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LEI'OHU RYDER, and SHAKA MOVEMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT,	) CIVIL NO. 14-00582 SOM-BMK
Plaintiffs,	) PLAINTIFFS ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, AND SHAKA MOVEMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS [DKT
vs.	
COUNTY OF MAUI; MONSANTO COMPANY; DOW AGROSCIENCES	[*caption continued on next page*]

LLC; ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; AGRIGENETICS, INC.; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC. DBA MAKOA TRUCKING AND SERVICES; HIKIOLA COOPERATIVE; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	) #14], FILED JANUARY 15, 2015;) DECLARATION OF BARBARA E.) SAVITT; DECLARATION OF) MICHAEL C. CARROLL; EXHIBIT A;) CERTIFICATE OF WORD COUNT;) CERTIFICATE OF SERVICE

PLAINTIFFS ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, AND SHAKA MOVEMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT COUNTY OF MAUI'S MOTION TO DISMISS [DKT #14], FILED JANUARY 15, 2015

Plaintiffs Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement (collectively, "SHAKA"), by and through their attorneys, Bays Lung Rose & Holma, hereby submit the following Memorandum in Opposition to Defendant County of Maui's (the "County") Motion to Dismiss, filed January 15, 2015 ("Motion" or "Motion to Dismiss").

I. INTRODUCTION

SHAKA's lawsuit challenges the County's ongoing unwillingness to certify and implement a local ordinance placing a temporary moratorium on the

growth, testing, and cultivation of genetically engineered organisms in Maui County (the "Ordinance"), an ordinance that was approved into law by voters on November 4, 2014. Rather than answer SHAKA's complaint, the County chose to file this Motion, alleging several unfounded grounds for a partial dismissal of the complaint, none of which have any merit.

SHAKA challenges an actual, ongoing dispute regarding the County's duty to implement the Ordinance pursuant to the protections outlined in the Hawaii Constitution. Refusing to resolve the parties' disputes and dismissing SHAKA's complaint would serve only to perpetuate the continuing harm to Maui's public health and safety, environment, and natural resources. These are not abstract, speculative claims; thus, the issues in SHAKA's complaint are ripe for adjudication. See infra Part IV, Section B. Moreover, SHAKA has properly exercised its right to bring this lawsuit to require the County to perform its constitutionally mandated duties. See infra Part IV, Section C.

The County's actions preceding and following the approval of the Ordinance make plain that the County does not—and will not—support the Ordinance. Less than two weeks after the Ordinance was approved by voters, the County entered into a stipulation with Monsanto Company, Agrigenetics, Inc., and certain aligned parties (collectively, the "Industry") to delay the enactment and enforcement of the Ordinance. Since then, the County has supported the Industry's

removal of this action from state court to federal court. The County has taken no position regarding the Industry's motion for partial summary judgment. Finally, the County has filed this Motion attempting to dismiss SHAKA's complaint. In sum, the County's "defense" of the Ordinance can hardly be called a defense. The County has failed to assert any arguments to support the Ordinance and instead has actively taken steps to frustrate SHAKA's efforts to enforce the Ordinance.

The County offers no legitimate grounds to support a partial dismissal of the claims set forth in SHAKA's complaint. The County ignores the fact that it has, through its own actions and statements, demonstrated to SHAKA and the general public that it will not support the Ordinance. Accordingly, SHAKA respectfully requests that since the County has failed to establish any valid grounds to dismiss SHAKA's complaint, the Court should deny the County's Motion to Dismiss in its entirety and reach the merits of this case.

II. FACTUAL BACKGROUND

On April 7, 2014, the petitioner's committee, which consisted of individually-named Plaintiffs in this matter, submitted the proposed Ordinance to the Maui County Clerk pursuant to the voter initiative power provided for in the Maui County Charter. See Declaration of Barbara E. Savitt ("Savitt Dec."), ¶ 4. On June 6, 2014, after the petitioner's committee coordinated the necessary

signatures, the County Clerk determined the proposed Ordinance to be sufficient. Id. at ¶ 5.

