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

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor Defendants-Appellants SHAKA MOVEMENT, by and through its attorneys, Bays Lung Rose & Holma, hereby submits this Corporate Disclosure Statement. SHAKA Movement is a tax-exempt non-profit corporation under Section 501(c) of the Internal Revenue Code, organized under the laws of the State of Hawaii. SHAKA Movement has no parent corporation, and no publicly held corporation owns 10% or more of its outstanding stock.

DATED: Honolulu, Hawaii, April 30, 2015.

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BRIEF OF APPELLANTS

Intervenor Defendants-Appellants Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and Sustainable Hawai'ian Agriculture for the Keiki and the 'Aina Movement (collectively, "SHAKA") hereby submit this Brief, pursuant to Rules 28 and 32 of the Federal Rules of Appellate Procedure ("FRAP"), and Rules 28-1 and 28-2 of the Circuit Rules for the Ninth Circuit ("Ninth Circuit Rule").[1]

I. JURISDICTIONAL STATEMENT

A. DISTRICT COURT JURISDICTION

On November 13, 2014, Plaintiffs-Appellees[2] (hereinafter, "Monsanto and Dow[3]") filed their Complaint in the United States District Court for the District of Hawaii ("District Court") against Defendant-Appellee County of Maui (the "County"). (4ER 214-262). On December 15, 2014, the District Court granted SHAKA intervention as defendants in the case. (3ER 205-222). Monsanto and Dow base the District Court's subject matter jurisdiction over this

[1] Pursuant to Ninth Circuit Rule 30-1, SHAKA filed its Excerpts of Record ("Excerpts") concurrently with this Brief. The first, second, third, and fourth volumes of the Excerpts of Record are cited as "ER #", "2ER #", "3ER #", and "4ER #" respectively herein.

[2] Plaintiffs-Appellees are Robert Ito Farm, Inc.; Hawaii Farm Bureau Federation, Maui County; Molokai 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.

[3] Agrigenetics, Inc., a named Plaintiff-Appellee in the action, is a subsidiary of the Dow Chemical Company.

action on federal question jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). (4ER 224).

B. APPELLATE COURT JURISDICTION

On March 19, 2015, the District Court entered an Order Extending Injunction Entered Into By Stipulation ("Order Extending Injunction"), continuing the preliminary injunction which enjoined the County from enacting, implementing, or enforcing the Maui County law at issue in this action (the "Ordinance") until the District Court has ruled on the merits of the case. (ER 004-019). Thus, this Court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1292(a)(1), which states, in relevant part:

> [T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]

28 U.S.C. § 1292(a)(1).

C. TIMELINESS OF APPEAL

On March 19, 2015, the District Court entered its Order Extending Injunction. (ER 004-019). On April 2, 2015, SHAKA filed its Notice of Preliminary Injunction Appeal ("Appeal"). (ER 001-003). Accordingly, SHAKA's Appeal from the Order Extending Injunction was timely, pursuant to FRAP Rule 4(a)(1)(A).

D. BASIS FOR APPEAL

This Appeal is from an interlocutory order entered by the District Court continuing a preliminary injunction. (ER 004-019). This Court may exercise interlocutory appellate jurisdiction over a district court's preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1). See Hendricks v. Bank of Am., N.A., 408 F.3d 1127, 1134 (9th Cir. 2005).

II. STATEMENT OF ISSUES PRESENTED

A. Whether the District Court violated Rule 65 of the Federal Rules of Civil Procedure ("FRCP") when it continued the preliminary injunction without allowing a hearing and instead limiting SHAKA's opposition to a 2,500-word brief that was due within three days.

B. Whether the District Court misapplied the legal standard for continuing the preliminary injunction when it found that (1) Monsanto and Dow's economic harms decidedly outweighed the environmental, public health, and other harms that were being created in enjoining the County from implementing the Ordinance; and (2) the public interest justified the injunction notwithstanding the fact that Maui citizens (the public) voted in favor of the Ordinance given the irreparable harm.

III. CONCISE STATEMENT OF THE CASE

The Constitution of the State of Hawaii affirms 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.

Haw. Const. art. XI, § 9.

