IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JIM AANA, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. PIONEER HI-BRED INTERNATIONAL, INC., a DuPont Business and Iowa Corporation, GAY & ROBINSON, INC., a Hawaii corporation; ROBINSON FAMILY PARTNERS, a general partnership registered in Hawaii; and DOE DEFENDANTS 1-10, Defendants.	CIVIL NO. 12-00231 LEK-BMK CIVIL NO. 12-00665 LEK-BMK
JEFFREY CASEY, et al., on behalf themselves and all others similarly situated, Plaintiffs, vs. PIONEER HI-BRED INTERNATIONAL, INC., et al., Defendants.	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS I, II, IV, V, AND VI OF THE THIRD AMENDED COMPLAINT

On April 29, 2014, Defendants Pioneer Hi-Bred International, Inc.,[1] Gay & Robinson, Inc. ("Gay & Robinson" or

[1] Pioneer Hi-Bred International, Inc., is now known as (continued...)

"G&R"), and Robinson Family Partners[2] (all collectively "Defendants") filed their Motion for Partial Summary Judgment as to Counts I, II, IV, V, and VI of the Third Amended Complaint ("Motion"). [Dkt. no. 718.] Plaintiffs Jim Aana, et al., on behalf of themselves and all others similarly situated (collectively, "Plaintiffs"),[3] filed a "limited opposition" to the Motion on August 12, 2014,[4] and Defendants filed their reply on August 19, 2014. [Dkt. nos. 791, 794.] This matter came on

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[1](...continued)
DuPont Pioneer. [Third Amended Complaint (Property Related Claims) ("Third Amended Complaint"), filed 9/6/13 (dkt. no. 331), at ¶ 5; Pioneer's Answer to Third Amended Complaint ("Pioneer's Answer"), filed 3/21/14 (dkt. no. 679), at ¶ 5.] The Court will refer to both entities as "Pioneer."

[2] The Court will refer to Gay & Robinson and Robinson Family Partners collectively as "the Robinson Defendants."

[3] Insofar as the two cases have been consolidated, the Court will refer to the plaintiffs in both cases collectively as "Plaintiffs." When necessary, this Court will distinguish between "the Aana Plaintiffs" and "the Casey Plaintiffs." The defendants are the same in both cases.

[4] Plaintiffs initially filed an opposition to the instant Motion on June 2, 2014. [Dkt. no. 751.] At the time, it was set for hearing on June 23, 2014. Plaintiffs stated, *inter alia*, that the parties agreed to continue the hearing on the Motion as to Counts I, II, IV, and V until after the parties conducted depositions related to what the Robinson Defendants knew or should have known about Pioneer's farming operations. This Court continued the hearing on the instant Motion, in its entirety, to September 2, 2014. [Order Granting in Part and Denying in Part the Parties' Request to Continue the Hearing on a Portion of Defendants' Motion for Partial Summary Judgment as to Counts I, II, IV, V, and VI of the Third Amended Complaint, filed 6/9/14 (dkt. no. 756).]

for hearing on September 2, 2014.[5]

On September 3, 2014, this Court issued its Order Granting in Part and Denying in Part Plaintiffs' Request for Fed. R. Civ. P. 56(d) Continuance, which allowed the parties to file supplemental memoranda. [Dkt. no. 808.] Plaintiffs filed their supplemental memorandum in opposition to the Motion ("Plaintiffs' Supplemental Memorandum") on September 17, 2014, and Defendants filed their response ("Defendants' Supplemental Memorandum") on September 24, 2014. [Dkt. nos. 818, 822.]

On October 31, 2014, this Court issued an entering order ruling on the Motion ("10/31/14 EO Ruling"). [Dkt. no. 846.] The instant Order supersedes the 10/31/14 EO Ruling. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Defendants' Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set forth below. Specifically, this Court: GRANTS summary judgment in favor of the Robinson Defendants as to all claims against them; GRANTS summary judgment in favor of Pioneer as to the remaining portion of Count VI; and DENIES the Motion to

[5] At the hearing, the Court also heard arguments regarding Plaintiffs' Motion for Partial Summary Judgment to Dismiss Defendant DuPont Pioneer's Third Affirmative Defense Based on the Hawaii Right to Farm Act, Hawaii Revised Statutes, Chapter 165, filed May 23, 2014. [Dkt. no. 745.] The Court issued an order denying that motion on September 30, 2014 ("9/30/14 Summary Judgment Order"). [Dkt. no. 825.] The 9/30/14 Summary Judgment Order is also available at 2014 WL 4956489.

the extent that it seeks summary judgment in favor of Pioneer as to Count II.

