Appeal No. 15-16552

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

MOTION TO CONSOLIDATE AND EXPEDITE PROCEEDINGS

BAYS LUNG ROSE & HOLMA
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000

Attorneys for Intervenor Defendants-Appellants
Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh,
Lei'ohu Ryder, and SHAKA Movement

Appeal No. 15-16552

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, August 12, 2015.

/s/ Michael C. Carroll
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY

Attorneys for Intervenor Defendants-Appellants
ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, and SHAKA MOVEMENT

EXHIBIT A

Appeal No. 15-16552

MOTION TO CONSOLIDATE AND EXPEDITE PROCEEDINGS

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 respectfully move this Court for an order consolidating the above-captioned appeal with Appeal Nos. 15-15641, 15-16466, and 15-16486 pursuant to Rule 27 of the Federal Rules of Appellate Procedure ("FRAP"), and to expedite briefing and hearing pursuant to Rule 27-12 of the Circuit Rules for the Ninth Circuit ("Ninth Circuit Rule"). This Motion relates to the following related appeals:

Appeal No.	15-15641	15-16466	15-16486	15-16552
Underlying Case	Federal Court Action[1]	State Court Action[2]	Federal Court Action	Federal Court Action
Decision Appealed	Order Continuing The Preliminary Injunction	Final Judgment Entered In The State Court Action	Final Order Entered In The Federal Court Action	Final Judgment Entered In The Federal Court Action
Status	Fully Briefed; Awaiting Hearing and Decision	Opening Brief Due October 30, 2015	Opening Brief Due October 30, 2015	Opening Brief Due November 12, 2015

[1] The Term "Federal Court Action" refers to the underlying proceeding in this appeal, D.C. No. 1:14-cv-00511-SOM-BMK.

[2] The term "State Court Action" refers to the lawsuit that SHAKA filed in State Court that the Defendants removed to Federal Court, D.C. No. 1:14-cv-00582-SOM-BMK.

Appeal No. 15-15641, the first appeal that was filed, is an appeal from the District Court's decision extending a preliminary injunction ("Preliminary Injunction Appeal"). This appeal is subject to expedited treatment pursuant to Ninth Circuit Rule 3-3. The parties have fully briefed this appeal and are awaiting hearing and decision.

The remaining three appeals (including this one), stem from the District Court's decision granting the Chemical Companies'[3] motion for partial summary judgment ("Final Order"). Appeal No. 15-16466 is an appeal from a case SHAKA filed in Hawaii State Court, which Defendants removed to District Court, and which the District Court dismissed as moot in its Final Order ("State Court Action"). Appeal Nos. 15-16486 and 15-16552 are appeals from a case the Chemical Companies filed in District Court that were resolved by the Final Order and subsequent judgment ("Federal Court Action"). The Ninth Circuit has set the briefing schedule for all appeals with the opening briefs due on October 30, 2015 in both Appeal Nos. 15-16466 and 15-16486, and on November 12, 2015 in Appeal No. 15-16552.

There is also a fifth appeal that has been filed in the Federal Court Action. Proposed Intervenors The Moms on a Mission Hui, Moloka`i Mahi`ai,

[3] The term "Chemical Companies" refers to the named Plaintiffs in this appeal and Appeal Nos. 15-16486, and 15-16552, and to the private defendants in Appeal No. 15-16466.

Gerry Ross and Center for Food Safety filed a notice of appeal of the District Court's decision denying them intervenor status in the case at Appeal No. 15-15246. SHAKA is not seeking any relief with respect to this fifth appeal.

SHAKA respectfully requests that the Court enter an order that provides for the following relief:

First, SHAKA requests that all four appeals be consolidated as they involve overlapping issues and consolidation is warranted in the interest of conserving judicial resources.

Second, SHAKA respectfully requests that the Court set a single briefing schedule allowing for separate briefs in the State Court Action and the Federal Court Action.[4] SHAKA proposes that the Court adopt the schedule set forth in the Time Schedule Order for Appeal Nos. 15-16466 and 15-16486 with the opening briefs due on October 30, 2015 and Answering Briefs due on November 30, 2015 in both appeals.

Finally, while the Preliminary Injunction Appeal is already subject to expedited treatment under Ninth Circuit Rule 3-3, SHAKA respectfully requests that this Court expedite hearing and decision on all appeals. As explained in

[4] With respect to the Federal Court Action, SHAKA filed an initial appeal from the Final Order as it was unclear at the time when the District Court intended to issue a final judgment. SHAKA filed its appeal in the abundance of caution given the time limitations. It is, however, unnecessary for the parties to submit separate briefs relating to the two appeals filed in the Federal Court Action.

SHAKA's briefs filed with the District Court and herein, the District Court's ruling involves serious irreparable harm to the environment and public health caused by a lack of regulations on GMO operations. Given that the Court is already treating the Preliminary Injunction Appeal in an expedited matter, SHAKA respectfully requests that the Court also expedite hearing on the additional substantive appeals.

Pursuant to Circuit Rule 27-12, SHAKA has contacted counsel for the Chemical Companies and the County. They are agreeable to consolidation of Appeal Nos. 15-16466 and 15-16552 to allow them to be decided by the same Ninth Circuit panel and argued contemporaneously; provided , however, that the parties should retain the ability to file separate briefs in each of those two appeals. These parties are not agreeable to the other requested relief provided for in this motion. See Exhibits A (Chemical Company's response) and B (County's response). SHAKA is in the process of ordering all transcripts for the appeals and will do so by the current deadline of August 21, 2015 for all appeals.

I. FACTUAL BACKGROUND

1. Maui County is "ground zero" for the unregulated development and testing of genetically modified crops ("GMOs"). The crops that are tested and developed on Maui include crops that are genetically designed to withstand high doses of chemical pesticides that would kill the natural counterparts. The process of developing these plants involves using high quantities and combinations of

repeated spraying of pesticides and different uses of agricultural lands that are more destructive than commercial agricultural operations. These practices have been allowed to continue on Maui unregulated causing potentially serious environmental harms and dangers to public health. High quantities of chemicals have been found throughout Maui's environment and citizens that live near the chemical fields are experiencing adverse health consequences. Global research has linked similar practices to serious and fatal health consequences. Despite the significance of these potential harms, no studies or tests have ever been conducted in Maui County to demonstrate that these practices are not harmful. See SHAKA's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at pp. 5-16 [DKT #101].[5]

2. In November 2014, in response to growing concerns on the dangers to the community by these activities, a majority of Maui voters adopted, via citizen initiative, an ordinance to place a temporary moratorium on further GMO operations until a safety study is completed demonstrating that these activities are not harmful. There are no equivalent federal or state laws that

[5] Pursuant to Rule 30-1 of the Circuit Rules for the Ninth Circuit ("Ninth Circuit Rule"), SHAKA will file its Excerpts of Record ("Excerpts") with its Opening Brief. Given that there are no Excerpts that can properly be referred to in response to the instant Motion, SHAKA refers to the record from the underlying District Court action herein, S.C. No. 1:14-cv-00511-SOM-BMK.

provide this protection to Maui residents. Id. at p. 17 and [DKT #102-21] (the "Ordinance").

3. The Ordinance was adopted pursuant to the Hawaii Constitution, which provides that the State of Hawaii and its municipalities, including Maui County, shall "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, 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." See Haw. Const. Art. XI, Section 1 and the Ordinance at Section 3.1, [DKT #102-21].

4. Following the laws adoption, in anticipation that the County would not take action to implement the law, SHAKA immediately filed a declaratory judgment action in Hawaii State Court seeking to compel the County to implement the Ordinance and to declare that the Ordinance was not preempted by state law.[6] SHAKA named the Chemical Companies in the case. SHAKA did not assert any federal claim in the State Court action. Id.

5. Additionally, the day after SHAKA filed its State Court action, the Chemical Companies filed a separate lawsuit in Federal Court seeking to invalidate the law under federal and state preemption doctrines. [DKT #1]. The same day the Chemical Companies filed this lawsuit, they entered into a stipulation

[6] See SHAKA's Complaint for Declaratory Relief and First Amended Complaint for Declaratory Relief filed in 1:14-cv-00582-SOM-BMK ("SHAKA DKT") # 1-3.

with the County of Maui to enjoin certifying the election results and enforcing the Ordinance, and to an expedited briefing schedule to invalidate the law via summary judgment by May 2015 (within 6-months). [DKT #23, 24, 25, and 26]. As a result, the County did not certify the election results or implement the law. No hearing was ever conducted to establish whether an injunction was appropriate or even warranted.

6. With respect to the State Court Action, the Chemical Companies filed a Notice of Removal to transfer the case to federal court. [SHAKA DKT #1]. SHAKA then moved to remand the case back to state court as there was no federal question alleged nor was there complete diversity. [SHAKA DKT #15]. Instead of remanding the case, the Federal District Court denied the Motion to Remand and retained jurisdiction. [SHAKA DKT #55] at pp. 10-21; Exhibit C. In doing so, the court relied on a 1985 case that has never been applied in this circuit to remand, and is entirely contrary to the well-pleaded complaint rule that the Ninth Circuit has adopted for determining the basis for remand. See [SHAKA's] Objections to Amended Findings and Recommendations to Deny Plaintiffs' Motion to Remand, [SHAKA DKT #45] at pp. 7-13.

7. With respect to the Federal Court Action, SHAKA was allowed to intervene on December 15, 2014. [DKT #63]. Pursuant to the schedule that was previously agreed to between the Chemical Companies and the County of Maui,

the Chemical Companies filed their Motion for Partial Summary Judgment to invalidate the law on December 18, 2015. [DKT # 70]. While the County had agreed to the expedited briefing and to the self-imposed injunction, the County took no position with respect to the Motion for Partial Summary Judgment. [DKT #98]. SHAKA opposed the motion on the merits, requested that the Federal Court certify the state law issues to State Court, and requested a Rule 56(d) continuance to respond to the Chemical Companies' claims that the harms that the Ordinance seeks to redress are somehow being regulated by the Federal and State government. [DKT #101].

8. Based on the prior agreement between the Chemical Companies and the County, the hearing on the Motion for Partial Summary Judgment was set for March 10, 2015, and the injunction was to lapse on May 31, 2015.

9. On March 9, 2015, the day before the hearing on the motion, the District Court *sua sponte* vacated the hearing and scheduled a status conference to discuss continuing the hearing and the injunction based on two bills that were pending in the Hawaii State Legislature that would ostensibly limit the County's ability to regulate agriculture. [DKT #128]. At the status conference on March 10, 2015, SHAKA opposed continuing the injunction. The Court requested SHAKA to submit a 2,500 word brief on why the Court should not continue the injunction. [DKT #130]. SHAKA filed its brief on March 13, 2015 explaining the ongoing

harms caused by not enforcing the Ordinance and requested that the Court hold an expedited hearing to allow evidence of harms to be presented. [DKT # 131].

10. On March 19, 2015, the District Court entered its Order Extending Injunction Entered into by Stipulation. [DKT #134.] Exhibit D. In its ruling, the District Court denied SHAKA's request for an expedited hearing to present evidence of the harms. Without hearing evidence, the District Court concluded that the financial expense to the Chemical Companies in having to delay growing more crops outweighed the harms to the environment and public health that the Court characterized as "brief." Id. at p. 12. Thereafter, SHAKA filed an interlocutory appeal in Appeal No. 15-15641.

11. Following the District Court's ruling continuing the injunction, on June 15, 2015 the Court held the hearing on the Chemical Companies' Motion for Partial Summary Judgment. The Court then issued its Order Determining That The County of Maui GMO Ordinance Is Preempted And Exceeds The County's Authority ("Final Order"). This order was filed in both cases. [DKT #166] and [SHAKA DKT #55]. See Exhibits E and F. In its Final Order, the Court ruled as follows:

a. The Court denied SHAKA's request for 56(d) discovery ruling. Id. at p. 16.

b. The Court denied SHAKA's request to certify the state law issues to the Hawaii Supreme Court.

c. The Court denied SHAKA's request to stay based on ripeness. Id. at pp. 18-19.

d. The Court rejected SHAKA's substantive arguments and invalidated the law on federal and state preemption and as exceeding the County's authority to impose fines. Id. at p. 54.

e. The Court dismissed the State Court Action as moot. Id. at pp. 54-55.

12. In its ruling, the Court expressly declined to consider any of the benefits or dangers of GMO operations, the potential risks to "human health, the environment, and the economy" caused by these activities, and the importance of voter initiatives that are adopted to protect against local harms under the Hawaii Constitution. Id. at p.2.

13. On June 30, 2015, the District Court entered its Judgment in the State Court Action. [SHAKA DKT #60]. See Exhibit G.

14. On July 22, 2015, SHAKA filed a notice of appeal of: (1) the Final Judgment entered in the State Court Action; and (2) the Final Order in the Federal Court Action. See Appeal Nos. 15-16466 and 15-16486.

15. On July 30, 2015, the Court entered its Final Judgment in the Federal Court Action. [DKT #188]. See Exhibit H. SHAKA Filed its Notice of Appeal of the Final Judgment on August 4, 2015. [DKT #192-1].

16. The parties have completed the briefing on the Preliminary Injunction Appeal. The Court has set the following briefing schedule on Appeal Nos. 15-16466 and 15-16486: October 30, 2015 – Opening Brief; and November 30, 2015 – Answering Briefs. The Court has set the following briefing schedule for Appeal No.15-16552: November 12, 2015 – Opening Brief; and December 14, 2015 – Answering Briefs.

II. DISCUSSION

A. All Four Appeals Should Be Consolidated

1. Pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 3(b)(2), "[w]hen the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals."

2. In this case, all four appeals involve the enforceability of a single County Ordinance and the procedural irregularities that the District Court followed in invalidating the law. Accordingly, in the interest of judicial economy, this Court should consolidate the four matters to avoid inconsistent results.

3. In addition, to simplify the briefing, the Court should set one briefing schedule for the opening brief, answering briefs, and reply for the State Court Action appeal and the Federal Court Action appeal.

B. The Hearing On The Consolidated Appeal Should Be Expedited

4. Ninth Circuit Rule 27-12 provides that a motion to expedite briefing and hearing may be granted upon a showing of "good cause." Good cause includes, but is not limited to, situations where "irreparable harm may occur or the appeal may become moot." Id.

5. In Calif. ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004), California filed interlocutory appeals, which were set on an expedited schedule for briefing and hearing. Id. at 837. Before the interlocutory appeals were decided, the District Court granted the defendant companies' motion to dismiss and directed entry of final judgment on the merits. Id. The State of California timely appealed and moved to consolidate the substantive appeal on the merits with the interlocutory appeals, as well as to expedite briefing and hearing of all the appeals. Id. The motion's panel granted the State's motion in its entirety, and the consolidated appeals were set for expedited schedule before the Ninth Circuit.

6. SHAKA requests similar treatment as the Court applied in Lockyer. A preliminary injunction appeal is pending, which involves serious

irreparable harm. The fact that a final judgment has been entered that is adverse does not diminish the need for expedited treatment, but only emphasizes the importance of it. SHAKA respectfully submits that the Court should consider the merits of the final rulings of the District Court in connection with its review of the preliminary injunction appeal. Further, given that all cases involve the potential for serious irreparable harm, SHAKA respectfully requests that all appeals be expedited for hearing and decision.

CONCLUSION

Based on the foregoing, SHAKA respectfully requests that this Court grant its Motion and allow consolidation and expedited treatment. This relief is warranted in the interest of judicial economy and efficiency and based on the irreparable harm that SHAKA is objecting to in this case.

DATED: Honolulu, Hawaii, August 12, 2015.

/s/ Michael C. Carroll
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY

Attorneys for Intervenor Defendants-Appellants
ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, and SHAKA MOVEMENT

Andrea R. Farleigh

Subject: FW: GMO Litigation

From: Nick Kacprowski [mailto:NKacprowski@ahfi.com]
Sent: Tuesday, August 11, 2015 1:36 PM
To: palston@ahfi.com; Ken Robbins; MargeryBronster; Rex Fujichaku; caleb.rowe@co.maui.hi.us; kristin.tarnstrom@co.maui.hi.us; moana.lutey@co.maui.hi.us; pat.wong@co.maui.hi.us; Michael C. Carroll
Cc: Andrea R. Farleigh; Karin L. Holma
Subject: Re: GMO Litigation

Mike

I am responding on behalf of all plaintiffs in *Robert Ito Farm* and all private defendants in *Atay*.

For clarity, we note that there are five separate appeals stemming from the two Maui cases.

You have filed four appeals: (1) 15-15641, an appeal of the extension of the *Robert Ito Farm* preliminary injunction; (2) 15-16486, an appeal of the summary judgment order in *Robert Ito Farm*; (3) 15-16466, an appeal of the final judgment in *Atay*; and (4) 15-16552, an appeal of the final judgment in *Robert Ito Farm*.

In addition, there is a fifth appeal, 15-15246, regarding CFS's request to intervene in *Robert Ito Farm*, that has been fully briefed and is awaiting decision by the Ninth Circuit. The Ninth Circuit has already denied CFS's request to expedite that appeal.