In furtherance of this constitutional mandate, in November 2014, the citizens of Maui voted and approved the Ordinance, which establishes a temporary moratorium on the growth, testing, and cultivation of genetically modified organisms ("GMOs") until an Environmental and Public Health Impacts Study ("EPHIS") analyzing the key environmental and health effects of GMO operations is completed. (4ER 263-274).

Within days of Maui voters approving this Ordinance into law, Monsanto and Dow initiated this lawsuit and entered into an agreement with the County to enjoin the certification and implementation of the Ordinance until March 2015 (the "stipulated injunction")—the date coinciding with the District Court's anticipated hearing on the motion for partial summary judgment to invalidate the law. (4ER 214-262, 4ER 070-087). The injunction agreement was based upon an uncontested Motion for Temporary Restraining and Preliminary Injunction ("Motion for Preliminary Injunction") that Monsanto and Dow had filed

simultaneously with the Complaint. (4ER 090-094). No hearing was ever conducted on whether Monsanto and Dow satisfied the test for an injunction.

Following this agreement, SHAKA was permitted to intervene in the case. (3ER 205-222).

In March 2015, the day before the scheduled hearing date on Monsanto and Dow's Motion for Partial Summary Judgment, the District Court vacated the hearing and requested that the parties appear the following day to discuss whether the parties were agreeable to continuing the stipulated injunction in light of two proposed legislative bills concerning counties' rights to regulate agriculture. (2ER 042-44). At the hearing, SHAKA objected to any continuance of the injunction. (ER 031-035). The District Court instructed SHAKA to submit a 2,500-word brief within three days of the hearing, and limited the scope of the brief solely to the balance of hardships inquiry. (2ER 040, ER 033-034). SHAKA timely filed its brief and requested an expedited evidentiary hearing so that the District Court could hear the evidence before deciding whether the injunction should be continued. (2ER 011-012). On March 19, 2015, the District Court denied SHAKA's request for an evidentiary hearing and continued the injunction until the District Court rules on the merits of the case. (ER 004-019).

The District Court erred in denying SHAKA an evidentiary hearing and a fair opportunity to oppose the continuance on the injunction. SHAKA was

only allowed to file a 2,500-word brief that was due within three days, and as a result, SHAKA was unable to fully present its argument to the District Court as to why the injunction should not be continued. Had the District Court permitted an expedited hearing, SHAKA could have presented its case to the District Court in a timely and efficient manner.

Further, the District Court erred in its application of the balance of the hardships, as the environmental and health risks set forth by SHAKA significantly outweigh the economic losses that would allegedly arise out of the temporary delay in Monsanto and Dow's operations. (4ER 143-146). Moreover, the injunction is not in the public interest, as it was the public—Maui voters—who decided that GMO operations should be abated to stop the irreparable harm to the community.

Based on the reasons set forth herein, SHAKA respectfully requests that this Court reverse the District Court's Order Extending Injunction, with instructions for the District Court to conduct an expedited hearing on the balance of hardships.

IV. STATEMENT OF RELEVANT FACTS

Maui County is considered to be "ground zero" for the testing and development of genetically modified crops. (2ER 150-152). The GMO industry, namely, Monsanto and Dow, use Maui County as their testing field to develop new crops that they can market and profit on throughout the country and internationally.

(4ER 155-189). These companies use the land in Maui County in a more destructive way than commercial agricultural activities. (2ER 150-157). 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. (2ER 150).

As a result, these practices have caused serious environmental harms, including chemical and environmental pollution, pesticide drift, transgenic contamination, and the creation of "superweeds" that are resistant to high levels of pesticides. (3ER 017). The activities not only threaten the environment, but also natural and organic farmers who run the risk of having their crops contaminated with genetically altered traits. (2ER 022-026). In addition, Native Hawaiian culture is unique in that Native Hawaiians have a special bond with the natural environment. (2ER 252-256).[4] Thus, the threat of transgenic contamination coupled with the risk of harming indigenous plants and animals seriously

[4] In 1993, Congress recognized the significance of this special relationship in Public Law 103-150, a Joint Resolution of Congress:

> [T]he health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land; . . . the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people; . . . the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions[.]

S.J. Res. 19, 103d Cong. (1993).

compromises Native Hawaiian values and practices that can never be replaced. (2ER 252-256).