BACKGROUND

The relevant factual and procedural background of this case is set forth in this Court's: 1) August 9, 2013 Order Granting in Part and Denying in Part Defendants Gay & Robinson, Inc. and Robinson Family Partners' Motion to Dismiss Plaintiffs' Second Amended Complaint Under Fed. R. Civ. P. 12(b)(6); and Granting in Part and Denying in Part Defendants Gay & Robinson, Inc., Robinson Family Partners, and Pioneer Hi-Bred International, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint ("8/9/13 Dismissal Order"); and 2) February 27, 2014 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Third Amended Complaint (Rule 12(b)(6)) ("2/27/14 Dismissal Order"). [Dkt. nos. 224, 608.[6]]

The crux of Plaintiffs' Third Amended Complaint is that Plaintiffs have allegedly suffered various forms of property damage as a result of Pioneer's commercial farming operation at the Waimea Research Center. [Third Amended Complaint at ¶ 16.] The Third Amended Complaint alleges the following claims: (1) negligence against all Defendants for failure to use due care (Count I); (2) negligence against all Defendants for failure to

[6] The 8/9/13 Dismissal Order is available at 965 F. Supp. 2d 1157, and the 2/27/14 Dismissal Order is available at 2014 WL 806224.

investigate and warn (Count II); (3) strict liability against Pioneer (Count III); (4) trespass against all Defendants (Count IV); (5) nuisance against all Defendants (Count V); and (6) negligent and intentional misrepresentation against Pioneer (Count VI).

After the 2/27/14 Dismissal Order, the remaining claims are: 1) the claims in Counts I, II, IV, and V against the Robinson Defendants based on the sublease dated April 1, 2010 between Pioneer and Gay & Robinson ("the 2010 Sublease"); 2) the claims in Counts I, II, IV, and V against Pioneer for damages from December 13, 2009 forward for the Aana Plaintiffs and from May 23, 2010 forward for the Casey Plaintiffs; and the portion of Count VI regarding the letter dated December 2011 that Pioneer issued in response to complaints from the Waimea community ("December 2011 Letter"). 2014 WL 806224, at *14.

In the instant Motion, Defendants seek summary judgment as to:

-the portion of Count II "based on Plaintiffs' assertion that Pioneer had a duty to warn nearby landowners of 'latent defects' in the property farmed by Pioneer[;]" [Mem. in Supp. of Motion at 1;]

-the portion of Count VI "based on Pioneer's alleged misrepresentation that it 'had been following reasonable agricultural practices in 2010[;]'" [id. at 2;] and

-Plaintiffs' claims in Counts I, II, IV, and V against the Robinson Defendants [id.].

DISCUSSION

I. Plaintiffs' Supplemental Concise Statement of Facts

At the outset, the Court notes that Plaintiffs' concise statement of facts in support of their Supplemental Memorandum ("Plaintiffs' Supplemental CSOF"), [filed 9/17/14 (dkt. no. 819),] does not include a declaration of counsel attesting to the authenticity of the exhibits, nor do the exhibits which are excerpts of deposition transcripts contain court reporter's certifications. See Local Rule LR56.1(h) ("Affidavits or declarations setting forth facts and/or authenticating exhibits, as well as exhibits themselves, shall only be attached to the concise statement."); Orr v. Bank of Am., NT & SA, 285 F.3d 764, 774 (9th Cir. 2002) ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent.").

In spite of the lack of proper authentication of exhibits, this Court declines to strike Plaintiffs' exhibits because, even if this Court considers the exhibits, Plaintiffs still fail to raise a triable issue of fact as to the Robinson Defendants' liability, for the reasons set forth *infra*. This Court, however, CAUTIONS the parties that all exhibits filed in connection with future motions must be properly authenticated or

this Court will not consider them.