We agree that appeals 3 and 4 listed above (nos. 15-16466, 15-16552) should be consolidated in the sense that they should be heard by the same Ninth Circuit panel and argued contemporaneously; provided, however, that the parties should retain the ability to file separate briefs in each of those two appeals.

We oppose consolidation of any of the other appeals. Under clear Ninth Circuit law, appeal number 1 (15-15641) of the preliminary injunction extension was mooted by the final judgment in *Robert Ito Farm* and must be dismissed. Similarly, appeal number 2 (15-16486) must be dismissed because at the time it was filed there was no final judgment in the case—as you know, summary judgment orders are not themselves appealable in federal court absent a final judgment. Please let us know by close of business today whether you will voluntarily dismiss those two appeals. Finally, CFS's appeal should not be consolidated because it presents entirely different issues than those in the other appeals.

We oppose expedition of any of the appeals.

Regards,

Nick

EXHIBIT A

EXHIBIT A

ALSTON HUNT FLOYD & ING LAWYERS

Nickolas A. Kacprowski
Of Counsel

Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, HI 96813
Phone: (808) 441-6131
Fax: (808) 524-4591
E-mail: NKacprowski@ahfi.com
Website: www.ahfi.com

>>> "Michael C. Carroll" <mcarroll@legalhawaii.com> 8/10/2015 4:16 PM >>>
Counsel,

As you know, there are currently four appeals pending with the 9th Circuit. Given that all the appeals overlap and involve claims for irreparable harm, we intend to request the following relief from the 9th Circuit:

* That all four appeals be consolidated as they involve overlapping issues and consolidation is warranted in the interest of conserving judicial resources.

* That the Court set a single briefing schedule allowing for separate briefs in the State Court Action and the Federal Court Action. SHAKA proposes that the Court adopt the schedule set forth in the Time Schedule Order for Appeal Nos. 15-16466 and 15-16486 with the opening briefs due on October 30, 2015 and Answering Briefs due on November 30, 2015 in both appeals.

* That all appeals be subject to expedited treatment under Ninth Circuit Rule 3-3.

Pursuant to Circuit Rule 27-12, we are required to set forth opposing counsel's position in our request to the Ninth Circuit. Accordingly, we respectfully request a response as to your respective positions to the requested relief by the close of business tomorrow.

Sincerely,

Michael C. Carroll
Attorney at Law
Bays Lung Rose & Holma
Attorneys at Law
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawai'i 96813
Telephone: (808) 523-9000
Fax: (808) 533-4184

E-mail: mcarroll@legalhawaii.com<mailto:mcarroll@legalhawaii.com>

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 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; et al., Defendants	CIVIL NO. 14-00582 SOM/BMK ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

I. INTRODUCTION.

This case arises out of an initiative to ban genetically modified organisms in the County of Maui that won a majority of votes in an election held in November 2014. Plaintiffs in this case originally filed this action in state court, arguing in relevant part that the County should be required to implement the law. A day later, the private entities

that are Defendants in this case filed Robert Ito Farm, Inc. v. County of Maui, Civil No. 14-00511 SOM/BMK ("Robert Ito Farm Action"), in this court, arguing that the ban violated the Commerce Clause of the United States Constitution and that the ban was preempted by state and federal law. After the Complaint filed in the state court was amended, the state court case was removed to this court.

Before the court are Plaintiffs' motion to remand this case to state court and the County's motion to dismiss the First Amended Complaint. The court declines to dismiss on ripeness grounds claims that mirror the claims in the Robert Ito Farm Action. The court continues the hearing on the merits of the motion to dismiss to the same time as the dispositive motions in the Robert Ito Farm Action. The court adopts the Magistrate Judge's Amended Findings and Recommendation to Deny Plaintiffs' Motion to Remand and denies Plaintiffs' remand motion.

II. FACTUAL BACKGROUND.

On November 4, 2014, "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance") was passed by ballot initiative in the County of Maui. See ECF No. 1-3, PageID # 85.

The Ordinance renders it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test

Genetically Engineered Organisms within the County of Maui" until such ban is amended or repealed by the Maui County Council. Id., PageID # 88. Any person or entity violating the Ordinance is subject to civil penalties of $10,000 for the first violation, $25,000 for the second violation, and $50,000 for the third or any subsequent violation. Id. PageID # 89. Each day that a person or entity is in violation of the Ordinance is considered a separate violation. See id.

In addition to civil penalties, "any person or entity, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of [the Ordinance], shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars ($2,000.00), or imprisoned not more than one (1) year, or both, for each offense." Id.

On November 12, 2014, only eight days after the ballot initiative passed, Plaintiffs Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement filed a Complaint for Declaratory Relief in the Circuit Court of the Second Circuit, State of Hawaii. See ECF No. 1-3, PageID # 25 ("Atay Action"). Paragraphs 25 and 26 of the Complaint alleged that Defendants Monsanto Company and Dow Agrosciences LLC had made statements that they intended to challenge the legality and enforceability of the Ordinance. Id., PageID # 30. Paragraph 29

of the Complaint alleged that Maui County's mayor had publicly indicated that the County was determining how much manpower, equipment, and other resources would be needed to implement the Ordinance. Id., PageID # 29. Count I of the Complaint sought declaratory relief to establish the enforceability of the Ordinance under state law. Count II of the Complaint sought declaratory relief to have Maui County implement the Ordinance and allow Plaintiffs to participate in that implementation.

The following day, November 13, 2014, 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., and Hikiola Cooperative sued the County of Maui by filing the Robert Ito Farm Action in this court. The complaint in that case asserts 1) that the Ordinance is preempted by federal law (First Cause of Action); 2) that Maui County lacks authority to enact and enforce the Ordinance and that it is preempted by state law (Second Cause of Action); 3) that the Ordinance violates the Commerce Clause of the United States Constitution (Third Cause of Action); and 4) that the Ordinance is invalid under the Maui County Charter and state law (Fourth Cause of Action). See Robert Ito Farm, Inc. v. County of Maui, Civil No. 14-00511 SOM/BMK, ECF No. 1.

On November 13, 2014, the plaintiffs in the Robert Ito Farm Action also moved for an order temporarily restraining the implementation of the Ordinance and for a preliminary injunction seeking the same relief. See id., ECF No. 5.

On November 17, 2014, the plaintiffs in the Robert Ito Farm Action and Maui County stipulated, and the court ordered, that the Ordinance not be "published, certified as an Ordinance, enacted, effected, implemented, executed, applied, enforced, or otherwise acted upon until March 31, 2015, or until further order of this Court, in order to allow for adequate time for the parties to brief and argue and for the Court to rule on the legality of the Ordinance as a matter of law." See id., ECF No. 26, PageID # 441.

On December 10, 2014, Plaintiffs in the Atay Action filed a First Amended Complaint for Declaratory and Injunctive Relief. See ECF No. 1-3, PageID # 38. The First Amended Complaint added Defendants in the Atay Action so that all the plaintiffs in the Robert Ito Farm Action became parties in the Atay Action. Id. The First Amended Complaint in the Atay Action criticized Maui County for having stipulated to a delay in certifying election results concerning the Ordinance. Id., PageID # 49. The pleading reiterated assertions from the original Atay Complaint that the Ordinance was not preempted by state law and sought a declaration that the Ordinance was

enforceable. See Id., Count I. The First Amended Complaint also asserted that Maui County should implement the Ordinance, that the Atay Plaintiffs should be permitted to assist and participate in that implementation, and that Maui County should be required to certify the election results and implement the Ordinance. See Id., Counts II and III. Finally, it sought attorney's fees under the private attorney general doctrine. See Id., Count IV.

On December 15, 2014, Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement, the Atay Plaintiffs, were permitted to intervene in the Robert Ito Farm Action. See Civ. No. 14-00511 SOM/BMK, ECF No. 63.

On December 30, 2014, Dow Agrosciences removed the Atay Action to this court. See ECF No. 1.

On January 15, 2015, Maui County moved to dismiss the Atay Action. See ECF No. 14. Maui County argued that the case was not ripe, that Plaintiffs in the Atay Action had no right to be consulted regarding implementation of the Ordinance, and that Plaintiffs are not entitled to attorney's fees. See id. Maui County sought to stay the removed Atay Action pending adjudication of the summary judgment motions filed in the Robert Ito Farm Action.

Also filed on January 15, 2015, was a motion by the Atay Plaintiffs to remand the removed action to state court. See ECF No. 15. On February 27, 2015, Magistrate Judge Barry M.

Kurren issued his Findings and Recommendations ("F&R") in which he recommended that the court decline to remand this action. See ECF No. 36. On March 5, 2015, Magistrate Judge Kurren amended the F&R. See ECF No. 38.

On March 11, 2015, the Atay Plaintiffs filed objections to the Amended F&R. See ECF No. 45. This court now addresses those objections.

III. STANDARD.

A district judge reviews de novo those portions of a magistrate judge's findings and recommendation to which an objection is made and may accept, reject, or modify, in whole or in part, the findings and recommendation made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Local Rule 74.2. In other words, a district judge "review[s] the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." Freeman v. DirectTV, Inc., 457 F.3d 1001, 1005 (9th Cir. 2006).

The district judge may accept those portions of the findings and recommendation that are not objected to if the district judge is satisfied that there is no clear error on the face of the record. United States v. Bright, 2009 WL 5064355, *3 (D. Haw. Dec. 23, 2009); Stow v. Murashige, 288 F. Supp. 2d 1122, 1127 (D. Haw. 2003). The district judge may receive further evidence or recommit the matter to the magistrate judge with

instructions. 28 U.S.C. § 636(b)(1). The district judge may also consider the record developed before the magistrate judge. Local Rule 74.2. While the district judge must arrive at independent conclusions about those portions of the magistrate judge's report to which objections are made, a de novo hearing is not required. United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989); Bright, 2009 WL 5064355, *3; Local Rule 74.2.

IV. ANALYSIS.

Before the court are objections to the thorough and well-reasoned Amended F&R, which recommended denial of the motion to remand this case to state court. After de novo review, the court adopts the Amended F&R and denies the motion to remand. Before analyzing the motion to remand, the court turns to Maui County's contention that this court lacks jurisdiction over this matter because the claims are not ripe. The court denies the motion to dismiss to the extent it is based on that contention and continues the remainder of that motion to June 15, 2015, at 9:00 a.m.

A. Plaintiffs' Claims are Ripe.

Article III, section 2, of the Constitution confines federal courts to deciding cases or controversies. To qualify for adjudication in a federal court, a plaintiff must show that an actual controversy exists at all stages of the case. Arizonans for Official English v. Arizona, 520 U.S. 43, 63

(1997). No case or controversy exists if a dispute lacks ripeness, which has both a constitutional and a prudential component. See Coons v. Lew, 762 F.3d 891, 897 (9th Cir. 2014). Only the constitutional component of ripeness is at issue here.

"A dispute is ripe in the constitutional sense if it presents concrete legal issues, presented in actual cases, not abstractions." Montana Environmental Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014) (quotation marks, alterations, and citation omitted). "In the context of a declaratory judgment suit, the inquiry depends upon whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (quotation marks and citations omitted). "The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." Coons, 762 F.3d at 897.

By the time the First Amended Complaint was filed in state court, the County had entered into a stipulation with the plaintiffs in the Robert Ito Farm Action to stay implementation of Ordinance until this court ruled on its enforceability. The Atay Plaintiffs are challenging, among other things, the County's refusal to immediately certify and enforce the Ordinance. At

least some of Atay Plaintiffs' claims mirror the claims in the Robert Ito Farm Action. Both cases seek determinations concerning the enforceability of the Ordinance. Given the preemption issues raised by the plaintiffs in the Robert Ito Farm Action and the positions taken in that case by the County, this court finds no ripeness impediment with respect to such claims. The Atay Plaintiffs' "mirror-image" claims present a substantial controversy among parties having adverse legal interests that is of sufficient immediacy and reality to warrant a determination that the claims are ripe. See Montana Environmental Info. Ctr., 766 F.3d at 1188.

As the parties know, the calendar of court proceedings in the Robert Ito Farm Action has changed from what it was when the motion to dismiss in the Atay Action was filed. Those changes now make it efficient for this court to address the merits of the motion to dismiss in the Atay Action at the same time the court addresses the dispositive motions in the Robert Ito Farm Action, a coordination that this court was not originally amenable to.

B. The Court Denies the Motion to Remand.

A defendant may remove any civil action brought in state court over which the federal court would have original jurisdiction. 28 U .S.C. § 1441(a). That is, a civil action that could have originally been brought in federal court may be

removed from state to federal court. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."). A federal court has original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, 482 U.S. at 392. Plaintiffs are therefore the master of their claims and, in the absence of diversity jurisdiction, may avoid federal jurisdiction by exclusive reliance on state law. Id.

Generally, "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." Caterpillar, 482 U.S. at 392. This general rule is inapplicable, however, when a matter is completely preempted. That is, when "an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. Complete preemption is not an issue in this removed action. This court therefore

applies the general rule and examines whether the Atay Action is an action arising under federal law that could have been originally filed in this court. For purposes of determining whether this court has federal question jurisdiction over the Atay Action, this court need identify only a single federal question, as any additional related claims arising solely under state law could be addressed under this court's supplemental jurisdiction. See 28 U.S.C. § 1367.

Relying on Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985), and its progeny, this court determines that it would have had federal question jurisdiction over the claims in the First Amended Complaint in the Atay Action had they been filed in this court.

Janakes was a mail carrier who suffered injuries while delivering mail. Id. at 1092. Janakes applied for and received $1,545.58 for "continuation of pay" under 5 U.S.C. § 8118. Id. Defendant United States Postal Service ("USPS") informed Janakes that he was required to reimburse the "continuation of pay" if the third-party tortfeasor paid him any money. Id. at 1092-93. In relevant part, Janakes filed suit under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking an interpretation of 5 U.S.C. §§ 8101 to 8193 and the USPS's right to subrogation and reimbursement under those statutes. Id. at 1093.

The Ninth Circuit noted that the Declaratory Judgment Act, by itself, did not provide the district court with jurisdiction. Id. The Ninth Circuit then drew a distinction between a plaintiff with a Declaratory Judgment Act claim who asserts a federal defense to enforcement of a state law and a "coercive action" to enforce rights. The former provides no jurisdiction, while the latter does if it arises under federal law. Id. The Ninth Circuit stated, "If . . . the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense." Id. Although Janakes filed his action in anticipation of an action by the USPS for reimbursement and his action was therefore in the nature of a federal defense, the Ninth Circuit concluded that the USPS could have filed a well-pleaded coercive federal suit for reimbursement under 5 U.S.C. § 8132. Accordingly, the Ninth Circuit concluded that it had jurisdiction over Janakes's claims. Id. at 1095.

In Standard Insurance Company v. Saklad, 127 F.3d 1179, 1181 (9th Cir. 1997), the Ninth Circuit explained that, under Janakes, "A person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there. . . . In other words, in a sense we can reposition the parties in a declaratory relief action by asking

whether we would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy."

The original state-court complaint in the Atay Action was filed just days after the Ordinance was voted on. See ECF No. 1-3, PageID # 25. It alleged that "Monsanto and Dow have made public statements stating that they will challenge the legality and enforceability of the GMO bill in court." Id. ¶ 35; see also id. ¶¶ 25, 26. The original state-court Complaint also alleged that Maui County's mayor had made public statements indicating that the County was finalizing how much manpower, equipment, and other resources it would need to implement the Ordinance. Id., PageID ¶ 29. Under those circumstances, the Atay Action Plaintiffs sought a declaration that the Ordinance was enforceable and not preempted by state law. The Atay Action Complaint was clearly filed in anticipation of the Robert Ito Farm Action that was shortly thereafter filed in federal court.

The complaint in the Robert Ito Farm Action seeks a declaration that the Ordinance is preempted by both state and federal law, that Maui County lacks the authority to enact and enforce the invalid Ordinance, and that the Ordinance violates the Commerce Clause of the United States Constitution. See Civ. No. 14-00511 SOM/BMK, ECF No. 1. Concurrent with filing the federal case, the plaintiffs in the Robert Ito Farm Action filed

a motion seeking temporary and permanent injunctive relief. See Civ. No. 14-00511 SOM/BMK, ECF No. 5.

After the Robert Ito Farm Action suit was initiated, Plaintiffs in the Atay Action filed a First Amended Complaint alleging that Maui County was not acting to implement the Ordinance. The First Amended Complaint alleged that the County had stipulated to a "temporary injunction to delay the certification and implementation of the Ordinance." See First Amended Complaint ¶ 48, ECF No. 1-3, PageID # 47. On November 17, 2014, Magistrate Judge Barry M. Kurren signed a stipulation that stated, "In order to maintain the status quo and avoid any irreparable harm that may occur upon the enactment of the Ordinance, to allow the parties sufficient time to brief the merits of a summary disposition of this action before this Court, and to give the Court adequate time to decide the matter, the parties have agreed to an extension of the effective date of the Ordinance by stipulation and proposed order." See Civ. No. 14-00511 SOM/BMK, ECF No. 26. On March 19, 2015, this court issued an order, noting that the terms of the stipulated injunction allowed the court to continue the injunction until the court ruled on the merits of the Robert Ito Farm Action, and deciding, moreover, that even without the stipulation, an injunction was warranted. See Civ. No. 14-00511 SOM/BMK, ECF No. 134. The court continued until June 15, 2015, the hearing on the

dispositive motions in the Robert Ito Farm Action addressing whether the Ordinance was preempted under both federal and state law.

