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ALIKA ATAY, LORRIN PANG,  
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LEI'OHU RYDER, and SHAKA MOVEMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

TRUCKING AND SERVICES; and	)	INQUIRY; DECLARATION OF
HIKIOLA COOPERATIVE,	)	MICHAEL C. CARROLL; EXHIBITS
	)	A-H; CERTIFICATE OF SERVICE
Plaintiffs,	)	
	)	
vs.	)	
	)	
COUNTY OF MAUI; ALIKA ATAY;	)	
LORRIN PANG; MARK SHEEHAN;	)	
BONNIE MARSH; LEI’OHU RYDER;	)	
and SHAKA MOVEMENT,	)	
	)	
Defendants.	)	
_____	)	

INTERVENOR-DEFENDANTS’ ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI’OHU RYDER, AND SHAKA MOVEMENT’S BRIEF ADDRESSING BALANCE OF HARDSHIPS INQUIRY

Intervenor-Defendants ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI’OHU RYDER, and SHAKA MOVEMENT (collectively, “SHAKA”) hereby submit this brief in response to the Court’s request for briefing on the balance of hardships inquiry concerning the injunction that was previously agreed upon between Defendant County of Maui (the “County”) and Plaintiffs (collectively, the “Industry”).

I. INTRODUCTION

An entire county decided that GMO operations are causing significant irreparable harm to the natural environment, human health, and cultural heritage when the County of Maui adopted this Ordinance. In essence, the Court has before

it the testimony of Maui voters that would need to be discredited if this Court were to continue the injunction. As the Ordinance states:

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 County is threatened by harms that are well-documented and supported by independent scientific evidence. These harms are imminent where children are defenseless as against serious health risks each day these activities are allowed to continue. The County should never have agreed to enjoin itself against the decision of its voters. The County's self-imposed injunction should terminate on March 31, 2015.

The Industry cannot satisfy its burden of proof. The balance of hardships does not "decidedly" favor continuing this injunction. At stake is ongoing damage to the environment, potentially serious health problems associated with continuing practices, threats to Native Hawaiian culture and practices, and the integrity of our own election process. These interests are significantly concrete and cannot be remedied by money damages. They are significantly greater than the corporate profits that the Industry relies on to justify the injunction. These harms are, for all intents and purposes, irreparable and imminent.

Finally, before the Court can continue the injunction, the Industry should be required to prove *with evidence* at a hearing that the Industry will suffer irreparable harm. There are issues of fact in dispute, and this Court should not allow an improper injunction to continue unless a limited hearing is conducted on key evidence.

## II. DISCUSSION

“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). The party seeking a preliminary injunction must prove either: “(1) probable success on the merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation, with the balance of hardships tipping decidedly in favor of the party requesting relief.” Malama Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1215 (D. Haw. 2001) (citations omitted).

In this case, the parties have already extensively briefed and established that there are sufficient questions going to the merits of the case. Thus, the Industry must show that the balance of hardship tips “decidedly” in favor of continuing the injunction. The Industry cannot meet its burden.

A. The Balance Of Irreparable Harms Favors SHAKA

It is well established in the Ninth Circuit that money damages or pecuniary loss is not an irreparable harm. 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 Env'tl. Ctr. v. Hodel, 803 F.2d 466 (9th Cir. 1986) (“More than pecuniary harm must be demonstrated.”). Additionally, the Supreme Court, Ninth Circuit, and this Court have repeatedly recognized that potential environmental harms significantly outweigh potential economic losses caused by a temporary delay. 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 Env'tl. 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).

As the Supreme Court has stated, and as this Court has quoted and relied on:

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.

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (cited in Malama Malama Makua, 163 F. Supp. 2d at 1220-21). In recognizing the permanency of environmental harms, this Court has also treated the associated harms to Native Hawaiian cultural resources and rights as a significant factor in evaluating the harm for an injunction. Malama Makua, 163 F. Supp. at 1221.