II. Count VI - Negligent and Intentional Misrepresentation

In the instant Motion, Defendants argue that they are entitled to summary judgment as to Count VI because: Plaintiffs have not identified any evidence of detrimental reliance on the December 2011 Letter;[7] and Plaintiffs' alleged damages could not have been caused by the alleged misrepresentation in the December 2011 Letter because their damages precede December 2011. [Mem. in Supp. of Motion at 7-15.]

Plaintiffs respond that they "agree to voluntarily withdraw Count VI" in light of this Court's ruling limiting "Plaintiffs' claim under a six-year limitations period to only include representations made with Pioneer's December 2011 letter." [Mem. in Opp. at 4.] This Court construes Plaintiffs' offer to withdraw Count VI as an admission that there are no genuine issues of material fact for trial as to their misrepresentation claims. See Fed. R. Civ. P. 56(a) (stating that a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). Based on Plaintiffs' admission, and for the reasons set forth in the

[7] In the 8/9/13 Dismissal Order, this Court listed the elements of an intentional or fraudulent misrepresentation claim and a negligent misrepresentation claim. Reliance is a required element of both claims. 965 F. Supp. 2d at 1178.

2/27/14 Dismissal Order, 2014 WL 806224, at *12, and the 8/9/13 Dismissal Order, 965 F. Supp. 2d at 1182, this Court CONCLUDES that Defendants are entitled to summary judgment as to Count VI.

Defendants' Motion is GRANTED as to Count VI.

III. <u>Plaintiffs' Claims Against the Robinson Defendants</u>

The Motion also argues that the Robinson Defendants are entitled to summary judgment as to all of the remaining claims against them. Defendants emphasize that Plaintiffs' theory of the Robinson Defendants' liability is that they are vicariously liable for the acts of their lessee, Pioneer. [Mem. in Supp. of Motion at 15.]

In the 8/9/13 Dismissal Order, this Court stated:

> In order to establish the Robinson Defendants' liability for [their negligence, trespass, and common law nuisance] claims, Plaintiffs will have to prove that, when they entered into the lease with Pioneer, the Robinson Defendants: (1) consented to Pioneer's unlawful farming practices or knew, or had reason to know, Pioneer would carry on unlawful practices; and (2) knew or should have known that Pioneer's activities would necessarily involve or were already causing a nuisance as defined under the Hawai`i Right to Farm Act.

965 F. Supp. 2d at 1177. As to the remaining claims against the Robinson Defendants, Plaintiffs allege that, at the time of the 2010 Sublease, "the Robinson Defendants knew and consented to Pioneer's operating without the required permits and exemptions and that Waimea residents had already presented complaints to Pioneer and the Robinson Defendants about erosion and drift from

the GMO Test Fields." See 2/27/14 Dismissal Order, 2014 WL 806224, at *6. In the instant Motion, Defendants contend that Plaintiffs have not identified evidence to support these allegations.

A. Failure to Maintain Required Permits or Exemptions

The Court first turns to Defendants' assertion that: "The Robinson Defendants did not have notice of or consent to Pioneer farming without a permit or exemption." [Defs.' Separate Concise Statement of Facts in Supp. of Motion, filed 4/29/14 (dkt. no. 719) ("Defs.' CSOF"), at ¶ 7 (citing Defs.' CSOF, Decl. of Charles Okamoto ("Okamoto Decl.") at ¶¶ 4-5,[8] Decl. of Adam Friedenberg ("Friedenberg Decl."), Exh. F[9] at 22-23).] Defendants note that the 2010 Sublease required Pioneer to "maintain in effect all permits, approvals, licenses, consents or other entitlements required" under the applicable laws. [Okamoto Decl., Exh. 1 (2010 Sublease), Exh. B (General Terms and Conditions of Sublease) at § 9.6.] Defendants emphasize that the 2010 Sublease does not require Pioneer to obtain prior approval from the Robinson Defendants for any permit application. [Mem. in Supp. of Motion at 17.]