These activities have further created the potential for serious health problems for the citizens of Maui County. (2ER 156-158). The health problems and risks linked to GMO activities includes severe respiratory problems, digestive problems, neurological problems, cancer, lymphocytic leukemia, brain tumors, developmental disorders, physical birth defects, brain tumors in children, and fetal death, among other documented adverse side-effects. (2ER 156-158).

Since SHAKA filed its brief with the District Court, the World Health Organization has confirmed the serious health risks related to GMO operations. On March 20, 2015, the World Health Organization published a report, authored by 17 experts from 11 countries, which concludes based on years of research that glyphosate, the active ingredient in Roundup, is a probable carcinogen.[5] Following the publication of this report, the American Cancer Society also listed glyphosate as a probable carcinogen.[6] Upon information and belief, glyphosate is just one of many chemicals that are being sprayed in Maui County indiscriminately for use in GMO operations. (3ER 016-019).

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[5] See K. Guyton, et al., Carcinogenicity of tetrachlorvinphos, parathion, malathion, diazinon, and glyphosate, Lancelot Oncol 2015 (March 20, 2014), http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(15)70134-8/abstract.

[6] See American Cancer Society, Known and Probably Human Carcinogens, (last revised March 26, 2015), http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens.

Many of these adverse side effects have been noted and observed in Maui County, where these operations are located in close proximity to neighborhoods, schools, businesses, and parks. (2ER 022-039, 2ER 241-251). 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. (2ER 242-243). Residents in this small community, including children, report negative health effects from living in such close proximity to the testing fields. (2ER 241-251). One resident stated that she could taste the chemicals in her mouth as frequently as once a week. (2ER 250).

Despite all these harms, no testing has ever been conducted in Maui County to demonstrate that the GMO practices are not harmful, nor are there any permitting requirements addressing these harms. (2ER 158-159). The federal and state agencies that Monsanto and Dow claim are overseeing these activities admittedly do not protect against any of these harms, nor do they have any rules setting standards for safety. (2ER 021-027). According to the Hawaii Department of Agriculture ("HDOA"), the agency which Monsanto and Dow have pointed to as the agency responsible for regulating the safety of these activities:

> We looked into stream sediments specifically for glyphosate, for Roundup, and we found Roundup in all of the samples that we took. All in all, we found 20 herbicides, 11 insecticides, 6 fungicides, 7 locations with glyphosate but no EPA benchmarks, there are no EPA benchmarks for sediment, for glyphosate. ***So we found stuff but, frankly, we don't know what it means and no one in, we don't know***

> ***how to compare that to any kind of health standards. So there's additional work that needs to be done there.***

(2ER 268) (emphasis added).

With this backdrop, Maui voters went to the polls and approved the Ordinance into law. (4ER 016-017). The summary statement included as part of the Ordinance explains why Maui citizens voted in favor of the law's adoption:

> The Hawaii Constitution states that the Public Trust Resources (including but not limited to the land, water, and air) shall be conserved and protected for current and future generations.
>
> The Genetically Engineered (GE) Operations and Practices occurring in Maui County (also known as GMO) are different than GE food production farming and therefore pose different circumstances, risks, and concerns. In Maui County, GE Operations and Practices include the cultivation of GE seed crops, experimental GE test crops, and extensive pesticide use including the testing of experimental Pesticides and their combinations in what is effectively an outdoor laboratory.
>
> The citizens of Maui County have serious concerns as to whether GE Operations and Practices and associated use and testing of Pesticides, occurring in Maui County are causing irreparable harm to the people, Environment, and Public Trust Resources.
>
> Therefore, the citizens of Maui County call for a suspension of all GE Operations and Practices within the County through a Temporary Moratorium Initiative until an Environmental Public Health Impact Statement analysis of the impacts stemming from GE Operations and Practices and their associated Pesticide use is provided and reviewed by County Council.

(4ER 263).

Monsanto and Dow spent roughly $8 million in an advertising campaign to prevent this law's adoption.[7] In addition to the influence of Monsanto and Dow, Maui County officials publicly opposed the law's adoption. (4ER 016-017). Notwithstanding all the money that was spent in an attempt to convince voters that the Ordinance should not be adopted, Maui citizens approved the Ordinance into law on November 4, 2014. (4ER 017).

