

Of Counsel:

BAYS LUNG ROSE & HOLMA

KARIN L. HOLMA 5207-0  
*kholma@legalthawaii.com*

Attorney at Law

A Law Corporation

MICHAEL C. CARROLL 7583-0  
*mcarroll@legalthawaii.com*

Attorney at Law

A Law Corporation

SHARON A. LIM 10142-0  
*slim@legalthawaii.com*

Topa Financial Center

700 Bishop Street, Suite 900

Honolulu, Hawaii 96813

Telephone: (808) 523-9000

Facsimile: (808) 533-4184

Attorneys for Intervenor-Defendants

ALIKA ATAY, LORRIN PANG,  
MARK SHEEHAN, BONNIE MARSH,  
LEI'OHU RYDER, and SHAKA MOVEMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII	)	CIVIL NO. 14-00511 SOM-BMK
FARM BUREAU FEDERATION,	)	
MAUI COUNTY; MOLOKAI	)	INTERVENOR-DEFENDANTS
CHAMBER OF COMMERCE;	)	ALIKA ATAY, LORRIN PANG,
MONSANTO COMPANY;	)	MARK SHEEHAN, BONNIE MARSH,
AGRIGENETICS, INC.;	)	LEI'OHU RYDER, AND SHAKA
CONCERNED CITIZENS OF	)	MOVEMENT'S CROSS-CLAIM
MOLOKAI AND MAUI; FRIENDLY	)	AGAINST DEFENDANT COUNTY
ISLE AUTO PARTS & SUPPLIES,	)	OF MAUI; CERTIFICATE OF
INC.; NEW HORIZON	)	SERVICE
ENTERPRISES, INC. DBA MAKOA	)	[caption continued on next page]

TRUCKING AND SERVICES; and	)
HIKIOLA COOPERATIVE,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
COUNTY OF MAUI,	)
	)
Defendant.	)
_____	)

INTERVENOR-DEFENDANTS ALIKA ATAY,  
LORRIN PANG, MARK SHEEHAN, BONNIE MARSH,  
LEI’OHU RYDER, AND SHAKA MOVEMENT’S  
CROSS-CLAIM AGAINST DEFENDANT COUNTY OF MAUI

Intervenor-Defendants and Cross-Claimants ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI’OHU RYDER (collectively, “Concerned Citizens”) and SHAKA MOVEMENT (“SHAKA”), by and through their attorneys, Bays Lung Rose & Holma, hereby assert the following Cross-Claim against Defendant COUNTY OF MAUI (the “County”), and allege and aver as follows:

NATURE OF THE CASE

1. On November 4, 2014, Maui County voters passed into law a voter initiative entitled “A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms” (the “Ordinance”). The Ordinance was Maui County’s first-ever voter initiative attempt since the Maui County Charter granted voters this initiative power in 1983. Maui voters adopted this law because of the

potential irreparable harm to the public health and environment, the failure of federal or state law to mandate or perform any studies, and the lack of federal or state regulations and oversight. Despite the significance of this Ordinance to the citizens of Maui, the County has refused to defend the Ordinance and has sided with Plaintiffs' (collectively, "GMO Industry") efforts to invalidate the Ordinance.

2. Hawaii is ground zero for the development of genetically modified organisms ("GMOs"). It has been a magnet for experimental GMO testing. GMO companies, such as Monsanto Company, conduct more testing on GMO crops in Hawaii than anywhere else in the world. These companies use the land in a more destructive way than commercial agricultural activities, which results in higher risks for pollution and health problems. Notwithstanding, there are no federal or state laws protecting against these harms or addressing Maui County's unique interests. Further, no tests have been conducted to show that these activities will not cause harm to the environment and people of Maui.

3. Under Article I, § 1 of the Hawaii Constitution, "[a]ll political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority." The County has violated this basic principle of self-governance by siding with the GMO Industry against enforcement of the Ordinance, thereby undermining the will of Maui voters and ignoring their compelling health and environmental concerns.

4. The Hawaii Constitution further expressly recognizes that the County has public trust duties to conserve and protect its natural resources for the benefit of its people. In particular, Article XI, § 1 of the Hawaii Constitution provides:

For the benefit of present and future generations, the State *and its political subdivisions shall* conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

(emphasis added). The Hawaii Supreme Court has confirmed that the public trust duties outlined in Article XI, § 1 trump any state legislation, including any comprehensive scheme, and that statutes must be interpreted to conserve their constitutionality.