[8] Charles Okamoto is the president of Gay & Robinson. [Okamoto Decl. at ¶ 1.]

[9] Exhibit F is an excerpt from the transcript of Plaintiff Klayton K. Kubo's February 7, 2013 deposition. [Dkt. no. 719-21.]

Plaintiffs respond that: "The relevant issue is not whether the Robinsons had notice or consented to farming without a permit, but whether the Robinsons knew or should have known Pioneer's activities in Waimea would necessarily result in a nuisance." [Pltfs.' Suppl. CSOF at ¶ 1.] Plaintiffs also call the issue of whether the Robinson Defendants "reviewed Pioneer's permits" a "red herring." [Pltfs.' Suppl. Mem. at 1.]

Although Plaintiffs' arguments suggest that the issue of whether the Robinson Defendants had notice of or consented to Pioneer's unpermitted operations is irrelevant to Plaintiffs' claims, the Third Amended Complaint contains specific allegations about Pioneer's failure to obtain required permits or exemptions. Plaintiffs include these allegations as part of their argument that Pioneer and the Robinson Defendants failed to follow generally accepted agricultural and management practices ("GAAMP") in 2011. See, e.g., Third Amended Complaint at ¶¶ 83-94.[10] Reading the Third Amended Complaint in conjunction with the 8/9/13 Dismissal Order, Plaintiffs' claims against the Robinson Defendants are based - at least in part - on the

[10] For example, Plaintiffs allege that the Kauai County Engineer's March 2011 Notice of Violation "specifically cite[d] Pioneer and the Robinson [Defendants] for Pioneer's grubbing of the GMO Test Fields without a permit" and, until the Notice of Violation, Plaintiffs "[d]id not know that Pioneer failed to obtain grubbing permits or an Agricultural Exemption for Pioneer's 1100 acres until after the March 2011 Notice of Violation[.]" [Third Amended Complaint at ¶¶ 86-87 (emphasis omitted).]

allegation that, at the time of the 2010 Sublease, the Robinson Defendants: knew or should have known that Pioneer would operate without the required permits or agricultural exemptions; or otherwise consented to Pioneer's operation without the required permits or exemptions.

Plaintiffs' response to paragraph 7 of Defendants' CSOF does not directly contradict Defendants' assertion that the Robinson Defendants neither had notice of nor consented to Pioneer's operation without required permits or exemptions. See Pltfs.' Suppl. CSOF at ¶ 1. Further, Plaintiffs' response does not identify any evidence which indicates that the Robinson Defendants did have such notice or did give such consent. This Court can therefore construe Defendants' CSOF paragraph 7 as being admitted. See Local Rule LR56.1(b), (g). However, even if this Court does not deem paragraph 7 as admitted, Plaintiffs have not raised a triable issue of fact as to the issue of whether the Robinson Defendants had notice of, or consented to, Pioneer's operation without required permits or exemptions.

Plaintiffs' Supplemental Memorandum argues that this Court should not consider the statements in the Okamoto Declaration regarding the Robinson Defendants' knowledge or consent regarding Pioneer's permits and exemptions because other statements in the declaration contradict Mr. Okamoto's deposition

testimony.[11] Plaintiffs argue that, at a minimum, the contradictions create a genuine issue of material fact as to Mr. Okamoto's credibility and as to whether the Robinson Defendants knew or should have known that Pioneer did not have the permits required by Kauai Ordinance 808. [Pltfs.' Suppl. Mem. at 7-9.]