Under these circumstances, the Magistrate Judge was correct in determining that the Atay Action was filed in anticipation of the coercive Robert Ito Farm Action, filed by parties who were Defendants in the Atay Action. See ECF No. 38, PageID # 602. The Atay Action is akin to Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 242 (1952), in which the court said:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. 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.

Because the Robert Ito Farm Action has a basis in federal law, the court agrees with the Magistrate Judge that the Atay Action can be maintained in federal court pursuant to Janakes and Saklad. When the parties are repositioned, this court has

jurisdiction over this declaratory relief action. See Saklad, 127 F.3d at 1181.

Because this action could have originally been filed in this court, removal was proper. See 28 U .S.C. § 1441(a); Caterpillar, 482 U.S. at 392. In so ruling, this court is applying the principle that, if the action could have originally been filed in this court, it may be removed to this court.

C. **Brillhart/Dizol Factors Do Not Weigh in Favor of Remand.**

The Supreme Court has noted that "the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). Guidance concerning when to exercise discretion to decide a matter is provided by Brillhart v. Excess Insurance Co. of America, 316 U.S. 491 (1942), and its progeny.

In Brillhart, the Supreme Court stated that it would ordinarily

> be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

316 U.S. at 495. Brillhart set forth a nonexhaustive list of factors to be considered in determining whether to stay or dismiss a federal court Declaratory Judgment Act case:

> Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Id.

In Government Employees Insurance Company v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998), the Ninth Circuit stated, "The Brillhart factors remain the philosophic touchstone for the district court. The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." The Ninth Circuit explained,

> If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. The pendency of a state court action does not, of itself, require a district court to refuse

> federal declaratory relief. Nonetheless, federal courts should generally decline to entertain reactive declaratory actions.

Id. (citations omitted).

Dizol recognized that the Brillhart factors are not exhaustive and noted that district courts may consider

> whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a "res judicata" advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems.

Id. at 1225 n.5 (quoting Am. States Ins. Co. v. Kearns, 15 F.3d 142, 145 (9th Cir. 1994) (J. Garth, concurring) (quotation marks omitted)). In other words, "when deciding whether to exercise its jurisdiction under the Declaratory Judgments Act, [a district court] must balance concerns of judicial administration, comity, and fairness to the litigants." Chamberlain v. Allstate Insurance Company, 931 F.2d 1361, 1367 (9th Cir. 1991).

As the Magistrate Judge correctly noted, this court need not determine whether any party was engaged in forum shopping to determine whether it should decide the issues raised in the Atay Action. Although the Atay Action seeks a determination that the Ordinance is not preempted by state law and the Atay Action Plaintiffs argue that the state courts should

decide issues of state law, this court is unpersuaded that it should remand this matter to state court when the result would be uneconomical duplicative proceedings. The Robert Ito Farm Action has pending dispositive motions that Atay Action Plaintiffs have briefed. The Robert Ito Farm Action examines whether the Ordinance is preempted under both federal and state law and raises the issue of whether the Ordinance violates the Commerce Clause of the United States Constitution. In that respect, the Robert Ito Farm Action will examine issues raised in the state-court case. If this court were to remand the Atay Action to state court, there would be potentially duplicative litigation as to the issue of state-law preemption without any gain in judicial economy. The Robert Ito Farm Action would remain before this court, while the Atay Action would not decide the issues of federal law raised in the Robert Ito Farm Action. Under these circumstances, it is better to have the issues in the Robert Ito Farm Action and the Atay Action decided by the same judge.

The court recognizes that, if it retains jurisdiction over the Atay Action, the Atay Plaintiffs will not be proceeding in their chosen state-court forum on Maui. But the case does remain within Hawaii, and, as the Magistrate Judge noted, proceeding in federal court will not be overly burdensome on Plaintiffs in the Atay Action. Counsel for those Plaintiffs

lists a downtown Honolulu address near this court as counsel's place of business.

The court therefore adopts the Amended F&R, and incorporates its factual and legal analyses.

V. CONCLUSION.

The court denies the Motion to Dismiss the First Amended Complaint in the Atay Action, ECF No. 14, to the extent it seeks dismissal on ripeness grounds of matters that mirror the issues raised in the Robert Ito Farm Action. The hearing on the merits of that motion is continued until June 15, 2015, at 9:00 a.m.

The court adopts the Amended F&R and denies the Motion to Remand the Atay Action to state court, ECF No. 15.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 15, 2015.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District

Alika Atay, et al. v. County of Maui, et al.; Civil No. 14-00582 SOM/BMK; ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

Mike,

We agree with the contents of Nick's email, below.

Thanks,
Moana

On Aug 11, 2015, at 2:08 PM, Nick Kacprowski <NKacprowski@ahfi.com> wrote:

> Mike
>
> I am responding on behalf of all plaintiffs in *Robert Ito Farm* and all private defendants in *Atay*.
>
> For clarity, we note that there are five separate appeals stemming from the two Maui cases.
>
> You have filed four appeals: (1) 15-15641, an appeal of the extension of the *Robert Ito Farm* preliminary injunction; (2) 15-16486, an appeal of the summary judgment order in *Robert Ito Farm*; (3) 15-16466, an appeal of the final judgment in *Atay*; and (4) 15-16552, an appeal of the final judgment in *Robert Ito Farm*.
>
> In addition, there is a fifth appeal, 15-15246, regarding CFSâ€™s request to intervene in *Robert Ito Farm*, that has been fully briefed and is awaiting decision by the Ninth Circuit. The Ninth Circuit has already denied CFSâ€™s request to expedite that appeal.
>
> We agree that appeals 3 and 4 listed above (nos. 15-16466, 15-16552) should be consolidated in the sense that they should be heard by the same Ninth Circuit panel and argued contemporaneously; provided, however, that the parties should retain the ability to file separate briefs in each of those two appeals.
>
> We oppose consolidation of any of the other appeals. Under clear Ninth Circuit law, appeal number 1 (15-15641) of the preliminary injunction extension was mooted by the final judgment in *Robert Ito Farm* and must be dismissed. Similarly, appeal number 2 (15-16486) must be dismissed because at the time it was filed there was no final judgment in the caseâ€"as you know, summary judgment orders are not themselves appealable in federal court absent a final judgment. Please let us know by close of business today whether you will voluntarily dismiss those two appeals. Finally, CFSâ€™s appeal should not be consolidated because it presents entirely different issues than those in the other appeals.
>
> We oppose expedition of any of the appeals.
>
> Regards,
>
> Nick

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC., et al.,	CIVIL NO. 14-00511 SOM/BMK
Plaintiffs,	ORDER EXTENDING INJUNCTION ENTERED INTO BY STIPULATION
vs.	
COUNTY OF MAUI,	
Defendant,	
and	
ALIKA ATAY, et al.,	
Intervenor-Defendants	

ORDER EXTENDING INJUNCTION ENTERED INTO BY STIPULATION

I. INTRODUCTION.

Two bills were introduced in the Legislature of the State of Hawaii seeking to prohibit county ordinances abridging the rights of farmers and ranchers to use agricultural practices not prohibited by federal or state law. In light of the possibility that legislation may affect this case, even if ultimately through legislative vehicles other than those two bills, this court continues the hearing on the pending motions in this case until the legislative session has concluded, and extends the injunction staying the enactment, implementation, and enforcement of the ordinance at the heart of this case. That injunction was stipulated to by Plaintiffs 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., and Hikiola Cooperative (collectively, "Plaintiffs"), and by the County of Maui (the "County").

The hearing on the motions currently pending in this case is continued until 9 a.m. on Monday, June 15, 2015. The injunction staying the enactment, implementation, and enforcement of the ordinance in issue remains in effect until the court rules on the merits of this dispute.

II. FACTUAL BACKGROUND.

On November 4, 2014, "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance") was passed by ballot initiative in the County of Maui. See ECF No. 26, PageID # 440.

The Ordinance renders it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test Genetically Engineered Organisms within the County of Maui" until such ban is amended or repealed by the Maui County Council. ECF No. 71-4, PageID # 1412; ECF No. 102-21, PageID # 2520. The Ordinance provides an exception to the ban on genetically engineered ("GE") organisms if an organism is in "mid-growth cycle" when the Ordinance is enacted. See id.

Any person or entity that violates the Ordinance is subject to civil penalties of $10,000 for the first violation, $25,000 for the second violation, and $50,000 for the third or any subsequent violation. See ECF No. 71-4, PageID # 1413; ECF No. 102-21, PageID # 2521. Each day that a person or entity is in violation of the Ordinance is considered a separate violation. See id.

In addition to civil penalties, "any person or entity, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of [the Ordinance], shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars ($2,000.00), or imprisoned not more than one (1) year, or both, for each offense." Id.

Plaintiffs filed their Complaint against the County on November 13, 2014, asserting that the Ordinance is preempted under federal law and state law, violates the Commerce Clause of the United States Constitution, and violates the Maui County Charter and state law.

On November 17, 2014, Plaintiffs and the County stipulated, and the court ordered, that the Ordinance may not be "published, certified as an Ordinance, enacted, effected, implemented, executed, applied, enforced, or otherwise acted upon until March 31, 2015, or until further order of this Court, in

order to allow for adequate time for the parties to brief and argue and for the Court to rule on the legality of the Ordinance as a matter of law." ECF No. 26, PageID # 441.

On December 15, 2014, Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement ("Intervenors") were permitted to intervene in this action as Defendants. See ECF No. 63.

Two bills were introduced in the Legislature of the State of Hawaii that, if enacted, would prohibit county ordinances abridging the rights of farmers and ranchers to use agricultural practices not prohibited by federal law or state law. See H.B. No. 849; S.B. No. 986. These bills were introduced after the summary judgment motion now before this court was filed, so the bills are not addressed in the summary judgment briefs. Although the court (and, the court assumes, the parties) became aware of the bills, neither the court nor the parties immediately raised the subject of the bills, as there were no substantive proceedings scheduled in the case until March 10, 2015, and as the fate of the bills was uncertain.

Shortly before the March 10 hearing, the court suggested that the March 10 hearing time be used to address whether to defer consideration of the motions before the court in light of the bills. As it turned out, neither H.B. No. 849 nor S.B. No. 986 met the Legislature's decking or cross-over

deadline. Neither bill appears at the moment likely to be enacted in 2015. All parties nevertheless acknowledged on the record at the March 10 hearing in this lawsuit that legislative procedures might still allow for language from the bills to become law in 2015. That is, while the bills themselves might not move forward, the content of the bills could conceivably find its way into other bills.

Given the chance, however remote, that legislation might affect the present dispute, a discussion was held on March 10 regarding whether the Ordinance should be stayed until the Legislature adjourns in May 2015. Plaintiffs and the County expressed the view that the terms of the injunction they had stipulated to already stay the effect of the Ordinance until the date the court rules on the merits of this dispute, whenever that might be. See ECF No. 24, PageID # 429 ("Defendant County of Maui shall be and is hereby enjoined from . . . enacting, . . . enforcing, or otherwise acting upon the Ordinance, and the Ordinance shall not be . . . enacted, . . . enforced, or otherwise acted upon until March 31, 2015, *or until further order of this Court, in order to allow for adequate time for the parties to brief and argue and for the Court to rule on the legality of the Ordinance as a matter of law*." (emphasis added)).

Intervenors opposed any injunction beyond March 31, 2015, noting that they had not been parties to the original

stipulation. The court permitted Intevenors to file a brief discussing the balance of hardships relevant to an extension of the injunction beyond March 31, 2015.[1] See ECF No. 130.

III. STANDARD.

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

---

[1] In issuing the present order, the court is relying on the factual circumstances included in the record. As noted above, there is no dispute among the participants in this case that a possibility, while slight, exists that legislation affecting this case might pass in 2015, even if such legislation ends up being contained in a vehicle other than H.B. No. 849 or S.B. No. 986. The court reiterates this in light of a rumor that came to the court's attention only because one of the district judge's relatives happened to make a reference to a letter the relative had heard might have been written by a state legislator to the judge in connection with this case. The judge did not engage in discussion on the subject with the relative. The court would not normally comment on rumors, but does so here only because of the allegedly official nature of the communication referred to. The judge has not received any such letter. Indeed, with respect to factual matters, except for materials that are readily available to the parties and verifiable as authentic, courts typically confine themselves to relying on materials that are submitted by the parties and that are included in the record. No such letter was submitted by a party, and none is in the record. Moreover, any such letter would be irrelevant to the present ruling unless it provided some reason for this court to disregard the unanimous acknowledgment by the participants in this case, apparently based on observations or experiences in other instances, that, even if particular bills are not advancing in a legislative session, a possibility remains for the passage in the session of some legislation that includes provisions from those bills.

injunction may also issue when there are serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff "so long as the plaintiff 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, 1135 (9th Cir. 2011).

IV. ANALYSIS.

A. Intervenors' Request For an Evidentiary Hearing is Denied.

Intervenors contend that they are entitled to an evidentiary hearing before this court makes any ruling relating to the injunction entered into by stipulation. See ECF No. 131, PageID # 2910. Intervenors assert that an evidentiary hearing is necessary for Plaintiffs to demonstrate irreparable harm and for Intervenors to oppose issuance of an injunction. See id. at PageID #s 2910-11.

Intervenors' request for an evidentiary hearing is denied. Contrary to their contention, Intervenors have not been deprived of an opportunity to oppose issuance of an extended injunction. Before the hearing on March 10, 2015, Intervenors had notice that the court was considering extending the injunction, see ECF No. 128, and Intervenors argued against an extension at that hearing. They then submitted a brief on the balance of hardships issue. Intervenors contend that the notice requirement in Rule 65(a) of the Federal Rules of Civil Procedure

"implies a hearing in which a defendant is given a fair opportunity to oppose the application and to prepare for such opposition." Id. at PageID # 2910 (quoting Eisen v. Golden, 2006 Bankr. LEXIS 4790, *16-18 (B.A.P. 9th Cir. Dec. 28, 2006)). Intervenors do not demonstrate noncompliance with Rule 65(a).

To the extent Intervenors are contending that an evidentiary hearing is required to resolve disputed facts, the court is unpersuaded. Intervenors identify no material disputed facts likely to be resolved in the requested evidentiary hearing, and the court perceives no need for additional evidence to decide whether the injunction should be extended.

The court also notes that the evidentiary hearing Intervenors request would likely require discovery and findings of fact that, even if expedited, would likely occupy about the same amount of time as the extension that Intervenors oppose.

B. An Extended Injunction is Appropriate.

The terms of the stipulation between Plaintiffs and the County allow the injunction currently in place to remain in effect beyond March 31, 2015, without further order of this court. Even if this court declines to rely solely on the stipulation to extend the injunction in the face of opposition by Intervenors, who were not parties to the stipulation, this court concludes that an extension is warranted. Support for the extension is found in Plaintiffs' motion for temporary

restraining order and preliminary injunction, filed prior to the stipulation. As even Intervenors agree, there are serious questions going to the merits of this case. See ECF No. 131, PageID # 2903. Plaintiffs' extensive briefing on their motion for a temporary restraining order and preliminary injunction identifies serious preemption issues of the kind addressed in Syngenta Seeds, Inc. v. County of Kauai, Civ. No. 14-00014 BMK, 2014 WL 4216022 (D. Haw. Aug. 25, 2014), and Hawaii Floriculture & Nursery Association v. County of Hawaii, 2014 WL 6685817 (D. Haw. Nov. 26, 2014). In those cases, orders were filed precluding implementation of ordinances in other counties in Hawaii regulating genetically engineered organisms. The preemption rulings in those two decisions demonstrate the seriousness of the questions on the merits of this dispute.

This court also concludes that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction staying enforcement of the Ordinance until the court rules on the merits of the dispute raised by this case. If the Ordinance takes effect, Plaintiffs Monsanto Company ("Monsanto") and Agrigenetics Inc. ("Agrigenetics"), will be barred from any new planting of GE crops, the primary focus of their operations. See ECF No. 5-1, PageID # 129. Although Intervenors characterize the harm to Plaintiffs resulting from enforcement of the Ordinance as purely monetary, the potential harm extends beyond pocketbook injuries.

To the extent having to stop planting GE crops injures the ability of Monsanto and Agrigenetics to compete in the industry and causes them to lose customers, those are injuries that courts have recognized as intangible harms incapable of being redressed monetarily. See Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 861 F. Supp. 2d 1170, 1188 (D. Haw. 2012); Design Furnishings, Inc. v. Zen Path LLC, No. CIV. 2:10-02765 WBS GGH, 2010 WL 4321568, at *4 (E.D. Cal. Oct. 21, 2010).