In this case, the potential irreparable harms to the environment, public health and safety, Native Hawaiian interests, and integrity of the political process significantly outweigh any potential economic harms that the Industry claims will result in enforcing the Ordinance.

1. Irreparable Environmental Harms

GMO operations in Maui County involve a different type of agricultural use that is more destructive and harmful to the environment than

commercial agricultural activities. See Declaration of Hector Valenzuela (“Valenzuela Dec.”) ¶ 5. The practice involves the use of high levels and combinations of repeated pesticide application in which dangerous chemicals are allowed to bleed into the environment in high quantities. Id.

The activities also include the use of a disproportionately small portion of the land, leaving large areas barren and more susceptible to higher environmental pollution. See Valenzuela Dec. ¶ 5. The environmental harms supported by scientific data include: (1) pesticide and chemical drift – chemicals contaminating streams, soil, the ocean, other natural resources, and nearby communities and schools; (2) “superweeds” – the development of weeds that are resistant to high applications of pesticides; (3) the development of insects that are resistant to pesticides; and (4) transgenic contamination – GE traits contaminating native species and threatening natural farming. George A. Kimbrell & Aurora L. Paulsen, *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, Vermont Law Review; Winter 2014, Vol. 39, Issue 2, p. 354; Valenzuela Dec. ¶¶ 9, 11; see also Declaration of Gerry Ross ¶¶ 5-6.

No tests or studies have ever been conducted to determine the harmful environmental effects that these GMO operations have on Maui. See Valenzuela Dec. ¶ 19. This fact is undisputed.

2. Irreparable Health And Safety Harms

Coupled with the environmental harms are serious health problems affecting the Maui community. International research has directly linked the exposure to pesticides in GMO operations on farm workers, their families, and residents from nearby communities, to severe respiratory problems, dermatological and/or mucocutaneous disorders, digestive problems, and neurological problems. See Valenzuela Dec. ¶ 17. Further, studies link the exposure of pesticides from these operations to high levels of DNA damage resulting in cancer, lymphocytic leukemia, brain tumors, developmental disorders, physical birth defects, brain tumors in children, and fetal death, among other documented adverse side-effects. Id. ¶¶ 17-18 (citation omitted).

In Maui, these practices are conducted in close proximity to schools, neighborhoods, and businesses. See Exhibit “A” (aerial photographs showing fields in Maui). As a result, multiple nearby residents have provided declarations complaining of similar health scares linked to these activities. See Declaration of Jacquelyn Stewman (“Stewman Dec.”) ¶ 3, Declaration of Amie Stokes (“Stokes Dec.”) ¶ 8, Declaration of Hoala Davis ¶¶ 3-4, and Declaration of Mercy Ritte ¶ 3. These are not the harms noted by a few, but rather the harms raised by an entire community that voted in favor of this Ordinance.

Moreover, these harmful impacts have also been observed firsthand. For example, Monsanto Mokulele Fields, one of Monsanto's testing fields in Maui, is located approximately 500 yards away from a neighborhood called Hale Piilani. See Stewman Dec. ¶ 3. As set forth in the attached declarations, residents in this small community, including small children, report negative health effects from living in close proximity to the testing fields. One resident stated that she can taste the chemicals in her mouth as frequently as once a week. Stokes Dec. ¶ 8. These residents report the same health problems noted in the studies performed in Latin America: vitamin deficiencies, respiratory problems, central nervous system issues, and seizures. See Stokes Dec. ¶¶ 5-8; see also Stewman Dec. ¶ 5-12, 16.

The Industry offers no evidence to contradict these health risks or the need for studies – as no tests have ever been done in Hawaii. See Valenzuela Dec. ¶ 7. The article the Industry cites to rebut Dr. Valenzuela's testimony and his supporting data was authored by none other than Dow AgroSciences. See Reply Mem. at p. 8, n.3 (citing Rod A. Herman and William D. Price, *Unintended Compositional Changes in Genetically Modified (GM) Crops: 20 Years of Research*, 61 J. of Agric. Food Chem. 11695, 11697 (2013), available at <http://pubs.acs.org/doi/pdf/10.1021/jf400135r>). This article did not even address health problems associated with GMO operations, and the claim that there is a consensus on safety is widely rebuked by the independent scientific community.