5. Article XI, § 9 of the Hawaii Constitution also recognizes that:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

In this case, SHAKA and the Concerned Citizens have a compelling personal interest in enforcing the Ordinance.

6. Despite the GMO Industry's strident false assertions to the contrary, the Ordinance is not preempted by any state or federal laws, and this

Court should properly order that the Ordinance be enforced. There are no state laws that regulate GMO operations or address the health and safety risks inherent in these activities. The State Legislature has not carved out the areas of environmental and agricultural regulation exclusively for the State. Rather, dual jurisdiction exists between the County and the State in these fields, as provided in the Hawaii Constitution, various state laws, and various County provisions. Moreover, the Hawaii Department of Agriculture's ("HDOA") regulatory authority does not set forth an exclusive and comprehensive state statutory scheme governing the regulation of all GMO operations. Finally, the Ordinance does not conflict with any state laws regarding pesticide use, plant quarantine, and noxious weeds. As such, the Ordinance is not preempted by state laws.

7. There are no federal laws that expressly or implicitly regulate GMO operations. The executive branch adopted a policy regulating certain aspects of GMOs through the federal Coordinated Framework for Regulation of Biotechnology. This policy document, however, is not an act of Congress, and it does not have any preemptive effect. Likewise, the underlying statutes that form the Coordinated Framework do not preempt Maui County from regulating GMO operations. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") regulates herbicides. It does not regulate the testing and cultivation of GMOs. Moreover, FIFRA expressly allows local municipalities to place additional

restrictions, provided such restrictions do not conflict with federal law. The Plant Protection Act (“PPA”) regulates the interstate movement of plant pests and noxious weeds. The PPA does not preempt a county’s ability to protect public health and environmental safety, as these areas fall “within the traditional exercise of the police powers of the state.”<sup>1</sup> The PPA also does not assure the protections to the environment and human health that this Ordinance seeks to address. The Ninth Circuit Court of Appeals has already held that the PPA does not address any issues associated with the Ordinance, including transgenic contamination and environmental hazards resulting from increased herbicide use.<sup>2</sup>

8. As the Ordinance is not preempted by any state or federal laws, the Court should enter a declaratory ruling that the Ordinance is valid and enforceable, and enter an injunction ordering the County to certify the election results and implement the law.

### PARTIES

9. At all relevant times herein, Intervenor-Defendant and Cross-Claimant SHAKA (Sustainable Hawaiian Agriculture for the Keiki and the ‘Aina) Movement is and was a Hawaii non-profit corporation providing advocacy, communications, and educational outreach programs. SHAKA has over 500 active supporters and participants, and the Ordinance, which was developed by SHAKA,

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<sup>1</sup> Oxygenated Fuels Ass’n v. Davis, 331 F.3d 665, 667-68 (9th Cir. 2003).

<sup>2</sup> Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 833 (9th Cir. 2013).

was approved by a majority—more than 23,000—of Maui’s residents who voted in the last general election. SHAKA’s supporters and participants include farmers, businesses, doctors, educators, and concerned parents and residents that live, work and spend their leisure time near GMO operations. SHAKA’s supporters and participants are directly affected by the County’s failure to implement the Ordinance, as they either live near these operations and are exposed to chemicals, pollutants, and other adverse consequences, their businesses are directly affected by being exposed to these operations, their health and the health of their children are at risk, or they engage in natural farming practices that are being contaminated and harmed by ongoing GMO operations.

10. At all relevant times herein, Intervenor-Defendants and Cross-Claimants Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, and Lei’ohu Ryder are and were residents of the County of Maui, State of Hawaii, and registered voters who voted in favor of the Ordinance on the November 4, 2014 ballot. Additionally, these individuals have a personal stake in the enforcement of the ordinance based on, among other things:

A. Alika Atay is a Native Hawaiian who serves as the President of Mauna Kahalawai, the West Maui Chapter of the Hawai‘i Farmers Union United (“HFUU”), whose majority members consist of organic and natural family farmers or backyard gardeners. Mr. Atay is also a natural farmer who

grows organic crops in Maui County by utilizing natural practices such as the use of natural fertilizers and non genetically modified seeds. Mr. Atay is directly harmed by GMO operations in that these practices cause pesticide drift and transgenic contamination, thereby impacting his natural farming practices and his ability to function as a natural farmer.