Mr. Okamoto has been employed with Gay & Robinson since 1998. As its current president, he is responsible for, *inter alia*, "oversight of property leasing and management issues." [Okamoto Decl. at ¶¶ 1-2.] The Okamoto Declaration states that "[i]n 2002, 2005 and 2010, [he] was the principal negotiator for G&R with respect to lease negotiations with" Pioneer. [Id. at ¶ 2.] In his deposition, Mr. Okamoto testified that he was **not** involved with the negotiations of the 2002 amendment or the 2005 amendment. Instead, after the negotiations, but before the execution, he was asked to give his input on the draft. [Pltfs.' Excerpts of Okamoto Depo. at 23-25, 98-99.] In considering Defendants' Motion, this Court must view the record in the light most favorable to Plaintiffs. See Crowley v. Bannister, 734 F.3d 967, 976 (9th Cir. 2013). This Court will therefore assume that the Okamoto Declaration is mistaken about his involvement in the

[11] Exhibit 5 to Plaintiffs' Supplemental CSOF is Plaintiffs' excerpts of the transcript of Mr. Okamoto's July 9, 2014 deposition ("Plaintiffs' Excerpts of Okamoto Deposition"). [Dkt. no. 819-5.]

2002 and 2005 lease negotiations. Even with that assumption, however, Plaintiffs have not identified any evidence contradicting Mr. Okamoto's involvement in the negotiations of the 2010 Sublease, which is the document at issue in Plaintiffs' remaining claims against the Robinson Defendants. What the Robinson Defendants had knowledge of, or consented to, at the time of the 2002 and 2005 negotiations is only relevant as evidence of what they knew or should have known about at the time of the 2010 negotiations. Plaintiffs have not identified any evidence indicating that, at the time of the 2010 negotiations, the Robinson Defendants consented to, knew about, or should have known about, Pioneer's operation without required permits or exemptions.

Even assuming a genuine issue of fact as to who was the Robinson Defendants' principal negotiator for the 2002 and 2005 negotiations, the dispute is not material. "A fact is material if it could affect the outcome of the suit under the governing substantive law." Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006). Any dispute about who was involved in the 2002 and 2005 negotiations does not affect the outcome of Plaintiffs' claims against the Robinson Defendants, which turn upon what the Robinson Defendants consented to, knew about, or should have known about, at the time of the 2010 negotiations.

This Court finds that Plaintiffs have not raised a genuine issue of material fact as to whether, at the time they entered into the 2010 Sublease, the Robinson Defendants: knew or should have known that Pioneer would operate without the required permits or agricultural exemptions; or otherwise consented to such operation. This Court therefore CONCLUDES that the Robinson Defendants are entitled to judgment as a matter of law as to the portions of Plaintiffs' claims against them regarding Pioneer's operation without required permits or agricultural exemptions. This Court GRANTS Defendants' Motion as to those portions of Counts I, II, IV, and V.

B. Notice of Nuisance

Plaintiffs contend that there is at least a triable issue of fact as to the question of whether, at the time they entered into the 2010 Sublease, the Robinson Defendants: knew or should have known that Pioneer's farming operations would necessarily result in a nuisance or was already resulting in a nuisance; or consented to the operation of a nuisance.

Plaintiffs point out that Pioneer's 1998 lease, in which Gay & Robinson is identified as the lessor and Robinson Family Partners as the owner ("the 1998 Lease"), recognizes that each entity "in its agricultural operation works twenty-four (24) hours of each day and, therefore, will have noise, smoke, soot, dust, lights, noxious vapors and odors twenty-four (24) hours of

the day." [Errata to Pltfs.' Suppl. CSOF, Exh. 1 at Land Lease Agreement, dated 8/1/98, ¶ 8.] Further, they agreed that each party would "not be responsible or liable . . . for the consequences resulting from the creation and discharge of such noise, smoke, soot, dust, lights, noxious vapors and odors in the normal course of operations, unless such adverse effects are caused by the gross negligence or willful conduct of the other Party." [Id.] Mark Miller, Pioneer's Fed. R. Civ. P. 30(b)(6) designee regarding lease negotiations with the Robinson Defendants, testified that the purpose of this provision was to ensure that both Pioneer and the Robinson Defendants would be able to conduct their normal farming operations because this was the first time they would be operating adjacent to one another. [Pltfs.' Suppl. CSOF, Exh. 2 (Excerpts of Trans. of 8/26/14 Depo. of Mark Miller) at 56-57.] Plaintiffs argue that this is evidence that the Robinson Defendants knew, at the time they entered into the 2010 Sublease, that Pioneer's farming operations would necessarily create "dust, lights, noxious vapors, and odors." [Pltfs.' Suppl. Mem. at 5.]