Collateral effects on other businesses reliant on Monsanto's and Agrigenetics' GE operations, including Plaintiffs Friendly Isle Auto Parts & Supplies, Inc., and New Horizon Enterprises, Inc., will also likely result from implementation of the Ordinance. See ECF No. 1, PageID #s 9-10. Aside from monetary loss, those businesses may, like Monsanto and Agrigenetics, lose prospective customers and the ability to compete in their industries as a result of the Ordinance's enforcement.

For the same reasons that the court concludes that Plaintiffs will suffer irreparable harm, the court sees the balance of hardships tipping sharply towards Plaintiffs.

Although this court concludes that the harms cited by Plaintiffs alone tip the balance of hardships sharply in their favor, this court also considers the harm that may result to the County in the absence of an injunction, as the County and

Plaintiffs are aligned in stipulating to the extended injunction that Intervenors oppose. Absent an injunction, the County must implement the infrastructure necessary to enforce the Ordinance. If the Legislature prohibits the County from banning GE organisms, or if the court grants Plaintiffs' pending motion for summary judgment, such efforts by the County may be for naught. A short stay of the Ordinance could avoid a potential waste of taxpayer resources.

In addition to the potential harms outlined above, implementation of the Ordinance could result in the loss of jobs for individuals in jobs relating to GE organisms. See ECF No. 5-1, PageID # 129; see also ECF No. 1, PageID #s 6-8. The effects of job loss will likely be particularly severe on the island of Molokai, where job prospects are limited and the unemployment rate is high. See ECF No. 5-1, PageID # 130. Unemployment cannot be confined to purely monetary effects. The loss of a job affects the availability of health insurance and of college and other opportunities for the laid-off worker's family members. These personal losses could have long-term effects on the County as a whole.

Intervenors contend that the balance of hardships tips in their favor because the issuance of an injunction will cause irreparable harm to the environment, public health and safety, Native Hawaiian interests, and the integrity of the political

process. ECF No. 131, PageID # 2905.

But whatever harm the proposed extension of the injunction might cause to the environment and to public health and safety would be indisputably brief. The extended injunction will stay the Ordinance only until shortly after the 2015 legislative session ends, a new hearing is held, and this court rules on the merits of this dispute. This will be a matter of a few months.

Any environmental or public health and safety harm resulting from maintaining the status quo for a few more months must be viewed in the context of the provision in the Ordinance saying that the ban on GE organisms does not apply to organisms in "mid-growth cycle" at the time the Ordinance is enacted. Section 11-7 of Article 11 of the Maui County Charter provides that a proposed ordinance approved by a majority vote of qualified electors "shall be considered enacted upon certification of the election results." The Ordinance has not yet been certified. See ECF No. 101, PageID # 2263. Even if "enactment" occurred on March 31, 2015, GE crops in "mid-growth cycle" at that time would be unaffected by the Ordinance, and their cultivation could continue. Intervenors focus much of their attention on potential harms from pesticide use should the injunction be extended a few months, but Intervenors do not even suggest that pesticide use would significantly abate absent an

injunction during those few months given the exemption for "mid-growth cycle" organisms.

Intervenors' arguments regarding pesticides also appear inconsistent. In their opposition to Plaintiffs' motion for summary judgment, Intervenors say that the Ordinance "does not seek to regulate pesticide users or distribut[o]rs." ECF No. 101, PageID # 2283. Here, however, Intervenors focus much of their argument against extension of the injunction on harms flowing from pesticide use. See, e.g., ECF No. 131, PageID #s 2906, 2907-08.

With respect to Intervenors' contentions regarding irreparable harm to Native Hawaiians, Invervenors' papers do not clearly describe the alleged harms at issue. Intervenors state that the Native Hawaiian practices of "protecting the land, preserving native species, and utilizing native plants and animals in the environment" are "threatened by continued GMO operations," but offer no explanation of how that is the case. Intervenors' papers do not describe precisely what damage will result to which Native Hawaiian practices or to which species from an injunction staying enforcement of the Ordinance over the next few months. The declaration Intervenors refer to in their discussion of harm to Native Hawaiians appears to concern only the alleged pesticide issue.

Intervenors also contend that an extension of the

injunction staying enforcement of the Ordinance will harm the integrity of the political process. See ECF No. 131, PageID #s 2909-10. Intervenors say that "[t]he 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." ECF No. 131, PageID # 2910.

A short stay of the Ordinance will not undermine the integrity of the political process. The Ordinance is the subject of litigation that may be affected by state legislation that is no less part of the political process than a County initiative. A short delay in enforcement of the Ordinance in light of the reality of the legislative process and judicial review does no harm to the integrity of the political process at the County level.

The harms outlined by Intervenors do not tip the balance of hardships in their favor.

Finally, this court examines whether extending the injunction is in the public interest. An injunction staying the Ordinance for the few months it takes to determine whether the Legislature will act, and to allow this court to rule on the merits of this dispute, is in the public interest. As previously noted, a delay of this litigation makes practical sense given the potential effect of legislation on this case. Failure to extend

the injunction staying the Ordinance could result in a considerable waste of public resources if the County is forced to build the infrastructure necessary to enforce the Ordinance, only to find that other circumstances render those efforts unnecessary.

The court has determined that: (1) there are serious questions going to the merits; (2) there is a likelihood of irreparable injury to Plaintiffs; (3) the balance of hardships tips sharply towards Plaintiffs and the County; and (4) an injunction is in the public interest. On the basis of those determinations, the court extends the injunction barring enactment, implementation, or enforcement of the Ordinance until this court has ruled on the merits of this dispute. The hearing on the motions in this case previously scheduled for March 10, 2015 (and then for March 31, 2015), is continued until 9 a.m. on Monday, June 15, 2015, after the end of the legislative session in May. The court expects to issue a ruling on those motions no later than the end of June. (The hearing on the matters in Atay v. County of Maui, Civ. No. 14-00582, remain on the calendar for March 31, 2015.)

V. CONCLUSION.

Pursuant to this order, the County is enjoined from enacting, implementing, or enforcing the Ordinance until the court has ruled on the merits of this dispute.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 19, 2015.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District

Robert Ito Farm, Inc., et al. v. County of Maui; Civil No. 14-00511 SOM/BMK; ORDER EXTENDING INJUNCTION ENTERED INTO BY STIPULATION

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 TRUCKING AND SERVICES; HIKIOLA COOPERATIVE, Plaintiffs vs. COUNTY OF MAUI, Defendant and ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI`OHU RYDER; and SHAKA MOVEMENT, Intervenor-Defendants	CIVIL NO. 14-00511 SOM/BMK ORDER DETERMINING THAT THE COUNTY OF MAUI GMO ORDINANCE IS PREEMPTED AND EXCEEDS THE COUNTY'S AUTHORITY
ALIKA ATAY, et al. Plaintiffs, vs. COUNTY OF MAUI; DOW AGROSCIENCES LLC, et al., Defendants	CIVIL NO. 14-00582 SOM/BMK ORDER DETERMINING THAT THE COUNTY OF MAUI GMO ORDINANCE IS PREEMPTED AND EXCEEDS THE COUNTY'S AUTHORITY

ORDER DETERMINING THAT THE COUNTY OF MAUI GMO ORDINANCE IS PREEMPTED AND EXCEEDS THE COUNTY'S AUTHORITY

I. INTRODUCTION.

Is a County of Maui Ordinance banning genetically engineered ("GE") activities and/or genetically modified organisms ("GMOs") preempted by federal and/or state law? Does the Ordinance exceed the County's authority? Those are the questions that the present order addresses.

As this court noted at the hearing on the motions now before the court, none of the motions asks this court to determine whether GE activities or GMOs are good, bad, beneficial, or dangerous. Nor do the pending motions ask this court to address the value of voter initiatives to adopt laws such as the Ordinance. The court recognizes the importance of questions about whether GE activities and GMOs pose risks to human health, the environment, and the economy, and about how citizens may participate in democratic processes. But any court is a reactive body that addresses matters before it rather than reaching out to grab hold of whatever matters may catch a judge's fancy because the matters are interesting, important, or of great concern to many people. This order is not an attempt by this court to pass judgment on any benefit or detriment posed by GE activities or GMOs. Notwithstanding the concern that many people have expressed on both sides of these issues, and the visible (and sometimes audible) passion of members of the substantial audiences that have attended hearings in this case, those issues

are not before this court on the present motions, and those who want those issues addressed must seek means other than the present order to accomplish that.

Similarly not before the court at this time is the question of whether it might be a good idea to allow the County to regulate GE activities and GMOs.

The motions now before this court can be ruled on based on an examination of the laws in this area, without regard to political, medical, economic, or other social concerns, as important as those are. Having examined the applicable law, this court concludes that the Ordinance is indeed preempted by federal and state law and does exceed the County's authority. The court therefore declares the Ordinance invalid and unenforceable.

II. PROCEDURAL BACKGROUND.

The Ordinance in issue was passed through the initiative process. On November 12, 2014, eight days after the ballot initiative passed, Plaintiffs Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei`ohu Ryder, and SHAKA Movement (collectively, "SHAKA"), supporters of the initiative, filed a Complaint for Declaratory Relief in the Circuit Court of the Second Circuit, State of Hawaii. See ECF No. 1-3, PageID # 25 (the "Atay Action").

The following day, November 13, 2014, 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., and Hikiola Cooperative, opponents of the initiative, sued the County of Maui by filing the Robert Ito Farm Action in this court. See Robert Ito Farm, Inc. v. County of Maui, Civil No. 14-00511 SOM/BMK, ECF No. 1 (the "Robert Ito Farm Action").

On November 17, 2014, Plaintiffs in the Robert Ito Farm Action and Maui County stipulated, and the court ordered, that the Ordinance not be "published, certified as an Ordinance, enacted, effected, implemented, executed, applied, enforced, or otherwise acted upon until March 31, 2015, or until further order of this Court, in order to allow for adequate time for the parties to brief and argue and for the Court to rule on the legality of the Ordinance as a matter of law." See id., ECF No. 26, PageID # 441.

On December 15, 2014, SHAKA intervened in the Robert Ito Farm Action. See Civ. No. 14-00511 SOM/BMK, ECF No. 63.

On December 30, 2014, Dow Agrosciences removed the Atay Action to this court. See ECF No. 1. Both the Robert Ito Farm Action and the Atay Action have been assigned to this judge. Because the issues raised in the two actions are interrelated, the court rules on both in this single order. Plaintiffs in the Robert Ito Farm Action are referred to collectively in this order

as the "Seed Parties," a term the court also uses, given the substantial duplication, to include Defendants other than the County in the Atay Action.

Before the court are several motions. First, on December 17, 2014, the Seed Parties filed a motion for summary judgment in the Robert Ito Farm Action with respect to federal preemption of the Ordinance (First Cause of Action), state preemption of the Ordinance (Second Cause of Action), and alleged violation of the Maui County Charter and related state law (Fourth Cause of Action). See Robert Ito Farm Action, ECF No. 70. That motion is granted in part and denied in part.

Second, on November 21, 2014, SHAKA filed a motion to dismiss or for judgment on the pleadings in the Robert Ito Farm Action, ECF No. 39, arguing that preference should be given to resolving the issues in the Atay Action by a state court. That motion is denied, given the court's determination that the Ordinance is preempted and exceeds the authority granted by the Maui County Charter.

Third, on January 15, 2015, the County of Maui filed a motion to dismiss in the Atay Action. ECF No. 14. The court has previously addressed part of that motion, and now grants the remainder of the motion to dismiss. Because the Ordinance is invalid, SHAKA has no right to be consulted regarding

implementation of it and SHAKA is not entitled to its attorneys' fees.

Finally, on June 8, 2015, SHAKA filed a motion in the Robert Ito Farm Action, seeking to be allowed to cross-claim against the County of Maui to force it to certify the election results and implement the ordinance. See ECF No. 161. That motion is also denied, given the court's determination that the Ordinance is unenforceable.

III. FACTUAL BACKGROUND.

On November 4, 2014, "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance") was passed by ballot initiative in the County of Maui. See ECF No. 26, PageID # 440.[1]

The Ordinance renders it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test Genetically Engineered Organisms within the County of Maui" until such ban is amended or repealed by the Maui County Council. ECF No. 71-4, PageID # 1412. The Ordinance provides an exception to the ban on GE organisms for organisms in "mid-growth cycle" at the time of enactment of the Ordinance. See id.

The Ordinance contains "Findings," including the following:

[1]Unless otherwise noted, citations refer to the docket in the Robert Ito Farm Action.

1. The rapid and unregulated growth of commercial agricultural entities engaged in the cultivation and development of GE Organisms threatens the stability and growth of Maui County's agricultural economy, the health of its citizens, and its environment.

. . . .

3. GE Organisms are not a part of the natural environment of Maui County and instead exist in the County as a possible invasive species.

. . .

4. The genetic engineering of plants and animals often causes unintended consequences. Manipulating genes via genetic engineering and inserting them into organisms is an imprecise process. The results are not always predictable or controllable. Mixing plant, animal, bacterial, and viral genes through genetic engineering in combinations that are not selected for in nature may produce results that lead to adverse health or environmental consequences and threaten Maui County's cultural heritage, Environment and Public Trust Resources.

. . . .

14. The contamination of agricultural products with GE Organisms can have a myriad of significant impacts. Organic and many foreign markets prohibit GE products and even a single event of Transgenic Contamination can and has resulted in significant economic harm when the contaminated crops are rejected by buyers.

15. Transgenic contamination can and does occur as a result of cross-pollination, co-mingling of conventional and GE seeds, accidental transfer by animals or weather events, and other mechanisms. Transgenic contamination results in GE crops growing where they are not intended. . . .

> 16. Transgenic contamination prevents farmers and the public from having the fundamental right to choose whether or not to grow crops that are free from GE. . . .
>
> . . . .
>
> 18. There are no known or proven scientific methodologies or procedures to recall GE Organisms or remediate/decontaminate the Environment from any damages once GE Organisms are released into the Environment and contamination has occurred.

Ordinance, ECF No. 71-4, PageID #s 1409-10.

> The stated purposes of the Ordinance are:
>
> 1. to protect Maui County's Environment and Public Trust Resources from transgenic contamination by GE Operations and Practices;
>
> 2. to defend and promote the economic integrity of organic and non GE markets that are harmed by transgenic contamination by GE Operations and Practices;
>
> 3. to protect Maui County from hazardous aspects of GE Operations and Practices, including but not limited to increased Pesticide use;
>
> 4. to preserve the right of Maui County residents to reject GE Operations and Practices based on health-related, moral, or other concerns; and
>
> 5. to preserve Maui County's Environment and Public Trust Resources (with its unique and vulnerable ecosystems), while promoting the cultural heritage of the indigenous peoples of Maui and indigenous agricultural Operations and Practices.

ECF No. 71-4, PageID # 1411-12.

Any person or entity violating the Ordinance is subject to civil penalties of $10,000 for the first violation, $25,000 for the second violation, and $50,000 for the third or any subsequent violation. Id., PageID # 1413. Each day that a person or entity is in violation of the Ordinance is considered a separate violation. See id. In addition to civil penalties, "any person or entity, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of [the Ordinance], shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars ($2,000.00), or imprisoned not more than one (1) year, or both, for each offense." Id. The Ordinance also authorizes the Director of Environmental Management to enter property to remove GMOs at the violator's expense. Id. There is also a citizen suit provision, allowing private suits to enjoin violations. Id. At the hearing on the motions now before this court, SHAKA conceded that the Ordinance applies not only to the Seed Parties, but also to individuals who have GMO plants in their back yards, including a single GE papaya tree, although SHAKA's counsel said the Ordinance's intent was not specifically to regulate individual homeowners.

Under section 6 of the Ordinance, the County Council may consider amendment or repeal of the "temporary moratorium"

for a specific GE operation or practice if: (1) an Environmental and Public Health Impacts Study ("EPHIS") is completed for that operation or practice; (2) the EPHIS is reviewed by the County Council and citizens, as provided in section 8.2a of the Ordinance; (3) a public hearing is held; (4) at least two-thirds of the County Council votes in favor of amendment or repeal; and (5) the County Council determines that "passage of the amendment or repeal pertaining to such GE Operation or Practice does not result in significant harm and will result in significant benefits to the health of present and future generations of Maui citizens, significantly supports the conservation and protection of Maui's natural beauty and all natural resources." ECF No. 71-4, PageID # 1412. Although the second condition listed in the preceding sentence refers to satisfaction of section 8.2a of the Ordinance, there is no section 8.2a in the Ordinance. Given the impossibility of satisfying all of the listed conditions, the "temporary moratorium" is akin to a ban on GE operations. Even if the requirement of EPHIS review pursuant to section 8.2a is stricken from the Ordinance, satisfying the requirements appears time-consuming, expensive, and unlikely.