B. Mark Sheehan is a Maui resident and environmental activist who owns and operates a sustainable agriculture organic farm on the North Shore of Maui. Mr. Sheehan has been a board member of Maui Tomorrow Foundation, an environmental advocacy organization monitoring the enforcement of Hawaii's environmental and land use laws, for about 25 years. Mr. Sheehan grows a wide variety of vegetables, fruits, and other crops on his organic farm, and he strives for sustainability and growth of food for local consumption. Mr. Sheehan is directly harmed by GMO operations in that such practices may, through pesticide drift and transgenic contamination, contaminate and harm Mr. Sheehan's organic crops.

C. Lei'ohu Rider is a Native Hawaiian who participates in Native Hawaiian practices and teaches these practices. She serves as a kahu, a spiritual leader and educator. She is also the caretaker of a sacred site called Kukuipuka Heiau. As part of her practices, Ms. Ryder recognizes the connection that Native Hawaiians have to the land, and the natural and unaltered native



species in Hawaii. She collects and gathers native species, using natural plants for medicine and cultural and spiritual purposes. Ms. Ryder is directly harmed by GMO operations that introduce high quantities of chemicals into the environment and create the threat of transgenic contamination that potentially damages the natural genome of native species.

11. At all relevant times herein, Defendant County of Maui is and was a municipal corporation duly organized under the laws of the State of Hawaii and a political subdivision of the State of Hawaii, with the capacity and power to sue and be sued pursuant to Hawaii Revised Statutes (“HRS”) Chapter 46 and other applicable laws.

#### JURISDICTION AND VENUE

12. This Cross-Claim is brought for declaratory and injunctive relief to establish that the Ordinance is not preempted by state or federal law, and that the County should be compelled to certify the election results and implement the law. This Cross-Claim is brought under the provisions of 28 U.S.C. §§ 2201-2202, Rules 57 and 65 of the Federal Rules of Civil Procedure (“FRCP”). Jurisdiction of the Court is further proper pursuant to 28 U.S.C. §§ 1331 and 1343.

13. Further, this Court has supplemental and pendant jurisdiction over this action pursuant to 28 U.S.C. §1367, in that certain claims which are not brought under federal law or the United States Constitution, but are pendant and

joined to this action as being derivative from the common operative facts and therefore form part of and are ancillary to, the same case and controversy as the primary action.

14. Proper venue is established pursuant to 28 U.S.C. § 1391(b), as this matter is being brought in the United States District Court for the District of Hawaii, in which a substantial part of the events or omissions giving rise to the claims occurred, or a substantial part of the property that is the subject of the action is situated.

15. SHAKA expressly reserves its position that the proper Court to decide the issues associated with this dispute is the Circuit Court of the Second Circuit, State of Hawaii. SHAKA initially filed a Complaint for Declaratory Relief in Civil No. 14-1-0638(2) in the Circuit Court of the Second Circuit of the State of Hawaii (the “State Court action”) against the County and the GMO Industry. The GMO Industry, with the County’s consent, then removed the State Court action to federal court in *Alika Atay, et al. v. County of Maui, et al.* in Civil No. 14-00582 SOM-BMK. In the State Court action, SHAKA requested the same relief it seeks in this Cross-Claim against the County. SHAKA has asserted this Cross-Claim in light of the Court’s recent ruling denying SHAKA’s Motion to Remand in the State Court action. In the event the decision denying remand is correctly reversed on appeal, SHAKA intends to pursue all previously-asserted claims in state court,

where this controversy originated. This Cross-Claim shall in no way be construed as a waiver of SHAKA's rights to have these claims litigated in state court.

### FACTUAL BACKGROUND

#### A. GMO Operations In Maui County

16. GMO operations in Maui involve a different type of agricultural use that creates the risk of serious harmful environmental and human health impacts. These impacts have never been studied and are not being evaluated on the federal or state level. The practice involves the use of high levels and combinations of repeated pesticide application, and use of a disproportionately small portion of the land, leaving large areas barren and more susceptible to causing environmental pollution. These practices result in potentially serious environmental and health problems. Moreover, these activities are being performed in greater frequency than anywhere else in the United States. Hawaii has been the site of over 2,230 field trials to develop new GMO crops.

