Ordinance's passage. *See supra* pp. 11-14. All three organizations actively reached out to their organizational members through newsletters and other social media networks to raise awareness and support for Ordinance 960. *See* Decl. of Andrew Kimbrell ¶¶ 9-10; Decl. of Paul Towers ¶ 2. Similarly, members of Proposed Intervenor Ka Makani Ho'opono participated in public rallies and attended public hearings before the

County Council, urging the County Council to vote in favor of Ordinance 960. *See supra* pp. 13-14. In light of Proposed Intervenors' actions supporting the passage of Ordinance 960, Proposed Intervenor organizations possess significantly protectable interests warranting intervention as of right. *See Jackson*, 282 F.R.D. at 516-17; *Tuscon Women's Ctr. v. Ariz. Medical Bd.*, Civ. No. 09-1909, 2009 U.S. Dist. LEXIS 113948, at \*4 (D. Ariz. Nov. 24, 2009) (holding public interest group that provided testimony in support of the challenged law had a demonstrated significant interest warranting intervention as of right); *Pickup v. Brown*, 2:12-CV-02497-KJM, 2012 WL 6024387, at \*1 (E.D. Cal. Dec. 4, 2012) (finding public interest group who sponsored and lobbied for the challenged bill prior to its passage has a significantly protectable interest in the case).

Second, members of Proposed Intervenors possess significant health, life, and property interests in conserving the public health and natural environment of Kaua'i County, as guaranteed by Article XI of the Hawai'i State Constitution and Section 46-1.5 of the Hawai'i Revised Statutes.<sup>27</sup> Proposed Intervenors' members

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<sup>27</sup> 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 Hawai'i's natural beauty and all natural resources, including, land, water, air, minerals and energy sources.

Haw. Const. Art. XI, § 1. Similarly, Section 46-1.5(13) of the Hawai'i Revised Statutes grants county governments “the power to enact ordinances

include residents of Kaua‘i who work or live near areas of commercial agricultural production where genetically engineered crops are being farmed or field-tested. *See* Decl. of Malia Chun ¶¶ 3-4 (filed concurrently); Decl. of Howard Hurst ¶¶ 3-5. Specifically, members of Proposed Intervenor Ka Makani Ho‘opono reside on the west side of Kaua‘i, where the majority of Plaintiffs’ agricultural activities take place, surrounded by the frequent applications of toxic pesticides on genetically engineered crops. *See, e.g.*, Decl. of Malia Chun ¶¶ 3-4. Similarly, Proposed Intervenor CFS, Surfrider and PANNA represent the interests of their members on Kaua‘i who have significant personal health and environmental interests in the enactment of Ordinance 960. For example, Dr. LaBedz, a member of Proposed Intervenor Surfrider, has an active interest in safeguarding the quality of Kaua‘i’s coastal waters. *See* Decl. of Gordo Labedz, M.D. ¶¶ 2-3, 5-6, 9 (filed concurrently). Mr. Hurst, a member of Proposed Intervenor PANNA and a school teacher at a middle school on the west side of Kaua‘i, has significant personal health concerns over the spraying of pesticides near his workplace. *See* Decl. of Howard Hurst ¶¶ 5-15; *see United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 552 (1996) (organization’s interests in litigation

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deemed necessary to protect health, life, and property . . . of the county and its inhabitants . . . .” H.R.S. § 46-1.5(13).

shown by alleged harms to its members). Proposed Intervenors' members have significant, concrete, and protectable interests in Ordinance 960's enactment that warrant intervention as of right.

Proposed Intervenors have met the second prong for intervention as of right under Rule 24(a).

**C. Disposition of This Case in Plaintiffs' Favor Will Impair Proposed Intervenors' Interests.**

Under the third prong of the Rule 24(a) intervention test, an applicant for intervention as of right must be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest."

*Prete*, 438 F.3d at 954. In their First Amended Complaint, Plaintiffs request this Court to issue a declaratory judgment that Ordinance 960 is unconstitutional, and grant injunctive relief enjoining the County from enforcing the provisions of the

Ordinance. A ruling in Plaintiffs' favor would thus invalidate Proposed

Intervenors' past efforts to enact Ordinance 960 and eliminate the protection and transparency promised by the Ordinance's measures, to the detriment of Proposed

Intervenors' members. *See City of Los Angeles*, 288 F.3d at 399 (intervention as of right is appropriate where the remedy sought is injunctive relief). Indeed, "after

determining that the applicant has a protectable interest, courts have 'little difficulty concluding' that the disposition of the case may affect such interest."