The Ordinance contains a severability clause stating that "[e]very provision in this chapter and every application of the provisions in this chapter are severable from each other," and "[i]f any application of any provision in this chapter to any

person or group of persons or circumstances is found by a court to be invalid, the remainder of this chapter and the application of its provisions to all other persons and circumstances may not be affected." Id.

IV. SUMMARY JUDGMENT STANDARD.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2010). See Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Movants must support their position that a material fact is or is not genuinely disputed by either "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials"; or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element

at trial. See id. at 323. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000).

The burden initially falls on the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp., 477 U.S. at 323). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote omitted).

The nonmoving party must set forth specific facts showing that there is a genuine issue for trial. T.W. Elec. Serv., Inc., 809 F.2d at 630. At least some "'significant probative evidence tending to support the complaint'" must be produced. Id. (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). See Addisu, 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of

material fact."). "[I]f the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." Cal. Arch'l Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., 475 U.S. at 587). Accord Addisu, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

All evidence and inferences must be construed in the light most favorable to the nonmoving party. T.W. Elec. Serv., Inc., 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. Id. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." Id.

V. PRELIMINARY MATTERS.

Before turning to the merits of the motions, the court examines some initial matters, determining that a Rule 56(d) continuance is unwarranted, declining to strike SHAKA's concise

statement of facts, and determining that the issues presented are ripe for adjudication.

A. SHAKA's Request for a Rule 56(d) Continuance is Denied.

SHAKA urges this court to defer consideration of the Seed Parties' motion for summary judgment under Rule 56(d) of the Federal Rules of Civil Procedure until completion of discovery. See ECF No. 101, PageID # 2261. That request is denied.

SHAKA says that discovery is needed to present "evidence demonstrating that [the Seed Parties'] bases in asserting federal and state preemption of the Ordinance [are] flawed." ECF No. 102-22, PageID # 2525. According to SHAKA, it needs discovery on the following issues: (1) "[t]he studies and approvals that [the Seed Parties] represent were performed and/or obtained in connection with federal and state oversight of GMO operations being conducted in Maui County"; (2) "[t]he details concerning [the Seed Parties'] GMO operations"; (3) "[t]he health and environmental impacts associated with these operations and practices"; and (4) "[t]he federal and state oversight that is allegedly being carried out with respect to [the Seed Parties'] GMO operations." Id.

Rule 56(d) of the Federal Rules of Civil Procedure provides that, when "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to a motion for summary

judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). The burden is on the party seeking a Rule 56(d) continuance "to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

SHAKA has failed to show that it cannot present facts essential to its opposition. The relevant facts are uncontested, and this court is being asked to determine legal matters. Whether preemption applies can be resolved without further development of the "factual" issues that SHAKA asserts are necessary to defeat preemption. See, e.g., Hotel Employees & Rest. Employees Int'l Union v. Nevada Gaming Comm'n, 984 F.2d 1507, 1513 (9th Cir. 1993) ("Preemption is predominantly a legal question, resolution of which would not be aided greatly by development of a more complete factual record."); Or. Coast Scenic R.R. LLC v. Or., Dep't of State Lands, No. 3:14-CV-00414-HZ, 2014 WL 1572445, at *1 (D. Or. Apr. 18, 2014) (characterizing preemption as a "legal question").

Contrary to SHAKA's assertions, the issues for which discovery is allegedly required are largely, if not completely, irrelevant to its opposition. The "studies and approvals . . .

performed and/or obtained in connection with federal and state oversight of GMO operations . . . in Maui County," the "details concerning [the Seed Parties'] GMO operations," the "health and environmental impacts associated with these operations and practices," and the "federal and state oversight . . . allegedly being carried out with respect to [the Seed Parties'] GMO operations" have no bearing on whether the Ordinance is preempted under either federal or state law. The overarching legal questions relating to federal and state preemption do not, for example, turn on oversight of the Seed Parties' specific operations, on the health and environmental impacts of those operations, or whether GMOs are good or bad. As important as those matters are, they are not implicated by a challenge to the Ordinance as preempted by federal and state law.

B. SHAKA's Concise Statement of Facts Does Not Satisfy Local Rule 56.1.

Under Local Rule 56.1(b), any party opposing a motion for summary judgment "shall file and serve with his or her opposing papers a separate document containing a single concise statement that admits or disputes the facts set forth in the moving party's concise statement, as well as sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." Material facts set forth in the moving party's concise statement "will be deemed admitted

unless controverted by a separate concise statement of the opposing party." Local Rule 56.1(g). "When preparing the separate concise statement, a party shall reference only the material facts that are absolutely necessary for the court to determine the limited issues presented in the motion for summary judgment (and no others), and each reference shall contain a citation to a particular affidavit, deposition, or other document that supports the party's interpretation of the material fact." Local Rule 56.1(c).

The Seed Parties contend that SHAKA's Concise Statement of Facts violates Local Rule 56.1 by generally denying the facts without citation of any evidence and by including immaterial additional facts. See ECF No. 109, PageID #s 2655-56. The court agrees that SHAKA has failed to comply with Local Rule 56.1.

In response to the twenty-four facts set forth in the Seed Parties' Concise Statement, SHAKA merely states that it denies "the factual allegations set forth in Plaintiffs' Concise Statement of Facts." ECF No. 102, PageID # 2304. Neither further explanation nor citation to any particular document is provided. The purpose of a concise statement is to aid this court in determining whether disputed material facts exist, and in identifying the bases for any disputes. Providing this court with a general denial of facts asserted in a moving party's concise statement is insufficient to controvert those facts. See

Coles v. Eagle, Civ. No. 09-00167 LEK, 2014 WL 5089177, at *3 (D. Haw. Oct. 8, 2014) ("A general denial, such as the one [Plaintiff] made in response to [Defendant's Concise Statement of Facts], is not sufficient."). This is especially so in this case, in which SHAKA has disputed even the Seed Parties' statement that "Defendant County of Maui is a political subdivision of the State of Hawai'i governed by the Constitution of the State of Hawai'i and Hawai'i state laws." ECF No. 71, PageID # 1391; ECF No. 102, PageID # 2304.

Although this court could, on this basis, deem assertions in the Seed Parties' Concise Statement admitted under Local Rule 56.1(g), the court determines that this is unnecessary. Even with SHAKA's general denial of all facts in the Seed Parties' Concise Statement, there is no genuine dispute as to any material fact in this case. As previously noted, preemption is a legal issue that can be resolved without further factual development of the record in this case. None of the facts cited or controverted by SHAKA establishes that disputed issues of material fact preclude summary judgment.

C. This Matter is Ripe for Adjudication.

In its Opposition to the Seed Parties' motion for summary judgment, SHAKA argues that the preemption issues raised in the motion are not ripe for adjudication because the election results have not yet been certified and the Ordinance has not yet

been implemented. This court has already rejected a similar argument by Maui County concerning SHAKA's claims in the Atay action. See Atay Action, ECF No. 55, PageId#s 793-95. Because there is no contention that the County does not intend to certify the election results or that SHAKA itself will decline to attempt to enforce the Ordinance once it has been implemented, the preemption issues discussed in this order are ripe for adjudication. Before this court is a substantial controversy of sufficient immediacy and reality to warrant a determination that the claims are ripe. See Montana Environmental Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014).

VI. ANALYSIS.

A. The Ordinance is Preempted by Federal Law.

The Seed Parties argue that the ban on GE organisms, which SHAKA characterizes as a "temporary moratorium," is preempted by federal law. The court agrees.

"[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985).

The Supremacy Clause in the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. 6, cl. 2.

There are three ways in which state law may be preempted by federal law, U.S. Const. art. VI, cl. 2. The three ways are: (1) express preemption, which exists when Congress has explicitly defined the extent to which its enactments preempt state law; (2) implied field preemption, which exists when state law attempts to regulate conduct in a field that Congress intended federal law to occupy exclusively; and (3) implied conflict preemption, which exists when compliance with both state and federal requirements is impossible, or when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives Congress had. See Indus. Truck Ass'n, Inc. v. Henry, 125 F.3d 1305, 1309 (9th Cir. 1997) (citing English v. Gen. Elec. Co., 496 U.S. 72, 78-80 (1990)); accord Whistler Invs., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159, 1164 (9th Cir. 2008) ("Congress has the constitutional power to preempt state law, and may do so either expressly--through clear statutory language--or implicitly." (citations omitted)). With respect to each type of preemption, "Congressional intent to preempt state law must be clear and manifest." Indus. Truck, 125 F.3d at 1309.

1. The Ordinance is Expressly Preempted Under Federal Law.

"It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." Hillsborough, 471 U.S. at 712 (quoting Gibbons v. Ogden, 9 Wheat 1, 211 (1824)). "[S]tate laws can be pre-empted by federal regulations as well as by federal statutes." Id. at 713.

The "[p]reemption analysis begins with the presumption that Congress does not intend to supplant state law." Tillison v. Gregoire, 424 F.3d 1093, 1098 (9th Cir. 2005) (internal quotation marks and citation omitted). Accord Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) ("Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress." (alterations, quotation marks, and citation omitted)). When Congress expressly supersedes state legislation by statute, this court's task is to "identify the domain expressly pre-empted." Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778 (2013). This is because, when Congress enacts a provision expressly defining the preemptive reach of a statute, matters beyond the reach of the provision are not preempted. See Cipollone, 505 U.S. at 517.

"In considering the preemptive scope of a statute,

congressional intent is the ultimate touchstone." Dilts v. Penske Logistics, LLC, 769 F.3d 637, 642 (9th Cir. 2014) (internal quotation marks and citation omitted). "'Congress' intent . . . primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996)).

In the First Cause of Action in the Complaint of November 13, 2014, filed in the Robert Ito Farm Action, the Seed Parties contend that the Ordinance is expressly preempted by the Plant Protection Act, 7 U.S.C. §§ 7701 to 7786. The Plant Protection Act authorizes the Secretary of Agriculture to

> prohibit or restrict the importation, entry, exportation, or movement[2] in interstate

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[2]In 7 U.S.C § 7702(9), "move," "moving," and "movement" are defined as meaning the following:

> (A) to carry, enter, import, mail, ship, or transport;
>
> (B) to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting;
>
> (C) to offer to carry, enter, import, mail, ship, or transport;

commerce of any plant, plant product, biological control organism, noxious weed,[3] article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the

(D) to receive to carry, enter, import, mail, ship, or transport;

(E) to release into the environment; or

(F) to allow any of the activities described in a preceding subparagraph.

[3]In 7 U.S.C § 7702(10), "noxious weed" means "any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment."

> dissemination of a plant pest[4] or noxious weed within the United States.

7 U.S.C. § 7712(a).

The Plant Protection Act expressly preempts certain state laws:

> (1) In general
>
> Except as provided in paragraph (2), no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the

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[4]In 7 U.S.C § 7702(14), "plant pest" means

> any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product:
>
> (A) A protozoan.
>
> (B) A nonhuman animal.
>
> (C) A parasitic plant.
>
> (D) A bacterium.
>
> (E) A fungus.
>
> (F) A virus or viroid.
>
> (G) An infectious agent or other pathogen.
>
> (H) Any article similar to or allied with any of the articles specified in the preceding subparagraphs.

> dissemination of the biological control organism, plant pest, or noxious weed within the United States.
>
> (2) Exceptions
>
> (A) Regulations consistent with Federal regulations
>
> A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary.
>
> (B) Special need
>
> A State or political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

7 U.S.C. § 7756(b); see also 7 C.F.R. § 301.1(a) (same).

In other words, with two exceptions, if the Secretary of Agriculture has issued a regulation or order to prevent the dissemination of a plant pest or noxious weed, neither Hawaii nor any of its counties "may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in

order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed." 7 U.S.C. § 7756(b).

On June 16, 1987, the Animal and Plant Health Inspection Service, part of the United States Department of Agriculture, issued a final rule governing "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which are Plant Pests or Which There is Reason to Believe are Plant Pests." 52 C.F.R. 22892 (June 16, 1987). Effective July 16, 1987, these regulations were published as 7 C.F.R., Part 340.

These regulations state that "Part 340 regulates, among other things, the introduction of organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests." 7 C.F.R. § 340.0 n.1. Interpreting the regulations, the Ninth Circuit has noted that "a genetically modified organism is regulated as a plant pest if it is created using an organism that is itself a plant pest." Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 835 (9th Cir. 2013). According to the Ninth Circuit, the Animal and Plant Health Inspection Service "regulates such a genetically engineered organism, referred to by the parties as a 'presumptive plant

pest," until the agency concludes on the basis of scientific evidence that the modified plant is not a 'plant pest.'" Id.

The regulations implementing the Plant Protection Act prohibit persons[5] from introducing[6] any regulated article[7] unless (1) the Administrator[8] receives notification as required by 7 C.F.R. § 340.3, that the introduction is permitted in accordance with 7 C.F.R. § 340.4, or is conditionally exempt; and (2) the introduction of the regulated article conforms with all other requirements of part 340. 7 C.F.R. § 340.0.

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[5]"Person" is defined as "Any individual, partnership, corporation, company, society, association, or other organized group." 7 C.F.R. § 340.1.

[6]"Introduce or introduction" is defined as "To move into or through the United States, to release into the environment, to move interstate, or any attempt thereat." 7 C.F.R. § 340.1.

[7]"Regulated Article" is defined as "Any organism which has been altered or produced through genetic engineering, if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest, or is an unclassified organism and/or an organism whose classification is unknown, or any product which contains such an organism, or any other organism or product altered or produced through genetic engineering which the Administrator, determines is a plant pest or has reason to believe is a plant pest. Excluded are recipient microorganisms which are not plant pests and which have resulted from the addition of genetic material from a donor organism where the material is well characterized and contains only non-coding regulatory regions." 7 C.F.R. § 340.1.

[8]"Administrator" is defined as "The Administrator of the Animal and Plant Health Inspection Service (APHIS) or any other employee of APHIS to whom authority has been or may be delegated to act in the Administrator's stead." 7 C.F.R. § 340.1.

The Ordinance at issue essentially bans all GE organisms, including those permitted by section 340.0, making it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test Genetically Engineered Organisms within the County of Maui," unless (1) the Ordinance has been repealed or (2) an Environmental and Public Health Study has been completed (and reviewed in accordance with section 8.2.a of the Ordinance, a nonexistent section), a public hearing has been held, at least two-thirds of the County Council votes to allow the GE organisms, and the County Council determines that the GE organism "does not result in significant harm and will result in significant benefits to the health of present and future generations of Maui citizens, [and] significantly supports the conservation and protection of Maui's natural beauty and all natural resources." Ordinance, section 6, ECF No. 71-4, PageID # 1412.

The Ordinance states that the purpose of the ban on GE organisms is to protect against transgenic contamination caused by GE operations and practices; to defend and promote the integrity of organic and non GE markets; to protect from hazardous aspects of GE operations and practices (including pesticide use and testing); to preserve the right of the County to reject GE operations and practices based on health-related, moral, or other concerns; and to preserve Maui County's

environment and public trust resources. Ordinance, section 4, ECF No. 71-4, PageID #s 1411-12.

Because the Ordinance bans all GE organisms, with exceptions for (1) GE crops that "are in mid-growth cycle" when the Ordinance is enacted; (2) GE organisms incorporated into any food or medicine "in any manner already prepared for sale for human or animal consumption;" (3) licensed health practitioners using GE organisms for diagnosis, care, or treatment; and (4) fully accredited colleges or universities conducting non-commercial indoor research or education, the ban directly conflicts with the regulation set forth in section 340.0 allowing GE organisms under certain circumstances.

If the Ordinance conflicts with 7 C.F.R. § 340.0, then the Ordinance's conflicting provisions are preempted pursuant to 7 U.S.C. § 7756(b). Specifically, § 7756(b) applies to political subdivisions of a state, such as the County of Maui. The statute prohibits the County from regulating the movement (including the release into the environment) of GE organisms in interstate commerce, if they are plant pests or noxious weeds. The Plant Protection Act includes the express statement that "all plant pests, noxious weeds, plants, plant products, articles capable of harboring plant pests or noxious weeds regulated under [the Plant Protection Act] are in or affect interstate commerce or foreign commerce." 7 U.S.C. § 7701(9). Neither of the exceptions

included in § 7756(b) applies, as the ban is not "consistent with and do[es] not exceed the regulations" and there has been no showing that the County of Maui received a finding by the Secretary of Agriculture that there was a "special need" for the ban.

To determine whether preemption applies, this court must examine whether GE organisms can be considered either plant pests or noxious weeds. This court need not look beyond the language in the Ordinance itself in this regard. The Ordinance's ban on GE organisms had several purposes, including preventing "transgenic contamination" and protecting the integrity of organic and non-GE markets. According to the Ordinance's findings, controlling GE organisms is difficult once they are released into the environment. Moreover, the Ordinance says that, once released, undesirable GE organisms may cross-pollinate with desirable non-GE organisms. The Ordinance seeks to regulate GE crops, such as genetically engineered papayas and bananas, to prevent those crops from "contaminating" or damaging non-GE papaya and banana crops. In other words, the Ordinance inherently considers GE organisms to be "noxious weeds" and/or "plant pests" as defined in 7 U.S.C § 7702(10) and (14).