Plaintiffs also argue that the record indicates that, at the time of the 2002 lease negotiations: "Pioneer's agricultural research was already causing an unreasonable interference for Waimea[;]" Pioneer planned to raise issues related to that interference during the negotiations; and Pioneer

did raise those concerns to Gay & Robinson. [Id. at 5-7.] Plaintiffs present an email, dated June 13, 2002, in which Mark Miller circulated a document titled "Robinson Lease Negotiations Plan - Confidential - Draft for Comment" ("2002 Negotiation Plan"). [Pltfs.' Suppl. CSOF, Exh. 3.] The 2002 Negotiation Plan set forth a list of "Key Lease Negotiation Points," which included:

> 1. We appreciate the Robinson's.
>
> a. Cooperation and commitment to agriculture.
> . . . .
> c. Their concern for the environment is to be admired.
> . . . .
>
> 2. We share their values.
>
> a. Land stewardship - DuPont most socially responsible company.
> b. This generation does not own the land, we are borrowing it from the future.
> . . . .
>
> . . . .
>
> 4. We have had some problems that we hope can be fixed.
>
> a. Dust control - community relations.
> b. Wash-outs.
> . . . .
>
> 5. We would like to expand our presence on your ground, but we need your help in the spirit of our long-term relationship.
> . . . .
> f. Air/water quality community concerns.
> . . . .
>
> . . . .

7. What we need to do is jointly develop a plan to make it happen.

    a. Develop joint plan to improve the existing farm.
        i. Better roads for dust control.
        ii. Better erosion control
            1. Terraces
            2. Risers
        . . . .
    . . . .

[Id. at 2-3.] As evidence that Pioneer actually raised these concerns with Gay & Robinson during the 2002 negotiations, Plaintiffs point to the Master Farm Improvement Plan ("2002 Improvement Plan") that Pioneer and Gay & Robinson entered into following the negotiations. [Pltfs.' Suppl. CSOF, Exh. 4.] In the 2002 Improvement Plan, Pioneer and Gay & Robinson "agree[d] to make improvements to the Premises as defined in the [1998 Lease]. The purpose of the work is to increase the overall utilization of the Premises." [Id. at 1.]

In response to Plaintiffs' Supplemental CSOF, Defendants argue that Plaintiffs have presented no evidence that Pioneer actually discussed the points in the 2002 Negotiation Plan with the Robinson Defendants. [Defs.' Response to Pltfs.' Suppl. CSOF, filed 9/24/14 (dkt. no. 823), at ¶ 3.] In fact, Mr. Miller testified that he did not recall raising the Waimea community's concerns about dust and the air and water quality with the Robinson Defendants as part of the 2002 negotiations. [Defs.' Suppl. Mem., Decl. of Clement L. Glynn ("Glynn Decl."),

Exh. B (Excerpts of Trans. of 8/26/14 Depo. of Mark Miller) at 88.[12]] Construing the record in the light most favorable to Plaintiffs, this Court will assume - for purposes of the instant Motion only - that Pioneer discussed the 2002 Negotiation Plan with the Robinson Defendants during the 2002 lease negotiations. However, Plaintiffs' evidence, at best, only establishes that, at the time of the 2010 negotiations, the Robinson Defendants knew that: 1) Pioneer's farming operations created "noise, smoke, soot, dust, lights, noxious vapors and odors[;]" and 2) the Waimea community had concerns about dust control and air quality. That alone is not enough to raise a genuine issue of material fact as to the Robinson Defendants' liability.

Under the Hawai`i Right to Farm Act ("the Farm Act"):

> No 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. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance.

Haw. Rev. Stat. § 165-4. The key terms are defined as follows:

> "Farming operation" means a commercial agricultural . . . facility or pursuit conducted, in whole or in part, including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and

[12] This Court notes that Defendants attached the Glynn Declaration, and its exhibits, to Defendants' Supplemental Memorandum instead of to Defendants' Supplemental CSOF as required by Local Rule LR56.1(h).