*Jackson*, 282 F.R.D. at 517 (quoting *Lockyer*, 450 F.3d 436, 442).



The Court's resolution of Ordinance 960's legality will directly affect Proposed Intervenor's ability to protect their members' health and property, as well as their organizational interests in insulating Kaua'i's public health and environment from the detrimental impacts of pesticide applications and genetically engineered crop cultivation. Accordingly, the Court should grant intervention as of right. *See Jackson*, 282 F.R.D. at 517 (finding that an adverse decision in the case would impair public interest group's interest in preserving the challenged constitutional amendment).

**D. The Defendant County Does Not Adequately Represent Proposed Intervenor's Interests.**

The burden of showing inadequate representation is minimal, and the applicant need only show that representation of its interests by existing parties "may be" inadequate." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The process preceding the County's eventual adoption of Ordinance 960 and the County's actions since Plaintiffs filed this suit make plain that the County does not—and is unlikely to—adequately represent Proposed Intervenor's interests.

A court considers the following factors in assessing adequate representation:

- (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments;
- (2) whether the present party is capable and willing to make such arguments; and
- (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

*Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 952 (9th Cir. 2009)

(internal quotations omitted). Although a general presumption exists that “a state adequately represents its citizens” when the applicant for intervention shares the same interest, the presumption is rebuttable.

For example, the presumption can be overcome where the applicant for intervention demonstrates “more narrow, parochial interests” than existing parties.

*Nat’l Ass’n of Home Builders v. San Joaquin Valley Unified Air Pollution Dist.*,

No. 1:07-cv-0820 LJO DLB, 2007 WL 2757995, at \*4 (E.D. Cal. Sept. 21, 2007)

(quoting *Lockyer*, 450 F.3d at 444-45); *Californians for Safe & Competitive Dump*

*Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (“[B]ecause the employment interests of [intervenor]’s members were potentially more narrow and

parochial than the interests of the public at large, [intervenor] demonstrated that the representation of its interests by the [defendant state agencies] may have been

inadequate.”). Indeed, the Ninth Circuit has held that “[i]nadequate representation

is most likely to be found when the applicant asserts a personal interest that does

not belong to the general public.” *Forest Conservation Council v. U.S. Forest*

*Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds*, *Wilderness*

*Soc’y*, 630 F.3d at 1178.

Here, Proposed Intervenors have met their burden of demonstrating the County’s inadequate representation to satisfy the fourth prong for intervention as

of right. First, Proposed Intervenors and their members' interests are narrower than that of the County Defendant. Second, it is plain that Defendant may not be capable or willing to make all of Proposed Intervenors' arguments. Finally, Proposed Intervenor organizations offer their organizations' unique expertise and their members' personal perspectives on the negative impacts of pesticide use and GE crop cultivation on Kaua'i that the County may neglect.

Proposed Intervenors have a narrower interest than that of the Defendant County government, which represents the varied interests of all of Kaua'i's residents, as well as business and economic interests—including the business and economic interests of Plaintiffs and their employees. As residents of Kaua'i who reside, work, or recreate near fields where Plaintiffs constantly apply pesticides, members of Proposed Intervenors have personal health interests in upholding the transparency and protection afforded by Ordinance 960 that are narrower and far more personal than the County's general desire to defend its own legislation. *See supra* pp. 11-14. Proposed Intervenors' members or their keiki have personally suffered illnesses and ailments caused by being constantly exposed to pesticides. *See* Decl. of Malia Chun ¶ 5 (stating that she started experiencing symptoms that doctors diagnosed as adult asthma, which was attributed to environmental factors, and that her daughter also experienced symptoms of discomfort, as fields of genetically engineered crop production surrounded her town); Decl. of Howard

Hurst ¶¶ 6-14 (describing symptoms such as headache, nausea, and difficulty breathing he experienced and observed in his students as a school teacher at a school adjacent to Plaintiff Syngenta's crop fields).

The personal interests of Proposed Intervenors are sufficiently distinct from the County's general interests to overcome the presumption of adequate representation. For example, in *National Association of Home Builders*, the court allowed national public interest environmental groups to intervene on behalf of the defendant district agency in a suit challenging the district agency's promulgation of a regulation requiring construction companies to mitigate emissions of air pollutant from residential construction projects. 2007 WL 2757995, at \*4. In seeking intervention, the applicant public interest groups emphasized their individual members' health interests. *Id.* at \*4. The court agreed, holding that “[w]hile [p]roposed [i]ntervenors and the [d]istrict share a general interest in public health, the [d]istrict has a much broader interest in balancing the need for regulations with economic considerations . . . .” *Id.* at \*5. The court found that the defendant district's interest in defending the rule is motivated by other factors such as “cost and political pressures.” *Id.*