SHAKA actively participated in support of the Ordinance during the legislative process in order to get the Ordinance on the ballot. Id. at ¶ 6. SHAKA and other supporters of the Ordinance maintained a strong presence for the entirety of the public hearings, showing their support and urging the County Council to vote in favor of the Ordinance. Id. at ¶ 7. After the County Council determined that it would take no action on the Ordinance, the County Clerk then submitted the Ordinance to be placed on the ballot for the general election on Tuesday, November 4, 2014, as it was required to do. See Maui County Charter, Article 11.

In order to emphasize to the Maui community the potential harmful impacts of unregulated GMO operations within the County, SHAKA devoted what limited resources it had to educate the community on the importance of the Ordinance in light of the Public Trust Doctrine and its interests in preserving Maui's natural resources. See Savitt Dec., ¶ 8. SHAKA actively reached out to Maui County residents through community events featuring various speakers, two marches, door-to-door campaigning, radio and television advertising, educational mailings, the use of social media networks, and volunteers working thousands of hours in order to raise awareness and support for the Ordinance. Id. at ¶ 9.

On the other hand, Maui County Mayor Alan Arakawa made statements before the Ordinance's approval, stating that the Ordinance is impractical and that the County was unsure on how it would administer the Ordinance. The Mayor's public statements underscored his strong desire to discourage support of the Ordinance. Notwithstanding the County's dismissive and inaccurate statements regarding the Ordinance and aggressive campaigning against the Ordinance from the Industry, on November 4, 2014, Maui voters passed the Ordinance into law. Id. at ¶ 10.

On November 12, 2014, in order to protect its significant interests in ensuring the implementation of the Ordinance, 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) (the "State Court action") against the County, Monsanto Company, and Dow Agrosciences LLC. See Exhibit A. SHAKA initiated this State Court action to ensure that the Ordinance would be properly and timely administered, that SHAKA would be permitted to have a role in the process given its unique relationship to the Ordinance, and that the Ordinance would be declared valid and legal, and not otherwise preempted by state law.

One day later, after SHAKA initiated the State Court action, the Industry commenced a lawsuit in the United States District Court for the District of Hawaii in Civil No. 14-00511 SOM-BMK (the "Federal Court action"), seeking to

invalidate the Ordinance, notwithstanding that the issue of the Ordinance's validity was already pending in the State Court action. [Civ. 14-00511, DKT #1]

On the same day that the Industry initiated the Federal Court action, the Industry and the County agreed to enjoin certification and implementation of the Ordinance. [Civ. 14-00511, DKT #23] Although the County states that the parties "stipulated to continue the injunction . . . to give the parties and the Court adequate time to brief the matter on summary judgment[,]" no such brief was submitted by the County in opposition to the Industry's motion for partial summary judgment. [Mem. in Supp. of Mot. to Dismiss ("Mem. in Supp."), p. 3]

Less than one week after the Industry commenced the Federal Court action, on November 17, 2014, the Industry and the County submitted their written agreement to delay the certification and enactment of the Ordinance until March 31, 2015 and to expedite disposition of the case by summary judgment within four months. [Civ. 14-00511, DKT #26] Rather than advocating for the immediate enforceability of the Ordinance, the County agreed to this injunction. As a result of the County and the Industry's agreement, the Ordinance has not been certified, and the necessary protections to Maui's environment, public health, and natural resources have been compromised.

On December 10, 2014, SHAKA filed its First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") in the State Court action,

naming all the Industry parties in the Federal Court action as additional defendants to the State Court action. See Exhibit "A." The Complaint contains, in relevant part, the following causes of action: (1) declaratory relief to establish the enforceability of the Ordinance; (2) declaratory relief regarding the proper implementation of the Ordinance; and (3) injunctive relief regarding certification of election results and implementation of the Ordinance. See id. at pp. 12-18.

On January 15, 2015, the County filed this Motion [DKT #14], seeking to dismiss Counts II, III, and IV of SHAKA's Complaint, while only seeking a stay on Count I. [Mem. in Supp., p. 13] The County fails to establish any valid grounds to support a partial dismissal of the claims set forth in SHAKA's Complaint. Accordingly, the County's Motion should be denied in its entirety.