V. STATEMENT OF RELEVANT PROCEDURAL HISTORY

Immediately following the law's adoption, on November 13, 2014, Monsanto and Dow commenced this action with the District Court in Civil No. 14-00511 SOM-BMK, seeking to invalidate the Ordinance.[8] (4ER 214-262). On the same day, Monsanto and Dow also filed a Motion for Preliminary Injunction, seeking to enjoin the County from enacting the Ordinance and arguing that Monsanto and Dow would suffer irreparable harm if the Ordinance were certified and implemented. (4ER 090-151). Monsanto and Dow included a 57-page brief, as well as numerous declarations and exhibits to support their Motion for Preliminary Injunction. (4ER 095-213).

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[7] See K. Kerr, Pro-GMO companies spend $8 million to fight Maui initiative, Hawaii News Now, October 28, 2014, http://www.hawaiinewsnow.com/story/27106705/pro-gmo-companies-spend-8-million-to-fight-maui-initiative.

[8] 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). SHAKA initiated this action in state court to ensure that the Ordinance would be properly and timely administered, and that the Ordinance would be declared valid and legal, and not otherwise preempted by state law. (4ER 055).

Four days later, on November 17, 2014, Monsanto, Dow, and the County stipulated, and the District Court ordered, that the County be enjoined from certifying or enacting the Ordinance until March 31, 2015. (4ER 070-075). The stipulated injunction was entered into without the District Court having heard any evidence of alleged harm, without any opposition by the County, and before the County disclosed that it had no plans to oppose Monsanto and Dow's efforts to invalidate the Ordinance.

On November 21, 2014, only one week after the Complaint was filed, SHAKA moved to intervene as defendants in this action. (4ER 001-005). That same day, Monsanto, Dow, and the County agreed to an expedited briefing schedule, which sought to have the merits of the case decided within four months. (4ER 069). On December 15, 2014, the District Court granted SHAKA's Motion to Intervene (4ER 001-005), finding that SHAKA had significantly protectable interests that would be impaired should the Ordinance be invalidated. (3ER 205-222).

On December 18, 2014, Monsanto and Dow filed their Motion for Summary Judgment on Counts 1, 2, and 4 ("Motion for Partial Summary Judgment"). (3ER 109-112). On January 30, 2015, SHAKA filed its Memorandum in Opposition to the Motion for Partial Summary Judgment. (3ER 001-068). As part of its opposition, SHAKA requested that the District Court defer

ruling on the merits of the case to allow for discovery pursuant to FRCP Rule 56(d). (3ER 031-033). The County took no position with respect to the Motion for Partial Summary Judgment, despite having agreed to the expedited briefing schedule and the stipulated injunction. (3ER 069-073).

The hearing on the Motion for Partial Summary Judgment was originally scheduled for March 10, 2015. (3ER 201-202). The day before the hearing, however, the District Court issued a Minute Order, in which the District Court continued the hearing on the merits of the motions, stating: "The hearing set for March 10 remains on calendar but, instead of having a hearing on the merits of the motions, tomorrow's 9:00 a.m. hearing will be limited to how the court should proceed in light of HB 849 and SB 986." (2ER 042-044). These referenced bills addressed the ability of counties to regulate agriculture. No party had raised these bills as being an issue in their briefs. (ER 007)[9]

The Minute Order further noted: "The court invites the parties to stipulate to an extension of the present delay of the effective date of the ordinance at issue in this case, or, in the absence of a stipulation, invites any party to seek a temporary restraining order, either by resurrecting the previously filed motion or by orally seeking such relief at the hearing tomorrow until it is clear that the

[9] Before the hearing took place, both of the bills that the District Court used to justify a continuance failed to meet "the Legislature's decking or cross-over deadline" and could not be enacted in the 2015 session. (ER 007-008). The concern raised by the District Court was that "the contents of the bills could conceivably find its way into other bills." (ER 008).

Legislature will take no final action in 2015 with respect to HB 849 and/or SB 986." (2ER 042-044).

During the March 10, 2015 hearing, SHAKA objected to continuing the stipulated injunction beyond the end of March, given the harms that are associated with the activities, as well as the demands of Maui voters. (ER 031-035). As a result, the District Court directed SHAKA to file a limited brief addressing how the balance of hardships in continuing the stipulated injunction would tip in SHAKA's favor. (2ER 040). The District Court limited SHAKA's brief to 2,500 words and gave SHAKA only three days to prepare the brief. (2ER 040). On March 13, 2015, SHAKA filed its Brief Addressing Balance of Hardships Inquiry and requested that the District Court conduct an expedited evidentiary hearing before ruling on whether to continue the stipulated injunction. (2ER 001-013).

