BIG ISLAND FARM BUREAU

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LATE TESTIMONY

TESTIMONY on HB 548 HD2
RELATING TO TRESSPASS

Hearing: Tuesday, March 1, 2011 @ 2:00 p.m
Conference Room 325

Rep. Gilbert S.C. Keith-Agaran, Chair, Committee on Judiciary

Aloha Chairperson and Committee Members

We **STRONGLY SUPPORT Bill HB 548 HD2** relating to Trespass.

My name is Lorie Farrell, Executive Director of the Big Island Farm Bureau. We are directly affiliated with the Hawaii Farm Bureau Federation with 650 members on the Island of Hawaii. Trespass issues are huge on the Big Island; we understand some people do not understand they may be trespassing or in dangerous situations but the writers of the articles are perpetuating the myths and should be held liable. We support this bill and the troublesome issues it seeks to help resolve.

The tourism and visitor Industry is important to Hawaii as is public access but not at the cost of private property rights or at the safety of the public.

We believe in private property rights and the right of the public to access land; however if an area is deemed private and closed then it should remain so.

We respectfully and STRONGLY SUPPORT HB 548 HD2; Thank you for this opportunity to testify.

Lorie Farrell
Big Island Farm Bureau

BEFORE THE
HOUSE COMMITTEE ON
JUDICIARY

Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair

HB548, HD2 RELATING TO TRESPASS

TESTIMONY OF
ANDY DOUGHTY
President

LATE TESTIMONY

Wizard Publishing, Inc.
P.O. Box 991
Lihue, Hawaii 96766-0991

March 1, 2011, 2:00 pm
State Capitol, Room 325

Chair Keith-Agaran & Members of the Committee:

My name is Andy Doughty, President of Wizard Publishing, Inc. Wizard Publishing is a locally-owned company which publishes guidebooks for Oahu, Kauai, Maui and Hawaii. I appear before this Committee in STRONG OPPOSITION to HB548, HD2, which holds authors and publishers of visitor websites and publications liable to readers who suffer injury or death as a result of being enticed to trespass and exempts property owners from liability.

HB548, HD2 is overly broad, holding publishers and authors responsible for the acts of individuals it has no control over. In particular, we oppose HB548, HD2 for the following reasons:

- Protection for Landowners from injuries to trespassers already exists in HRS, Ch. 520, (Hawai`i's "Recreational Use Statute"), so the proposed legislation adds nothing in that regard, despite stating this is the purpose of this bill.

  The purpose behind the Recreational Use Statute was to get landowners to be *more lenient* about letting visitors onto their land to go hiking, swimming, etc., by eliminating the landowners' liability and thereby promoting tourism. *See, e.g., Stout v. U.S.*, 696 F. Supp. 538, 539 (D. Haw. 1987). HB548, HD2 seeks to (1) protect landowners who are already protected and (2) impose strict liability on those who cannot account for whether a landowner who has previously allowed recreational use suddenly throws up a "No Trespassing sign." Nor does it account for public access which is lawful, notwithstanding signs.

- The result of the legislation will very likely be to force guidebook publishers and others to altogether cease publications and information regarding Hawai`i, because:

    1. Any website, commercial wireless forum, blog or other social media communication, such as an online bulletin board, which has the capability for viewers to post/publish live, on-line comments (such as Frommer's website or Twitter or Facebook) would have to shut it down altogether, because they would be strictly liable for the content of their site even if they did not place the information on the site. The cost and effort necessary to constantly review and censor third-party reader posts would prohibit continued operation;

    2. The legislation would extend to Google, Yahoo, YouTube, Twitter, Bing, Flickr, Facebook, Wikimaps and Wikipedia, etc. and any other online search engines that bring up photographs or favorable descriptions of attractions which could be deemed as "enticing" visitors. A search on Google, for example, for "Kipu Falls" brings up 9,710 results;

    3. Publishers are liable even if the "NO TRESPASSING" signs are invalid, such as, erected by someone *other than* the landowner possessing the rights to control access;

    4. Tens of thousands, or more, of old editions of guidebooks are in circulation and beyond control of the publishers and cannot be modified to change their content or to include warnings; and

    5. Publishers would likely lose their Error and Omission Insurance for all Hawaii-related titles/websites, which would force them to drop those publications and sites;

Thus, the "big picture" result of the legislation will be impairment and diminishment of tourism in Hawaii.

Other practicable and important considerations include:

- Guidebooks/websites promoting Hawai`i should not be treated differently than other forms of media, such as television, movies, cable, etc., that provide images and/or information on sites, thereby potentially "enticing" tourists to trespass to get there.

