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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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	) CIVIL NO. 14-00511 SOM-BMK)) INTERVENOR-DEFENDANTS ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, AND SHAKA MOVEMENT'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR)) (*caption continued on next page*)

TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE, Plaintiffs, vs. COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT, Defendants.	) FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, TO STAY PROCEEDING, FILED NOVEMBER 21, 2014; CERTIFICATE OF WORD COUNT; CERTIFICATE OF SERVICE

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I. INTRODUCTION

Two related cases are pending before this Court concerning the validity of a local ordinance placing a moratorium on agricultural operations involving the use of genetically modified organisms ("GMOs"). SHAKA filed a lawsuit in state court first, seeking to compel the County of Maui ("County") to implement the Ordinance and to resolve the conflict over the law's enforceability under state law. Subsequently, Monsanto Company, Agrigenetics, Inc. (a subsidiary of Dow AgroSciences), and several other pro-GMO businesses (the "Industry") filed this action seeking to invalidate the law. SHAKA brings this Motion for a dismissal or a stay because the issues in this lawsuit should be litigated and resolved in state court first. A dismissal or stay is appropriate under the Court's inherent powers and pursuant to the factors recognized in Pullman[1] and Colorado River[2] for this type of relief. Notably, this Motion is the only motion pending before the Court that seeks to have the issues in both lawsuits decided in one case and in an orderly manner. This is the only motion that, if granted, would avoid conflicting and overlapping proceedings.

[1] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).
[2] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

In their oppositions, the Industry and the County offer no legitimate grounds to support litigating the issues regarding the Ordinance's validity in two separate cases. They spend considerable time criticizing SHAKA's efforts to enforce the Ordinance, none of which is accurate or appropriate. They ignore the Court's inherent authority to control its docket by ordering a stay to prevent overlapping and conflicting proceedings. They ignore the fact that the Ninth Circuit has applied the Pullman abstention doctrine to federal preemption. They misapply the factors under the Pullman and Colorado River abstention doctrines.

To state the obvious, the Industry wants this Court to strike down the Ordinance as quickly as possible during the infancy of the case. They want the Court to ignore the issues of disputed fact in the voluminous record. In turn, they want to deny SHAKA's requests for discovery, discovery that could further undermine the Industry's position. The issues in this case are far too important and complex for summary disposition. SHAKA's state court action will allow for a fully reasoned decision on the merits and should take precedence over this case. SHAKA's state court action was filed first and seeks to resolve the County's obligations to enact the Ordinance and any challenges that may be asserted in response to its implementation. Neither lawsuit should be decided in haste. The most effective way to resolve this case without compromising the Court's thorough

deliberation of the issues is by staying or dismissing this case, and allowing the state court action to proceed.

II. THE INDUSTRY AND THE COUNTY MISCHARACTERIZE THE PROCEDURAL HISTORY OF THE PENDING ACTIONS

The Industry and the County devote much of their respective oppositions to mischaracterizing the procedural history of both this lawsuit (the "Federal Court action") and the related lawsuit filed by SHAKA in the Second Circuit Court in Civil No. 14-1-0638(2) (the "State Court action"). These points have no merit and do not support a denial of this Motion. First, SHAKA did not "race" to state court knowing that the Industry was going to file the Federal Court action the next day. Instead, SHAKA exercised its right to file its lawsuit in state court and to have the issues decided in Maui County. In this case, Maui citizens adopted a voter initiative to protect Maui County from harms to the environment and local health. These are fundamental rights protected under the Hawai`i Constitution. The central issue in both cases is whether the County has an obligation to adopt this law under Hawai`i law, recognizing the County's police powers. SHAKA has a significant interest in assuring that the County actually implements the law, as SHAKA devoted significant time and resources facilitating the law's adoption and is, in large part, responsible for its adoption. These interests are significant and strongly weigh in favor of SHAKA's decision to file

this lawsuit in state court, and for this Court to defer action on this case pending resolution of the claims in state court.