On March 19, 2015, without conducting a hearing, the District Court entered its Order Extending Injunction, continuing the stipulated injunction until the District Court rules on the merits of the case. (ER 004-019). In continuing the injunction, the District Court denied SHAKA's request for an evidentiary hearing on the alleged harms asserted by Monsanto and Dow. (ER 010-011). Shortly thereafter, on April 2, 2015, SHAKA timely filed this Appeal to have the District Court's Order Extending Injunction reversed and the case remanded with

instructions for the District Court to conduct an expedited evidentiary hearing on the alleged harms.

VI. SUMMARY OF ARGUMENT

The District Court denied SHAKA's request for an evidentiary hearing and continued the stipulated injunction, enjoining the County from enacting, implementing, or enforcing the Ordinance. (ER 004-019). While Monsanto and Dow previously filed a 57-page brief and over 50 pages of additional declarations in support of their request for an injunction (4ER 090-213), the District Court limited SHAKA's opposition to a 2,500-word brief, gave SHAKA only three days to prepare the brief, and allowed SHAKA to address only one factor of the applicable four-part "serious questions" preliminary injunction test. (2ER 040).

The District Court should not have permitted the stipulated injunction to continue until it conducted a limited hearing on key evidence regarding Monsanto and Dow's alleged irreparable harms. SHAKA had not been a party to the action at the time Monsanto, Dow, and the County had entered into the stipulated injunction. (4ER 070-087). Thus, at the very least, the District Court should have granted SHAKA's request for a hearing so the parties could present their alleged harms to the District Court, SHAKA would have been given a full and

fair opportunity to oppose the injunction, and the District Court could then have made an informed determination as to the balance of irreparable harms.

Moreover, the District Court's application of the "serious questions" preliminary injunction test was unsupported by the facts in the record. (ER 011-018). Although there are serious questions going to the merits of this dispute, the District Court's application of the other factors were clearly erroneous and thus an abuse of its discretion. First, the balance of hardships does not decidedly favor continuing the stipulated injunction. At stake for SHAKA and other Maui residents is the ongoing damage to the environment, serious health problems associated with continuing GMO operations, threats to Native Hawaiian culture and practices, and the integrity of the County's election process. (2ER 006). These interests are significantly greater than the corporate profits that Monsanto and Dow rely on to justify the continuance of the stipulated injunction. (4ER 143-148). The harms set forth by SHAKA are irreparable and ongoing, and the stipulated injunction allowing these harms to continue is not in the public's interest.

VII. STANDARD OF REVIEW

"A preliminary injunction is an 'extraordinary and drastic remedy' [that] is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 689-90 (2008) (citations omitted). To prevail on a motion for a preliminary injunction, the party

seeking a preliminary injunction must "establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc. 555 U.S. 7, 20 (2008).

Alternatively, under the "serious questions" test, a preliminary injunction may also issue if there are "serious questions going to the merits" and a balance of hardships ***tips sharply*** in favor of the party requesting injunctive relief, so long as the moving party "also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011); see also Farris v. Seabrook, 677 F.3d 858, 864 (9th Cir. 2012).

This Court applies an abuse of discretion standard in its review of a district court's preliminary injunction order. Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012); see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 793 (9th Cir. 2005). "A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion." Associated Press v. Otter, 682 F.3d 821, 824 (9th Cir. 2012) (quoting Pimentel, 670 F.3d at 1105). This Court reviews conclusions of law *de novo* and findings of fact for clear error. Pimentel, 670 F.3d at 1105 (citations omitted).

In deciding whether the district court has abused its discretion, this Court applies a two-part test, first determining *de novo* whether the district court "identified the correct legal rule to apply to the relief requested[.]" Pimentel, 670 F.3d at 1105 (citations omitted). Second, the Court determines whether the district court's application of the legal standard was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Pimentel, 670 F.3d at 1105 (internal quotation marks and citations omitted).