- Non-visitor-guides about Hawai`i that contain information and/or pictures of remote attractions on non-public lands (such as a coffee table book featuring Hawai`i's waterfalls)

would fall within the definition of "visitor guide publication," thereby affecting photo-journalists, writers, etc., and extending much broader than it would appear the drafters intended. These publications would also likely lose insurance.

- The same unintended consequences exist for various local businesses that run websites or distribute marketing materials, such as farms, ranches or dive companies. (See, e.g., Maui County Farm Bureau Submission re HB548 to Committee on Tourism dated January 31, 2011 and Fathom Five Divers Submission re HB548 and HB552) In fact, any newspaper or news agency that reports on a privately-situated attraction could be deemed to have "enticed" a trespasser who read the article or saw the report.

- If a visitor were to be hurt accessing an attraction on private land, he or she would only have to do minimal post-injury research to see if any "publishers" had ever featured the attraction and sue any or all of them. That the injured plaintiff did *not* in fact read the publication or visit the website and was *not* enticed by it would be virtually impossible to prove.

- There are much narrower and simpler means to curb trespassing at specific sites (such as Kipu Falls – which appears to be the most hot-topic spot), if that is the true motivation behind the bills. The current approach is overkill.

- No other state or federal jurisdiction in the United States has such a law.

HB548, HD2 also raises serious legal issues due to significant digressions from Hawai`i's historical common law on trespass, negligence and strict products liability, as well as, certain First Amendment principles, all of which follow the prevailing approaches from all other state and federal jurisdictions. For example:

- In 1992, the Hawai`i Supreme Court expressly *rejected* an injured plaintiff's attempt to impose liability on Fodor's Travel Guides for failing to warn in its guidebook of inherently dangerous surf conditions at Kekaha Beach on Kauai. (*See Birmingham v. Fodor's Travel Publications, Inc.*, 73 Haw. 359 (Hawaii 1992).) The Hawaii Supreme Court in *Fodor's* held: (1) under Hawaii's common law on negligence, the publisher owed no special duty to the reader to warn of dangerous conditions[1], and; (2) even if it did, the reader's decision to ignore indicated, potentially dangerous conditions was a superseding cause of the injury; (3) no claim for strict liability could be maintained because a guidebook disseminating opinions was not defective "product;" and (4) imposing liability on guidebooks presenting opinions and ideas would start down a thorny path regarding chilling of First Amendment

[1] Regarding the first point, *Fodor's* limited its ruling to publishers who do not create or author their content, as those were the facts and parties before them.

freedom of speech. On this point, quoting favorably from *Alm v. Van Nostrand Reinhold Co.*, 134 Ill. App. 3d 716, 717, 480 N.E.2d 1263, 1264 (1985), the Hawaii Supreme Court in *Fodor's* Court stated:

> More important for our purposes, however, is the chilling effect which liability would have upon publishers . . . . Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.

Id., at 368-369. *See also Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991).

The existing legislation, thus, (1) imposes a duty of care on a publisher that was previously found by the Hawaii Supreme Court to not exist under the common law, (2) makes that duty one of strict liability, as opposed to reasonableness, which the Hawaii Supreme Court previously found to be inappropriate in the publisher-guidebook, free ideas context; (3) renders irrelevant any contributory or superseding negligence or recklessness by the reader/trespasser; and (4) stifles First Amendment freedom of idea principles that the Hawaii Supreme Court deems worthy of strong protection. This is surely cannot be what the drafters intended.

- Other cases from around the nation have similarly rejected efforts to pin liability to the creators of various forms of social media for allegedly enticing, promoting or attracting viewers and users to commit crimes. For example, courts have routinely dismissed claims that violent video games enticed or encouraged players to commit acts of violence harming themselves and/or others. In *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003), heavily cited by both state and federal courts, the Sixth Circuit Court of Appeals held that the maker of several (admittedly) violent video games could not be held liable for the criminal acts of a high school student who played those games and later shot and killed several co-students. The Court explained that for liability to attach, the defendant must have given the actor the direct instrument that caused the harm and that, in video game cases, the injuries were too far removed. The *Meow Media* Court, further, held that the video games, like guidebooks, were not to be considered defective "products" giving rise to strict liability and discussed at length the same First Amendment issues as in *Fodor's*. *Meow Media* mimicked the *Fodor's* decision, stating:

  > the Court is loath to hold that ideas and images can constitute the tools for a criminal act ... or even to attach tort liability to the dissemination of ideas. Attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided.

Id., at 695.

- The legislation also improperly mixes the concepts of civil and criminal trespass. (See Submission of Hawaii Association for Justice dated January 31, 2011 in opposition to HB548.)

I STRONGLY OPPOSE HB548, HD2, and urge you to hold this bill. Thank you for the opportunity to testify on this matter.