Other courts similarly have found the presumption of adequate representation rebutted where proposed intervenors had narrower interests than those of the defendant government agencies' general duty to uphold challenged

laws. *See, e.g., Golden Gate Restaurant Ass'n v. City and Cnty. of San Francisco*, No. C 06-06997 JSW, 2007 W 1052820, at \*4 (N.D. Cal. Apr. 5, 2007) (in suit challenging validity of city ordinance requiring businesses to contribute to employees' health care expenses, finding that "the [u]nion's members here have a personal interest in the enforcement of the [o]rdinance that is more narrow than the [c]ity's general interest because they would be among the employees directly affected by the injunction of the Ordinance."); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that because the government must represent the broader public interest, the interest of the defendant agency and the proposed intervenor industry group "will not necessarily coincide" even if they may share some "common ground"). While Proposed Intervenors and the Defendant County may share a general interest in upholding the validity of Ordinance 960, as those that would be directly affected by an injunction barring implementation of Ordinance 960, Proposed Intervenors' members have direct, narrower interests that may not be adequately represented by the County. *See WildEarth Guardian v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.") (citation omitted)).

The actions of Kaua‘i’s Mayor further demonstrate that the County is unlikely and unwilling to make all the arguments in defense of Ordinance 960’s validity that Proposed Intervenors are prepared to make in this case. As noted in the background section *supra*, the Mayor vetoed the Council’s adoption of Ordinance 960, stating his belief that the Ordinance is “legally flawed” and that it is not “legally defensible.”<sup>28</sup> The Mayor based his veto on a confidential memorandum prepared by the County Attorney’s Office for Kaua‘i County, which the Mayor’s office released concurrent with the veto announcement. *See supra* pp. XXX. Since the County Attorney gave the same analysis to the Kaua‘i County Council, this memorandum was protected by the attorney-client privilege between the County Attorney’s Office and not only the Mayor, but the County Council as well, which had previously formally voted not to release the memorandum to the public. *See id.* The Mayor’s release of the memorandum under these circumstances (presumably with the knowledge and advice of the County Attorney), in the face of the Council’s formal vote refusing to do so, was highly inappropriate, at a minimum. It illustrates the profound lack of unity within the Kaua‘i County government in its interpretation of, and support for, Ordinance 980, as well as the County Attorney’s conflict of interest in simultaneously representing

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<sup>28</sup> *See* Decl. of Paul H. Achitoff, Ex. 3.

the Mayor, who opposed the measure, and the Council, which supported it.

Proposed Intervenors can have no confidence that the County's defense of this suit will be vigorous and will assert every appropriate argument, where the Mayor remains the County's chief executive, and where he and his County Attorney have already declared the ordinance indefensible. *See NISH v. Cohen*, 191 F.R.D. 94, 97-98 (E.D. Va. 2000) ("Applicants' argument for inadequate representation is bolstered by this evidence of divergence amongst, and dissension with, the existing [defendant government agencies] . . . ."); *see* Decl. of Paul H. Achitoff, Exs. 3-5.

The County Attorney's conflict of interest and the Mayor's lack of support for Ordinance 960 continue to undermine the County's defense of Ordinance 960 in the present litigation. The County, through its Finance Department (whose Director is appointed by the Mayor), solicited pro bono legal representation of the County's defense in this suit, yet the County's overly-broad definition of pro bono representation included the requirement that applicants donate all litigation-related costs and expenses, in direct violation of Rule 1.8(e) of the Hawai'i Rules of Professional Conduct forbidding attorneys from paying litigation costs without the client's agreement for reimbursement.<sup>29</sup> Although there were applicants, the

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<sup>29</sup> *See* Hawai'i Rules of Prof'l Conduct R. 1.8(e); *see* Chris D'Angelo, *Pro Bono Defense Offered*, The Garden Island, Feb. 7, 2014, *available at* <http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense->

County declared them unresponsive because of their unwillingness to fund their own expenses.<sup>30</sup> The Kaua‘i County Council then approved the contingency request for \$75,000 (which might have been used to reimburse pro bono counsel’s expenses) to search for and select paid legal representation.<sup>31</sup> To date, the County has yet to select legal representation for its defense in this lawsuit, long after the original complaint was served. This chaotic process strongly suggests the Mayor’s lack of support for the ordinance will continue to hobble the County’s defense; at a bare minimum, the County’s representation “may” be inadequate. *See Trbovich*, 404 U.S. at 538 n.10.

