Of Counsel:

BAYS LUNG ROSE & HOLMA

KARIN L. HOLMA 5207-0
kholma@legalhawaii.com
Attorney at Law
A Law Corporation
MICHAEL C. CARROLL 7583-0
mcarroll@legalhawaii.com
Attorney at Law
A Law Corporation
SHARON A. LIM 10142-0
slim@legalhawaii.com
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184

Attorneys for Plaintiffs
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

ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT, Plaintiffs, vs. COUNTY OF MAUI; MONSANTO COMPANY; DOW AGROSCIENCES	) CIVIL NO. 14-00582 SOM-BMK)) PLAINTIFFS ALIKA ATAY, LORRIN) PANG, MARK SHEEHAN, BONNIE) MARSH, LEI'OHU RYDER, AND) SHAKA MOVEMENT'S) OBJECTIONS TO THE FINDINGS) AND RECOMMENDATION TO)) *(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.	) DENY PLAINTIFFS' MOTION TO) REMAND [DKT #36]; CERTIFICATE) OF SERVICE

PLAINTIFFS ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, AND SHAKA MOVEMENT'S OBJECTIONS TO THE FINDINGS AND RECOMMENDATION TO DENY PLAINTIFFS' MOTION TO REMAND [DKT #36]

Pursuant to 28 U.S.C.S. § 636(b)(1)(B), Rule 72(b) of the Federal Rules of Civil Procedure, and Local Rule 74.2 of the Rules of the United States District Court for the District of Hawaii, Plaintiffs Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement (collectively "SHAKA") respectfully submit their objections to the Findings and Recommendation to Deny Plaintiffs' Motion to Remand [DKT #36] ("Recommendation").

I. INTRODUCTION

One of the fundamental and most contentious issues in this case is determining which court should be the first to decide if a local ordinance placing a moratorium on GMO operations in Maui County is enforceable. There are no state cases on whether state law precludes the County of Maui from regulating GMOs. There are no cases interpreting the scope of Hawaii's constitutional protections for the environment and delegation of powers to the counties. These issues are of a fundamental concern to Maui residents, and that is why SHAKA has tried so vigorously to have these issues decided on the local level first.

SHAKA respectfully objects to Magistrate Judge Barry M. Kurren's ("Magistrate") Recommendation, as it does not apply the correct standard for determining a motion to remand. The test suggested in the Recommendation would invalidate the standard for federal court jurisdiction and the exception for "complete preemption." Moreover, the Recommendation misapplies several factors concerning the Court's discretion to remand the case to state court. For the reasons set forth herein, SHAKA respectfully requests that the Court not accept the Recommendation and enter an order remanding this matter back to state court.

Additionally, SHAKA respectfully submits that the issues presented herein overlap with and relate to SHAKA's pending motion requesting that the Court stay the related federal court case. The Magistrate has not been able to hear

the arguments or consider the briefing on this related motion. The additional briefing and arguments on that related motion will further enlighten the Court on the parties' positions and the issues in the case. Accordingly, SHAKA respectfully suggests that the Court defer ruling on the Recommendation until after it has had an opportunity to review and consider the pending motion seeking a stay of the related case.

II. FACTUAL BACKGROUND

On November 4, 2014, Maui voters adopted a ballot initiative to place a moratorium on further GMO operations until a study is completed demonstrating that these activities are not harmful ("Ordinance"). See Exhibit A.[1] Maui voters approved this initiative despite County officials' public opposition, and the agrichemical industry spending roughly $8 million in an advertising campaign against the law's adoption.[2]

Following the adoption of the law, on November 12, 2014, SHAKA filed a Complaint in the Circuit Court of the Second Circuit of the State of Hawaii ("State Court action") against the County of Maui ("County"), Monsanto Company, and Dow Agrosciences LLC. See Exhibit B. SHAKA initiated the State Court action to ensure that the Ordinance would be properly and timely

[1] Exhibit references herein refer to those exhibits attached to SHAKA's Motion to Remand [DKT #15].
[2] See Hawaii News Now, Pro-GMO companies spend $8 million to fight Maui Initiative, available at: http://www.hawaiinewsnow.com/story/27106705/pro-gmo-companies-spend-8-million-to-fight-maui-initiative (last visited March 5, 2015).

implemented, that SHAKA would be permitted to have a role in the process given their 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, Monsanto Company, Agrigenetics, Inc., and certain aligned parties (collectively, the "Industry") commenced a lawsuit in federal court in Civil No. 14-00511 SOM-BMK ("Federal Court action"). [Civ. 14-00511, DKT #1.] The Federal Court action seeks to invalidate the Ordinance, notwithstanding that this issue is already pending in the State Court action. See id.