III. LEGAL STANDARD

The County's Motion alleges a lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1) and failure to state a claim pursuant to FRCP Rule 12(b)(6).

A. Rule (12)(b)(1): Ripeness

Under FRCP Rule 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction.[1] "The question of ripeness, like other challenges to a court's subject matter jurisdiction, is treated as a motion to dismiss under Rule

[1] Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014).

12(b)(1)," and thus, "[i]t is the burden of the complainant to allege facts demonstrating the appropriateness of invoking judicial resolution of the dispute."[2]

On a motion to dismiss for ripeness, "a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment."[3] The moving party "should prevail [on a motion to dismiss] only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law."[4]

B. Rule 12(b)(6): Failure To State A Claim

A Rule 12(b)(6) motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. When reviewing a Rule 12(b)(6) motion to dismiss, a court takes the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff.[5] To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the notice pleading standard set forth in FRCP Rule 8(a)(2).[6] A complaint does not need

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[2] Haw. Coal. for Health v. Hawaii Dep't of Human Servs., 576 F. Supp. 2d 1114, 1119 (D. Haw. 2008) (quoting 15 Moore's Federal Practice § 101.73[1] (2005)); see also Gemtel Corp. v. Cmty. Redevelopment Agency, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994) (noting that ripeness is properly challenged under Rule 12(b)(1)).

[3] See Gemtel Corp., 23 F.3d at 1544 n.1 (quoting Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

[4] Casumpang v. Int'l Longshoremen's & Warehousemen's Union, 269 F.3d 1042, 1060-61 (9th Cir. 2001) (citation and quotations omitted).

[5] See Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005); See also Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

[6] See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1102-03 (9th Cir. 2008).

detailed factual allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on its face."[7]

"[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[8] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9] Therefore, motions to dismiss for failure to state a claim should rarely be granted, and courts considering such a motion should construe the pleadings liberally, and not technically.[10]

IV. THE COURT SHOULD DENY THE COUNTY'S MOTION TO DISMISS IN ITS ENTIRETY

A. The County's Request To Stay Count I Of SHAKA's Complaint Is Improper And Should Be Denied

In its Motion, the County does not seek to dismiss Count I of SHAKA's Complaint. Rather, the County asks the Court to stay Count I for approximately two months. This request is moot. Count I of SHAKA's Complaint seeks a declaratory ruling from the Court that the Ordinance is valid and

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[7] Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (stating that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

[8] Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citations omitted).

[9] Roth v. Garcia Marquez, 942 F.2d 617, 625 (9th Cir. 1991) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[10] Tseu ex rel. Hobbs v. Jeyte, 88 Hawai'i 85, 90, 962 P.2d 344, 349 (1998) (citations and internal quotations omitted).

enforceable. The County, like the Industry, assumes that the Court will grant the Industry's motion for partial summary judgment and that the issue of the Ordinance's validity will be resolved in the Federal Court action. This has yet to occur, so the County's anticipatory request for a stay is improper.

The rush with which the County and the Industry have sought to invalidate the Ordinance in the Federal Court action does not support granting this Motion. All the agreements to dispose of this case in an expedited fashion were made between the Industry and the County *before* SHAKA was allowed to intervene and state an objection. The Industry and the County never contacted SHAKA regarding its position on the expedited briefing schedule and the injunction, despite being aware of this pending State Court action and SHAKA's interest in the Federal Court action. Simply because the Industry and the County are seeking to terminate this case in four months does not justify dismissing the State Court action and giving greater weight to the Federal Court action.

Moreover, the temporary injunction that was stipulated to between the Industry and the County expires on March 31, 2015, the same date as the hearing on this Motion. The Court has not yet ruled on whether it will extend the injunction beyond this date. The Court has not yet heard or ruled on SHAKA's Motion to Dismiss or for Judgment on the Pleadings, or in the Alternative, to Stay Proceeding in the Federal Court action. Finally, the hearing on SHAKA's

Objections to Judge Kurren's Findings and Recommendation to Deny Plaintiffs' Motion to Remand is also set for March 31, 2015. There has been no substantive ruling on the merits in either case.