VIII. ARGUMENT

A. THE DISTRICT COURT VIOLATED FRCP RULE 65 WHEN IT CONTINUED THE PRELIMINARY INJUNCTION WITHOUT FIRST CONDUCTING A HEARING

FRCP Rule 65 provides that no preliminary injunction shall be issued without notice to the adverse party. Fed R. Civ. P. 65. The notice requirement under FRCP Rule 65(a) "implies a hearing in which a defendant is given a fair opportunity to oppose the application and to prepare for such opposition." Eisen v. Golden (In re Eisen), 2006 Bankr. LEXIS 4790, *16-18 (B.A.P. 9th Cir. Dec. 28, 2006) (quoting Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 434 n.7 (1974)). A hearing should be permitted where the responding party has been "unfairly deprived of the chance to show opposition to the issuance of a preliminary injunction." Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986).

Moreover, while the Ninth Circuit has not adopted a presumption that an evidentiary hearing is required, where the facts are sharply disputed and an evidentiary hearing can be conducted in an efficient manner, a hearing may be warranted. Nelson, 799 F.2d at 555. In Aguirre v. Chula Vista Sanitary Serv. & Sani-Tainer, Inc., this Court reasoned that:

> There is no apparent reason to deny [a] petitioner an opportunity to present his witnesses where, as in this case, there is a sharp factual conflict, resolution of that conflict will determine the outcome, the witnesses are immediately available, the facts are simple, little time would be required for an evidentiary hearing, and the court has concluded that relief must be denied if the motion is decided on the affidavits alone.

542 F.2d 779, 781 (9th Cir. 1976) (citations omitted); see also Nelson, 799 F.2d at 555.

The District Court's actions in extending the stipulated injunction denied SHAKA a fair opportunity to present its case and diverged from the standard procedures that courts typically follow in granting or extending injunctions. The original injunction that was entered into was done so by agreement, without a hearing, contrary to the will of the people as expressed in the general election, before SHAKA was made a party to this action, and without any findings as to any of the elements warranting injunctive relief. (4ER 070-087). When the District Court continued the injunction, SHAKA did not receive a fair opportunity to oppose the stipulated injunction. SHAKA was denied its request for

an expedited hearing that would have balanced the parties' presentation of the evidence. While the District Court already had for its review and consideration over 100 pages in arguments, declarations, and exhibits in support of Monsanto and Dow's Motion for Preliminary Injunction (4ER 090-213), SHAKA was limited to a 2,500 word brief on one factor in the four-part "serious questions" preliminary injunction test. (ER 033-034, 2ER 130).

Moreover, the District Court gave SHAKA only three days to prepare its brief, effectively precluding SHAKA from including all the information it would need to fully oppose the stipulated injunction, and hindering SHAKA's ability to obtain additional declarations that would have fully allowed for the presentation of the evidence. SHAKA did not have a fair opportunity to counter the declarations and evidence submitted by Monsanto and Dow in their Motion for Preliminary Injunction, because SHAKA only had three days to file its Brief. Thus, in order to protect its interests and have an equal opportunity to present its objections to the stipulated injunction, SHAKA requested a limited evidentiary hearing in its brief.

Furthermore, the District Court did not hear oral argument from the parties before it continued the injunction. Although the District Court states in its Order Extending Injunction that SHAKA "argued against an extension at [the March 10, 2015] hearing[,]" this was not a hearing on the merits. (ER 010). The

District Court specifically limited the March 10, 2015 hearing to a discussion regarding the impact of certain legislative bills, while continuing the merits of the case to another date. (2ER 042-044). All that was discussed at this hearing were the issues regarding the pending legislative bills, scheduling of hearings on various motions, and whether the parties would stipulate to continuing the injunction. (ER 020-044). SHAKA's counsel briefly stated his objection to any continuance of the stipulated injunction on the record, but this short statement cannot be construed as sufficient "oral argument" against continuing the stipulated injunction. (ER 031-035).

The District Court further erred in making factual findings on the sufficiency of the evidence without giving SHAKA an adequate opportunity to support and explain the basis for the irreparable harm. In its Order Extending Injunction, the District Court notes that SHAKA's brief "[does] not clearly describe the alleged harms at issue." (ER 016). Further, the District Court states that SHAKA "[does] not describe precisely what damage will result" from the irreparable harms described in SHAKA's brief. (ER 016). The District Court's own findings support SHAKA's contention that it was not given an opportunity to fully oppose the continuance of the stipulated injunction. As a result of the limitations that the District Court imposed on SHAKA in the preparation of its

brief—in word-count, filing deadline, and limited scope of topic—SHAKA was unable to fully elaborate on the basis for the irreparable harms.