According to the Ordinance, GE plants directly and indirectly injure or damage crops, agriculture interests, public health, and the environment. The Ordinance therefore seeks to

regulate what it sees as a "noxious weed" as defined by federal law. See 7 U.S.C § 7702(10) and (14) (defining "noxious weeds" and "any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment," and defining "plant pest" as any of a number of things that could directly or indirectly injure or damage plants).

As noted above, this court is not deciding the wisdom of regulating GE organisms. This court is instead examining whether the Ordinance impermissibly seeks to ban GE organisms that are specifically governed by 7 C.F.R. § 340.0. To the extent the ban conflicts with the federal regulation in section 340.0, the ordinance is expressly preempted by § 7756(b). This ruling is consistent with this court's previous examination of the County of Hawaii's regulation affecting GE organisms. In Hawaii Floriculture & Nursery Association v. County of Hawaii, 2014 WL 6685817, *7 to *9 (D. Haw. Nov. 26, 2014), Magistrate Judge Barry M. Kurren, sitting by consent of the parties, determined that a County of Hawaii ordinance imposing restrictions on open air cultivation, propagation, development, and testing of GE crops and plants was preempted by § 7756(b).

In ruling that the Maui Ordinance is expressly preempted by the Plant Protection Act, this court rejects SHAKA's argument that, because the Ordinance has an alleged purpose other than governing "plant pests," preemption is inapplicable.

In Perez v Campbell, 402 U.S. 637, 652 (1971), the Supreme Court ruled that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause," even if the stated objective of the state law has nothing to do with the purposes of the federal law. To hold otherwise "would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy--other than frustration of the federal objective--that would be tangentially furthered by the proposed state law." Id.

As the Supreme Court noted in Boggs v. Boggs, 520 U.S. 833, 841 (1997), this court "can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of [the federal law at issue] or operates to frustrate its objects." Accord Johnson v. Couturier, 572 F.3d 1067, 1078 (9th Cir. 2009) (quoting Boggs, 520 U.S. At 841); Branco v. UFCW-N. Cal. Employers Joint Pension Plan, 279 F.3d 1154, 1157 (9th Cir. 2002) (same). In other words, even if the Ordinance is not expressly preempted, the Ordinance is preempted if it stands as an obstacle to the accomplishment and execution of the full

purpose and objectives of Congress. See Arizona v. United States, 132 S. Ct. 2492, 2505 (2012); Indus. Truck Ass'n, 125 F.3d at 1309.

SHAKA's reliance on Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983), on this point is not persuasive. In Pacific Gas, the Supreme Court addressed a California moratorium on construction of nuclear power plants. Energy companies challenged the moratorium, arguing that it was preempted by the federal Atomic Energy Act. Id. at 198. The Atomic Energy Act contained a preemption provision that preserved state and local power "to regulate activities for purposes other than protection against radiation hazards." Id. at 210 (quoting 42 U.S.C. § 2021(k)). The Supreme Court noted that any state statute regulating the construction or operation of a nuclear power plant "would clearly be impermissible," as it would directly conflict with the federal government's exclusive authority over plant construction and operation. Id. at 212.

While Congress had taken "complete control of the safety and 'nuclear' aspects of energy generation," it left other aspects to states. Id. at 212. That is, the Atomic Energy Act's preemption provision still allowed the states to "exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land

use, ratemaking, and the like." Id. On the facts presented in Pacific Gas, whether the moratorium was preempted turned on whether it fell within the express preemption provision. Preemption depended on whether the moratorium had a "non-safety rationale." Id. at 213. Because the California moratorium had an economic rationale, the Supreme Court held that it was not preempted by the federal Atomic Energy Act. Id. at 223-24.

The situation in Pacific Gas is not analogous to the situation before this court. Pacific Gas involved a federal reservation of rights to state and local governments for "non-safety purposes" and a state law relating to atomic energy. The California law did not interfere with federal safety concerns. By contrast, the Plant Protection Act and related federal regulations preclude state or county regulation of plant pests and noxious weeds and is expressly concerned with protecting agricultural interests, natural resources, public health, and the environment. The broad sweep of the Ordinance in issue here directly overlaps those purposes.

Nor is the court persuaded by SHAKA's argument that, because the Ordinance governs GE organisms only in Maui County, interstate commerce is not affected. Hawaii consists of islands in the middle of the Pacific Ocean, making it likely that at least some GE organisms are imported from or exported to other places. SHAKA offers Hector Valenzuela as an expert witness who

says the Seed Parties are conducting GMO experiments in Hawaii. See ECF No. 102-1, PageID # 2314. References to experiments suggest that, if a seed company deems a GMO experiment to be successful, the seed companies may export the GMOs to other counties, states, and countries. There is simply no genuine issue of material fact before this court as to whether the Ordinance regulates the movement of GE organisms in interstate commerce. The Ordinance's complete ban on GE organisms is indicative of a regulation in or affecting interstate commerce. Notably, the preemptive Plant Protection Act applies to states and political subdivisions of states when they regulate movement in interstate commerce. See 7 U.S.C. § 7756(b)(1). The reference to a state's political subdivision evidences a recognition by Congress that a municipality's regulation of plants has an inherently interstate impact. See, e.g., 7 U.S.C. § 7701(9) (all "plant pests" and "noxious weeds" are in or affect interstate commerce).

Maui's ban of GE organisms funs afoul of the Plant Protection Act and its regulations.

2. The Ordinance is Also Subject to Implied Conflict Preemption Under Federal Law.

"In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that

Congress left no room for the States to supplement it." Cipollone, 505 U.S. at 516 (quotation marks and citations omitted). With respect to implied conflict preemption, the Ninth Circuit has clarified that state legislation is preempted when it is impossible to comply with both state and federal requirements, or when state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. See Indus. Truck Ass'n, 125 F.3d at 1309. Accord Arizona, 132 S. Ct. at 2505. With respect to implied preemption, the Seed Parties are contending that the Ordinance conflicts with those laws, not that federal law occupies the field with respect to GE organisms.

The preemptive scope of the Plant Protection Act is governed entirely by its express language.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Id. at 517 (quotation marks and citations omitted). Accordingly, because this court has determined that the Plant Protection Act expressly preempts the Ordinance, the court need not determine

whether it also impliedly preempts the Ordinance based on actual conflicts between the Ordinance and federal law. The court nevertheless addresses the Seed Parties' implied preemption argument in connection with SHAKA's argument that federal preemption is inapplicable because the Ordinance only seeks to protect public health, safety, and welfare within the County or to protect the County's organic crop industry.

Even if preemption were not express, the Ordinance would still be preempted because it frustrates the purpose of the Plant Protection Act. The ban on GE organisms, some of which are plant pests, causes the Ordinance to run afoul of the Plant Protection Act's purpose of setting a national standard governing the movement of plant pests and noxious weeds in interstate commerce based on sound science. See 7 U.S.C. § 7701.

The Seed Parties contend that, in addition, the Ordinance is impliedly preempted because it conflicts with the EPA's experimental use permits. Monsanto, for example, says that it conducts "authorized regulatory fields trials" in Maui County. See Decl. of Sam Eathington ¶ 7, ECF No. 71-1, PageID # 1401. This court does not rely on this proposition in the present order. This is the kind of argument that would benefit from the additional discovery SHAKA seeks. Without more detail about the EPA's authorization of Monsanto's field trials, the court cannot determine the existence or scope of any conflict. Nor can the

court determine from the record whether and to what extent the EPA has actually authorized GE field trials under the experimental use permitting system set forth in 40 C.F.R., Part 172. Because the court can resolve the federal preemption issue without resolving the Seed Companies' experimental use argument, the court does not reach the experimental use issue.

B. The Ordinance is Preempted by State Law.

1. The Court Declines to Certify to the Hawaii Supreme Court the Issue of State Preemption.

SHAKA and Amici Curiae ask this court to certify the question of whether the Ordinance is preempted by state law to the Hawaii Supreme Court. See ECF No. 101, PageID #s 2257-61; ECF No. 99, PageID # 2197. The court declines to do so.

Whether to certify a question to a state supreme court is a matter of judicial discretion. See Riordan v. State Farm Mut. Auto. Ins. Co., 589 F.3d 999, 1009 (9th Cir. 2009). This court may certify a question to the Hawaii Supreme Court when: "(a) there is a question concerning Hawaii law; (b) the question is determinative of the cause; and (c) there is no clear controlling precedent in Hawaii judicial decisions." Ill. Nat. Ins. Co. v. Nordic PLC Const., Inc., Civ. No. 11-00515 SOM-KSC, 2013 WL 160263, at *2 (D. Haw. Jan. 14, 2013) (citing Haw. R. App. P. 13(a)). When the law at issue is "reasonably clear such that the court can readily predict how the Hawaii Supreme Court would decide the issue," certification is inappropriate. Id.

(internal quotation marks omitted).

SHAKA contends that the question of whether the Ordinance is preempted by state law is determinative of the case, and that no clear controlling precedent exists in Hawaii decisions. See ECF No. 101, PageID # 2258. Regardless of whether that is so, the standards relevant to deciding whether the Ordinance is preempted by Hawaii law are reasonably clear, allowing this court to "readily predict how the Hawaii Supreme Court would decide the issue" without subjecting this case to the delay involved in certifying only the state preemption portion of the case to the Hawaii Supreme Court. Id. (internal quotation marks omitted); see Haw. Floriculture, 2014 WL 6685817, *10 ("Hawaii appellate opinions have articulated very clear and specific state preemption standards."). Accordingly, the court declines to certify the state-law preemption issue to the Hawaii Supreme Court.

2. The Ordinance Is Preempted By State Law.

State preemption of municipal ordinances does not function the way federal preemption of state laws functions. As noted by Magistrate Judge Kurren in Syngenta Seeds, Inc. v. County of Kauai, 2014 WL 4216022, *4 n.7 (D. Haw. Aug. 25, 2014), the majority of jurisdictions follow what is known as Dillon's Rule, named after Judge Dillon, who authored a treatise called "Municipal Corporations." Dillon's Rule expresses the notion

that a municipal corporation has only the power conferred on **it** by the state. Id.

By contrast, the relationship between the federal government and the states is not something Congress can entirely control on its own. That is, the Constitution recognizes states as existing and having certain rights independent of what Congress may do, while "[m]unicipal corporations are solely the creation of the State. As such they may exercise only those powers which have been delegated to them by the State legislature." In re Application of Anamizu, 52 Haw. 550, 553, 481 P.2d 116, 118 (1971).

Hawaii has expressly reserved the power to enact laws of general application. See Haw. Rev. Stat. § 50-15 ("Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith."). Hawaii Revised Statutes also provide that

> Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied

> intent that the statute shall be exclusive or uniform throughout the State.

Haw. Rev. Stat. § 46-1.5(13).

Construing section 46-1.5(13), the Hawaii Supreme Court has stated that a county ordinance is preempted by state law when "(1) [the ordinance] covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law." Richardson v. City & Cnty. of Honolulu, 76 Haw. 46, 62, 868 P.2d 1193, 1209 (1994); see also Ruggles v. Yagong, SCWC-13-0000117 (slip op. June 25, 2015) (preempting Hawaii County ordinance giving lowest law enforcement priority with respect to cannabis because it conflicted with state law as discussed in the second prong of Richardson).

The Seed Parties contend that the Ordinance's ban on GE organisms "intrudes into the field of potentially dangerous plant regulation reserved exclusively to the State." ECF No. 70-1, PageID # 1328. They point to numerous state statutes and regulations that they contend demonstrate a comprehensive statewide framework addressing the same concerns underlying the Ordinance's ban on GE organisms, i.e, "the concern that genetically engineered crops may contaminate, injure, or harm non-genetically engineered crops through open air transfer,

uncontrolled spread, and cross pollination." ECF No. 70-1, PageID # 1331 (internal quotation marks omitted).

SHAKA, on the other hand, argues that state preemption is inapplicable because the statutes and regulations cited by the Seed Parties address statewide concerns about the importation of plants into the state, while the Ordinance "addresses local health and safety concerns regarding activities performed within the County." ECF No. 101, PageID # 2284. SHAKA also contends that no state statute addresses the same subject matter at issue in the Ordinance, i.e., "the potentially irreversible harms that GMO operations threaten to impose on agricultural business, the public health, and the unique environment and natural resources within Maui County." Id. This court addresses each of these arguments later in this order.

Any ordinance that "conflict[s] with the intent of a state statute or legislate[s] in an area already staked out by the legislature for exclusive and statewide statutory treatment" is preempted by state law. Richardson, 76 Haw. at 60, 868 P.2d at 1207 (1994); see also Syngenta Seeds, 2014 WL 4216022. Accord Ruggles v. Yagong, SCWC-13-0000117 at 16 (slip op. June 25, 2015). To determine whether an ordinance impermissibly legislates in an area of exclusive and statewide statutory treatment, a "comprehensive statutory scheme" test is applied. Richardson at 61, 868 P.2d at 1208. The court first considers

whether the municipal ordinance covers the same subject matter as state law. State v. Ewing, 81 Haw. 156, 161, 914 P.2d 549, 554 (Ct. App. 1996). If so, the court then determines whether the statutory scheme "disclos[es] an express or implied intent to be exclusive and uniform throughout the state." Richardson, 76 Haw. at 62, 868 P.2d at 1209; see also Citizens Utils. Co., Kauai Elec. Div. v. Cnty. of Kauai, 72 Haw. 285, 288, 814 P.2d 398, 400 (1991) ("[A] municipal ordinance, which covers the same subject matter embraced within a State statute[,] is invalid if the statute discloses an express or implied intent that the same shall be exclusive, or uniform in application throughout the State.").

Article XI, Section 3 of the Hawaii State Constitution requires the state to "conserve and protect agricultural lands" and vests the state legislature with power to "provide standards and criteria" relevant to that goal. The legislature has vested the State of Hawaii's Department of Agriculture with authority to oversee the introduction, propagation, inspection, destruction, and control of plants.

Section 141-2 of Hawaii Revised Statutes charges the Hawaii Department of Agriculture with the job of adopting, amending, and repealing rules concerning: (1) "[t]he introduction, transportation, and propagation of trees, shrubs, herbs, and other plants"; (2) "[t]he quarantine, inspection . . .

destruction, or exclusion . . . of any . . . seed . . . or any other plant growth or plant product . . . that is or may be in itself injurious, harmful, or detrimental to [the agricultural or horticultural industries or the forests of the State]; and (3) "[t]he manner in which agricultural product promotion and research activities may be undertaken." Haw. Rev. Stat. § 141-2.

The Hawaii Department of Agriculture is also required to designate as "restricted plants" those plants that "may be detrimental or potentially harmful to agriculture, horticulture, the environment, or animal or public health." Haw. Rev. Stat. § 150A-6.1(b). The Hawaii Board of Agriculture, which is the executive board of the Department of Agriculture, is directed to maintain a list of restricted plants that may enter the state only by permit. Haw. Rev. Stat. §§ 26-16(a), 150A-6.1(a).

The Hawaii Department of Agriculture is also authorized to establish criteria and procedures to designate as a "noxious weed" any "plant species which is, or which may be likely to become, injurious, harmful, or deleterious to the agricultural . . . industry of the State and to forest and recreational areas and conservation districts of the State." Haw. Rev. Stat. §§ 152-1, 152-2. The Hawaii Department of Agriculture may adopt rules for the "[c]ontrol or eradication of noxious weeds when deemed economically feasible." Haw. Rev. Stat. § 152-2.

In its Noxious Weed Rules, the Hawaii Department of Agriculture has established criteria for noxious weeds based on, among other things, plant reproduction, growth characteristics, detrimental effects, and distribution and spread. See Haw. Admin. Rules §§ 4-68-1, 4-68-4 4-68-5, 4-68-6, 4-68-8. Those regulations note the potential characteristics of noxious weeds, including their "capab[ility] of competing with cultivated crops for nutrients, water or sunlight." Haw. Admin. Rules §§ 4-68-4, 4-68-5. The regulations also note that noxious weeds may have the following detrimental effects: (1) "severe production losses or increased control costs to the agricultural . . . industr[y]"; (2) "endangering native flora and fauna by encroachment in forest and conservation areas"; (3) "hampering the full utilization and enjoyment of recreational areas including forest and conservation areas"; and (4) poisoning, injuring, or otherwise harming humans or animals. Haw. Admin. Rules § 4-68-6. Noxious weeds may, however, be imported for research by permit under state law. Haw. Rev. Stat. § 150A-6.1.

These statutes and regulations create a comprehensive scheme addressing the same subject matter as the Maui Ordinance. The statutes and regulations reflect the authority of state agencies over the introduction, propagation, inspection, destruction, and control of plants that may harm agriculture, the environment, or the public. The Ordinance bans the cultivation

of GE organisms in light of "serious concerns as to whether GE Operations and Practices . . . occurring in Maui County are causing irreparable harm to the people, Environment, and Public Trust Resources." Aimed at protecting against transgenic contamination and other "hazardous aspects" of GE operations and practices, the Ordinance seeks to regulate the same subject matter that the state framework addresses. ECF No. 71-4, PageID #s 1409, 1411-12.

