



New York Biotechnology Association

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To: **Senator Catharine M. Young, New York State Senate**
Ranking Member, Senate Agriculture Committee

From: **Nathan Tinker**, New York Biotechnology Association (NYBA)
Brian O'Connor, Biotechnology Industry Organization (BIO)

Re: **New York Senate Bill 785 and New York Assembly Bill 2111:** An act to amend the general obligations law, in relation to genetically modified organisms

Date: **February 17, 2011**

Senator Young:

On behalf of the members of the Biotechnology Industry Organization (BIO) and New York Biotechnology Association (NYBA), please accept the following legal concerns in opposition to Senate Bill 785/Assembly Bill 2111:

- There is no evidence that any seed manufacturer patent holder has ever pursued a farmer for "accidental" infringement. As such, the bill attempts to address a problem that doesn't exist and therefore is unnecessary.
- Low-level presence, the allowance of inadvertent presence of transgenic seeds or other material in conventional and organic crops, does not create legal liability for infringement under patent law. There are no infringement cases involving an innocent farmer being sued for having transgenic adventitious presence in a crop. In most infringement cases involving both conventional and transgenic crops, farmers charged with infringement have admitted that they saved patented seeds intentionally. One often quoted case is the exception. However, in *Schmeiser v. Monsanto Canada, Inc.*, the Canadian courts at the trial level, appellate level, and Supreme Court level actually found that Mr. Schmeiser purposefully saved and planted patented seed that he knew or should have known contained a patented gene for herbicide tolerance.
- Lawsuits against farmers who save and replant GM seed allege both breach of contract as well as the underlying patent infringement. In such cases, the federal

courts have exclusive jurisdiction over the infringement claim and pendent jurisdiction over the contract claim. As such, Senate Bill 785/Assembly Bill 2111 would clearly be preempted by federal law.

- Any lawsuits brought against farmers for using GM seed without paying for the technology would be brought under Federal law for patent infringement, in which case this affirmative defense would be meaningless. According to legal experts whom we have consulted, States cannot provide affirmative defenses to federal causes of action under the Federal Patent Act (35 U.S.C. 271 et seq.).
- Additionally, 28 U.S.C 1338, which gives federal courts exclusive jurisdiction in cases arising under the patent laws, would preempt Senate Bill 785/Assembly Bill 2111 should it pass.
- Even the New York Farm Bureau's has previously submitted testimony on this issue that, while supportive, indicates that they cannot imagine a manufacturer actually suing a non-negligent farmer for inadvertently using its seed – it simply has not happened.

To summarize, the biotechnology industry is not aware of any instance of the kind of situation that prompted the drafting of Senate Bill 785/Assembly Bill 2111 and as such this bill is a solution in search of a problem. In addition, the bill as written would definitely be preempted by long-standing federal law.

Thank you,

The New York Biotechnology Association and the Biotechnology Industry Organization

About NYBA

The New York Biotechnology Association is a not-for-profit trade association dedicated to the development and growth of New York State based biotechnology related industries and institutions, and to strengthening the competitiveness of New York State as a premier global location for biotechnology/biomedical research, education and industry.

www.nyba.org

About BIO

BIO is a national trade organization, based in Washington, DC, representing more than 1,100 biotechnology companies, academic institutions, state biotechnology centers, and related organizations across the United States and 31 other nations. BIO members are involved in the research and development of healthcare, agricultural, industrial and environmental biotechnology products.

www.bio.org