Appeal No. 15-15641

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

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

INTERVENOR DEFENDANTS-APPELLANTS' RESPONSE TO MOTION TO DISMISS APPEAL AS MOOT, FILED AUGUST 12, 2015

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I. INTRODUCTION

The decision of the District Court to condone and continue a preliminary injunction without ever holding a hearing, nor considering the grave harms to the community, is not moot. The dangers of the unregulated development of genetically modified organisms ("GMOs") in Maui, and the potential irreversible harms to Public Trust resources in Hawaii, is the heart of this case. The District Court ignored these harms when it consented to the original injunction, continued the injunction, and then invalidated the entire democratically approved Ordinance (which was only a temporary moratorium on the practice until independent safety studies could be conducted) within a period of seven months.

The preliminary injunction that is the subject of this appeal was entered into by agreement between two parties that were on the same side of the dispute. On one side, were the Chemical Companies that profit at the expense of Maui's environment. These entities develop and grow GMOs in Maui that are resistant to the harmful pesticides they sell. On the other side, is the County of Maui that previously denounced the Ordinance before the election. Once the litigation started, the County then chose to disregard the will of its voters by agreeing to an injunction and siding with the Chemical Companies on all issues in the case. The District Court's ruling with respect to the preliminary injunction is

one of many errors that were made that should be reversed. This appeal is not moot, rather it should be consolidated with the substantive appeal on the merits. Both appeals should be expedited to mitigate the continuing harms caused by the unregulated development of GMOs.

This Motion should be denied on the following grounds.

First, the issues in this appeal are not moot because this Court has the power to ensure that SHAKA's procedural and substantive rights are protected. The injunction allowing the Chemical Companies' operations to continue unabated has only allowed damage to the environment and threats to public health to continue. Further, the doctrine of merger does not apply to moot this appeal because this appeal raises distinct legal issues, which are not consumed in the appeal from the final judgment. In fact, the doctrine of merger supports SHAKA's related motion seeking to consolidate this preliminary injunction appeal with the District Court's final ruling in Docket Number 15-16486 (the "Summary Judgment Appeal") by allowing all issues to be decided together.

Second, the issues raised fall within the capable of repetition yet evading review exception to the mootness doctrine. This is a case where the District Court's quick decision on summary judgment (7 months) could prevent the Ninth Circuit from reviewing the decision on the preliminary injunction. In the

event the final decision is reversed, SHAKA will be potentially subject to the same treatment on remand.

Finally, this motion is premature. This motion seeks to dismiss the preliminary injunction appeal before the Court has had an opportunity to rule on the Summary Judgment Appeal. If the Court rules in SHAKA's favor in the Summary Judgment Appeal, the Court should also set aside the decision to continue the injunction. Therefore, a determination on whether the issues raised in this appeal are moot cannot be made until this Court rules on the appeal on the decision on the merits.

II. BACKGROUND

This case involves an environmental and health crisis affecting Maui County. Maui County is "ground zero" for the testing and development of GMOs. (2ER 149-160). Many of the GMOs developed on Maui are designed to withstand repeated spraying of chemical pesticides that are dangerous to humans and the environment. (2ER 150-151). The testing and development of these crops require unprecedented chemical spraying and a highly destructive use of the land as compared to commercial agricultural activities. (2ER 150-151). These practices are linked to serious environmental and public health problems, including chemical and environmental pollution, pesticide drift, transgenic contamination, and the creation of "superweeds" that are resistant to high levels of pesticides. (2ER 150-

152, 156-158; 3ER 017). Despite the dangers, no tests or studies are conducted in Maui County (2ER 154-156), and there are no Federal or State laws that regulate against these harms. See Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 839-841 (9th Cir. 2013).

In November 2014, after fears related to these activities reached its peak, Maui citizens voted into law, via citizen initiative, a local ordinance placing a temporary moratorium on growing and testing GMOs until a safety study is completed demonstrating that these activities are not harmful ("Ordinance"). (4ER 263-274). Maui voters adopted this Ordinance over a massive advertising campaign initiated by the Chemical Companies and opposition by County officials that chose to side with the Chemical Companies activities. (4ER012-018, 4ER066-067). Within days of this election, Plaintiffs-Appellants Chemical Companies filed (1) a complaint seeking to invalidate the Ordinance (4ER 214-262); and (2) a motion for preliminary injunction to delay the County from certifying the election results (4ER 090-213).

When the Chemical Companies filed this lawsuit, both the Chemical Companies and the County were co-defendants in a state court action that SHAKA filed seeking to compel the County to implement the Ordinance and to declare the

Ordinance valid under state law.[1] The County, rather than following the will of its voters, chose to again side with the Chemical Companies' position that the law should not be implemented and agreed to an immediate injunction. The day the Chemical Companies filed the lawsuit, the County agreed with the Chemical Companies to a stipulated injunction to not certify the election results until the end of March 2015. (4ER 070-088). This date coincided with the Chemical Companies' anticipated schedule to invalidate the law by summary judgment that the County had no intention of opposing. (3ER 069-073). The District Court approved the stipulation without ever holding a hearing to see if there were really irreparable harms. (4ER 088-089).