17. Of particular concern to Maui residents is that many of these open field tests involve the development of new GMO crops designed to be resistant to high levels and combinations of pesticides. For example, Monsanto Company has developed "Round-Up Ready" crops, which are resistant to high levels of the herbicide glyphosate. Glyphosate has been linked to significant chronic kidney deficiencies, liver congestions and necrosis, tumors, kidney

disturbances and failure, and other serious health conditions. Glyphosate is the leading offender of pesticide drift and is responsible for the creation of “superweeds” that are resistant to high applications of the herbicide.

18. While glyphosate is intended to only affect plants, this does not mean that it cannot have unintended toxicity for humans, as demonstrated in studies involving animal models and human cells.

19. On March 20, 2015, the World Health Organization published a report, authored by 17 experts from 11 countries, which concluded based on years of research that glyphosate is a probable carcinogen. Following the publication of this report, the American Cancer Society also listed glyphosate as a probable carcinogen.

20. Glyphosate is just one of more than 82 different chemicals that the GMO Industry has developed and is employing in combinations that have never been tested or approved by any state or federal agency. The possible combinations of these untested experimental chemical applications that Maui residents, including children and the elderly, are being exposed to on a daily basis is incalculable.

21. Ongoing GMO operations have increased pesticide use exponentially, with an extra 527 million pounds of herbicides being used from 1997 to 2011.

22. Many of the adverse health effects linked to GMO operations have been noted and observed in Maui County, where these operations are located in close proximity to neighborhoods, schools, businesses, and parks. For example, Monsanto Mokulele Fields, one of Monsanto's testing fields in Maui County, is located approximately 500 yards away from a neighborhood called Hale Piilani. Residents in this small community, including children, report negative health effects from living in such close proximity to the testing fields. One resident stated that she could taste the chemicals in her mouth as frequently as once a week.

23. Despite all these harms, no testing has ever been conducted in Maui County to demonstrate that these GMO practices are not harmful, nor are there any permitting requirements addressing these harms. Moreover, the County has not taken a role in protecting the environment and public health from these harms, even where the County has been placed on notice of chemicals found in the environment, complaints and concerns from the public, the results of the November 2014 election where the citizens voted and recognized these harms, and other health and environmental harms that discovery may reveal.

B. The Federal Coordinated Framework—An Executive Branch Policy Statement Regarding GMOs

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24. There are no federal statutes that regulate chemical and agricultural operations concerning GMO crops. Instead, in 1986, the White House's Office of Science and Technology Policy adopted a policy statement

called the Coordinated Framework for Regulation of Biotechnology (“Coordinated Framework”) to address aspects of GMO crops without seeking legislation. Under this policy statement, the White House recognized that certain areas involving genetically modified plants could be regulated by three agencies: (1) the Food and Drug Administration (“FDA”); (2) the Environmental Protection Agency (“EPA”); and (3) the U.S. Department of Agriculture (“USDA”), through the Animal and Plant Health Inspection Service (“APHIS”). In the nearly 30-years since the Executive Branch adopted this policy statement, Congress has never recognized any regulatory authority over GMO farming operations through legislation.

i. The FDA

25. The FDA is the primary federal agency responsible for ensuring the safety of commercial food and food additives, except for meat and poultry products. The FDA’s primary statutory authority is pursuant to the Federal Food, Drug, and Cosmetic Act (“FFDCA”). “The FDA’s authority is limited to removing adulterated food from the national food supply, which could include food from genetically modified plants.” There are no provisions in the FFDCA that address genetically modified plants.

26. In 1992, the FDA adopted a policy statement that its role is to regulate the characteristics of GMO crops, and that it did not have a role in the development or manner in which the crop is created. Instead, the FDA stated that

ultimately, the food producer is responsible for safety, not the FDA. According to the FDA, premarket review of any genetically modified plant is entirely voluntary.

ii. The EPA

27. The EPA's regulatory authority arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA governs the use, sale, and labeling of herbicides. A herbicide manufacturer is required to register a herbicide with the EPA before it can be distributed or sold in the United States. The EPA's involvement with genetically modified plants is limited, because FIFRA deals with chemicals, not plants. The EPA has adopted C.F.R.s that treat some GMOs as herbicides if they were genetically modified to produce pesticides, which the EPA has termed "plant-incorporated protectants" ("PIPs"). The EPA approves field tests under the auspices of 7 U.S.C. § 136c for "Experimental Use Permits" to register certain crops as PIPs.