Conversely, the Industry and the County have no countervailing interest in having this case decided in federal court. Other than the fact that the Industry believes that this Court will reach a similar result as in Hawaii Floriculture[3] and Syngenta Seeds[4], there is no reason the Industry, with consent of the County, pushed for a quick decision in federal court and blocked the State Court action. In fact, the Federal Court action appears to be a "reactive declaratory judgment action," which occurs when a party sues in federal court when there is a pending state court case presenting identical issues.[5] This type of "reactive declaratory judgment action" is strongly discouraged by the Ninth Circuit.[6]

Second, it is disingenuous for the Industry to criticize SHAKA for not immediately serving the Complaint in the State Court action. The Industry already raised this argument when it opposed SHAKA's previous Motion to Intervene in this case—arguments that SHAKA has previously addressed. During the hearing on the Motion to Intervene, SHAKA explained to the Court why the Complaint

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[3] Hawaii Floriculture & Nursery Ass'n v. County of Hawaii, No. 14-00267, 2014 U.S. Dist. LEXIS 165970 (D. Haw. Nov. 26, 2014).
[4] Syngenta Seeds, Inc. v. County of Kaua'i, No. 14-00014, 2014 U.S. Dist. LEXIS 117820 (D. Haw. Aug. 23, 2014).
[5] Gemini Ins. Co. v. Clever Constr., Inc., 2009 U.S. Dist. LEXIS 97768, 22 (D. Haw. Oct. 21, 2009).
[6] Gov't Emples. Ins. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998); see also Catholic Foreign Mission Soc'y of Am., Inc. v. Arrowood Indem. Co., 2014 U.S. Dist. LEXIS 178307, *28 (D. Haw. Dec. 29, 2014).

was not immediately served: because the Complaint needed to be amended to respond to the Industry's reactive declaratory judgment action filed in this action the following day.

The Industry's claim that SHAKA delayed moving forward with the State Court action is directly contrary to the record. In less than a month, SHAKA had filed its original lawsuit, amended its Complaint to address the filing by the Industry in federal court, filed its motion for preliminary injunction, and responded to all the proceedings pending in this Federal Court action. SHAKA is a small local non-profit organization. Monsanto and Dow Chemical (the parent corporation of Dow AgroSciences) are two of the largest multinational corporate entities in the world, with combined reported annual global sales of more than $30 billion dollars in 2014 alone.[7] The claim that SHAKA has been sleeping on its rights on this record (with the volume of filings) is unsupportable. The only delay to the State Court action was the Industry and the County's efforts to halt the proceeding by removing the case to federal court when no federal question was asserted.

Finally, the haste with which the Industry, with the consent of the County, is seeking to invalidate the Ordinance in federal court does not support

[7] Dow Reports Fourth Quarter and Full-Year Results, http://www.dow.com/investors/earnings/2014/14q4earn.htm (last visited Feb. 23, 2015); 2014 Financial Highlights, http://www.monsanto.com/investors/pages/financial-highlights.aspx (last visited Feb. 23, 2015).

denial of this Motion. All the agreements to dispose of this case in a schedule of four months were made between the Industry and the County *before* SHAKA was allowed to intervene. Less than one week after filing the Complaint, the Industry and the County had agreed to enjoin certification of the Ordinance and to expedite disposition by summary judgment in four months. [DKT No. 26, Stipulation Regarding County of Maui Ordinance and Order.] All these actions were completed before SHAKA was allowed to intervene and state an objection, and before the County disclosed to the Court and SHAKA that it would not be opposing the Industry's plan to invalidate the law.

The Industry and the County never contacted SHAKA regarding their position on the expedited briefing schedule and the injunction, despite the fact that they were both aware of SHAKA's pending State Court action and SHAKA's interest in this litigation. While the Industry argues that its speed in obtaining a consent injunction and expediting summary judgment supports denying a stay, the opposite is true. There has been no substantive ruling in either case. The rush to set up this schedule is solely credited to an agreement between the Industry and the County (who does not oppose summary judgment). Simply because the Industry, with the County's consent, is seeking to terminate this case in four months does not justify giving greater weight to allowing the issues to be decided in two forums.