See Angelika Hilbeck et al., *No scientific consensus on GMO safety*, Environmental Sciences Europe, *available at* <http://dx.doi.org/10.1186/s12302-014-0034-1>.<sup>1</sup>

3. Irreparable Harms To Native Hawaiians

Also at stake is the historical and cultural relationship between Native Hawaiians and Hawaii's natural resources, and the preservation of Native Hawaiian culture and practices. Native Hawaiian practices involve protecting the land, preserving native species, and utilizing native plants and animals in the environment. See Declaration of Lei'ohu Ryder ¶¶ 3-9. These practices are threatened by continued GMO operations. Id. These interests are compelling, given the state and federal government's special relationship with Native Hawaiians as explained in prior briefs.

4. Irreparable Harms To The Integrity Of Political Process

"The State's interest in preserving the integrity of the electoral process is undoubtedly important." Doe v. Reed, 561 U.S. 186, 197 (2010). Electoral integrity seeks to promote "transparency and accountability in the electoral

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<sup>1</sup> The Industry cites to another article by Alessandro Nicolia, et al. entitled *An overview of the last 10 years of genetically engineered crop safety research*, Critical Reviews in Biotechnology (2013). See Reply Mem. at p. 8, n.3. This article has likewise been criticized for relying on research that is "irrelevant or tangential to assessing the safety of commercialized GM foods and crops for human and animal health and the environment" and ignores the studies that do show such harmful effects. See GMO Myths and Truths: An evidence-based examination of GMO claims, Section 2.3 Myth: The Nicolia review complies 1700+ studies showing that GMOs are safe, *available at* <http://earthopensource.org/gmomysandtruths/sample-page/2-science-regulation/136-2/>.

process.” Id. at 198. The Supreme Court has recognized that “[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” Prete v. Bradbury, 438 F.3d 949, 960 (9th Cir. 2005) (quoting Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 191 (1999)); see also Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012).

The County will greatly undermine the will of the people if it is not compelled to certify the election results approving a ballot measure and implement the law that the majority of Maui voters approved into law. The County has a duty to Maui voters to execute the will of the people. The County has a statutory duty to certify the election results that were approved by Maui voters, and to follow the wishes of the Maui electorate. Maui voters have an expectation that County officials will comply with the law, and this has not been done.

B. SHAKA Is Entitled To A Hearing Requiring The Industry To Demonstrate Irreparable Harm

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The injunction expires on March 31, 2015. There are issues of fact that are in dispute. Before the Court entertains an extension, SHAKA respectfully requests that this Court set an evidentiary hearing. 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,

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 allowed 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).

This temporary injunction was entered into solely based on an agreement between the Industry and the County reached the day the Industry filed the Complaint. The Court has not heard any evidence of the threat of irreparable harm that the Industry claims it will suffer. Moreover, the Industry previously filed a 48-page Motion for Temporary Restraining Order and Preliminary Injunction and 10 supporting declarations [DKT #5]. In order to adequately respond to the contentions set forth in the Industry’s papers, an evidentiary hearing is necessary for the Industry to prove their claims and to justify the alleged continuing damage that is being done. The Court should not allow an extension of the injunction without an evidentiary hearing. The injunction should expire on March 31, 2015, as currently set.

III. CONCLUSION

Based on the foregoing, SHAKA respectfully requests that the Court deny any extension of the injunction. The Court should not allow an extension of the injunction without an evidentiary hearing. The injunction should expire on March 31, 2015.

DATED: Honolulu, Hawaii, March 13, 2015.

/s/ Michael C. Carroll

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