Shortly after this agreement was reached, SHAKA was allowed to intervene. (3ER 205-222). As the deadline for the injunction was coming near, on March 9, 2015, the Court called a status conference in lieu of the scheduled hearing date on the Motion for Summary Judgment. (2ER 042-44). At the status conference, the Court was seeking input on whether the parties would agree to

[1]One day prior to Monsanto and Dow's filing of their Complaint, SHAKA filed a Complaint for Declaratory Relief in the Circuit Court of the Second Circuit of the State of Hawaii in Civil No. 14-1-0638(2) against the County, Monsanto Company, and Dow Agrosciences, LLC. (4ER 053-065). Defendants subsequently removed the state court action. (Civ. No. 1:14-cv-00582-SOM-BMK). The District Court stayed SHAKA's first-filed state court action pending resolution of this case; final judgment was entered concurrently in both cases. The state court action is the subject of appeal number 15-16466, which SHAKA has requested the Court to consolidate with this appeal and the Summary Judgment Appeal. See Exhibit A, Motion to Consolidate and Expedite Proceedings.

continue the injunction because the Court wanted to wait until the end of the legislative session (May 2015) to decide the case. (ER 031-035). Once again, the County and the Chemical Companies agreed to continue the injunction. SHAKA, representing the expressed will of the voters in a general election, rightfully refused to give consent. Rather than allowing an expedited hearing on irreparable harm in this time period, the District Court limited SHAKA's arguments against continuing the injunction to a 2,500 word brief that was due within 4 days. (ER 033-034).

The District Court rejected every one of SHAKA's points that were raised in the short brief. On March 19, 2015, the District Court entered its order extending the injunction and denying SHAKA's request for an expedited hearing on the harms. (ER 004-019). In the order, the District Court concluded that the financial expense to the Chemical Companies outweighed the harms to the environment and public health. Thereafter, SHAKA filed this appeal challenging the District Court's refusal to hold an evidentiary hearing, and its conclusion that the economic harms to the Chemical Companies by delaying their operations substantially outweighed the continuing harms to the environment and public health. (DKT # 137).[2]

[2] The DKT# citations are to documents filed at the District Court level after the record on appeal was filed with this Court, or where otherwise noted to documents filed in the related state court action, Civ. No. 1:14-cv-00582-SOM-BMK.

Subsequently, the District Court went forward with the Chemical Companies Motion for Summary Judgment. On June 30, 2015, only seven months after the case was filed, the District Court granted summary judgment in favor of the Chemical Companies and invalidated the Ordinance ("Final Order"). (DKT #166). In its ruling , as with the preliminary injunction challenge, the District Court denied every substantive issue that SHAKA raised. In particular, the District Court: (1) denied 56(d) discovery; (2) denied certifying the state law issues to state court; (3) denied SHAKA's request to stay based on ripeness; (4) refused to remand the issue to state court; and (5) rejected the substantive arguments on the merits.

Notably, in its Final Order, the District Court also disclaimed any of the factors that would warrant a permanent injunction. (DKT #166 at p. 2) ("[N]one of the motions ask this court to determine whether GE activities or GMOs are good, bad, beneficial, or dangerous."). Moreover, the District Court never converted the preliminary injunction into a permanent injunction. (DKT# 187).

After the Final Order was filed, SHAKA filed three appeals: (1) Appeal No. 15-16466, appeal from the final judgment in the case SHAKA initiated in state court (DKT# 61 in Civ. No. 1:14-cv-00582-SOM-BMK); (2) Appeal No.

15-16486, appeal in this case from the Final Order (DKT #179); and (3) Appeal No. 15-16552, appeal from the final judgment in this case (DKT #189).

On August 12, 2015, in Appeal No. 15-16552, SHAKA filed its motion to consolidate all four appeals, and to expedite the entire proceeding given the irreparable harm related to this initiative. (Exhibit A). The relief requested in SHAKA's motion is the relief that the Court should grant, not the relief requested by the Chemical Companies that would avoid deciding critical issues in the case.

III. DISCUSSION

A. This Appeal Is Not Moot Because The Court Can Provide Remedies For Continuing An Improper Injunction

"A case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries." United States v. Alder Creek Water Co., 823 F.2d 343, 345 (9th Cir. 1987). For example, "[w]here the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot. Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978). The "party moving for dismissal on mootness grounds bears a heavy burden." Jacobus v. Alaska, 338 F.3d 1095, 1103 (9th Cir. 2003).

Here, the Chemical Companies cannot meet their "heavy burden" because the factual circumstances have not changed so as to deprive the Court of the ability to redress SHAKA's injuries. SHAKA still seeks to have the County

certify the election results and enforce the Ordinance at the earliest possible date. On Appeal, the Ninth Circuit should reverse the decision holding that the Ordinance, and further hold that the preliminary injunction that was entered into was also in error. Because this Court has the power to protect SHAKA from these procedural and substantive injuries, this appeal is not moot.