Finally, there were no obstacles that would have made an evidentiary hearing impractical in this case. There was no indication that any of Monsanto and Dow's witnesses would not be available to testify. SHAKA would have made its witnesses available to testify. The issues presented for hearing could have been limited to the harms that were being claimed. This testimony could have been efficiently presented to the District Court, but no such opportunity was given.

B. THE DISTRICT COURT'S APPLICATION OF THE "SERIOUS QUESTIONS" TEST WAS UNSUPPORTED BY THE RECORD

The District Court's application of the "serious questions" test was clearly erroneous and thus an abuse of its discretion. Based on the facts in the record, the balance of hardships does not tip sharply in favor of continuing the stipulated injunction. The harms set forth by SHAKA below are, for all intents and purposes, irreparable and imminent, and the stipulated injunction allowing these harms to continue is not in the public's interest.

1. There Are Serious Questions Going To The Merits

SHAKA does not dispute that there are serious questions going to the merits of the case. In Monsanto and Dow's Motion for Partial Summary Judgment (3ER 109-200) and SHAKA's Memorandum in Opposition to the same (3ER 001-068), the parties have extensively briefed the issues on the merits.

2. The Balance Of Irreparable Harms Does Not Decidedly Favor Monsanto And Dow Or Continuing The Stipulated Injunction

The District Court erred in finding that the harms outlined by SHAKA did not tip the balance of hardships in SHAKA's favor based on the record. Monsanto and Dow, as the moving parties in support of the stipulated injunction, were required to establish that the balance of hardship ***tipped decidedly*** in favor of continuing the injunction. See Alliance for the Wild Rockies, 632 F.3d at 1131-35. Monsanto and Dow failed to meet their burden.

The U.S. Supreme Court and this Court have repeatedly recognized that potential environmental harms significantly outweigh potential economic losses caused by a temporary delay.[10] As the Supreme Court has stated:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

[10] League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Connaughton, 752 F.3d 755, 767 (9th Cir. 2014) (finding that plaintiffs were likely to face irreparable harm if a logging project were permitted to continue its operations); Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000) (holding that the alleged environmental injury was sufficiently likely that the balance of harms weighed in favor of protection of the environment); Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 (9th Cir. 1988) (noting that environmental injury was, by its nature, often irreparable); Am. Motorcyclist Ass'n v. Watt, 714 F.2d 962, 967 (9th Cir. 1983) (recognizing strong environmental concerns and public interest in the implementation of a conservation plan outweighed any possible injury to plaintiffs association and county); N. Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466 (9th Cir. 1986) (affirming a preliminary injunction granted to environmental groups that barred a miners' association from mining until environmental analyses were completed).

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (cited by Sierra Club v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007)). In recognizing the permanency of environmental harms, the District Court has also treated the associated harms to Native Hawaiian cultural resources and Native Hawaiian rights as a significant factor in evaluating the harm for an injunction. Malama Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1221 (D. Haw. 2001).

As set forth in both SHAKA's brief and in the Ordinance, GMO operations that are conducted in Maui County involve a different type of farming and agricultural use which is more destructive and harmful and results in significant, irreparable harm to the environment and to the public health and safety. (2ER 006-010, 4ER 263-267). These harms include environmental harms such as pesticide and chemical pollution, pesticide drift, transgenic contamination, and the creation of "superweeds." (4ER 263-267, 2ER 155-156, 3ER 017). With respect to the health risks, there is a wealth of research linking GMO operations to serious health problems such as severe respiratory problems, neurological problems, cancer, brain tumors, birth defects, and fetal death. (2ER 156-158). The GMO operations are performed in close proximity to schools, neighborhoods, businesses, and parks, making the irreparable harm imminent for Maui residents. (2ER 022-039, 2ER 241-251).

3. Monsanto And Dow Have Failed To Demonstrate A Likelihood Of Irreparable Injury

It is well established in the Ninth Circuit that money damages or pecuniary loss is not an irreparable harm. See, e.g., Regents of Univ. of California v. Am. Broad. Cos., Inc., 747 F.2d 511, 519 (9th Cir. 1984); Painsolvers, Inc. v. State Farm Mut. Auto. Ins. Co., 685 F. Supp. 2d 1123, 1138 (D. Haw. 2010); N. Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466 (9th Cir. 1986) ("More than pecuniary harm must be demonstrated.").