III. THE INDUSTRY IGNORES THE COURT'S INHERENT AUTHORITY TO GRANT A STAY

In its opposition, the Industry ignores the Court's inherent authority to stay the Federal Court action, despite there being substantial reasons for this Court to do so. A stay based on the Court's inherent authority is in addition to, and irrespective of, the factors considered under the Pullman and Colorado River abstention doctrines. The Court can stay a federal case in the "interest of sensible management." Bridge Aina Le`a, LLC v. Hawaii Land Use Comm'n, 2012 U.S. Dist. LEXIS 45284, *25-26 (D. Haw. Mar. 30, 2012). There is no dispute that the state court has jurisdiction to decide both the state law claims asserted in SHAKA's First Amended Complaint, as well as any defenses or cross-claims (predicated on state or federal law) that may be raised.

There is no stay in place in the State Court action, nor has any party to the State Court action sought a stay in the three months that the case has been pending. Unlike this case initiated in federal court, there is no basis to order a stay in the State Court action. SHAKA's State Court action will proceed irrespective of how the Court rules on the related motion to remand filed in the State Court action. Conversely, in this case, SHAKA filed this Motion only eight days after the Complaint was filed. This is the only request pending before this Court to have the issues decided in one case. Staying or dismissing this case and allowing the State

Court action to proceed would avoid the needless inefficiency and avoid splitting the case into two overlapping lawsuits.

The only argument raised against the Court's inherent authority to grant a stay is the County's argument that a stay would unduly prejudice the County by forcing it to enforce a "controversial Ordinance" that private plaintiffs are challenging. [DKT No. 100, County's Mem. in Opp. to Motion p. 13.] The County's argument is disturbing. First and foremost, 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." To say that the County will suffer an undue hardship in enforcing an ordinance that was duly adopted by its electorate directly conflicts with the County's duties under the County Charter. See Maui County Charter, Article 11.

In addition, a stay of this case will not cause delay. The Industry can equally request the same relief in the State Court action that it seeks in this case. Because the state court is capable of interpreting federal law, should the Industry choose to pursue its federal preemption defense, there is no prejudice to the Industry or the County regarding the resolution of the claims brought in the Federal Court action. Moreover, there are additional state claims that SHAKA is pursuing against the County in the State Court action. Dismissing or staying this proceeding, while allowing the State Court action to proceed, would permit all

claims raised by the Industry and SHAKA regarding the Ordinance's validity to be raised in one forum, and it would also allow SHAKA to concurrently address its independent and additional claims against the County regarding the Ordinance in the same State Court action.

IV. THE *PULLMAN* ABSTENTION FACTORS HAVE BEEN SATISFIED

A. *Pullman* Abstention Applies To Preemption Cases Involving Federal Constitutional Issues

In International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission of Nevada, 614 F.2d 206, 209 (9th Cir. 1980), the Ninth Circuit explained when a federal preemption question raises a constitutional issue for Pullman abstention to apply. The Ninth Circuit explained that there are "varying degrees" of constitutional issues when reviewing a preemption case. Id. at 210. On one end, beyond preemption as typically understood, lies the case where a state law is invalidated under the U.S. Constitution, such as the Commerce Clause. Id. On the other end is a claim that a state law is invalidated by a specific federal statute that expressly prohibits state regulation. Id. In between these two types of cases is the situation where the preemption claim is based on a claim that the state regulation enters a field that, although not expressly proscribed, is inconsistent with a federal scheme. Id. In these cases, the Court must determine if the local law "interferes with the federal scheme embodied in the Constitution[.]" Id. In these cases, the preemption

analysis embodies both "statutory construction and profound and delicate constitutional considerations." Id. The Court in International Brotherhood went on to hold that the three requirements of Pullman were met, and that the Court should not reach the question on whether a state regulation conflicted with the National Labor Relations Act (29 U.S.C. § 151 et seq.) and the Supremacy Clause.