28. Under 7 U.S.C. § 136v, a state or municipality may also regulate the sale or use of any federally registered pesticide or device in the State so long as "the regulation does not permit any sale or use prohibited" by FIFRA. The United States Supreme Court has held that FIFRA does not preempt local municipalities from regulating the use of pesticides.

29. In line with the lack of any Congressional mandate, the EPA has provided no oversight on any GMO operations in Maui County. According to

testimony presented before the Maui County Council concerning the Ordinance, the EPA has not conducted any inspections or investigations in Maui County in the last five years. Moreover, the EPA does not conduct independent studies or tests with respect to any of the activities in Maui County. Instead, the EPA relies entirely on industry reports and studies published in scientific journals.

iii. The USDA Through APHIS

30. The USDA has regulatory authority through the Animal and Plant Health Inspection Service (“APHIS”) over the interstate movement of plant pests and noxious weeds under the Plant Protection Act (“PPA”). A “plant pest” is defined under the PPA as a number of organisms that can “directly or indirectly injure, cause damage to, or cause disease in any plant or plant product.” The statute does not include GMOs.

31. Through administrative regulations, APHIS has regulated certain GMO crops as plant pests if the plant is created using an organism that is itself a plant pest. 7 C.F.R. § 340.1 (defining a regulated article under APHIS’s plant pest regulations as “[a]ny organism which has been altered or produced through genetic engineering, if the donor organism . . . or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest”). APHIS authorizes field trials of GMOs that fall within its definition



of a plant pest before the plant can be given “nonregulated status.” Once a plant is given nonregulated status, APHIS’s involvement ends.

32. APHIS’s involvement is further limited in that the only consideration in terms of risk evaluation is whether the plant itself may be deemed a plant pest. No other considerations of risks are considered, such as human health or environmental impacts. Under the PPA, APHIS does not evaluate the following harms: (1) the crops’ effects on endangered plants and animals; (2) transgenic contamination—whether the plant could cross-pollinate with and alter the genetic structure of other plants; (3) increased herbicide use and its effect on the soils, constitutionally-protected water resources, and public health; (4) the creation of herbicide resistant weeds, i.e., “superweeds”; and (5) economic harm to organic farms as a result of transgenic contamination. These regulatory concerns are left to local municipalities to fill in the void.

C. State Regulations

33. Under Article XI, Section 1 of the Hawaii Constitution and the Public Trust Doctrine, the State and the County are obligated to conserve and protect, for the benefit of present and future generations, Hawaii’s natural resources:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals, energy sources, and shall promote the development and utilization of

these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

34. The Hawaii Constitution further provides that the legislature shall create counties, and each county shall have and exercise such powers as shall be conferred under “general laws.” Haw. Const. art. VIII, § 1. This autonomy of counties to enact legislation and make decisions in their jurisdiction is often referred to as the “Home Rule.”

35. In accord with the Public Trust Doctrine and the Home Rule provision, the State Legislature expressly delegates certain other powers to each county “subject to general law[.]” HRS § 46-1.5. Such powers include: (1) “the power to enact ordinances deemed necessary to protect health, life, and property . . . of the county and its inhabitants . . . .” and (2) “enact and enforce ordinances necessary to prevent or summarily remove public nuisances[.]” HRS § 46-1.5(12)-(13).

36. With respect to regulating GMO operations, under the Hawaii Constitution, the County is authorized to enact regulations in accordance with its police power, and the State Legislature cannot trump the constitutional mandate through legislation.

37. Additionally, there are no state regulations that preempt the County from regulating GMOs. First, the Hawaii Pesticides Law, which is

codified in HRS Chapter 149A and administered by the HDOA, regulates pesticide users and distributors, imposing restrictions on the sale and use of pesticides other than those provided for in federal law. Second, the Hawaii Plant Quarantine Law addresses the importation, exportation, and possession of restricted plants and organisms that are introduced into the State. These statutes do not address GMOs and do not create a broad state policy that would prevent counties from regulating in this field.

D. Maui Voters Adopt The Ordinance Through The Initiative Power

38. Pursuant to Article 11 of the Charter of the County of Maui (“Charter”), the voters of the county have the power to propose ordinances to the Maui County Council (“Council”), and if the Council does not adopt the proposed ordinance, the voters may adopt the same ordinance at the polls. This is known as the initiative power.