Monsanto and Dow's argument that there will be a mass loss of jobs if their operations are temporarily halted is based on a misreading of the Ordinance and an attempt to place fear in the community. (4ER 143-148). The Ordinance ***does not*** ban these operations. (4ER 263-274). There is a two phase process that needs to be completed to demonstrate that these operations are safe before they are allowed to continue. (4ER 270-271). In Phase I, a Joint Fact Finding Group ("JFFG") is chosen and convened to conduct the analysis and determine the final scope of the EPHIS. (4ER 270). The Ordinance requires this to be completed in less than 90 days. (4ER 270). Under Phase II, the JFFG is tasked with completing the EPHIS, which must be completed in less than 18 months. There is then a 90-day public comment period. (4ER 271).

At most, this process will take approximately two years to complete. This process, however, could be completed in less than a year if Monsanto and

Dow were to cooperate. For example, the outside time limit to prepare the EPHIS is 18 months. The time to complete the EPHIS can be shortened significantly with cooperation and transparency by Monsanto and Dow. To put this into perspective, if Monsanto and Dow simply decided to follow the law and allowed the Ordinance to be certified in November 2014, the task force could have been preparing the EPHIS now, and the process could have been completed in 2015. This timeframe is significantly faster than the period over which this litigation is expected to last with anticipated appeals.

The moratorium also does not apply to any GMOs that are in mid-growth cycle. (4ER 269). Further, Monsanto and Dow can plant natural seeds during the moratorium period, a practice that they follow in countries that do not allow GMO operations. (2ER 271).

4. The Stipulated Injunction Is Not In The Public Interest

Finally, the continuance of the stipulated injunction is not in the public interest. Maui voters—the public—adopted this Ordinance because the public recognized that the harms of these operations significantly outweigh the money that the GMO industry spends to continue these practices. Ingrained throughout the Hawaii Constitution are provisions that recognize the importance of preserving Hawaii's environment and natural resources, which are furthered by the enforcement of this Ordinance. The State is expressly obligated to provide for the

"protection and promotion of the public health." Haw. Const. art. IX, § 1. The State also has the express power to "promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources." Haw. Const. art. IX, § 8.

The public also has a significant interest, in addition to the constitutional mandates, in the protection of cultural resources, Native Hawaiian rights, and the environment—which go to the very reasons why the public adopted the Ordinance and the reasons against allowing the injunction to continue. The public's votes—and the primary mandates of the Hawaii State Constitution—should not and cannot be ignored.

This injunction effectively denies Maui County voters their right to pass laws to protect the environment and human health. If this Court were to declare that this injunction can be continued, this Court is in turn rendering these votes and core provisions of the Hawaii State Constitution meaningless. Overriding the results of a properly conducted election and the decision of the voters is in direct conflict with the public interest.

IX. CONCLUSION

Based on the foregoing, SHAKA respectfully requests that this Court reverse the District Court's Order Extending Injunction and remand the case back

to the District Court with instructions for the District Court to conduct an expedited hearing on the balance of hardships.

DATED: Honolulu, Hawaii, April 30, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32-1 of the Circuit Rules for the Ninth Circuit and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, this brief is proportionately spaced, has a typeface of 14 points, and contains 6,449 words.

DATED: Honolulu, Hawaii, April 30, 2015.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, SHAKA is aware of one related case pending in this Court. The case name is Robert Ito Farm, Inc., et al. v. County of Maui, et al., and the Ninth Circuit docket number is 15-15246.

This related appeal was filed by The Moms on a Mission (MOM) Hui, Molokaʻi Mahiʻai, Gerry Ross, and Center for Food Safety (collectively "Center for Food Safety") on February 9, 2015 (2ER 136-138) and involves an appeal from Magistrate Judge Barry M. Kurren's order denying Center for Food Safety's Motion for Leave to Intervene on Behalf of Defendant.

DATED: Honolulu, Hawaii, April 30, 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 April 30, 2015. The following parties who are registered CM/ECF users will be served by the appellate CM/ECF system.

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