> plant and animal production for nonfood uses; the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment. "Farming operation" includes but shall not be limited to:
>
> > (1) Agricultural-based commercial operations as described in section [205-2(d)(15)];
> >
> > (2) **Noises, odors, dust, and fumes emanating from a commercial agricultural or an aquacultural facility or pursuit**;
> >
> > (3) Operation of machinery and irrigation pumps;
> >
> > (4) Ground and aerial seeding and spraying;
> >
> > **(5) The application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides**; and
> >
> > (6) The employment and use of labor.
>
> . . . .
>
> "Nuisance" means any interference with reasonable use and enjoyment of land, including but not limited to smoke, odors, dust, noise, or vibration; provided that nothing in this chapter shall in any way restrict or impede the authority of the State to protect the public health, safety, and welfare. "Nuisance" as used in this chapter, includes all claims that meet the requirements of this definition regardless of whether a complainant designates such claims as brought in nuisance, negligence, trespass, or any other area of law or equity; provided that nuisance as used in this chapter does not include an alleged nuisance that involves water pollution or flooding.

Haw. Rev. Stat. § 165-2 (brackets in original) (emphases added). Plaintiffs previously argued that the Farm Act does not apply in this case because the Waimea residential community predated both

Pioneer's farming of the GMO Test Fields and the Robinson Defendants' historic sugar cane farming on the property, but this Court rejected that argument. 9/30/14 Summary Judgment Order, 2014 WL 4956489.

Plaintiffs have presented some evidence that, at the time of the 2010 negotiations, the Robinson Defendants knew about "noise, smoke, soot, dust, lights, noxious vapors and odors" from Pioneer's farming operations, and they knew about community concerns regarding dust control and air quality. However, all of these are elements of Pioneer's "farming operation," as that term is defined in the Farm Act. See § 165-2. They cannot support a nuisance, negligence, or trespass claim if Pioneer was conducting its operations "in a manner consistent with" GAAMP. See § 165-4. Thus, Plaintiffs' prima facie case for their claims against the Robinson Defendants requires them to prove that, at the time of the 2010 Sublease negotiations, the Robinson Defendants consented to, knew about, or should have known about Pioneer's failure to follow GAAMP at the Waimea Research Center. In order for Plaintiffs' claims against the Robinson Defendants to survive summary judgment, Plaintiffs must identify evidence which creates a genuine dispute of material fact as to the issue of the Robinson Defendants' consent and/or knowledge.

Even viewing the record in the light most favorable to Plaintiffs, this Court finds that Plaintiffs have not identified

any evidence which indicates that the Robinson Defendants consented to, knew about, or should have known about Pioneer's failure to comply with GAAMP.[13] This Court therefore FINDS that there is no genuine dispute of material fact as to the Robinson Defendants' liability for Pioneer's farming operations at the Waimea Research Center, and this Court CONCLUDES that the Robinson Defendants are entitled to judgment as a matter of law. This Court GRANTS summary judgment in favor of the Robinson Defendants as to all of the remaining claims against them.

III. Count II - Negligent Failure to Investigate and Warn

Defendants also seek summary judgment as to the portion of Count II "based on Plaintiffs' assertion that Pioneer had a duty to warn nearby landowners of 'latent defects' in the property farmed by Pioneer." [Mem. in Supp. of Motion at 1.] Defendants contend that, under Hawai`i law, "'failure to warn' is cognizable primarily in the product liability context." [Id. at 4-5 (citing Acoba v. General Tire, Inc., 92 Hawai`i 1, 18, 986 P.2d 288, 305 (Haw. 1999) (discussing failure to warn theory in context of a manufacturer's duty to warn of "any known dangers

[13] This Court emphasizes that nothing in this Order should be construed as either a finding on or an inclination regarding the merits of Plaintiffs' claim that Pioneer's farming operation at the Waimea Research Center violates GAAMP. This Order merely finds that, even assuming that Plaintiffs can establish Pioneer's violation of GAAMP, Plaintiffs have not identified sufficient evidence to survive summary judgment as to their claims asserting that the Robinson Defendants are liable for Pioneer's violation.

which the user of **its product** would not ordinarily discover") (emphasis Defendants')).] Plaintiffs respond that a failure to warn claim is a cognizable negligence claim under Kajiya v. Department of Water Supply, 629 P.2d 635, 639 (Haw. 1981). [Mem. in Opp. at 2 & n.2.]