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.] The next day, the Court adopted an order recognizing this agreement between the Industry and the County. [Civ. 14-00511, DKT #23.]

Four days later, on November 17, 2014, the Industry and the County submitted their written agreement to enjoin the enforcement of the Ordinance and to expedite disposition of the case by summary judgment by the end of March 2015. [Civ. 14-00511, DKT #26.] This agreement was entered into without the Court hearing any evidence of alleged harm to the Industry, and before the County disclosed that it was not opposing summary judgment. As a result, the

Ordinance has not been certified, and the necessary protections to Maui's environment, public health, and natural resources have been compromised.

On November 21, 2014, SHAKA filed a Motion to Intervene as defendants in the Federal Court action; on December 15, 2014, the Court granted SHAKA intervention, finding that SHAKA had significantly protectable interests that would be impaired should the Ordinance be invalidated. [Civ. 14-00511, DKT #63.]

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 C. 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.

On December 10, 2014, SHAKA also filed a Motion for Preliminary Injunction in the State Court action, requesting that the state court compel the County to certify the election results and to implement the Ordinance. See Carroll Dec., ¶ 5 attached to the Motion to Remand. The Court set an evidentiary hearing on the Motion for Preliminary Injunction for January 12, 2015. See id. at ¶ 6.

On December 30, 2014, the Industry, with the consent of the County, filed a Notice of Removal, removing the State Court action to this Court. [DKT #1.]

On January 15, 2015, SHAKA filed its Motion to Remand. [DKT #15.] On February 27, 2015, the Honorable Barry M. Kurren issued his Findings and Recommendation to Deny Plaintiffs' Motion to Remand ("Recommendation"). [DKT #36.]

II. STANDARD OF REVIEW

In reviewing a magistrate judge's findings or recommendation, the Court is to conduct a *de novo* review of those portions of the findings or recommendation to which objections are made, and the Court "may accept, reject, or modify, in whole or in part, the findings or recommendation made by the Magistrate." Kaluna v. Iranon, 952 F. Supp. 1426, 1429 (D. Haw. 1996). *De novo* review means that the court is to consider the matter anew, as though it had not been heard before and as if no prior decision had been made. Id. While a further hearing is not necessary, the Court is obligated to arrive at its own independent conclusion. Id.

III. DISCUSSION

A. The Court Should Not Adopt The Rule In *Janakes* To Cases Removed From State Court

There is a "strong presumption" against removal jurisdiction. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). The removal statute is strictly construed against federal court jurisdiction and requires that the removing party (the Industry) bear the burden of establishing that removal is proper. Id.; see also Provincial Gov't of Marinduque v. Place Dome, Inc., 582 F.3d 1083, 1087 (9th Cir. 2009). Any doubts should be decided in favor of remand, as it is well established that the plaintiff is "master of his complaint" and can avoid federal jurisdiction by solely pleading state law claims. Valles v. Ivy Hill Corp., 410 F.3d 1071, 1075 (9th Cir. 2005).

The test that has been followed in determining whether a federal question exists in a lawsuit removed from state court is the "well pleaded complaint rule." Under this rule, "federal jurisdiction exists *only* when a federal question is presented *on the face of the plaintiff's properly pleaded complaint*." Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 (9th Cir. 2000) (emphasis added). A case may not be removed to federal court on the basis of a federal defense, including a claim of preemption, even if the defense is anticipated in the complaint. Franchise Tax Bd. v. Constr. Laborers Vacation Trust., 463 U.S. 1, 14 (1983).