39. The individually-named Intervenor-Defendants and Cross-Claimants in this matter—Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, and Lei’ohu Ryder—are citizens of Maui County who reside and work where GMO operations take place, and are directly harmed by the continued GMO practices. The Concerned Citizens formed a petitioner’s committee and submitted the Ordinance to the Maui County Clerk (“County Clerk”) in accordance with the Charter.

40. SHAKA and the Concerned Citizens coordinated the necessary signatures for the proposed Ordinance, submitted the signatures to the County Clerk for approval, and satisfied all other requirements to place the initiative on the ballot for Maui voters for the general election on Tuesday, November 4, 2014.

41. SHAKA and the Concerned Citizens then actively participated in a grassroots effort to educate the public on the potential harmful impacts of GMO operations and practices and the importance of the Ordinance in light of the Public Trust Doctrine and their interests in preserving Maui's environment and natural resources.

42. Notwithstanding the aggressive campaigning of the chemical companies that opposed the Ordinance, on November 4, 2014, Maui voters passed the Ordinance into law.

43. If a majority of the qualified electorate voting on the proposed ordinance vote in its favor, the ordinance is considered enacted upon certification of the election results. Charter § 11-7.

44. Proposed ordinances that are enacted under the voter initiative power will be published and will take effect as prescribed for ordinances generally. Charter § 11-8. As of the date of filing this Cross-Claim, in inexcusable disregard for the democratic process and the laws of the State of Hawaii, the November 4, 2014 election results have not been certified by the County.

COUNT I  
(Declaratory Relief)  
(28 U.S.C. §§ 2201-2202 and FRCP Rule 57)

45. SHAKA and the Concerned Citizens repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 to 44 of this Cross-Claim.

46. Article XI, § 9 of the Hawaii Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

47. This provision of the Hawaii Constitution gives the public standing to use courts to enforce laws intended to protect the environment.

48. SHAKA and the Concerned Citizens have suffered a concrete and particularized injury that is fairly traceable to the challenged conduct and is likely to be redressed by a favorable judicial decision. These injuries include, but are not limited to, (1) the threat of adverse health affects in being exposed to these activities; (2) economic damages as a result of harms to organic and natural farming practices; (3) interference with Native Hawaiian practices that involve natural plants and animals that are being harmed by GMO operations; (4) environmental damage, such as deteriorating air quality, odor, and chemical exposure; and (5) injuries to recreational and aesthetic interests, as the GMO

operations are interfering with and damaging recreational activities affecting SHAKA and the Concerned Citizens.

49. SHAKA and the Concerned Citizens have also suffered a procedural injury in that the County has created a risk that serious environmental impacts will be overlooked. SHAKA's organizers and supporters and the Concerned Citizens live, work, and/or spend their leisure time in close proximity to GMO operations, creating a geographical nexus between these activities and the Cross-Claimants. The Hawaii Constitution creates a procedural vehicle in which SHAKA and the Concerned Citizens are entitled to seek enforcement of laws that promote a clean and healthful environment.

50. An actual controversy exists between SHAKA and the Concerned Citizens with the County involving the enforceability of the Ordinance, the County's duty to certify the election results and implement the Ordinance. SHAKA and the Concerned Citizens' position is that the Ordinance is proper, legal, and enforceable, the Ordinance is not preempted by federal or state law, and that the County must immediately certify the election results and implement the Ordinance into law. The County is taking no position with respect to the law's enforcement and has refused to oppose efforts by the GMO Industry to invalidate the Ordinance.

51. The County's failure to follow the law, certify the election results, and implement the Ordinance has caused harm to Maui residents who voted to approve the Ordinance in the last general election. The County's actions and inactions have undermined the entire structure and rule of law that our civil society is organized upon, including the very authority under which the County has been granted the right to govern. It is harm that goes to the very foundation of the law, and the responsibility that elected officials have under the Hawaii Constitution and established law.

52. The Public Trust Doctrine grants counties the right and the responsibility to conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources. Moreover, the State of Hawaii has expressly granted counties the power to enact ordinances necessary to protect health, life, and property. See HRS § 46-1.5(12).