In this case, the basis of the Industry's federal preemption argument is that the Ordinance is preempted by federal law pursuant to the Supremacy Clause and that the federal government regulates certain aspects of GMOs through the Federal Coordinated Framework, a 1986 executive branch policy statement.[8] The Industry's Complaint heavily relies on the Supremacy Clause and the Commerce Clause as the basis for its jurisdiction, and the basis in which it seeks to invalidate the Ordinance. [DKT No. 1, Compl. at ¶¶ 58 and 71.] In order to evaluate the federal claims for preemption, the Court would necessarily need to consider the limits of the Supremacy Clause, the federal government's ability to implicitly preempt local law, and whether agency determinations as opposed to an act of Congress with constitutional authority can have preemptive force as they relate to local laws. This case is similar to International Brotherhood in which preemption is appropriate.

[8] See Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302 (June 26, 1986).

B. The Industry Ignores The Sensitive Questions Of Federal And State Law That Are Implicated In This Case

In the Industry's opposition, they argue that there are no "sensitive question[s] of federal constitutional law" that needs to be resolved, and that there are no "sensitive local social or policy issues" in which Pullman is concerned. [Industry's Mem. in Opp. of Motion pp. 9-10.] This argument is inconsistent with the very core issues in this case.

On the federal level, fundamental to a resolution of this case are the limits of federal jurisdiction and the ability for the federal government to implicitly preempt a local law. The main issue in this case, however, centers on alleged conflicts with state law. As the U.S. Supreme Court has observed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

More recently, in reaffirming the limitations on the federal government's ability to interfere with local police power, Chief Justice Roberts observed:

> Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held

> by governments more local and more accountable than a distant federal bureaucracy.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (emphasis added) (internal citations omitted).

With respect to sensitive local social or policy issues, these issues are the critical issues in this case. There should be no dispute that land use planning and health and safety issues are sensitive areas of social policy under Pullman.[9] The issues presented in this case involve even greater sensitive local concerns than these general categories.

In particular, the Hawai`i Constitution is unique in that it provides broad environmental protection for the public health and requires the State of Hawai`i to hold all public natural resources in trust for the benefit of the people.[10] The Hawai`i Constitution also recognizes the significance of protecting and preserving Native Hawaiian culture and values.[11] The recognition of duties owed to Native Hawaiians has similarly been embraced and subject to deference by the federal government.[12]

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[9] Kollsman v. Los Angeles, 737 F.2d 830, 833 (9th Cir. 1984); U.S. Ecology, Inc. v. Nevada, Dep't of Human Resources, 557 F. Supp. 464, 467 (D. Nev. 1983).

[10] Haw. Const. art. IX, §§ 1 and 8, art. XI, §§ 1 and 9.

[11] See Haw. Const. art. XII, §§ 4-6 (creating the Office of Hawaiian Affairs to manage ceded lands to benefit Native Hawaiians); Hawaiian Homes Commission Act, 1920, adopted as part of the Hawai'i Constitution by Art. XII, § 1 (transferring ceded lands to the State of Hawai'i to be held for the benefit of Native Hawaiians).

[12] Public Law 103-150, S.J. Res. 19, 103d Cong. (1993) (Apology Resolution).

In this case, the Industry is asking this Court to deny consideration of these critical local issues in the interest of powerful corporate interests. The Industry seeks to invalidate the results of a duly administered county election in federal court without allowing the state courts to review the issue first. The Court will necessarily need to decide the federal constitutional limits of its jurisdiction in light of fundamental local policies and issues. This analysis requires the Court to consider the limits of federalism and federal court jurisdiction under Pullman abstention.