The present scenario is akin to cases where courts have found inadequate representation by the government defendant and granted an applicant the right to intervene under Rule 24(a). In *Jackson*, the district court concluded that “there is no doubt that [the defendant government officer] will not represent [applicant public interest group’s] interest” where the defendant had issued press statements declining to defend the constitutionality of the challenged amendment and publicly

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offered/article\_83297e58-8fc1-11e3-acae-0019bb2963f4.html (last visited Feb. 22, 2014).

<sup>30</sup> Chris D’Angelo, *Pro Bono Defense Rejected*, The Garden Island, Feb. 12, 2014, available at [http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article\\_83297e58-8fc1-11e3-acae-0019bb2963f4.html](http://thegardenisland.com/news/local/crime-and-courts/pro-bono-defense-offered/article_83297e58-8fc1-11e3-acae-0019bb2963f4.html) (last visited Feb. 22, 2014).

<sup>31</sup> *Id.*



embraced the opposing party's position. *See* 282 F.R.D. at 518. Similarly, in *Lockyer*, where two anti-abortion organizations sought to intervene on behalf of the federal government in litigation brought by the State of California challenging the validity of a federal rider withholding federal funds from state and local governments that required health care providers to provide coverage or referrals for emergency abortion services, the Ninth Circuit found that the federal government did not adequately represent the organizations' interests where the federal government had already offered a narrower interpretation of the challenged rider in an earlier court filing. *See* 450 F.3d at 444.

Finally, Proposed Intervenors will offer unique elements to the present litigation not shared with—and in fact neglected by—the existing parties. Defending Ordinance 960 as a valid exercise of the County's authority to protect the health of its citizens and its natural resources will require knowledge of the public health and environmental harms associated with pesticide use and genetically engineered crop cultivation. Proposed Intervenors' expertise regarding such harms and their familiarity with the regulation of these subject matters ensure that Proposed Intervenors will advance a more comprehensive and better-informed analysis than the County is willing or able to offer.

In sum, all four factors for determining adequacy of representation weigh in favor of Proposed Intervenors. Proposed Intervenors have made a compelling

showing that their interests at least “may” not be adequately represented.

Accordingly, they meet all of the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

**V. AT A MINIMUM, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION**

Proposed Intervenors also satisfy the requirements for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 24(b). Similar to intervention of right under Rule 24(a), motions for permissive intervention are construed liberally in favor of the applicant for intervention. *See generally* Charles A. Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1913 (3d ed. 2005). The Ninth Circuit instructs that permissive intervention should be granted so long as an applicant establishes that: “(1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant’s claims.” *Donnelly*, 159 F.3d at 412. An applicant need not demonstrate inadequate representation or a direct interest in the subject matter of the challenged action. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002).

Proposed Intervenors meet the criteria for permissive intervention. As stated, Proposed Intervenors’ Motion is timely. *See supra* pp. 16-17. The Ninth Circuit has held that there is an independent jurisdictional basis for permissive

intervention where an applicant “asserts an interest” in the challenged law by presenting defenses and arguments that “squarely respond to the challenges made by plaintiffs in the main action.” *Kootenai Tribe*, 313 F.3d at 1110-11. Here, Proposed Intervenors, through their active participation in the passage of Ordinance 960 and dedicated efforts to address the harmful uses of pesticides and genetically engineered crop cultivations, have “asserted an interest in” the challenged litigation to establish an independent basis for jurisdiction for the purpose of permissive intervention. *See supra* pp. 11-14; *Kootenai Tribe*, 313 F.3d at 1110-11. Indeed, Proposed Intervenors’ and their members’ health and environmental interests are at the heart of Ordinance 960’s purpose. Finally, Proposed Intervenors’ arguments in defense of Ordinance 960’s lawfulness will address the very same questions of law or fact raised by Plaintiffs in this suit.

As explained in detail *supra*, Proposed Intervenors’ interests in the enactment of Ordinance 960 are directly threatened by an adverse ruling in this lawsuit. Therefore, should the Court find that Proposed Intervenors are not entitled to intervention as of right under Rule 24(a), the Court should nonetheless allow Proposed Intervenors to intervene permissively under Rule 24(b). *See Fed. R. Civ. P. 24.*

### **CONCLUSION**

For the foregoing reasons, Proposed Intervenors, and each of them,

respectfully request that the Court grant leave for intervention as of right pursuant to Rule 24(a). In the alternative, Proposed Intervenors, and each of them, request that the Court grant permissive intervention pursuant to Rule 24(b).

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Respectfully submitted,

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