53. The Ordinance was adopted in light of protecting the interests contained in the Public Trust Doctrine as well as to address an issue seriously affecting Maui County that was not being regulated by the State. In particular, the Ordinance seeks to safeguard Maui County by temporarily suspending all testing, cultivation, and development of GMOs and requiring that studies be completed to address the key environmental and public health questions associated with the continued operations before GMO operations may resume.

54. The Ordinance is not preempted by any state or federal laws, as there are no state or federal laws that regulate the subject matter of the Ordinance, and the Ordinance does not conflict with any existing state or federal laws.

55. The Hawaii Constitution and state statutes recognize a dual authority between the County and the State in adopting environmental and agricultural regulations. The legislature has not carved out the areas of environmental and agricultural regulation exclusively for the State. Rather, dual jurisdiction exists between the County and the State in regulating these areas, as provided for in the Hawaii Constitution, state laws, the Maui County Code, and the Maui Countywide Policy Plan.

56. The Ordinance is not preempted by the Hawaii Pesticides Law, the Hawaii Plant Quarantine Law, or the HDOA's authority to regulate these laws. The Ordinance does not seek to regulate pesticide use, nor does it impose any record keeping, notification, or reporting requirements on pesticide use. While chemical drift is a harm that the Ordinance seeks to address, the Ordinance does not conflict or interfere in anyway with the regulations regarding reporting of pesticide use and sales that are being regulated on the state level.

57. The Ordinance is neither expressly nor impliedly preempted by federal law. First, the Coordinated Framework is not a "regulatory scheme" or "federal law" resulting from Congress. It was not established by, nor does it



represent, any congressional purpose or directive. It is an executive branch policy document, as noted in the Federal Register notice,<sup>3</sup> that carries neither the force of law nor purports to set statutory or regulatory standards.<sup>4</sup> Accordingly, the Coordinated Framework is not entitled to deference in a preemption analysis.<sup>5</sup>

58. There is no adequate remedy at law, and irreparable injury will result unless the relief requested is granted.

59. Accordingly, SHAKA and the Concerned Citizens are entitled to a declaratory judgment as follows:

- i. That the Ordinance is valid and enforceable
- ii. That the Ordinance is not preempted by any state or federal laws;
- iii. That the County is obligated under the Maui County Charter to certify the election results and implement the Ordinance; and
- iv. That the Court should award such other relief that this Court deems appropriate.

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<sup>3</sup> Coordinated Framework for the Regulation of Biotechnology, 51 Fed. Reg. at 23,302

<sup>4</sup> See e.g., Found. on Econ. Trends v. Johnson, 661 F. Supp. 107, 109 (D.D.C. 1986) (“The Framework and definitions contained therein are set forth to guide policymaking, not to regulate”).

<sup>5</sup> United States v. Mead, 533 U.S. 218, 226-27 (2001) (citing Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)) (holding that agency decisions that are not made pursuant to legislative directives are not entitled to deference under Chevron, but may be entitled to some deference if the agency’s decision is based on a permissible construction of the statute).

COUNT II  
(Injunctive Relief)  
(FRCP Rule 65)

60. SHAKA and the Concerned Citizens repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 to 59 of this Cross-Claim.

61. The County has caused irreparable harm to SHAKA and the Concerned Citizens by, among other things, failing to certify the election results and implementing the Ordinance.

62. SHAKA and the Concerned Citizens have no plain, adequate, or speedy remedy at law to prevent the County, and all persons acting through it, from continuing to cause irreparable harm through their actions and/or inactions.

63. No award of monetary damages is adequate to compensate SHAKA and the Concerned Citizens for the damage being caused by the County's failure to act.

64. For the reasons set forth herein, SHAKA and the Concerned Citizens are entitled to the following injunctive relief:

- i. That the County be compelled to certify the election results and implement the Ordinance;

- ii. That the County be enjoined from taking action to prevent the adoption and implementation of the Ordinance;
- iii. Pursuant to FRCP Rule 65(d)(2), that this injunction shall be binding on the County and their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise; and
- iv. That the Court should award such other relief that this Court deems appropriate.

### COUNT III

(Attorneys' Fees And Costs Pursuant To The Private Attorney General Doctrine)

65. SHAKA and the Concerned Citizens repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 to 64 of this Cross-Claim.

66. The Hawaii Supreme Court formally adopted the "Private Attorney General" doctrine, allowing attorneys' fee shifting in certain circumstances. See Sierra Club v. Dep't of Transp., 129 Hawaii 181, 202 P.3d 1225 (2009).