Moreover, while the County concedes that it has a duty to protect the health and safety of its citizens as well as having duties owed to Native Hawaiians, it misconstrues the issues presented in this case. [DKT No. 100, County's Mem. in Opp. of Motion pp. 5-6.] The local issues at stake in this case are not merely "technical violations of the Maui County Charter," as the County claims. Id. at p. 6. There are a number of fundamental local interests at stake in this case, including: (1) the constitutional and statutory separation of power between the State of Hawai`i and its municipalities; (2) the ability and obligation of the County to protect the environment and human health; (3) whether state pesticide and plant quarantine laws were intended to prevent the County from regulating GMO activities; (4) the effects on traditional Hawaiian culture and the environment for open air genetic experimentation conducted by multinational corporate interests;

and (5) the constitutional right, under the Hawai`i Constitution, "to a clean and health environment"[13] and for any person to "enforce this right against any party, public or private, through appropriate legal proceedings[.]"[14] These are not simply technical nuances in which it does not matter which Court should decide the issue first. The Court will necessarily need to weigh these important local policies when it decides this case. These issues should not be ignored or trivialized, as the County advocates.

V. THE *COLORADO RIVER* ABSTENTION FACTORS HAVE BEEN SATISFIED

The factors considered by the Ninth Circuit to determine whether a stay or dismissal of the case is warranted under the Colorado River abstention doctrine weigh in favor of abstention or, at the very least, a stay of this case until the State Court action has finished. See R.R. St. & Co. Inc. v. Trans. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976)).

The first and fourth factors favor SHAKA, because the state court assumed jurisdiction over the physical property in dispute in this case before the federal court. In Colorado River, the property in dispute was the water rights in a river system. See Colo. River, 424 U.S. at 802. In this case, the property in

[13] Haw. Const. art. XI, § 9.
[14] Id.

dispute is Maui County's land and natural resources that are being harmed by GMO operations. Moreover, Hawai`i Rules of Civil Procedure ("HRCP") Rule 3 states that "[a] civil action is commenced by filing a complaint with the court." Haw. R. Civ. P. Rule 3.

When SHAKA first filed its Complaint on November 12, 2014, the state court retained subject matter jurisdiction over SHAKA's request for declaratory relief pursuant to HRS § 603-21.5 and HRS § 632-1. See e.g. Cnty. of Kauai v. Baptist, 115 Hawai'i 15, 26, 165 P.3d 916, 927 (2007). The fact that a plaintiff amends a complaint prior to service is not evidence of a lack of intent to toll the commencement of the action. Heiser v. Assoc. of Apt. Owners, 848 F. Supp. 1482, 1485 (D. Haw. 1993). SHAKA complied with the requirements under HRCP Rule 3 when it filed its Complaint in the State Court action, thereby obtaining jurisdiction over the property in dispute before the federal court.

The second, fifth, and seventh factors regarding choice of forum also favor SHAKA, because the circumstances giving rise to both lawsuits arose in Maui County. SHAKA and the individually-named Intervenor-Defendants are residents of Maui County. The Industry and the County all admittedly reside or conduct businesses in Maui County. Thus, having these local issues decided by a state court in Maui would be more practical and efficient for the parties and issues in this case. Moreover, the Industry's argument that this case presents numerous

federal issues is inaccurate. State law primarily controls the rule of decision on the merits, as this case necessarily requires the Court to evaluate a local county ordinance and its validity under Hawai`i law.

The third factor also favors SHAKA. The requested relief in the Federal Court action is identical to SHAKA's requested relief in the State Court action—a ruling on the validity and legality of the Ordinance. In the State Court action, however, SHAKA raises additional claims against the County that would not be addressed in the Federal Court action. In order to promote efficiency and prevent piecemeal litigation on the same issue, a dismissal or stay of this proceeding is warranted.

Finally the sixth and eighth factors also favor SHAKA because the Industry can assert any and all arguments concerning the legality of the Ordinance and its enforceability in the State Court action, including its federal preemption defense. If the Industry does not prevail on its federal preemption arguments in state court, it can seek review of the state court's interpretation of federal law and judgment with the Hawai`i appellate courts. Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 947 (9th Cir. 2014). Therefore, the Industry and the County's arguments regarding adequate protection of rights and resolution of all issues also fail.

VI. CONCLUSION

SHAKA respectfully requests that this Court recognize the well-established principles of comity, abstention, and the Court's inherent authority to stay this matter, and accordingly dismiss or stay this case to allow the State Court action to proceed forward.

DATED: Honolulu, Hawai'i, February 24, 2015.

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