SHAKA contends that the state statutes and regulations at issue address the importation of plants into the state, which is "a statewide concern warranting statewide regulation," while the Ordinance "addresses local health and safety concerns regarding activities performed within the County." ECF No. 101, PageID # 2284. But preemption of a county ordinance by state law does not turn on whether the ordinance addresses local, rather than statewide, concerns.

SHAKA also contends that the Ordinance cannot be seen as covering the same subject matter as the statutes and regulations cited above because "[n]o State statutes address whether local governments in Hawai'i are authorized to regulate" the "potentially irreversible harms that GMO operations threaten to impose on agricultural business, the public health, and the unique environment and natural resources within Maui County." ECF No. 101, PageID # 2284. Preemption is not restricted to

situations in which state statutes specifically mention the authority of local governments over regulation of potential harms from specifically named activities. See Haw. Floriculture, 2014 WL 6685817, *6 (recognizing County of Hawaii's authority regarding police powers, nuisances, and public trust duties, but stating that that authority does not permit legislation in areas staked out by state legislature for exclusive and statewide treatment); Syngenta Seeds, 2014 WL 4216022, *4-*5 (same). Preemption may occur absent an explicit state pronouncement barring the exercise by local authority in the precise area of regulation at issue. All that is necessary for state preemption is that a municipal ordinance cover the "same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or . . . conflict[] with state law." Richardson, 76 Haw. at 62, 868 P.2d at 1209.

Amici Curiae make a similar argument, contending that the Ordinance cannot be preempted by state law because no state statute or regulation mentions GE organisms. See ECF No. 99, PageID # 2193. Preemption may apply even absent explicit mention of GE organisms in a particular state law. Here, the scope of various state statutes and regulations reaches GE organisms, and the absence of state laws specifically mentioning or singling out

GE organisms in no way precludes preemption. See Richardson, 76 Haw. at 62, 868 P.2d at 1209.

Having determined that the Ordinance covers the same subject matter as state law, the court turns to the issue of whether the statutory scheme "disclos[es] an express or implied intent to be exclusive and uniform throughout the state." Richardson, 76 Haw. at 62, 868 P.2d at 1209. The court concludes that it does.

Both the Hawaii Department of Agriculture and the Hawaii Board of Agriculture are vested with authority over the comprehensive statutory scheme, and state law does not speak to county involvement in rulemaking, oversight, or enforcement relating to that scheme. At most, representatives from each county sit on the Hawaii Board of Agriculture, which suggests that any county-level involvement is limited to participation in the Hawaii Board of Agriculture's consideration of agricultural issues. See Haw. Rev. Stat. § 26-16(a).

The chairperson of the Hawaii Board of Agriculture or the chairperson's representative is also part of an advisory committee, along with representatives from the state's Board of Land and Natural Resources, the Office of Environmental Quality Control, and the Department of Health. The advisory committee advises the Hawaii Department of Agriculture "in problems relating to the introduction, confinement, or release of plants,

animals, and microorganisms" based on knowledge of "modern ecological principles and the variety of problems involved in the adequate protection of our natural resources." Haw. Rev. Stat. § 150A-10.

Clearly, "the state legislature intended this network of the [Hawaii Department of Agriculture], [Hawaii Board of Agriculture], and the advisory committee to have extensive and broad responsibilities over agricultural problems spanning the various counties to form a coherent and comprehensive statewide agricultural policy." Haw. Floriculture, 2014 WL 6685817, at *6. The statutory scheme discloses an intent to be exclusive and uniform throughout the state.

Because the Ordinance's ban on GE operations covers the subject matter embraced within a comprehensive scheme of state statutes and regulations intended to be exclusive and uniform throughout the state, the Ordinance is preempted by state law.

Amici Curiae contend that the Ordinance cannot be preempted by state laws that are a mere "patchwork of general agricultural laws" regulating "different, tenuously-related subjects." Id., PageID #s 2193, 2195. Calling the laws a "patchwork" because they were not enacted at the same time and are allegedly not all closely related does not negate preemption flowing from the intent and effect of those laws.

Amicus Curiae point to ordinances previously passed by Hawaii County banning GE taro and GE coffee, and by Maui County banning GE taro, contending that the failure of the state legislature to address statewide bans or express disapproval of the ordinances demonstrates the absence of the state's intent for the alleged statutory scheme to be exclusive and uniform throughout the state. Id., PageID #s 2195-96. Legislative silence with respect to pre-existing county bans of GE taro and GE coffee does not prevent this court from examining state laws to determine whether they form a comprehensive statutory scheme intended to be exclusive and uniform throughout the state. Any inference that may be drawn from the lack of prior legislative or judicial action is tenuous, at best. Without any indication that this silence was in fact intentional and designed to signal approval, this court will not infer that the preemptive sweep inherent in the state laws themselves should be ignored.

3. The Court Does Not Rely on State Pesticide Laws in Concluding that the Ordinance is Preempted.

The Seed Parties also contend that the Ordinance "intrudes into the field of pesticide regulation reserved to the State" by "banning GE crops in part because of pesticide issues, requiring the EPHIS to extensively study the impact of pesticides, and mandating the Council make findings about the safety of pesticide use." ECF No. 70-1, PageID # 1328.

Although the Ordinance reflects concern about the pesticide use that may be associated with the cultivation of GE organisms, the Ordinance does not truly regulate pesticides. The Ordinance requires any EPHIS to include research and analysis on pesticides, but does not restrict or impose any other requirement on pesticide use, unlike the ordinance at issue in Syngenta Seeds, Inc. v. Cnty. of Kauai, Civ. No. 14-00014 BMK, 2014 WL 4216022 (D. Haw. Aug. 25, 2014), which imposed reporting requirements and pesticide buffer zones. Id. at *1. Any change in pesticide use following implementation of the Ordinance is not a direct result of any provision in the Ordinance, but rather a byproduct of the Ordinance's ban on GE organisms.

Because the Ordinance does not regulate pesticides, it is not preempted by the state pesticide laws cited by Plaintiffs. Although pesticide usage may incidentally be affected by the Ordinance, the court does not base preemption on mere incidental effects on an unregulated subject.

C. The Ordinance Exceeds the Authority Delegated to Maui County, as Stated in the Maui County Charter.

As noted above, counties may only exercise powers delegated to them by a state legislature. See In re Application of Anamizu, 52 Haw. at 553, 481 P.2d at 118; see also Haw. Const. art VII, § 1 ("The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall

have and exercise such powers as shall be conferred under general laws."); Haw. Rev Stat. § 46-1.5(a) ("Each county shall have the power to frame and adopt a charter for its own self-government . . . .").

The County of Maui has adopted a charter. Section 13-10 of that charter states with respect to punishment for violations of ordinances that the Maui County Council has the power to provide for penalties for violations of ordinances so long as the penalties do not "exceed the amount of $1,000.00, or one (1) year's imprisonment, or both." The penalty provisions in the Ordinance clearly exceed the authorized amount, and have not been authorized by the Maui County Council as stated in the Maui County Charter.

The Ordinance, which was voted on via a ballot initiative, provides for civil penalties of $10,000 for a first violation, $25,000 for a second violation, and $50,000 for any subsequent violation. The Ordinance further states, "In assessing penalties, each day of violation must be considered a separate violation." See Ordinance, section 9, ECF No. 71-4, PageID # 1413. To the extent a violator is prosecuted criminally, violations are considered misdemeanors, punishable by not more than one year in jail and a $2,000 fine. Id. The Ordinance's fine provisions therefore exceed the $1000 maximum fine authorized by the Maui County Charter.

State law also provides that counties have the power to impose civil fines and criminal penalties for violations of county ordinances "after reasonable notice and requests to correct or cease the violation have been made upon the violator." Haw. Rev. Stat. § 46-1.5(24)(A). Although the Ordinance does not provide for such notice and cure, instead saying that the "Department of Environmental Management may assess a civil monetary penalty," this court presumes that that department would comply with state law and not impose penalties without first giving a violator notice of any violation and an opportunity to correct the violation.

In its Answer to the Complaint, Maui County admitted that the "Ordinance contains an invalid fine/penalty under the Charter and state law." See Defendant County of Maui's Answer to Plaintiffs' Complaint for Declaratory and Injunctive Relief ¶ 14, ECF No. 56, PageID # 998.

The Ordinance includes a severability provision that provides that, "if any part or application of this initiative is held invalid or unenforceable, the remainder of this initiative shall be construed to have the broadest interpretation allowed by law which would render it valid and enforceable." However, this court cannot simply sever the civil fine provisions without engaging in a legislative function. Unlike the criminal fine provision, which could be reduced to no more than $1,000 to be

consistent with the Maui County Charter, this court cannot simply reduce the civil fine provisions. The Ordinance has a graduated fine provision, providing for increasing fines for subsequent violations. Although the maximum civil fine could be limited to $1,000, it is not at all clear that the maximum fine should be imposed for a first violation, when the Ordinance itself has demonstrated an intent to increase the penalties for subsequent violations. Because this court is not in the business of legislating, the court cannot simply sever the invalid civil fine provisions and instead determines that the civil fine provisions are unenforceable.

VII. CONCLUSION.

The Ordinance is preempted by federal and state law and exceeds the County's authority to impose fines. The court therefore grants summary judgment in favor of the Seed Parties with respect to the First and Second Causes of Action asserted in the Complaint in Civ. No. 14-00511 SOM/BMK. The court grants partial summary judgment with respect to the Fourth Cause of Action asserted in that Complaint, declaring that any criminal fine in the Ordinance exceeding $1000 and all civil fines exceed the County's authority. Given these determinations, the court need not address the Seed Companies' remaining arguments.

Given the court's ruling, the court denies SHAKA's motion to dismiss or for judgment on the pleadings in the Robert

Ito Farm Action based on abstention, but grants the remaining parts of the County of Maui's motion to dismiss in the Atay Action. The Clerk of Court is therefore ordered to enter judgment against SHAKA in the Atay Action.

The court notes that, on June 8, 2015, SHAKA filed a motion in the Robert Ito Farm Action, seeking to be allowed to cross-claim against the County of Maui to force it to certify the election results and implement the Ordinance. See ECF No. 161. Because the court has determined that the Ordinance is unenforceable, the court denies that motion.

Finally, the court notes that this order does not discuss the Third Cause of Action in the Complaint in the Robert Ito Farm Action. That claim asserts that the Ordinance violates the Commerce Clause. No later than July 10, 2015, the Seed Parties shall inform the court how they wish to proceed with that claim. If they opt to move to voluntarily dismiss any claim or portion of a claim that this court has not ruled on without prejudice to refiling, the parties should immediately indicate to the court in a written filing whether there is an agreement to the entry of judgment in these cases.

The court stresses again, so that no lay party has any misapprehension on this point, that it is ruling purely on legal grounds. No portion of this ruling says anything about whether GE organisms are good or bad or about whether the court thinks

the substance of the Ordinance would be beneficial to the County.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 30, 2015.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District

Robert Ito Farm, et al. v. County of Maui, Civ. No. 14-00511 SOM/BMK; and Alika Atay, et al. v. County of Maui, et al., Civ. No. 14-00582 SOM/BMK; ORDER DETERMINING THAT THE COUNTY OF MAUI GMO ORDINANCE IS PREEMPTED AND EXCEEDS THE COUNTY'S AUTHORITY

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; SHAKA MOVEMENT

Plaintiff(s),

V.

COUNTY OF MAUI; MONSANTO COMPANY; DOW AGROSCIENCES 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; DOE GOVERNMENTAL ENTITIES 1-10

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CV 14-00582 SOM-BMK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

June 30, 2015

At 2 o'clock and 15 min p.m.
SUE BEITIA, CLERK

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to the "Order Denying Motion to Dismiss "Mirror-Image" Claims on Ripeness Grounds and Continuing Hearing on Merits of That Motion; Order Adopting Amended Findings and Recommendation and Denying Motion to Remand" filed on April 15, 2015 and the "Order Determining That the County of Maui GMO Ordinance is Preempted and Exceeds the County's Authority" filed on June 30, 2015.

June 30, 2015	SUE BEITIA
Date	Clerk
	/s/ Sue Beitia by ET
	(By) Deputy Clerk

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 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; et al., Defendants	CIVIL NO. 14-00582 SOM/BMK ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

I. INTRODUCTION.

This case arises out of an initiative to ban genetically modified organisms in the County of Maui that won a majority of votes in an election held in November 2014. Plaintiffs in this case originally filed this action in state court, arguing in relevant part that the County should be required to implement the law. A day later, the private entities

that are Defendants in this case filed Robert Ito Farm, Inc. v. County of Maui, Civil No. 14-00511 SOM/BMK ("Robert Ito Farm Action"), in this court, arguing that the ban violated the Commerce Clause of the United States Constitution and that the ban was preempted by state and federal law. After the Complaint filed in the state court was amended, the state court case was removed to this court.

Before the court are Plaintiffs' motion to remand this case to state court and the County's motion to dismiss the First Amended Complaint. The court declines to dismiss on ripeness grounds claims that mirror the claims in the Robert Ito Farm Action. The court continues the hearing on the merits of the motion to dismiss to the same time as the dispositive motions in the Robert Ito Farm Action. The court adopts the Magistrate Judge's Amended Findings and Recommendation to Deny Plaintiffs' Motion to Remand and denies Plaintiffs' remand motion.

II. FACTUAL BACKGROUND.

On November 4, 2014, "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance") was passed by ballot initiative in the County of Maui. See ECF No. 1-3, PageID # 85.

The Ordinance renders it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test

Genetically Engineered Organisms within the County of Maui" until such ban is amended or repealed by the Maui County Council. Id., PageID # 88. Any person or entity violating the Ordinance is subject to civil penalties of $10,000 for the first violation, $25,000 for the second violation, and $50,000 for the third or any subsequent violation. Id. PageID # 89. Each day that a person or entity is in violation of the Ordinance is considered a separate violation. See id.

In addition to civil penalties, "any person or entity, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of [the Ordinance], shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars ($2,000.00), or imprisoned not more than one (1) year, or both, for each offense." Id.

On November 12, 2014, only eight days after the ballot initiative passed, Plaintiffs Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement filed a Complaint for Declaratory Relief in the Circuit Court of the Second Circuit, State of Hawaii. See ECF No. 1-3, PageID # 25 ("Atay Action"). Paragraphs 25 and 26 of the Complaint alleged that Defendants Monsanto Company and Dow Agrosciences LLC had made statements that they intended to challenge the legality and enforceability of the Ordinance. Id., PageID # 30. Paragraph 29

of the Complaint alleged that Maui County's mayor had publicly indicated that the County was determining how much manpower, equipment, and other resources would be needed to implement the Ordinance. Id., PageID # 29. Count I of the Complaint sought declaratory relief to establish the enforceability of the Ordinance under state law. Count II of the Complaint sought declaratory relief to have Maui County implement the Ordinance and allow Plaintiffs to participate in that implementation.

The following day, November 13, 2014, 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., and Hikiola Cooperative sued the County of Maui by filing the Robert Ito Farm Action in this court. The complaint in that case asserts 1) that the Ordinance is preempted by federal law (First Cause of Action); 2) that Maui County lacks authority to enact and enforce the Ordinance and that it is preempted by state law (Second Cause of Action); 3) that the Ordinance violates the Commerce Clause of the United States Constitution (Third Cause of Action); and 4) that the Ordinance is invalid under the Maui County Charter and state law (Fourth Cause of Action). See Robert Ito Farm, Inc. v. County of Maui, Civil No. 14-00511 SOM/BMK, ECF No. 1.

On November 13, 2014, the plaintiffs in the Robert Ito Farm Action also moved for an order temporarily restraining the implementation of the Ordinance and for a preliminary injunction seeking the same relief. See id., ECF No. 5.

On November 17, 2014, the plaintiffs in the Robert Ito Farm Action and Maui County stipulated, and the court ordered, that the Ordinance not be "published, certified as an Ordinance, enacted, effected, implemented, executed, applied, enforced, or otherwise acted upon until March 31, 2015, or until further order of this Court, in order to allow for adequate time for the parties to brief and argue and for the Court to rule on the legality of the Ordinance as a matter of law." See id., ECF No. 26, PageID # 441.

On December 10, 2014, Plaintiffs in the Atay Action filed a First Amended Complaint for Declaratory and Injunctive Relief. See ECF No. 1-3, PageID # 38. The First Amended Complaint added Defendants in the Atay Action so that all the plaintiffs in the Robert Ito Farm Action became parties in the Atay Action. Id. The First Amended Complaint in the Atay Action criticized Maui County for having stipulated to a delay in certifying election results concerning the Ordinance. Id., PageID # 49. The pleading reiterated assertions from the original Atay Complaint that the Ordinance was not preempted by state law and sought a declaration that the Ordinance was

enforceable. See Id., Count I. The First Amended Complaint also asserted that Maui County should implement the Ordinance, that the Atay Plaintiffs should be permitted to assist and participate in that implementation, and that Maui County should be required to certify the election results and implement the Ordinance. See Id., Counts II and III. Finally, it sought attorney's fees under the private attorney general doctrine. See Id., Count IV.