67. Under the Private Attorney General Doctrine, a court evaluating a claim for fees and costs considers three factors: “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [*sic*] (3) the number of people standing to benefit from the decision.” Id. at 218, 202 P.3d at 1263 (citations omitted).

68. An application of the three-prong test of the Private Attorney General Doctrine demonstrates that all three prongs have been satisfied.

69. First, there is strong public policy that may be vindicated through this action in that this Cross-Claim seeks to enforce an Ordinance adopted by the voters of Maui that seeks to protect environmental, health, and Native Hawaiian rights.

70. Second, this Cross-Claim was necessary in light of the County’s position in this lawsuit concerning the Ordinance’s enforcement.

71. Third, the implementation of the Ordinance provides an enormous public benefit to all of Maui County, in that the Ordinance protects the entire County from the harms associated with GMO operations.

72. Based on the application of the three-prong test of the Private Attorney General Doctrine, SHAKA and the Concerned Citizens are entitled to recover their attorneys’ fees and costs in this matter.

WHEREFORE, SHAKA and the Concerned Citizens respectfully request that the Court enter judgment in their favor and against the County as follows:

- A. For a declaratory judgment as provided herein;
- B. For a permanent injunction as provided herein;
- C. For SHAKA and the Concerned Citizens' costs of suit herein, including attorneys' fees and costs; and
- D. For such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, \_\_\_\_\_, 2015.

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KARIN L. HOLMA  
MICHAEL C. CARROLL  
SHARON A. LIM

Attorneys for Intervenor-Defendants and  
Cross-Claimants  
ALIKA ATAY, LORRIN PANG, MARK  
SHEEHAN, BONNIE MARSH, LEI'OHU  
RYDER, and SHAKA MOVEMENT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII	)	CIVIL NO. 14-00511 SOM-BMK
FARM BUREAU FEDERATION,	)	
MAUI COUNTY; MOLOKAI	)	CERTIFICATE OF SERVICE
CHAMBER OF COMMERCE;	)	
MONSANTO COMPANY;	)	
AGRIGENETICS, INC.;	)	
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,	)	
	)	
vs.	)	
	)	
COUNTY OF MAUI,	)	
	)	
Defendant.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served on the following parties by CM/ECF, on \_\_\_\_\_, 2015, addressed as follows:

MARGERY S. BRONSTER, ESQ.  
REX Y. FUJICHAKU, ESQ.  
KENNETH S. ROBBINS, ESQ.  
DONNA C. MARRON, ESQ.  
Bronster Fujichaku Robbins  
1003 Bishop Street, Suite 2300  
Honolulu, HI 96813

Attorneys for Plaintiffs  
ROBERT ITO FARM, INC.; HAWAII FARM BUREAU  
FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF  
COMMERCE; and AGRIGENETICS, INC.

PAUL ALSTON, ESQ.  
J. BLAINE ROGERS, ESQ.  
NICKOLAS A. KACPROWSKI, ESQ.  
MICHELLE N. COMEAU, ESQ.  
Alston Hunt Floyd & Ing  
1001 Bishop Street, Suite 1800  
Honolulu, HI 96813

and

PHILIP PERRY, ESQ. (*pro hac vice*)  
ANDREW D. PRINS, ESQ. (*pro hac vice*)  
Latham & Watkins LLP  
555 Eleventh Street, NW, Suite 1000  
Washington, D.C. 20004

Attorneys for Plaintiffs  
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

PATRICK K. WONG, ESQ.  
MOANA MONIQUE LUTEY, ESQ.  
RICHARD B. ROST, ESQ.  
CALEB P. ROWE, ESQ.  
KRISTIN K. TARNSTROM, ESQ.  
Department of Corporation Counsel, County of Maui  
200 S. High Street  
Wailuku, HI 96793

Attorneys for Defendant  
COUNTY OF MAUI

DATED: Honolulu, Hawaii, \_\_\_\_\_, 2015.

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KARIN L. HOLMA  
MICHAEL C. CARROLL  
SHARON A. LIM

Attorneys for Intervenor-Defendants and  
Cross-Claimants  
ALIKA ATAY, LORRIN PANG, MARK  
SHEEHAN, BONNIE MARSH, LEI'OHU  
RYDER, and SHAKA MOVEMENT