The only exception to the well-pleaded complaint rule that could possibly apply in this case is the "complete preemption" doctrine. The Ninth Circuit has repeatedly applied the well-pleaded complaint rule and the complete preemption doctrine, a corollary to the well-pleaded complaint rule,[3] in determining whether a case has been properly removed to federal court. Under the complete preemption doctrine, the court may look beyond the four corners of the complaint to anticipated federal defenses if the federal law is so prevalent that the claim essentially asserts a federal claim. See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-65 (1987). In such a case, a claim based on that preempted law is considered, from its inception, a federal claim, and thus arises under federal law. Franchise Tax Bd., 463 U.S. at 24. The U.S. Supreme Court, however, has identified only three federal statutes to support a finding of complete preemption, none of which apply in this case.

In this case, the Recommendation initially concluded: (1) that "there is no question that there are no federal claims present on the face of Plaintiff's Complaint"; and (2) that the "complete preemption" doctrine is inapplicable and

[3] See, e.g. Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938 (9th Cir. 2014) (holding that the question of whether removal was proper was moot, because the plaintiff pled federal claims as a basis for jurisdiction); Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941 (9th Cir. 2009) (finding that there was no federal question removal jurisdiction, and that defendants could assert their defense of conflict preemption in state court); Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033 (9th Cir. 2003) (remanding case to state court because the federal district court lacked jurisdiction over the matter); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102 (9th Cir. 2000) (finding that the district court correctly concluded that the case should be remanded to state court for lack of subject matter jurisdiction); Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998) (holding that the case was improperly removed from state court, even where defendants had a defense of conflict preemption).

does not create federal question jurisdiction in the case. Recommendation at p. 8. Respectfully, the Court's analysis should have stopped there.

The Recommendation, however, goes on to conclude that the Court may go beyond the "well pleaded complaint rule" and the "complete preemption doctrine" and find federal court jurisdiction if there is a "coercive lawsuit" asserting federal law that the defendants could bring in response to the state court complaint. See Recommendation at 9-12 (citing Janakes v. United States Postal Serv., 768 F.2d 1091, 1094 (9th Cir. 1985)). SHAKA respectfully submits that this conclusion of law is in error.

First, the Janakes rule does not apply where a plaintiff initiates a lawsuit in state court, the defendant removes the case to federal court, and the court is then asked to determine whether remand is appropriate. In Janakes, the plaintiff filed the lawsuit *in federal district court* for a declaratory judgment *seeking the interpretation of federal law*—specifically, the Federal Employees Compensation Act (FECA), 5 U.S.C.S. §§ 8101-8193. Thus, a federal question was on the face of Janakes' well-pleaded complaint. The Court held that where the plaintiff files a lawsuit in federal court for declaratory relief, and the declaratory relief defendant could have brought a "coercive action" arising under federal law based on the same underlying facts, the federal court has jurisdiction to resolve the declaratory relief claim under 28 U.S.C. § 2201. Janakes, 768 F.2d at 1093. The Janakes Court *did*

not apply the standard for remand. The Janakes Court *did not* consider the presumption against federal court jurisdiction for removal actions, nor did the Court apply the test for removal looking at the complete preemption doctrine. Finally, this case did not present a situation where the plaintiff was seeking a ruling on state law issues in state court. Instead, Janakes involved a plaintiff seeking a ruling on federal law in federal court. Id.

Second, the Janakes rule derives from *dicta* in the U.S. Supreme Court's decision in Wycoff, where the Supreme Court *declined* jurisdiction in favor of strong deference to state court proceedings. Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 239 (1952). In Wycoff, the plaintiff brought a lawsuit in federal court seeking declaratory relief that (1) the transport of motion pictures in Utah constituted interstate commerce; and (2) defendants be enjoined from interfering with interstate commerce by blocking transportation routes in the future. Id. at 239. The Wycoff Court refused to decide the case because it interfered with and frustrated the state's right to adopt regulations that would convert general policies of state regulatory statutes into concrete orders. Id. at 247. In recognizing the limits of federal court jurisdiction, the Court stated:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened *state court action*, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigations from state courts merely because one, normally a

> defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.[4]

If this Court were to apply the same rationale from Wycoff to this case, it would be serving the opposite purpose: "seizing" litigation from state court on state law issues to be decided in federal court.

Third, the Janakes rule has never been applied in the Ninth Circuit to a case that has been removed from state court. Every case that the Industry cited to support its application of the Janakes rule in this case involved cases that were initially brought in federal court with similar facts to Janakes.[5] None of these cases involved lawsuits that were initially filed in state court and subsequently removed to federal court.