Based on the respective progress of both this case and the Federal Court action and the numerous pending motions before the Court in both cases, it would be improper for this Court to preemptively stay Count I of SHAKA's Complaint in favor of the Federal Court action. The County has failed to demonstrate why SHAKA is not entitled to a declaratory judgment that the Ordinance is valid and enforceable and that it is not preempted by any state laws, as sought in SHAKA's Complaint.

B. SHAKA's Claims Are Ripe For Adjudication

The County incorrectly asserts that Count II (declaratory relief regarding the proper implementation of the Ordinance) and Count III (injunctive relief regarding certification of the election results and implementation of the Ordinance) of SHAKA's Complaint are not ripe for adjudication. "The central concern of the ripeness inquiry is 'whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur

at all.'"[11] "[R]ipeness is . . . designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[12]

There is nothing "uncertain" or "abstract" about SHAKA's claims. SHAKA's claims rest on an ongoing, concrete dispute regarding what the County *has already failed to do*. The County argues that SHAKA has not shown that the County has a "concrete plan" not to enforce the Ordinance properly, and because SHAKA has "fail[ed] to allege that the County has 'communicated a specific warning' that it will not enforce the ordinance." [Mem. in Supp. p. 6]

The County, however, concedes that it is "**not in a position to enact or enforce the newly passed ordinance.**" It further states:

> The County is reasonably concerned about the conflicts with the new ordinance and various County Charter provisions as well as the legality of the ordinance here, given two similar ordinances in other counties that have recently been struck down by this Court. (citations omitted). In addition, the County is unable to enact or enforce the new ordinance until it has secured funding and hired personnel to handle enforcement.

[Mem. in Supp. p.3] The County, in its own words, has clarified its position that it will not enforce the Ordinance.

The County's actions and statements since the Ordinance was first introduced under the voter initiative power make plain that the County does not—

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[11] Jackson v. City & Cnty. of S.F., 829 F. Supp. 2d 867, 870 (N.D. Cal. 2011) (quoting Richardson v. City and Cnty. of Honolulu, 124 F.3d 1150, 1160 (9th Cir. 1997)).
[12] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1338 (9th Cir. 1999) (en banc) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)).

and will not—support the Ordinance. Although the County attempts to argue that it "had no opportunity to enforce the ordinance because it has been subject to the restraining order issued in the Robert Ito Farms case[,]" this is an overstatement. [Mem. in Supp. p. 7] The County itself agreed to a stipulation with the Industry subjecting the County to the restraining order. The County enjoined itself.

Ultimately, it is the County's job to enforce ordinances that are adopted by its electorate. This is regardless of whether County officials oppose the law or whether the officials consider the law "controversial." Once the Maui electorate approved the Ordinance into law, the County was obligated to certify the election results approving the Ordinance and properly implement the law. The County refused to implement the Ordinance, so SHAKA sought declaratory and injunctive relief in this action in order to have the Ordinance enforced.

Not only did the County have a duty to honor the will of its voters, but it also has a continuing duty to protect the health and safety of its citizens and the natural resources. Under the Public Trust Doctrine, the County has a significant duty to preserve and protect environmental resources for current and future generations. As a result of the County's inaction and failure to protect these interests, the necessary protections to Maui's environment, public health, and natural resources demanded by Maui voters have been compromised. Thus,

Plaintiffs and SHAKA, as citizens of Maui, properly exercised their right to bring this lawsuit to require the County to perform its constitutionally mandated duties.

The County fails to cite a single case in which the Court has found that a claim by citizens for the proper implementation of a voter-approved law is not fit for judicial review. SHAKA's Complaint invokes the constitutional protections that recognize the fundamental rights of Hawaii citizens to a "clean and healthful environment,"[13] gives standing to citizens to pursue direct constitutional claims for harming Hawaii's natural environment,[14] and delegates the responsibility and duty to the counties to protect the natural environment and Public Trust resources.[15] The County's failure to certify the election results and its decision to agree to a voluntary injunction with the Industry directly infringes on SHAKA's constitutional rights. See Exhibit A ¶¶ 36, 37, 59, 62, and 91. These

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[13] Haw. Const. art. XI, § 9 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.