First, the mere fact that the failure to warn claim is well-defined in Hawai`i case law regarding products liability does not necessarily mean that the claim is only cognizable in that context. Nothing in Acoba expressly precludes a plaintiff from bringing a failure to warn claim in another type of case. This Court agrees with Plaintiffs that, in light of Kajiya, a failure to warn claim is not limited to the products liability context.

This Court has cited Kajiya in analyzing whether Pioneer had a duty to warn regrading its pesticide use. [Order Denying Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment for DuPont Pioneer's Misuse of Bee-Toxic Pesticides, filed 6/30/14 (dkt. no. 770) ("6/30/14 Summary Judgment Order"), at 16-17.] Kajiya recognizes that duties arise from foreseeable harm to property, not only from foreseeable harm to persons. 2 Haw. App. at 224, 629 P.2d at 639 ("While we agree that the Board of Water Supply's duty to humans is primary, we hold that it has a secondary duty to a human's property, which may include his pet fish.").

In addition, this district court has cited Kajiya for the proposition that "the duty to warn against unusual hazards has long been recognized as a source of tort liability." Barber v. Ohana Military Communities, LLC, Civil No. 14-00217 HG-KSC, 2014 WL 3529766, at *9 (D. Hawai`i July 15, 2014). In Barber, this district court denied the defendants' motion to dismiss, *inter alia*, the plaintiffs' claim alleging negligent failure to warn. That claim alleged that the defendants "were in control of the housing at Marine Corp Base Hawaii and failed to disclose that the soil was contaminated with pesticides and presented health risks." Id. (citation omitted). The district judge ruled that the plaintiffs "stated a claim for negligence based on [the d]efendants' alleged failure to warn [the p]laintiffs about the pesticide-contaminated soil." Id.

This Court agrees with the district court in Barber that, pursuant to Kajiya, a plaintiff states a cognizable negligence claim when he alleges that the defendant controlled an unusual hazard and failed to warn the plaintiff when it was foreseeable that he would be harmed by the hazard. Further, as previously noted, Kajiya recognizes that the foreseeable harm to the plaintiff can include harm to his property. This Court therefore rejects Defendants' argument that a failure to warn claim is only cognizable in the products liability context.

Having reviewed the record in this case in the light most favorable to Plaintiffs, this Court FINDS that there are genuine issues of material fact as to whether Pioneer violated its duty to warn persons whose properties could be subjected to foreseeable harm as a result of unusual hazards within Pioneer's control. This Court therefore DENIES Defendants' Motion to the extent that the Motion seeks summary judgment in favor of Pioneer as to Count II.

CONCLUSION

On the basis of the foregoing, Defendants' Motion for Partial Summary Judgment as to Counts I, II, IV, V, and VI of the Third Amended Complaint, filed April 29, 2014, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as this Court: grants summary judgment in favor of the Robinson Defendants as to all remaining claims against them; and grants summary judgment in favor of Pioneer as to the remaining portion of Count VI. The Motion is DENIED to the extent that it seeks summary judgment in favor of Pioneer as to Count II.

Insofar as there are no remaining claims against Defendants Gay & Robinson, Inc. and Robinson Family Partners, this Court DIRECTS the Clerk's Office to terminate them as parties. The only remaining claims in this case are Counts I, II, IV, and V against Pioneer for damages from December 13, 2009 forward for the Aana Plaintiffs and from May 23, 2010 forward for

the Casey Plaintiffs.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, November 26, 2014.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

JIM AANA, ET AL. VS. PIONEER HI-BRED INTERNATIONAL, INC., ET AL; CIVIL 12-00231 LEK-BMK; JEFFREY CASEY, ET AL. VS. PIONEER HI-BRED INTERNATIONAL, INC., ET AL; CIVIL 12-00655 LEK-BMK; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS I, II, IV, V, AND VI OF THE THIRD AMENDED COMPLAINT