Fourth, there is authority that specifically rejects the Janakes rule to state court cases that are removed to federal court. In La Chemise Lacoste v. Alligator Co., the Third Circuit held that the *dicta* in Wycoff did not apply to the removal of a state declaratory judgment proceeding. 506 F.2d 339, 344-45 (3d Cir. 1974). Instead, the court applied the well-pleaded complaint rule. Id. at 343-45.

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[4] Id. at 248 (emphasis added).

[5] Standard Ins. Co. v. Saklad, 127 F.3d 1179, 1180 (9th Cir. 1997) (Plaintiff filed suit in federal court seeking declaratory relief.); Mobil Oil Corp. v. City of Long Beach, 772 F.2d 534, 537 (9th Cir. 1985) (Plaintiffs filed suit in federal court seeking declaratory relief.); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1314 (9th Cir. 1986) (Parr-Richard filed suit in federal court seeking declaratory relief.); National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 564-65 (9th Cir. 1987) (The NBA brought suit in federal court seeking declaratory relief.); Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249, 1250 (9th Cir. 1987) (Plaintiff brought suit in federal court for declaratory relief.); Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 510 (9th Cir. 1990) (Eight insurance companies filed suit in federal court.); Corey v. U.S. Postal Serv., 485 Fed. App'x 228, 228 9th Cir. Sept. 13, 2012) (Plaintiff filed suit in federal court seeking declaratory relief.).

The Court relied on the fact that from 1894 to 1974, the U.S. Supreme Court has emphatically held that federal question jurisdiction must appear on the face of the complaint unaided by the answer, id. at 343, and that the removal procedure must be strictly construed, including the language that makes clear that the federal court is limited to looking at the "*initial pleading*" as the basis for removal. Id. at 344. See also Chronologic Simulation v. Sanguinetti, 892 F. Supp. 318, 320 (D. Mass. 1995) (distinguishing the defendant's reliance on cases applying the Wycoff dicta from cases involving removal jurisdiction, because the "federal status of the plaintiff's claim" in the cases applying Wycoff dicta was "readily ascertainable from the face of the complaint").

Fifth, adopting this test would make the complete preemption doctrine meaningless. The complete preemption doctrine allows the federal court to look beyond the four corners of the complaint if an anticipated federal defense is so prevalent that the claim essentially asserts a federal claim. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). If the Court were to follow the Janakes rule for removal jurisdiction, the complete preemption doctrine would be rendered meaningless. A defendant could simply avoid hearing a case in state court by filing a declaratory judgment action in federal court to strip the state court of jurisdiction and ignore the complete preemption doctrine. In fact, this is what the Industry did in this case.

Accordingly, SHAKA respectfully requests that the Court not accept the Recommendation denying remand.

C. The *Brillhart* And *Dizol* Factors Do Not Weigh In Favor Of Remand

Even if the Court were to find that it had subject matter jurisdiction over this case, SHAKA respectfully submits that the Court should deny jurisdiction based on the application of the *Brillhart* and *Dizol* factors. The Magistrate accurately sets forth the factors under *Brillhart* and *Dizol*. SHAKA, however, respectfully objects to the Magistrate's conclusions with respect to his application of certain factors, as set forth below.

1. Needless Determination of State Law Issues

Under this factor, when state law is unclear, absent a strong countervailing federal interest, the federal court should refrain from interjecting itself to decide unsettled state law issues. See Recommendation at p. 14 (citing Allstate Ins. Co. v. Davis, 430 F. Supp. 2d 1112, 1120 (D. Haw. 2006).

The Magistrate's conclusion that the Federal Court action implicates both issues of "state law" and "federal constitutional law" should be reconsidered in light of the Industry's recent filings in the Federal Court action. See Recommendation at p. 15. In response to SHAKA's motion to dismiss or stay the Federal Court action, on February 17, 2015, the Industry has taken the position that "preemption is not considered a constitutional issue" and "this Court would only

need to reach the Commerce Clause claim, *if at all*, after all other non-constitutional issues have been resolved." [Civ. 14-00511, DKT #110 at pp.8-10 (emphasis in original).] Thus, by the Industry's own admission, any constitutional claim on the merits is remote, at best. Accordingly, this finding should be reversed in light of the Industry's recent position.