The cases cited by Plaintiff-Appellees do not alter this conclusion. SEC v. Mount Vernon Mem'l Park stands for the unremarkable proposition that after final judgment, a *preliminary* injunction merges with the *permanent* injunction for purposes of appellate review. 664 F.2d 1358, 1361-62 (9th Cir. 1982). This serves the function of conserving judicial resources where two appeals raise identical issues. However, the merger doctrine does not deprive the appellate court of jurisdiction to address defects in a preliminary injunction order in cases- such as this- where the preliminary injunction appeal addresses distinct issues. See Stacey G. v. Pasadena Independent School Dist., 695 F.2d 949, 955 (5th Cir. 1983) (finding a preliminary injunction appeal was not moot because "the issue posed by the grant of the present preliminary injunction is independent of a decision on the merits"); Grupo Mexicano De Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999) (same). Northern Indian Public Services Co. v. Carbon County Coal Co., relied upon by the Chemical Companies in their motion, admits as much. 799 F.2d 265, 268 (7th Cir. 1986) ("Lifting a preliminary injunction does not always

make an appeal from the grant of the injunction moot; if the injunction was improper, the defendant may be entitled to damages.").

In this case, the District Court did not enter a permanent injunction in which the factors that the District Court needed to weigh would be consumed in the final ruling. There are independent errors with the respect to the District Court's ruling on preliminary injunction that are not resolved by the final judgment, including whether a hearing was warranted and whether the Court properly balanced the factors. If anything, the cases for merger support SHAKA's request that the Court consolidate the preliminary injunction appeal with the appeal on the Final Order as the Court can properly consider the entire record in one appeal.

B. The Challenged Action Is Capable Of Repetition Yet Evading Judicial Review

Even if the District Court's Final Order somehow rendered this appeal moot, the Court should rule on this appeal under the "capable of repetition yet evading review" exception to the mootness doctrine. To fit within this exception**,** the appellant must demonstrate that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Porter v. Jones, 319 F.3d 483, 490 (9th Cir. 2003).

In this case, SHAKA was injured by the District Court's Order extending the stipulated injunction without an evidentiary hearing and based on an improper application of the "balance of harms" test. "It is well established that when a party challenges a temporary injunction and that party will likely face a similar injunction in the future, the injury caused by that injunction is 'capable of repetition, yet evading review.'" ProtectMarriage.com - Yes on 8 v. Bowen, 752 F.3d 827, 837 n.4 (9th Cir. 2014) (citation omitted). See also Miller v. California Pac. Med. Ctr., 19 F.3d 449, 453-54 (9th Cir. 1994) (en banc) (overruled on other grounds); Enyart v. Nat'l Conf. of Bar Examiners, Inc., 630 F.3d 1153, 1160 (9th Cir. 2011). Under this case law, SHAKA satisfies the first-prong of the capable of evading review exception. The District Court's swift decision on the merits (7 months) in effect would preclude a reviewing court from ever evaluating whether the preliminary injunction was ever warranted in the first place.

As to the second prong of the exception, SHAKA has a reasonable expectation that it will be subjected to the same action again in the future. The County has made it clear in this proceeding that it has no interest in enforcing the Ordinance regardless of what the electorate has demanded. If this court rules in SHAKA's favor on the Summary Judgment Appeal, the District Court could reinstate the preliminary injunction without hearing, as was done initially over SHAKA's vigorous opposition.

Therefore, the capable of repetition exception to the mootness doctrine should apply to preserve the Court's jurisdiction over this appeal.

C. The Chemical Companies Motion To Dismiss Is Premature As The Court Has Not Considered The Merits Of The District Court's Final Ruling

Finally, the Court should not decide this case in piecemeal, and the issue of whether the preliminary injunction appeal is moot should be considered along with the Court's consideration of the merits of the Summary Judgment Appeal. If the Court rules in SHAKA's favor in the Summary Judgment Appeal, the District Court will need to revisit the merits of the stipulated preliminary injunction pending a final resolution of this case. Therefore, this issue is not ripe for determination by the court. The proper remedy for this Court would be to consolidate both matters for argument and decision as requested in SHAKA's related Motion to Consolidate and Expedite Proceeding.

IV. CONCLUSION

This appeal involves an unprecedented situation where two parties on the same side of a dispute (one from the government and one from private industry) agreed to an injunction together. The injunction is (i) contrary to the public interest (as expressed in a general election), (ii) potentially causing continued irreparable harm to the environment, and (iii) invalidating legal rights explicitly affirmed under the State's Constitution. One of the core foundations of

our judicial system is to allow two conflicting parties to a dispute to present their case on equal footing, and then for the Court to weigh the arguments on each side. This did not happen in this case. The issues surrounding the preliminary injunction are critically connected to the District Court's final ruling, and this Court should properly look at these actions to determine whether the District Court acted properly. Accordingly, this Motion should be denied.

DATED: Honolulu, Hawaii, August 21, 2015.

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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 by using the appellate CM/ECF system on August 21, 2015. The following parties who are registered CM/ECF users will be served by the appellate CM/ECF system.

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