[14] Id.

[15] Haw. Const. art. XI, § 1 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.

are affirmative claims, and without allowing this litigation to proceed forward in State Court, SHAKA's rights to pursue its requested remedies will be infringed.

The potential hazards associated with the rapid and unregulated growth in GMO testing and related test crop experimentation as well as the endangerment of the stability and growth of Maui County's environment, health, and natural resources illustrate the continuing harm to SHAKA and the general public. Until the County certifies and implements the Ordinance, the effects of the County's actions and noncompliance will be felt "in a concrete way[.]"[16] Accordingly, the Court should find that SHAKA's claims are ripe for adjudication and deny the County's Motion to Dismiss.

C. SHAKA's Request To Assist And Participate In the County's Implementation Of The Ordinance Is Valid And Should Not Be Dismissed

The Ninth Circuit has recognized that "[c]itizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement to government actions."[17] The Ninth Circuit has also recognized that Congress intended citizen suits to be "handled liberally, because they perform an important public function."[18] "A citizen suit can only be barred by the government enforcement action if the public has been given the opportunity to participate

[16] Abbott Labs., 387 U.S. at 148.
[17] Save Our Bays & Beaches v. City & Cnty. of Honolulu, 904 F.Supp. 1098, 1126 (D. Haw. 1994); see also Sierra Club v. City & Cnty. of Honolulu, 2008 U.S. Dist. LEXIS 94061, *9 (D. Haw. Nov. 18, 2008).
[18] Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987).

meaningfully in the government's action."[19] This Court has held that "'Congress's clear intention was to 'encourage citizen participation rather than treat it as a curiosity or a theoretical remedy,' that citizen plaintiffs are not to be treated as 'nuisances or troublemakers' but rather [as] 'welcomed participants in the vindication of environmental interests.'"[20]

Although these cases involve citizen lawsuits brought pursuant to the Clean Water Act, such lawsuits are analogous to the issues present in this case involving critical environmental and health concerns. The County argues that Count II of SHAKA's Complaint,[21] which requests, in part, that SHAKA be permitted to assist and participate in the County's implementation of the Ordinance, should be dismissed for failure to state a claim upon which relief can be granted. See Exhibit A pp. 15-16, § 78. This argument fails.

SHAKA included this request in their claim for declaratory relief, because SHAKA offers unique elements to the implementation of the Ordinance that is not shared with the County. As the drafters of the Ordinance, SHAKA provides expertise regarding the identification of such harms and impacts the

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[19] Save Our Bays, 904 F.Supp. at n.41.
[20] Id. at 1125 (quoting Proffitt v. Municipal Authority of the Borough of Morrisville, 716 F. Supp. 837, 844 (E.D. Pa. 1989) (internal quotations and citations omitted).
[21] In Count II of the Complaint, SHAKA requests that the Court order the following declaratory relief: (1) that the County certify the November 3, 2014 election results and immediately implement the Ordinance, (2) that SHAKA be permitted to assist and participate in the County's implementation of the law; (3) that the County adopt proper administrative rules and/or procedures necessary to enforce the Ordinance.

Ordinance aimed to target. SHAKA not only has unique personal interests in the protections guaranteed by the Ordinance as the original drafters and proponents of the Ordinance, but it also possesses interests as citizens and residents of Maui County who are concerned with the detrimental health and safety impacts associated with GMO operations. In that respect, SHAKA believes that the public as a whole should be given a meaningful opportunity to comment and participate in the County's implementation of the Ordinance.

The County erroneously argues that SHAKA is attempting to "dictate to the County how an ordinance must be interpreted and implemented." [Mem. in Supp. p. 10] This is inaccurate. SHAKA initiated this action pursuant to the provision in the Hawaii Constitution in Article XI section 9, which states, in relevant part, that "[e]ach person has the right to a clean and healthful environment . . . . Any person may enforce this right against any party, public or private, through appropriate legal proceedings[.]" This is precisely what SHAKA has done in initiating this lawsuit. The Ordinance serves as a "vindication of environmental interests"[22] that are crucial to Maui County residents, and SHAKA has taken the lead in enforcing those rights for the general public.