Additionally, the Court should not weigh the fact that if the court were to retain jurisdiction over the removed case (thereby eliminating a parallel state court action), this situation supports denying remand. Recommendation at p. 15. This scenario is results-oriented. This situation is only created by the Court's ruling denying the motion to remand. This is also not the appropriate inquiry for this factor.

The relevant inquiry for this factor should be whether there is a compelling federal interest that justifies the court retaining jurisdiction to decide uncertain state law issues. In this case, the Court will need to consider foremost the Hawaii constitutional provisions protecting the natural environment, delegating the power to protect the environment to the counties, state law that delegates additional rights to the counties, and the protection of Public Trust resources. While there are federal statutes at issue that may be asserted as defenses in this action, they do not arise to the level of federal constitutional importance, as compared to the critical state constitutional issues at stake.

2. Avoid Duplicative Litigation

The avoidance of duplicative litigation does not strongly favor a denial of remand. Under this factor, "where all of the issues presented by the declaratory judgment action could be resolved by the state court, the district court should not waste judicial resources by permitting the federal action to go forward." Great-West Life Assurance Co. v. Lunardi, 1992 U.S. Dist. LEXIS 6225, *6-*7 (N.D. Cal. Apr. 29, 1992). As with the first factor noted above, SHAKA respectfully submits that eliminating the State Court action should not be a consideration in favor of denying remand. The ruling should not provide the factual basis for the Court's reasoning. The key consideration on this factor is whether all issues can be decided in state court. It is undisputed that the state court can decide all issues.

Further, the avoidance of duplicative litigation can be avoided by the Court granting SHAKA's pending motion seeking a stay of the related Federal Court action. This would (1) allow the Court to give deference to the state court, (2) allow the state court to decide issues of state law, and (3) avoid duplicative litigation. Notably, while a denial of this motion to remand would eliminate multiple forums, it would not eliminate the fact that there are two cases pending before the court seeking conflicting relief.

3. Additional *Dizol* Factors

SHAKA respectfully submits that the additional *Dizol* factors also support remand. In this case, if the Court were to retain jurisdiction, it would not "settle all aspects of the controversy." This State Court action not only seeks to have the legality and validity of the Ordinance declared, but it also seeks injunctive relief that the County certify the election results and properly implement the law. SHAKA's Complaint also specifically invokes the constitutional protections that recognize the fundamental rights of Hawaii citizens to a "clean and healthful environment,"[6] gives standing to citizens to pursue direct constitutional claims for harming Hawaii's natural environment,[7] and delegates the responsibility and duty to the counties to protect the natural environment and Public Trust resources.[8] The County's failure to certify the election results and its decision to agree with the Industry to a voluntary injunction directly infringes on SHAKA's constitutional

[6] 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.

[7] Id.

[8] 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.

rights, for which remedies are being pursued in this State Court action. These are affirmative claims, and without allowing this litigation to proceed forward in state court, SHAKA's rights to pursue these remedies will be infringed upon.

Moreover, although a declaratory action will serve the useful purpose of clarifying the legal issues at hand, the declaratory judgment action need not be maintained in this Court. As discussed above, the state court is in a better position to resolve the issues raised in SHAKA's declaratory judgment action.

Finally, the convenience of the parties and the convenience of other remedies also weigh in favor of remand. The circumstances giving rise to the State Court action arose in Maui County. SHAKA and the individually-named Plaintiffs all reside in Maui County. The County and the Industry Defendants all admittedly reside or operate businesses in Maui County.

IV. CONCLUSION

SHAKA respectfully submits that the Court should not adopt the Recommendation, as the Janakes rule does not apply to cases removed from state court, and the factors that would allow this Court to retain jurisdiction favor remand. Additionally, SHAKA respectfully suggests that the Court consider this

Motion in light of the pending motions that are before the Court in the related Federal Court action.

DATED: Honolulu, Hawaii, March 5, 2015.

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

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served on the following parties by CM/ECF, on March 5, 2015, addressed as follows:

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

Attorneys for Defendant
COUNTY OF MAUI

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

Attorneys for Defendants
DOW AGROSCIENCES LLC; ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; MONSANTO COMPANY; and AGRIGENETICS, INC.

KENNETH S. ROBBINS, ESQ.
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 Defendants
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

DATED: Honolulu, Hawaii, March 5, 2015.

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

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