

Appeal No. 15-16552

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH;  
LEI’OHU RYDER; and SHAKA MOVEMENT,  
*Intervenor Defendants-Appellants,*

vs.

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI  
COUNTY, “MAUI FARM BUREAU”; MOLOKAI CHAMBER OF  
COMMERCE; AGRIGENETICS, INC., DBA MYCOGEN SEEDS; MONSANTO  
COMPANY; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY  
ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC.,  
DBA MAKOA TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE,  
*Plaintiffs-Appellees,*

and

COUNTY OF MAUI,  
*Defendant-Appellee.*

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Appeal from the United States District Court for the District of Hawaii  
Case No. 1:14-CV-00511-SOM-BMK

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ERRATA TO REPLY TO PRIVATE APPELLEES’ OPPOSITION TO MOTION  
TO CONSOLIDATE AND EXPEDITE PROCEEDINGS; EXHIBIT A;  
CERTIFICATE OF SERVICE

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## Appeal No. 15-16552

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**ERRATA TO REPLY TO PRIVATE APPELLEES' OPPOSITION TO  
MOTION TO CONSOLIDATE AND EXPEDITE PROCEEDINGS**

This Errata is being filed to replace the Reply to Private Appellees' Opposition to Motion to Consolidate and Expedite Proceedings ("Reply"). Due to a clerical error, the incorrect version of the document was filed, which did not include final revisions. This includes the name of the document, which should properly be referred to as APPELLANT'S REPLY TO (1) PRIVATE APPELLEES' OPPOSITION TO MOTION TO CONSOLIDATE AND EXPEDITE PROCEEDINGS [APP.DKT#9]; AND (2) DEFENDANT-APPELLEE COUNTY OF MAUI'S JOINDER [APP.DKT#10]. Attached hereto as Exhibit A is the true and correct copy of the Reply that is intended to replace APP.DKT.#12 in this Appeal No. 15-16552.

DATED: Honolulu, Hawaii, August 24, 2015.

/s/ Michael C. Carroll

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MOVEMENT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit on August 24, 2015. The below will be served by the appellate CM/ECF system.

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Appeal from the United States District Court for the District of Hawaii  
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**APPELLANT’S REPLY TO (1) PRIVATE APPELLEES’ OPPOSITION TO  
MOTION TO CONSOLIDATE AND EXPEDITE PROCEEDINGS  
[APP.DKT#9]; AND (2) DEFENDANT-APPELLEE COUNTY OF MAUI’S  
JOINDER [APP.DKT#10]**

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OPPOSITION TO MOTION TO CONSOLIDATE AND EXPEDITE  
PROCEEDINGS [APP.DKT#9]; AND (2) DEFENDANT-APPELLEE  
COUNTY OF MAUI’S JOINDER [APP.DKT#10]

Intervenor Defendants-Appellants Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei`ohu Ryder, and Sustainable Hawai`ian Agriculture for the Keiki and the `Aina Movement (collectively, “SHAKA”) hereby submits their reply brief to: (1) Private Appellees’ Opposition to Appellants’ Motion to Consolidate And Expedite Proceedings [APP.DKT#9]; and (2) Defendant-Appellee County of Maui’s Joinder To Plaintiff-Appellees’ Opposition to Appellants’ Motion to Consolidate and Expedite Proceedings [APP.DKT#10].

I. INTRODUCTION

Yesterday, August 23, 2015, the Guardian published an article outlining how the small town of Waimea on the Island of Kauai (another area plagued with nearby GMO development) has a “severe heart malformation” rate in newborns that is more than 10-times the national rate.<sup>1</sup> The treating Doctors in this community are raising concerns that this rate is linked to the high quantities of

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<sup>1</sup> Pesticides in paradise: Hawaii’s spike in birth defects puts focus on GM crops, <http://www.theguardian.com/us-news/2015/aug/23/hawaii-birth-defects-pesticides-gmo> (last visited August 24, 2015).

restricted and non-restricted pesticides that are being used on GMO fields in Hawai`i at greater rates and intensity than anywhere else in the world. Id.

In March of this year, after the parties had submitted their initial briefs on the motion for summary judgment, the World Health Organization published a report concluding that glyphosate is a probable carcinogen.<sup>2</sup> Glyphosate, the active ingredient in Monsanto's Roundup, is an unrestricted chemical that Monsanto is believed to be spraying in Maui indiscriminately for the testing and development of new crops that resist this chemical. These are just two new reports outlining the importance of having this case decided in a shortened appeal period.