SHAKA has set forth a basis for which it, and the general public, is entitled to participate in the implementation of the Ordinance. The County, on the

[22] Proffitt v. Mun. Auth. of Morrisville, 716 F. Supp. 837, 844 (E.D. Pa. 1989) (quoting Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976)).

other hand, has failed to demonstrate how SHAKA's entire claim for declaratory relief on the proper implementation of the Ordinance fails to state a claim in which SHAKA is entitled to relief. Accordingly, Count II of SHAKA's Complaint should not be dismissed, and the County's Motion should be denied.

D. SHAKA Is Entitled To Its Attorneys' Fees And Costs

The County requests that the Court dismiss Count IV of SHAKA's Complaint, which seeks attorneys' fees and costs pursuant to the Private Attorney General Doctrine. The Hawaii Supreme Court formally adopted the Private Attorney General doctrine, allowing attorneys' fee shifting in certain circumstances.[23] 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."[24] As set forth below, an application of this three-prong test demonstrates that SHAKA is entitled to recover its attorneys' fees and costs.

The first factor, which the County did not even attempt to address, favors SHAKA. This litigation regarding the implementation and enforceability of

[23] See Sierra Club v. Dep't of Transp., 120 Hawai'i 181, 202 P.3d 1226 (2009) (citations omitted).
[24] Id. at 218, 202 P.3d at 1263 (citations omitted).

the Ordinance seeks to hold the County accountable to upholding its duties to Maui residents. Through the voter initiative power, Maui voters determined that they wanted a temporary moratorium on GMO operations to take effect. Maui voters determined that they wanted appropriate studies to be conducted on the potential irreparable harms to the public health, environment, and Public Trust resources within Maui County. The County has refused to honor the will of the people despite the Ordinance being properly approved into law. The public policy behind the County's refusal to honor its obligation to its residents is a matter of high importance not only to SHAKA, but to the general public as well.

The second factor also favors SHAKA. As discussed throughout this brief, this litigation was necessary to enforce the County's duties to the public under the Hawaii Constitution and the Public Trust Doctrine. The County actively chose not to support the Ordinance. The County's failure to enforce the voter-approved Ordinance resulted in a heavy burden on SHAKA to ensure that the County would perform its obligations and duties to Maui residents. It is through SHAKA's efforts in emphasizing the potential harmful impacts of GMO operations, as well as educating the public about the importance of the Ordinance, that the Ordinance was passed into law, despite significant opposition. As a result, SHAKA as the drafters and original proponents of the Ordinance, deemed it

necessary to defend the enforcement of the Ordinance when the County, through its actions and statements, refused to support the lawfully enacted Ordinance.

Finally, the third factor, which the County also fails to address, favors SHAKA. The implementation of the Ordinance provides an enormous public benefit to the entire Maui County population, because it is a generally applicable law that provides for a temporary moratorium on GMO operations while a study is conducted regarding such practices. The study will address the potential irreparable harms caused by GMO operations to the public health, environment, and Public Trust resources. Thus, Maui residents would benefit as a whole once the Ordinance is certified and implemented, because it will provide clarity as to the specific impacts of GMO operations in Maui County.

At the very least, given the factual nature of these elements, there are questions of fact regarding whether SHAKA is entitled to its attorneys' fees and costs pursuant to the Private Attorney General Doctrine. These questions of fact cannot be appropriately decided in a Motion to Dismiss. Accordingly, because all three factors demonstrate that SHAKA is entitled to its attorneys' fees and costs, and because, at a minimum, these factors present questions of fact, the Court should not dismiss Count IV of SHAKA's Complaint.

V. CONCLUSION

Based on the foregoing, SHAKA respectfully requests that this Court deny the County's Motion to Dismiss in its entirety.

DATED: Honolulu, Hawaii, March 10, 2015.

/s/ Michael C. Carroll
KARIN L. HOLMA
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SHARON A. LIM

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