On December 15, 2014, Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement, the Atay Plaintiffs, were permitted to intervene in the Robert Ito Farm Action. See Civ. No. 14-00511 SOM/BMK, ECF No. 63.

On December 30, 2014, Dow Agrosciences removed the Atay Action to this court. See ECF No. 1.

On January 15, 2015, Maui County moved to dismiss the Atay Action. See ECF No. 14. Maui County argued that the case was not ripe, that Plaintiffs in the Atay Action had no right to be consulted regarding implementation of the Ordinance, and that Plaintiffs are not entitled to attorney's fees. See id. Maui County sought to stay the removed Atay Action pending adjudication of the summary judgment motions filed in the Robert Ito Farm Action.

Also filed on January 15, 2015, was a motion by the Atay Plaintiffs to remand the removed action to state court. See ECF No. 15. On February 27, 2015, Magistrate Judge Barry M.

Kurren issued his Findings and Recommendations ("F&R") in which he recommended that the court decline to remand this action. See ECF No. 36. On March 5, 2015, Magistrate Judge Kurren amended the F&R. See ECF No. 38.

On March 11, 2015, the Atay Plaintiffs filed objections to the Amended F&R. See ECF No. 45. This court now addresses those objections.

III. STANDARD.

A district judge reviews de novo those portions of a magistrate judge's findings and recommendation to which an objection is made and may accept, reject, or modify, in whole or in part, the findings and recommendation made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Local Rule 74.2. In other words, a district judge "review[s] the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." Freeman v. DirectTV, Inc., 457 F.3d 1001, 1005 (9th Cir. 2006).

The district judge may accept those portions of the findings and recommendation that are not objected to if the district judge is satisfied that there is no clear error on the face of the record. United States v. Bright, 2009 WL 5064355, *3 (D. Haw. Dec. 23, 2009); Stow v. Murashige, 288 F. Supp. 2d 1122, 1127 (D. Haw. 2003). The district judge may receive further evidence or recommit the matter to the magistrate judge with

instructions. 28 U.S.C. § 636(b)(1). The district judge may also consider the record developed before the magistrate judge. Local Rule 74.2. While the district judge must arrive at independent conclusions about those portions of the magistrate judge's report to which objections are made, a de novo hearing is not required. United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989); Bright, 2009 WL 5064355, *3; Local Rule 74.2.

IV. ANALYSIS.

Before the court are objections to the thorough and well-reasoned Amended F&R, which recommended denial of the motion to remand this case to state court. After de novo review, the court adopts the Amended F&R and denies the motion to remand. Before analyzing the motion to remand, the court turns to Maui County's contention that this court lacks jurisdiction over this matter because the claims are not ripe. The court denies the motion to dismiss to the extent it is based on that contention and continues the remainder of that motion to June 15, 2015, at 9:00 a.m.

A. Plaintiffs' Claims are Ripe.

Article III, section 2, of the Constitution confines federal courts to deciding cases or controversies. To qualify for adjudication in a federal court, a plaintiff must show that an actual controversy exists at all stages of the case. Arizonans for Official English v. Arizona, 520 U.S. 43, 63

(1997). No case or controversy exists if a dispute lacks ripeness, which has both a constitutional and a prudential component. See Coons v. Lew, 762 F.3d 891, 897 (9th Cir. 2014). Only the constitutional component of ripeness is at issue here.

"A dispute is ripe in the constitutional sense if it presents concrete legal issues, presented in actual cases, not abstractions." Montana Environmental Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014) (quotation marks, alterations, and citation omitted). "In the context of a declaratory judgment suit, the inquiry depends upon whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (quotation marks and citations omitted). "The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." Coons, 762 F.3d at 897.

By the time the First Amended Complaint was filed in state court, the County had entered into a stipulation with the plaintiffs in the Robert Ito Farm Action to stay implementation of Ordinance until this court ruled on its enforceability. The Atay Plaintiffs are challenging, among other things, the County's refusal to immediately certify and enforce the Ordinance. At

least some of Atay Plaintiffs' claims mirror the claims in the Robert Ito Farm Action. Both cases seek determinations concerning the enforceability of the Ordinance. Given the preemption issues raised by the plaintiffs in the Robert Ito Farm Action and the positions taken in that case by the County, this court finds no ripeness impediment with respect to such claims. The Atay Plaintiffs' "mirror-image" claims present a substantial controversy among parties having adverse legal interests that is of sufficient immediacy and reality to warrant a determination that the claims are ripe. See Montana Environmental Info. Ctr., 766 F.3d at 1188.

As the parties know, the calendar of court proceedings in the Robert Ito Farm Action has changed from what it was when the motion to dismiss in the Atay Action was filed. Those changes now make it efficient for this court to address the merits of the motion to dismiss in the Atay Action at the same time the court addresses the dispositive motions in the Robert Ito Farm Action, a coordination that this court was not originally amenable to.

B. The Court Denies the Motion to Remand.

A defendant may remove any civil action brought in state court over which the federal court would have original jurisdiction. 28 U .S.C. § 1441(a). That is, a civil action that could have originally been brought in federal court may be

removed from state to federal court. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."). A federal court has original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, 482 U.S. at 392. Plaintiffs are therefore the master of their claims and, in the absence of diversity jurisdiction, may avoid federal jurisdiction by exclusive reliance on state law. Id.

Generally, "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." Caterpillar, 482 U.S. at 392. This general rule is inapplicable, however, when a matter is completely preempted. That is, when "an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. Complete preemption is not an issue in this removed action. This court therefore

applies the general rule and examines whether the Atay Action is an action arising under federal law that could have been originally filed in this court. For purposes of determining whether this court has federal question jurisdiction over the Atay Action, this court need identify only a single federal question, as any additional related claims arising solely under state law could be addressed under this court's supplemental jurisdiction. See 28 U.S.C. § 1367.

Relying on Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985), and its progeny, this court determines that it would have had federal question jurisdiction over the claims in the First Amended Complaint in the Atay Action had they been filed in this court.

Janakes was a mail carrier who suffered injuries while delivering mail. Id. at 1092. Janakes applied for and received $1,545.58 for "continuation of pay" under 5 U.S.C. § 8118. Id. Defendant United States Postal Service ("USPS") informed Janakes that he was required to reimburse the "continuation of pay" if the third-party tortfeasor paid him any money. Id. at 1092-93. In relevant part, Janakes filed suit under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking an interpretation of 5 U.S.C. §§ 8101 to 8193 and the USPS's right to subrogation and reimbursement under those statutes. Id. at 1093.

The Ninth Circuit noted that the Declaratory Judgment Act, by itself, did not provide the district court with jurisdiction. Id. The Ninth Circuit then drew a distinction between a plaintiff with a Declaratory Judgment Act claim who asserts a federal defense to enforcement of a state law and a "coercive action" to enforce rights. The former provides no jurisdiction, while the latter does if it arises under federal law. Id. The Ninth Circuit stated, "If . . . the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense." Id. Although Janakes filed his action in anticipation of an action by the USPS for reimbursement and his action was therefore in the nature of a federal defense, the Ninth Circuit concluded that the USPS could have filed a well-pleaded coercive federal suit for reimbursement under 5 U.S.C. § 8132. Accordingly, the Ninth Circuit concluded that it had jurisdiction over Janakes's claims. Id. at 1095.

In Standard Insurance Company v. Saklad, 127 F.3d 1179, 1181 (9th Cir. 1997), the Ninth Circuit explained that, under Janakes, "A person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there. . . . In other words, in a sense we can reposition the parties in a declaratory relief action by asking

whether we would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy."

The original state-court complaint in the Atay Action was filed just days after the Ordinance was voted on. See ECF No. 1-3, PageID # 25. It alleged that "Monsanto and Dow have made public statements stating that they will challenge the legality and enforceability of the GMO bill in court." Id. ¶ 35; see also id. ¶¶ 25, 26. The original state-court Complaint also alleged that Maui County's mayor had made public statements indicating that the County was finalizing how much manpower, equipment, and other resources it would need to implement the Ordinance. Id., PageID ¶ 29. Under those circumstances, the Atay Action Plaintiffs sought a declaration that the Ordinance was enforceable and not preempted by state law. The Atay Action Complaint was clearly filed in anticipation of the Robert Ito Farm Action that was shortly thereafter filed in federal court.

The complaint in the Robert Ito Farm Action seeks a declaration that the Ordinance is preempted by both state and federal law, that Maui County lacks the authority to enact and enforce the invalid Ordinance, and that the Ordinance violates the Commerce Clause of the United States Constitution. See Civ. No. 14-00511 SOM/BMK, ECF No. 1. Concurrent with filing the federal case, the plaintiffs in the Robert Ito Farm Action filed

a motion seeking temporary and permanent injunctive relief. See Civ. No. 14-00511 SOM/BMK, ECF No. 5.

After the Robert Ito Farm Action suit was initiated, Plaintiffs in the Atay Action filed a First Amended Complaint alleging that Maui County was not acting to implement the Ordinance. The First Amended Complaint alleged that the County had stipulated to a "temporary injunction to delay the certification and implementation of the Ordinance." See First Amended Complaint ¶ 48, ECF No. 1-3, PageID # 47. On November 17, 2014, Magistrate Judge Barry M. Kurren signed a stipulation that stated, "In order to maintain the status quo and avoid any irreparable harm that may occur upon the enactment of the Ordinance, to allow the parties sufficient time to brief the merits of a summary disposition of this action before this Court, and to give the Court adequate time to decide the matter, the parties have agreed to an extension of the effective date of the Ordinance by stipulation and proposed order." See Civ. No. 14-00511 SOM/BMK, ECF No. 26. On March 19, 2015, this court issued an order, noting that the terms of the stipulated injunction allowed the court to continue the injunction until the court ruled on the merits of the Robert Ito Farm Action, and deciding, moreover, that even without the stipulation, an injunction was warranted. See Civ. No. 14-00511 SOM/BMK, ECF No. 134. The court continued until June 15, 2015, the hearing on the

dispositive motions in the Robert Ito Farm Action addressing whether the Ordinance was preempted under both federal and state law.

Under these circumstances, the Magistrate Judge was correct in determining that the Atay Action was filed in anticipation of the coercive Robert Ito Farm Action, filed by parties who were Defendants in the Atay Action. See ECF No. 38, PageID # 602. The Atay Action is akin to Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 242 (1952), in which the court said:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. 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.

Because the Robert Ito Farm Action has a basis in federal law, the court agrees with the Magistrate Judge that the Atay Action can be maintained in federal court pursuant to Janakes and Saklad. When the parties are repositioned, this court has

jurisdiction over this declaratory relief action. See Saklad, 127 F.3d at 1181.

Because this action could have originally been filed in this court, removal was proper. See 28 U .S.C. § 1441(a); Caterpillar, 482 U.S. at 392. In so ruling, this court is applying the principle that, if the action could have originally been filed in this court, it may be removed to this court.

C. **Brillhart/Dizol Factors Do Not Weigh in Favor of Remand.**

The Supreme Court has noted that "the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995). Guidance concerning when to exercise discretion to decide a matter is provided by Brillhart v. Excess Insurance Co. of America, 316 U.S. 491 (1942), and its progeny.

In Brillhart, the Supreme Court stated that it would ordinarily

> be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

316 U.S. at 495. Brillhart set forth a nonexhaustive list of factors to be considered in determining whether to stay or dismiss a federal court Declaratory Judgment Act case:

> Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Id.

In Government Employees Insurance Company v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998), the Ninth Circuit stated, "The Brillhart factors remain the philosophic touchstone for the district court. The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation." The Ninth Circuit explained,

> If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. The pendency of a state court action does not, of itself, require a district court to refuse

> federal declaratory relief. Nonetheless, federal courts should generally decline to entertain reactive declaratory actions.

Id. (citations omitted).

Dizol recognized that the Brillhart factors are not exhaustive and noted that district courts may consider

> whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a "res judicata" advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems.

Id. at 1225 n.5 (quoting Am. States Ins. Co. v. Kearns, 15 F.3d 142, 145 (9th Cir. 1994) (J. Garth, concurring) (quotation marks omitted)). In other words, "when deciding whether to exercise its jurisdiction under the Declaratory Judgments Act, [a district court] must balance concerns of judicial administration, comity, and fairness to the litigants." Chamberlain v. Allstate Insurance Company, 931 F.2d 1361, 1367 (9th Cir. 1991).

As the Magistrate Judge correctly noted, this court need not determine whether any party was engaged in forum shopping to determine whether it should decide the issues raised in the Atay Action. Although the Atay Action seeks a determination that the Ordinance is not preempted by state law and the Atay Action Plaintiffs argue that the state courts should

decide issues of state law, this court is unpersuaded that it should remand this matter to state court when the result would be uneconomical duplicative proceedings. The Robert Ito Farm Action has pending dispositive motions that Atay Action Plaintiffs have briefed. The Robert Ito Farm Action examines whether the Ordinance is preempted under both federal and state law and raises the issue of whether the Ordinance violates the Commerce Clause of the United States Constitution. In that respect, the Robert Ito Farm Action will examine issues raised in the state-court case. If this court were to remand the Atay Action to state court, there would be potentially duplicative litigation as to the issue of state-law preemption without any gain in judicial economy. The Robert Ito Farm Action would remain before this court, while the Atay Action would not decide the issues of federal law raised in the Robert Ito Farm Action. Under these circumstances, it is better to have the issues in the Robert Ito Farm Action and the Atay Action decided by the same judge.

The court recognizes that, if it retains jurisdiction over the Atay Action, the Atay Plaintiffs will not be proceeding in their chosen state-court forum on Maui. But the case does remain within Hawaii, and, as the Magistrate Judge noted, proceeding in federal court will not be overly burdensome on Plaintiffs in the Atay Action. Counsel for those Plaintiffs

lists a downtown Honolulu address near this court as counsel's place of business.

The court therefore adopts the Amended F&R, and incorporates its factual and legal analyses.

V. CONCLUSION.

The court denies the Motion to Dismiss the First Amended Complaint in the Atay Action, ECF No. 14, to the extent it seeks dismissal on ripeness grounds of matters that mirror the issues raised in the Robert Ito Farm Action. The hearing on the merits of that motion is continued until June 15, 2015, at 9:00 a.m.

The court adopts the Amended F&R and denies the Motion to Remand the Atay Action to state court, ECF No. 15.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 15, 2015.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District

Alika Atay, et al. v. County of Maui, et al.; Civil No. 14-00582 SOM/BMK; ORDER DENYING MOTION TO DISMISS "MIRROR-IMAGE" CLAIMS ON RIPENESS GROUNDS AND CONTINUING HEARING ON MERITS OF THAT MOTION; ORDER ADOPTING AMENDED FINDINGS AND RECOMMENDATION AND DENYING MOTION TO REMAND

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

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 TRUCKING AND SERVICES; HIKIOLA COOPERATIVE

Plaintiff(s),

V.

COUNTY OF MAUI

Defendant(s).

ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; SHAKA MOVEMENT

Intervenor-Defendants

JUDGMENT IN A CIVIL CASE

Case: CV 14-00511 SOM-BMK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

July 30, 2015

At 7 o'clock and 25 min a.m.
SUE BEITIA, CLERK

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court**. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to the "Order Determining That the County of Maui GMO Ordinance is Preempted and Exceeds the County's Authority" filed on June 30, 2015, the Minute Order issued on July 17, 2015 and the Minute Order issued on July 29, 2015.

July 30, 2015	SUE BEITIA
Date	Clerk
	/s/ Sue Beitia by ET
	(By) Deputy Clerk

Appeal No. 15-16552

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 on August 12, 2015. The below will be served by the appellate CM/ECF system.

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

and

CHRISTOPHER LANDAU, P.C.
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, D.C. 20005

Attorneys for Plaintiffs-Appellees
ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; AGRIGENETICS, INC.

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

RICHARD P. BRESS, ESQ.
PHILIP J. PERRY, ESQ.
ANDREW D. PRINS, ESQ.
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004

Attorneys for Plaintiffs-Appellees
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

PATRICK K. WONG, ESQ.
MOANA M. LUTEY, ESQ.
RICHARD B. ROST, ESQ.
CALEB P. ROWE, ESQ.
KRISTIN K. TARNSTROM, ESQ.
Department of Corporation Counsel, County of Maui
200 S. High Street
Wailuku, HI 96793

Attorneys for Defendant-Appellee
COUNTY OF MAUI

DATED: Honolulu, Hawaii, July 12, 2015.

/s/ Michael C. Carroll
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY

Attorneys for Intervenor Defendants-Appellants
ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, and SHAKA MOVEMENT