Incredibly, the District Court ignored the ongoing harms that SHAKA demanded that the Court consider, concluding instead that the potential harms by these practices are irrelevant for the Court's consideration.

This Motion seeks to consolidate the pending appeals and to expedite the proceeding given the threatening harms. For the first issue, there is no dispute that the cases should be consolidated. On the second issue, while the Chemical Companies and the County minimize the threatened harm, there can be nothing more important than deciding whether the County should enforce an ordinance that stops activities that may be causing cancer and other serious health and

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<sup>2</sup> K. Guyton, et al., Carcinogenicity of tetrachlorvinphos, parathion, malathion, diazinon, and glyphosate, Lancelot Oncol 2015 (March 20, 2014), [http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045\(15\)70134-8/abstract](http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(15)70134-8/abstract) (last visited August 24, 2015)

environmental problems to our community. There can be no greater reason for expedition.

## II. DISCUSSION

This motion involves the following appeals that are explained in greater detail in the underlying motion:

<b>Appeal No.</b>	15-15641	15-16466	15-16486	15-16552
<b>Underlying Case</b>	Federal Court Action <sup>3</sup>	State Court Action <sup>4</sup>	Federal Court Action	Federal Court Action
<b>Decision Appealed</b>	Order Continuing The Preliminary Injunction	Final Judgment Entered In The State Court Action	Final Order Entered In The Federal Court Action	Final Judgment Entered In The Federal Court Action
<b>Status</b>	Fully Briefed; Awaiting Hearing and Decision	Opening Brief Due October 30, 2015	Opening Brief Due October 30, 2015	Opening Brief Due November 12, 2015

### A. The Parties Do Not Dispute That Appeal Nos. 15-16466 And 15-16552 Should Be Consolidated

As an initial matter, the parties do not dispute that Appeal Nos. 15-16466 (the appeal from the final judgment in the State Court Action) and 15-16552 (the appeal from the final judgment in the Federal Court Action) should (1) be assigned to the same panel and consolidated for purposes of argument and

<sup>3</sup> The Term “Federal Court Action” refers to the underlying proceeding in this appeal, D.C. No. 1:14-cv-00511-SOM-BMK.

<sup>4</sup> The term “State Court Action” refers to the lawsuit that SHAKA filed in State Court that the Defendants removed to Federal Court, D.C. No. 1:14-cv-00582-SOM-BMK.



decision; and (2) the parties should be allowed to file separate briefs in each appeal. Accordingly, SHAKA respectfully requests that this relief be granted and the court set the briefing schedule.

B. The Appeals From The Final Order And The Final Judgment On The Federal Court Action Should Be Consolidated

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SHAKA filed its initial appeal of the Final Order [DKT #166] as it was unclear whether the Final Order was an appealable order or when the District Court would issue its final judgment. If this Court concludes that the appeal from the Final Order is a nullity and the only appeal that could have been filed was the timely appeal of the Final Judgment [DKT #188], SHAKA does agree that it may make sense to dismiss the initial appeal and allow SHAKA to raise all arguments in one appeal number. However, if the Court finds that the Final Order is a separate appealable order, the Court should consolidate the two proceedings allowing for one brief.

C. The Preliminary Injunction Appeal Is Not Moot

SHAKA's points in response to whether the Preliminary Injunction Appeal is moot is set forth in their response to the Chemical Companies' motion filed in Appeal No. 15-15641, and is incorporated herein by this reference. In short, SEC v. Mount Vernon Mem'l Park, 664 F.2d 1358 (9th Cir. 1982) does not support the Chemical Companies' arguments. Mount Vernon stands only for the proposition that a preliminary injunction appeal may be merged with the final

appeal from the order granting a permanent injunction. In this case, there was no permanent injunction. The District Court never considered any of the irreparable harms that were affecting Maui when it decided the case. The issues in the Preliminary Injunction appeal are in addition to the appealable issues from the final ruling. They include numerous serious procedural errors made by the District Court in granting the injunction to begin with, and then extending it, which are detailed in SHAKA's opening brief. This Court may still grant relief from errors with respect to granting and extending preliminary injunction, and at the very least, the matter is not ripe until the Court considers the merits of the appeal.

D. Good Cause Exists For This Court To Expedite The Appeal

There is an environmental and health crisis affecting the three populated Hawaiian Islands that constitute Maui County that is being caused by the unregulated GMO business in the county. As these activities are allowed to continue unabated, evidence continues to develop on the dangers of these practices. This evidence includes the World Health Organization report and the findings published in the Guardian showing higher cancer rates in Waimea, a GMO site in Hawaii. The harms caused by GMO operations, including health problems caused by increased pesticide usage and damage to organic or natural farmers, are dangers that Federal and State legislation do not protect against. See Ctr. for Food Safety

v. Vilsack, 718 F.3d 829, 839-841 (9th Cir. 2013). The Ordinance was intended to provide this protection that was lacking.

These harms that the Ordinance would prevent (and the injunction stopped from happening) are the most severe categories of irreparable harms that warrant expedited treatment. The Chemical Companies' claim that the District Court weighed these points below is simply inconsistent with the District Court's ruling. In fact, the District Court explicitly declined to consider any of these harms. In choosing to not consider SHAKA's points that the federal and state governments are not regulating against any of the harms associated with GMO operations, the Court stated:

Monsanto, for example, says it conducts 'authorized regulated field trials' in Maui County. See Decl. of Sam Eathington ¶ 7, ECF. No. 71-1, PageID # 1401. This court does not rely on this proposition in the present order. This is the kind of argument that would benefit from the additional discovery SHAKA seeks. Without more detail about the EPA's authorization of Monsanto's field trials, the court cannot determine the existence or scope of any conflicts. Nor can the court determine from the record whether and to what extent the EPA has actually authorized GE field trials under the experimental use permitting system set forth in 40 C.F.R., Part 172.

Final Order at 37.

Simply put, the District Court did not consider the issue of whether the Federal and State government were regulating or protecting against the harms that SHAKA asserted needed protection.

Finally, the Chemical Companies' claim that SHAKA acted with a "lack of dispatch" is another one of the Chemical Companies' fallacies. It only took the Chemical Companies seven months to have this case decided (from filing the complaint to judgment). In this seven month period, SHAKA did everything in its power to enforce the demands of Maui voters and to seek to have the Court enforce the Ordinance. SHAKA, among other things, (1) filed a motion to intervene and was granted intervenor status in this case [DKT #63]; (2) filed their own complaint and motion for preliminary injunction<sup>5</sup>; (3) moved to remand the lawsuit SHAKA filed back to state court [SHAKA DKT #15]; (4) sought discovery and defended against motions for protective order because the Chemical Companies did not want to disclose any records [DKT #159]; (5) opposed the County's motion to dismiss SHAKA's complaint [SHAKA DKT #41]; (6) opposed the continuation of the injunction that was entered into solely based on an agreement between the County and the Chemical Companies [DKT #131]; and (7) filed a preliminary injunction appeal after the District Court continued the injunction [DKT #137].

SHAKA is a small local non-profit organization. The Chemical Companies, consisting of Monsanto and Dow Chemical (the parent corporation of

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<sup>5</sup> SHAKA's Complaint for Declaratory Relief, First Amended Complaint for Declaratory Relief, and Motion for Preliminary Injunction filed in 1:14-cv-00582-SOM-BMK ("SHAKA DKT") # 1-3.

Dow AgroSciences), are two of the largest multinational corporate entities in the world, with combined reported annual global sales of more than \$30 billion dollars in 2014 alone.<sup>6</sup> The Chemical Companies also had the assistance of the County, which one would have expected to have defended the Ordinance. Instead, the County helped or agreed with the Chemical Companies on every single issue in the case making the case even more imbalanced. While it is certainly disappointing that SHAKA was not successful at the trial level, it is a gross strain on the Chemical Companies' credibility for them to say that SHAKA acted with a "lack of dispatch."

### III. CONCLUSION

This case is of a fundamental concern to the people of Maui County that voted in favor of this Ordinance with the expectation that their votes had value. SHAKA is only seeking in this Motion to have the appeals consolidated, and for the Court to expedite treatment of the consolidated appeal. So if SHAKA is correct in this case (that the Ordinance the voters approved in the general election should be enforced), the Ordinance can be implemented sooner, and the potential harms that are occurring each day can stop. For the reasons set forth in

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<sup>6</sup> Dow Reports Fourth Quarter and Full-Year Results, <http://www.dow.com/investors/earnings/2014/14q4earn.htm> (last visited August 24, 2015); 2014 Financial Highlights, <http://www.monsanto.com/investors/pages/financial-highlights.aspx> (last visited August 24, 2015).

SHAKA's motion and herein, SHAKA respectfully requests that the Court grant this Motion in its entirety.

DATED: Honolulu, Hawaii, August 24, 2015.

/s/ Michael C. Carroll

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MOVEMENT

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